EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4104188/2018 Hearing at Glasgow on 20, 21, 22, 23 and 24 September 2021

Employment Judge: M A Macleod
10 **Tribunal Member: P McColl**
Tribunal Member: J McCaig

Christopher Lowe — **Claimant**
15 **Represented by**
Ms K Stein
Advocate

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GAR Trading Ltd t/a Cashing In — **Respondent**
Represented by
Mr L Lane
25 **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The unanimous Judgment of the Employment Tribunal is that the claimant's claims all fail and are dismissed.

REASONS

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1. The claimant presented a claim to the Employment Tribunal on 20 April 2018, in which he complained that the respondent had unfairly dismissed him, discriminated against him on the grounds of disability and unlawfully withheld pay from him.

2. The respondent submitted an ET3 response in which they resisted all claims made by the claimant.

3. A Hearing was listed to take place in person at the Glasgow Tribunals Centre. The claimant was represented by Ms K Stein, advocate, and the respondent by Mr Lane, solicitor.

4. A joint bundle of productions was presented to the Tribunal and relied upon by the parties in the course of the hearing. A short delay arose at the start of the hearing when it was discovered that the bundles of productions which had been sent through to the Glasgow Tribunal had not arrived there in time. Mr Lane promptly arranged to make further copies and bring them to the Tribunal, which he did, enabling us to start

5. The claimant gave evidence on his own behalf, and called as a witness his father, Andrew Lowe.

6. The respondent called as witnesses George Andrew Ross, Owner; Dylan Melbourne, former Sales Assistant; Heather Carpenter, former Sales Assistant, and Joan Margaret Ross, Partner.

7. At the outset of the hearing, the Tribunal were informed that the solicitors acting for the respective parties had agreed, in the week before the hearing, that the witness statements which had been prepared would not be relied upon. Although counsel for the claimant appeared to be unaware of this until the morning of the first day of the hearing, she assented that the hearing should proceed on the basis of oral evidence in chief. As a result, the Tribunal has not been shown nor seen the witness statements.

8. By Judgment dated 22 October 2019, Employment Judge Young determined that the claimant's medical condition amounted to a disability within the meaning of section 6 of the Equality Act 2010, in the period between 27 September 2017 and 24 January 2018 (42ff).

9. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

10. The claimant, whose date of birth is 30 July 1972, commenced employment with Cash Generator on 7 December 201 0, a franchise owned by Mrs Joan Ross. The claimant's employment transferred to the respondent, GAR Trading Limited, trading as Cashing In, in April 2016, by the operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), and his terms and conditions of service, and continuity of employment, were preserved accordingly.

11. The respondent is a business which is owned and operated by George Ross, and his wife and business partner Mrs Joan Ross. They would tend to leave the day to day management of the shop to those on the shop floor, and would visit the shop from time to time in order to assess business and deal with any outstanding matters.

12. A Statement of Main Terms of Employment was produced (71), signed by the respondent and the claimant on 25 June 2016. It was stated that this, together with the Employee Handbook, formed part of his contract of employment and set out particulars of the main terms of his employment with Cash Generator, 10 English Street, Dumfries, which was now said to be trading as GR Trading, Cashing Inn. The claimant's name did not appear where it might have been anticipated to have been written on the contract.

13. The statement said that the claimant's hours of work were "Flex/zero hour contract", and that his remuneration was at the minimum wage. His job title was that of Sales Assistant. Notwithstanding that, his position was understood, from around 2016, to be that of Manager of the store.

14. The respondent operates a business selling second hand goods. It operates on the basis that customers may bring in items for sale to the shop, which are then valued and a price offered to the customer. If agreed, payment is made to the customer, and the item is either placed on the shop floor for sale, or is held for 28 days, within which time the customer may return and redeem the item.

15. On 21 November 2016, the respondent issued a final written warning to the claimant (106), in the following terms:

"Dear Chris,

Whilst attending the shop on Wednesday 16th November 2016, I discovered that you had manipulated the buying till and sales till to misappropriate a large amount of money from the business.

This is regarded as gross misconduct, and would normally result in instant dismissal. After long deliberation, and taking into consideration your valued assistance in the arduous transition of the business, I have taken the unprecedented decision to give you another chance to prove to me that I can trust you.

This decision was taken because of the aforementioned reasons, and also because of your repentance and your offer of instant return of the money (£407) that has been stolen.

Obviously this is an extremely serious incident, and has to be recognised as such, therefore this letter will constitute your final written warning, and any disciplinary related incident in future will result in instant dismissal.

Regards

George Ross

Owner"

16. The claimant signed his acknowledgement that he had read and fully understood the content of the letter, and agreed to repay the sum of £407 in full. He also added the comment that *"I fully understand this form and accept it."*

17. The claimant did not seek to challenge that decision, and in due course he repaid the sum agreed.

18. The claimant had taken a number of broken watches to the buying counter, valued them excessively highly and bought them for the shop from himself; and then had placed the watches on the floor for sale at considerably reduced prices. When Mr Ross had confronted him with this initially, he accepted that he had done something inappropriate, and promised to pay back the money he had taken from the business (£407), but failed to do so. As a result, Mr Ross decided to issue a final written warning.

19. The respondent's disciplinary procedure, contained within the Employee Handbook (73ff), provided that *"A final written warning will normally be disregarded after a 12 month period"* (97).

20. It was made clear by the claimant's representative during the course of the hearing that the claimant does not challenge the final written warning, nor does he seek to argue that it was manifestly inappropriate.

21. Towards the end of September 2017, Mr and Mrs Ross went on holiday, and were abroad for a period of time. In their absence, as normal, the claimant took responsibility for the running of the shop.

22. On 23 September 2017, the claimant fell ill with fever, and flu like symptoms and vomiting. His health deteriorated over the next few days and on 27 September he considered himself unfit to remain at work, and closed the shop early. At one point, he was advised that he had passed out in the shop. He suffered considerable pain. A notice was placed in the window by the other keyholder, Dylan Melbourne, stating "We have closed early for today. Sorry!" The sign remained on the window on the following day.

23. He was unable to and did not attend work the next day. He decided that the shop should not be opened on that day (28 September 2017) as he was the only person who knew the process for buying goods. Mr and Mrs Ross were abroad and he decided that in his capacity as manager he should not open the shop that day.

24. From time to time the shop has had to close in the past, for example if the police required to carry out a search to retrieve stolen goods alleged to have been sold to them, or if there were a robbery or assault occurring.

25. In the event that the shop had to close in circumstances such as those on 27 and 28 September 2017, Mr and Mrs Ross expected to be told in order that they could arrange for their daughter, who lived close by, to attend and take over the running of the shop rather than close it. Closing the shop, particularly during the aftermath of the coronavirus pandemic, is, as they said in evidence, likely to cause considerable alarm to customers who depend upon it as a source of income at particular times. A customer may have an item which they have sold to the shop but which is approaching the 28 day deadline for retrieval; if the shop is closed at that time, the customer may lose the right, or fear that he will lose the right, to redeem the item he sold, thinking it was a temporary loss of the item rather than a permanent sale. Further, customers would be liable to fear that if the shop closed on an ordinary business day that meant that it was closing permanently, or might do so, and accordingly the respondent seeks to avoid the closure of the shop except in the extreme circumstances where no alternative arrangement may be made.

26. On neither occasion (on 27 and 28 September) did the claimant notify Mr Ross or Mrs Ross that he was intending to close early or not open the shop due to his illness..

27. On the evening of 28 September 2017, having discovered that the shop had been closed for the day, Mrs Ross texted the claimant (110):

"Hi Chris / cannot believe that Dylan has only been off since Monday and you have already let us down. I hope there is no further sickness and the shop is open tomorrow. Even if you have to put Thomas on the buying counter and Heather on the sales, all you have to do is be there for business. Any manager who cared for his employer given our first holiday would at least take flu or a we have heard a bit of a cold get some tablets

and get through the next 2 days. Please make sure you make an effort to open. Thanks."

28. The claimant did attend work for the next day (29 September) despite the fact that he continued to feel unwell. On 30 September he attended again at work, but on 3 October 2017, owing to his continuing illness his father took him to the Emergency Department at Dumfries Royal Infirmary The claimant completed an SSP form (111) on 4 October 2017, confirming that he had finished work at 5pm, and that he had been diagnosed with a bacterial infection. He said that his sickness began on 2 October 2017.

29. It should at this point be noted that the Tribunal has had considerable difficulty understanding the claimant's evidence about the dates on which the significant events happened. It was not clear to us that we could rely upon the dates which he gave us.

30. A discharge summary from the hospital (119) confirmed that he was admitted on 3 October 2017 for treatment of the principal diagnosis of necrotising fasciitis of perineal region. The letter said that he had attended at the hospital on 3 October complaining of an increasingly severe 4 day history of right gluteal pain associated with incontinence and general malaise. It went on to confirm that on 5 October he underwent a laparoscopy, which required to be converted to a laparotomy (that is, keyhole surgery during which the surgeon decided to carry out an incision in order to open up the affected area). He was detained in hospital until 17 October 2017, when he was discharged as medically fit.

31. On 11 October 2017, the claimant's father, Andrew Lowe, brought a letter to the shop (114) enclosing a copy of a statement of fitness for work (115), confirming the diagnosis (Necrotising fasciitis (gluteal) requiring diversion stoma) and advising that he would not be fit for work for 2 weeks from 15 October 2017.

32. On 24 October 2017, the claimant's father brought another letter to the shop (118), enclosing the discharge summary (119) as clear evidence that he was unable and not fit for work on these dates shown in the summary.

33. The claimant returned home to the care of his father, who lived locally.

34. On 2 November 2017, Mr Ross wrote to the claimant (124) to invite him to attend an investigation meeting on 8 November 2017 in the shop at 10 English Street, Dumfries. The letter explained:

5 “The *purpose of the investigation meeting is to allow you the opportunity to provide an explanation for the following matter of concern:*

1. Wfe *have concerns over your conduct at work.*

The meeting will be conducted by a 'HRFace2Face' Consultant from Peninsula. A note taker will be in attendance.

10 *Possible outcomes from the meeting are that we may decide that it is necessary to pursue a formal disciplinary procedure with you, or alternatively we may decide that there are no grounds for this.*

I understand that you will want to know what is going to happen as soon as possible, and the Consultant will endeavour to let you know as quickly after
15 *the meeting as they can. It may be possible for the Consultant, during your discussions in the meeting, to provide you with some idea of whether they need to carry out any further investigations before getting back to you.*

You should be aware that the requirement for you to attend this investigation meeting during your working hours (during which time you will
20 *be paid) is deemed by the company to be a reasonable management instruction. If you fail to attend without notification, or good reason, we will treat your non-attendance as a separate issue of misconduct.*

You are expected to make every effort to attend this meeting because if you fail to attend the meeting without good reason, or fail to notify us of the good
25 *reason for your non-attendance in advance of the meeting, the HRFace2Face Consultant will proceed with the investigation in your absence. In such circumstances, the HRFace2Face Consultant will make their recommendations based upon the information available to them at the time of the meeting.*

If you have any queries regarding the contents of this letter please contact me.

Yours sincerely,

George Ross."

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35. At this point, the claimant was still absent from work, and had submitted a medical certificate covering his absence as unfit to work from 27 October until 12 November 2017 (123) by letter dated 1 November 2017 presented to the shop by his father (122).

36. The claimant was very upset when he received this letter inviting him to an investigation meeting. He told the respondent that he was not fit to attend the hearing, and also indicated that he did not know what allegations were being made against him.

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37. On 8 November 2017, Mr Ross sent a further letter (126), following receipt of the latest medical certificate (123), to say that before making a decision whether to reschedule the meeting, they required the claimant to produce medical evidence that his illness was so serious that he could not attend a meeting. He indicated that in effect this meant that he would be so unwell that he could not understand questions or give instructions to a representative to allow them to appear on his behalf. If no such medical evidence was provided, the meeting would take place on 15 November 2017.

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38. As an alternative, the claimant was offered the opportunity to have the meeting conducted within his home address or at a neutral venue of his choice, or to participate by telephone call.

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39. The claimant responded to that invitation by writing to Mr Ross on 11 November 2021 (130). He said that the delay gave him little or no time to seek advice and reply to the original letter, which left him feeling "somewhat intimidated and concerned at the speed of this investigation which makes no allowance for my condition or ability to take advice at short notice."

40. He stressed that as a result of two major operations - he had also required to have a hernia repaired - he was having difficulty walking or standing for any length of time, and having had a colostomy bag fitted while in hospital this required some adjustment to his bodily functions and personal hygiene, as well as the emotional trauma of having to deal with such an unpleasant situation. He referred to his latest fitness to work certificate which covered the 4 weeks from 13 November 2017 (129) which, he said, clearly confirmed his inability to attend any meeting during that time.

41. However, the claimant went on, *"I am anxious that this investigation is carried out as soon as possible and having taken advice I would accept your offer to arrange for the meeting to take place in Dalbeattie at the above address [his father's home]. Although I still feel intimidated and forced to make decisions with short notice I suggest Wednesday 15th November at 2.00 or if this is not acceptable on Thursday 16th November at 1.00pm."*

42. Saragh Reid, of HRFace2Face Consultants, was instructed by the respondent to conduct the investigation. She attended the meeting on 15 November at the claimant's father's house, with Ashleigh Hamilton in attendance to take notes. Unbeknown to the claimant at the time, Ms Hamilton is the daughter of Mr and Mrs Ross. Notes of the meeting were included within the Investigation Report (dated 29 November 2017) produced by Ms Reid (135ff), at 138ff.

43. It was noted at the outset of the Investigation Report that the claimant had been invited formally to attend an Investigation Meeting by letter dated 8 November 2017 to discuss *"the following:*

- *Attitude to other members of staff*
- *Closing the shop early*
- *Not following procedures*
- *Jewellery concerns"*

44. This was incorrect. The letter inviting the claimant to that meeting merely referred to concerns about his conduct in the workplace, and did not specify the 4 bullet points set out there. The Tribunal did not hear evidence from Ms Reid, and accordingly it is unknown why she made this erroneous statement.

45. Ms Reid then set out her findings about the allegations, and at the conclusion of her report made recommendations as to further action (146):

"In light of the above findings it is our recommendation that CL be informed of the outcome of the Investigation Meeting and that he be invited to attend a Disciplinary Hearing to answer the following allegations:

- *Failing to follow the correct procedure in the depositing/safe storage of cash overnight*
- *Failing to make contact with owners and instead making the decision to close the shop*
- *Selling his own jewellery to the store and processing this transaction himself*
- *Tampering with the security system on 21st September 2017 at 19.18 and 20.42 when he would have had no reason to be in the store at this time."*

46. Ms Reid also recommended that the report in its entirety should be disclosed to the claimant, and that it was a matter for the respondent to decide whether or not to accept all of the recommendations she had made.

47. Mr Ross accepted the recommendations made by the consultant and wrote to the claimant on 8 December 2017 (158) to invite him to a disciplinary hearing on 18 December 2017 at the shop in English Street, Dumfries.

48. He advised the claimant that the purpose of the hearing was to discuss the following "matters of concern":

1. "It is alleged that you have taken part in activities which cause the company to lose faith in your integrity. Further particulars being:

(a) It is alleged that you have failed to follow the correct procedure when depositing and safely storing money within the safe overnight. Further particulars being that on 3&h September 2017 you allegedly failed to follow protocol and left £1000 out of the safe, within an unlocked office, within the shop.

(b) It is alleged that on 26th September 2017 you allegedly failed to seek authorisation from the owners of Cashing Inn, before making the decision to close the shop earlier than the business hours' state.

(c) It is alleged that on 2&h September 2017 you allegedly failed to seek authorisation from the owners of Cashing Inn, before making the decision not to open the shop.

(d) It is alleged that on 21st September 2017 at 17.27pm and 18.30pm (sic), you processed 2 transaction agreements yourself, as renewals for the same person.

(e) It is alleged that on 21st September 2017 at 19.18pm and 20.42pm (sic), you allegedly tampered with CCTV recordings, despite there being no requirement to do so, and no requirement to be on the premises at that time.

(f) It is alleged that in March 2017 you locked your colleague, Heather Carpenter within the shop and refused to allow her to leave."

49. The letter then listed the documents enclosed to the claimant for the purpose of the hearing, as follows:

1. "Investigation Report

2. Witness Statement - G Ross

3. Witness Statement - Thomas Gillan

4. Witness Statement - Heather Carpenter

5. Images of the sign advising the shop is closed

6. Letter regarding CCTV - Advanced Aerials

7. Images of CCTV log

5 *8. Witness Statement - Dylan Melbourne*

9. Email regarding transactions - Kathryn Edge

10. Secom Report

11. Witness Statement - Dylan - 08/11/17

12. CCTV - please note that due to the size of the file, the CCTV will be
10 *made available to view prior to the meeting."*

50. Mr Ross confirmed that an HRFace2Face Consultant would hear the case and make recommendations to him as to the disposal of the matter.

51. On 8 December 2017, the claimant's father texted Mr Ross to advise that the claimant had been admitted to hospital earlier that week, and that a
15 further sick line would be provided confirming that he had been signed off for a further 28 days (160).

52. On 9 December 2017, the claimant wrote to Mr Ross to make a number of points about the disciplinary hearing. He suggested that the hearing be rearranged for 19 or 21 December as he had a scheduled medical
20 appointment on 18 December.

53. He went on to say:

"While I am anxious to reach a satisfactory conclusion I would like to raise a number of concerns.

- *I am not sure if you appreciate just how ill I have been. I am still*
25 *under the care of Dumfries NHS and receive daily visits from the local nurse. As you will note from the Discharge Summary 5th*

December I was re-admitted to DGRI. This has slowed my recovery programme and I am still awaiting notice of further surgery.

- *I have difficulty in sitting or standing for any length of time and as a consequence I find it difficult to concentrate.*

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- *As the meeting will be held at Cashing Inn I am very concerned with a number of issues. Privacy and confidentiality with staff and public in close proximity. Lack of heating. Personal health and hygienic facilities. My condition may require, with little or no notice, to use hygienic facilities that must not compromise the high standards of hygiene that I require. "*

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54. The claimant also raised some concerns about the legibility and provenance of the documents provided by the respondent. Following a further letter on 15 December, Yewlande Williams, Employment Law Consultant, emailed the claimant that day (164) to confirm that they would be happy to hold the meeting at another venue, such as his father's house, and invited him to suggest an alternative. The claimant replied on the following day, direct to Mr Ross, to confirm that he would be agreeable to meeting at his parents' house.

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55. The disciplinary hearing took place on 19 December 2017, and was chaired by Rachel Waugh, of HRFace2Face Consultants. The claimant was accompanied by his father, Andrew Lowe. The hearing was recorded, and a transcript of the audio recording was produced (166ff).

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56. The documents which were relied upon were as set out in the letter of invitation to the disciplinary hearing.

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57. The witness statement by George Ross (120) (undated) initially addressed the history of the claimant's working relationship with the respondent, referring to a verbal warning which was given to him in September 2016, and the final written warning already set out above. Mr Ross went on to say:

"Unfortunately we had a very sad bereavement in this period which took us away from the business and we trusted Chris to inform us on a daily basis as to all matters concerning staff and day to day running of the shop.

We *have just now after Chris went off sick discovered how the business has been steadily in decline.*

1. *No staff management.*
2. *Gross misconduct on closing the store and not making us aware of this 21/09/2017*
3. *Treating staff with bad attitude and threats*
4. *Not confirming to us any of his management rolls (sic) and sending staff for his personal shopping in their working time et Heather Carpenter on Saturday 30th Sep 2017.*
5. *Open and closing the shop when he liked.*
6. *Late on coming in to start work, then taking paid breaks to have cigarettes and coffee.*

Over the past few weeks we have be (sic) made aware by staff of these findings. Unknown to us staff were threatened with the sack if they tried to contact the owner. We are *still looking into some activities regarding his buying methods and are awaiting assistance from our epos supplier."*

58. Thomas Gillan, another sales assistant, provided a witness statement dated 2 November 2017 (125). He said that he and the claimant did not get on well when he started. He said that the claimant would not step in to help him with customers if the sales floor became too busy, and that the claimant's frequent cigarette breaks became a problem. He indicated that over time their relationship improved, but that he was denied access to the email address for either Mr or Mrs Ross, and that the cigarette breaks continued to be a problem.

59. Heather Carpenter provided a witness statement dated 1 November 2017 (121), requested by Mr and Mrs Ross. She described the claimant as lazy, taking cigarette breaks every 45 minutes. He would not provide her with contact details for Mr and Mrs Ross. She said that he regularly argued with staff in front of customers, and that he was regularly late opening the shop. She went on: *"On one occasion we had a heated discussion at closing time I don't remember what it was about but he actually locked me in the shop and wouldn't let me leave and threatened to fire my partner chris gowan was witness and he only let me leave as he was standing there at the door so my confidence went down in the shop which this severely affected my sales as I felt I didn't want to be there in that situation. .."*

60. A letter was received from Advanced Aerials, the company which assisted the respondent with their CCTV system, dated 14 November 2017 (131). It stated:

"Following our visit to the cctv system at Cashing Inn, 10 English Street we can verify that the internal settings of the DVR system have been accessed and that both internal HDD's have been formatted on two separate occasions on September 21st at 1918 and 2042.

This can be verified by screenshots taken on George's mobile phone.

This is not a procedure that could be done by accident' in my opinion as the premises were closed at these times and could only be accessed by the keyholder with knowledge of the system."

61. Produced with that letter were the screenshots referred to (132/3) which demonstrated that at the relevant times the system had been booted up.

62. An email was received from Kathryn Edge, of Intec Systems (Blackburn) Limited, dated 5 December 2017 (154). She stated:

"Further to our telephone conversation I would like to confirm the following:

Agreement number 8557 was processed on 21st September 2017 and 17.27.

Agreement number 8558 was processed on 21st September 2017 at 18.30.

Both agreements were processed as renewals for the same person.

There is no evidence that the system has crashed, we have checked the integrity of the database and it is all OK. If the system had crashed the transactions would not have been recorded correctly and would have shown up as errors rather than be intact with all data present.

The system is currently used in several other organisations, and has been used for many years by many companies. As you know it was originally written for the Cash Generator group who used it for many years in all of their company owned stores and franchises. The software is extremely robust and was written with audit and traceability features along with system checks to ensure all transactions are recorded correctly.

I would like to confirm that Christopher Lowe was involved in the transition from your old system to the Intec software when it was first installed and received assistance with regard to how the processes would work on the new system."

63. Dylan Melbourne provided two statements. The first was dated 8 November 2017, and was signed by him. It stated: *"In my 2 and a half years of working at cash generator and cashing inn it has never been policy or my experience for anyone to lock the door after 5, whilst staff are still in the shop."*

64. His second statement was dated 14 November 2017 (134), and again was signed by him:

"I Dylan Melbourne

Attended work on Monday 2nd October as the manager went off sick. When I attended work I noticed that the protocol of locking up the takings for the week end had been left in the back office with the door ajar.

Theis amount was 1000 pounds I informed the owner G R Ross as soon as I discovered this.

I have also had many discussions with C Lowe about his attitude towards myself and staff on occasions.

Further discussions also took place about his late timing and his unofficial cigarette breaks.

5 *I have worked with Chris for the past few years and find him lazy and not a leader to others. I felt he abused his position in the company and witnessed his moods towards myself and other staff."*

65. At the disciplinary hearing, Ms Waugh introduced herself and confirmed the names of the claimant and his father as present. The claimant pointed out
10 that he had been invited to the meeting by email at 8.30pm the night before, giving him less than 24 hours' notice. The claimant did not object to the hearing going ahead at that point.

66. The claimant declined to comment on a number of pieces of evidence. He refused to make any comment about the email by Kathryn Edge on the
15 basis that it was not signed, and said he could not comment on the allegation that he had processed the transactions she makes reference to in her email.

67. When asked about the CCTV footage and what it showed, the claimant (174) said that if he came back at the time alleged, he may have done so to
20 collect his mobile phone. He said there had been a number of times when he had forgotten his mobile phone, and noted that there were no images of him in the shop, only leaving it. When asked if he remembered "tampering with the CCTV", he replied that he could not recollect anything like that. He said that he wanted a disc of the system log, as he believed that the system
25 was not working properly.

68. When asked about deleting information he said 7 *have knowledge of the CCTV and I know how to look at the CCTV, provide information to the police via burning discs off. Looking back at when certain people were in the shop so rewind to when someone was in the shop. With regards to deleting*
30 *information, I couldn't 100% comment, probably do, but I don't know."*

69. The claimant made a number of criticisms of the respondent's investigation. He complained that the statements by Dylan Melbourne did not appear to have been written by him in language he would use; that Ashleigh Hamilton's notes should be independently verified as she was the daughter of Mr and Mrs Ross and should have declared a conflict of interest; and that the statements made about his attitude and conduct as manager could not be relied upon.

70. Following the hearing, the claimant wrote to Ms Waugh on 20 December 2017 (180), thanking her for a "very worthwhile meeting yesterday", and continuing to query the involvement of Ms Hamilton.

71. Ms Waugh produced a report dated 5 January 2017 (186ff).

72. She went through each of the allegations and set out her findings and conclusions.

73. With regard to the allegation that the claimant had failed to follow the correct procedure when depositing and safely storing money within the safe overnight, she concluded that as there was no witness statement to support this incident, and the claimant had no recollection of it, there was insufficient evidence to uphold that allegation.

74. Ms Waugh upheld the second allegation, that the claimant had, on 26 September 2017, failed to seek authorisation from the owners of Cashing Inn before making the decision to close the business earlier than normal closing time; and the third allegation, that on 28 September 2017 the claimant had failed to seek authorisation from the owners before deciding not to open the shop. Ms Waugh found that Ms Hamilton had been left as the emergency contact for the claimant in the absence of Mr and Mrs Ross, and that he had failed to contact her before closing the shop.

75. The fourth allegation, that on 21 September 2017 between 1727 and 1830 the claimant processed two transaction agreements himself as renewals for the same person, was also upheld. Ms Waugh was satisfied that the email from Ms Edge was reliable, and that the claimant chose not to make any

comment about it until a signed copy was received. Heather Carpenter had confirmed that the claimant was the only person in the shop when she left for that day, and the claimant also confirmed that he was in the office, as did the CCTV footage. Accordingly, Ms Waugh said that *"As CL has not provided an explanation or any mitigating evidence, RW believes that on the balance of probability and based on the evidence available, CL did process the two transactions agreements himself, as renewals for the same person".* She therefore upheld the allegation.

76. The fifth allegation was that the claimant had, on 21 September 2017 between 1918 and 2042, tampered with the CCTV recordings, despite there being no requirement to do so, and on requirement to be on the premises at the time. Ms Waugh noted that the claimant could not recollect having tampered with the CCTV footage, and that he doubted the veracity of the statement by Advanced Aerials; that he admitted that he knew how to operate the CCTV system and how to delete footage. As a result of the claimant's failure to provide sufficient mitigating evidence that he did not temper with the footage, Ms Waugh upheld the allegation.

77. The sixth and final allegation was that the claimant had locked Heather Carpenter in the store at the end of business and refused to allow her to leave. Ms Waugh concluded that there was insufficient evidence to support the allegation and did not uphold it.

78. Ms Waugh then summed up that she believed that the claimant's actions had caused an irrevocable breakdown in the employer-employee relationship, and recommended that he be dismissed without notice. She stated that it was a matter for the employer to decide whether or not to accept her recommendations.

79. Mr Ross received the report by Ms Waugh, and having read it concluded that the claimant should be summarily dismissed on the grounds of gross misconduct. He wrote to the claimant on 10 January 2018 to this effect:

"Dear Chris,

As *you know, we engaged a third party consultant to conduct the disciplinary hearing on 19th December 2017. Given the Christmas holiday period and the reasonable timescales given for you to supply any extra evidence, I am now in receipt of the report which I enclose with this letter.*
5 *This report represents my decision.*

This will take effect immediately. You are not entitled to notice or pay in lieu of notice.

You have the right to appeal against my decision and should you wish to do so you should write to George Ross, Managing director, within 5 days of
10 *receiving this letter giving the full reasons why you believe the disciplinary action taken against you is too severe or inappropriate.*

Yours sincerely,

George Ross'"

80. The claimant was unhappy with the respondent's decision to dismiss him,
15 and submitted a letter of appeal against that decision on 13 January 2018 (196). The grounds of appeal were that he believed that Rachel Waugh failed to make full and impartial recommendations following the disciplinary hearing, due to incomplete evidence and an incorrect and inaccurate transcript of the investigation meeting of 15 November 2017; and that he
20 had not been given a copy of the notes of the disciplinary hearing. He also asked for clarification as to the reason for termination of his employment as it was unclear in the covering letter.

81. An appeal hearing was fixed to take place on 24 January 2018 at the Queensbury Hotel, Dumfries, and the claimant was invited by letter dated
25 19 January (197).

82. The claimant responded to the invitation by confirming that he was prepared to attend the appeal hearing at the date and location fixed by the respondent (199). However, he intimated that the following "provisions" required to be observed:

1. *"The appeal meeting will be in a private room and not in a public accessible place.*

2. *Toilet facilities will be easily accessible from the venue of the meeting. From my recoliection from the ground floor the toilet facilities are accessed by ascending two flights of stairs.*

3. *The note taker will NOT be Ashley Hamilton, George or Joan Ross or have any connection to GAR Trading (Cashing Inn). I have stated my reasons for this in previous correspondence and is one of the reasons for the appeal..."*

83. He also asked for a number of documents to be made available to him for the appeal hearing.

84. The hearing took place on 24 January 2018 in a bedroom at the Queensbury Hotel, which had en-suite toilet facilities available. The claimant attended with his father, and the appeal was heard by Lucy Crossley, of HRFace2Face Consultants. Ashleigh Hamilton was the note taker, and the meeting was recorded. Notes of the meeting were produced (202ff).

85. Having set out his objections to Ms Hamilton taking notes at the meeting, the claimant was asked whether he was happy to proceed. He replied that *7 have made my objections clear, but I also want to proceed. "*

86. When asked to confirm what parts of the recording from the meeting of 15 November were not reflected in the notes, the claimant said *"You can make your own decision. That is for you to listen to the digital recording and compare with the transcription."* He was asked again and said that it was not his job to do that.

87. Following the meeting, which was largely taken up with the claimant's objections to the notes of 15 November, Ms Crossley produced a report dated 1 February 2018 (21 Iff).

88. With regard to the notes of the meeting of 15 November, Ms Crossley stated:

"LCR listened to the audio recording from 15th November 2017 and compared this recording with the transcribed notes. LCR finds that while the transcribed notes were not verbatim they were an accurate reflection of the meeting. LCR notes that comments raised by CL in regards to the timekeeping and unpaid breaks were condensed in the transcribed notes however LCR understands that this point was not relevant to the investigation meeting itself or the outcome of the disciplinary hearing."

89. Ms Crossley then went through the other points raised by the claimant in his appeal hearing.

90. She concluded that the appeal should be dismissed and that the original sanction of dismissal should remain.

91. The recommendation was received by Mr Ross, who accepted it, and wrote to the claimant on 8 February 2018 confirming that the report represented his decision (218).

92. Following the termination of the claimant's employment, he has been unable to find or search for work owing to the nature of his health conditions. He has received both Disability Living Allowance and Job Seekers' Allowance, or Universal Credit, together with Housing Benefit, amounting to £68.74 a week, and £300 per month.

Submissions

93. Parties made submissions which were taken into consideration by the Tribunal in reaching its conclusions. A short summary of those submissions follows.

94. Ms Stein, for the claimant, said her main point was that the claimant was dismissed because he was disabled. He shut the shop and made mistakes because he was ill, for which he was blamed. The investigation forced him to participate when he was not fit to do so. There was a clear intention to dismiss the claimant.

95. She argued that the claimant's conduct on 21 September was not such as to justify summary dismissal. There was no connection alleged with the conduct of the previous year leading to a final written warning.

96. The true reason for dismissal was that the respondent did not want to have an employee off sick for a long time. The spirit of reasonable adjustments is to create a level playing field, but that is not what happened here. He was subjected to harassment by the respondent creating a hostile environment, disregarding his physical and mental state, especially in the appeal hearing.

97. She invited the Tribunal to find that the claimant and his witnesses were credible and reliable, whereas it was “not above” the respondent to fabricate evidence. Mr Ross appeared to be unfamiliar with the statements so he either pointed to the advisers or to his wife as knowing what was happening.

98. The two incidents of unfavourable treatment were that he was put under pressure to open the shop when the respondent was aware that he was unwell, and insisting that he attended the hearings when he was disabled and unfit.

99. Ms Stein relied upon the schedule of loss for the remedy to be granted to the claimant.

100. Mr Lane referred to the familiar legal authorities and submitted that the respondent had reasonable grounds upon which to conclude that the claimant had committed acts of gross misconduct, which they upheld.

101. He submitted that the claimant's health did not render it unreasonable for the respondent to uphold the allegations. The allegations of misconduct related to events on 21 September, whereas the claimant’s illness did not manifest itself until 23 September. After closing the store the claimant drove home and did not seek medical attention. There was no reason for him to be unable to contact his bosses due to his health. His misconduct was in failing to contact them to inform them that he was unable to continue working on that day.

102. The investigation fell within the band of reasonable responses. The statements were provided fairly - Heather Carpenter said so in relation to her statement. Dylan Melbourne said that he had been forced to give the statements he did, but he signed those statements and he has given evidence out of loyalty to the claimant. In any event, those statements relate to the allegations which were not upheld.

103. Dismissal was within the band of reasonable responses, he submitted. The respondent did rely on the final written warning, and made reference to what had happened before. The respondent followed a fair procedure, compliant with the ACAS Code of Practice. It is accepted that Ms Hamilton is the Rosses' daughter, but there were no other employees of the business who were not involved in this matter and they required to have someone take notes. They could have appointed a contractor but that would have come at a further cost.

104. Mr Lane accepted that Employment Judge Young found that the claimant was disabled within the meaning of the 2010 Act from 27 November 2017 until 24 January 2018. The respondent did not have actual knowledge that the claimant was disabled at that time. At the end of September 2017, the claimant himself did not know the extent of his illness.

105. There were no threats by the respondent to the claimant. The text message at 110 cannot be said to amount to unfavourable treatment under section 15 of the 2010 Act.

106. It was reasonable to proceed with the hearings. The respondent was concerned about the claimant's conduct, and it was for that reason he was dismissed, though it is now accepted that he was disabled at the material time.

107. Dismissal was a proportionate means of achieving a legitimate aim, that is to maintain standards of conduct, particularly in relation to a senior employee of the business.

108. The PCP relied upon by the claimant is the implementation of the disciplinary process. He has not established that he suffered a substantial disadvantage, and in any event the claimant himself expressed that he was anxious to proceed to a conclusion. He did effectively participate in the process.

109. With regard to harassment, Mr Lane argued that the claimant has failed to establish that even if there were failings in the disciplinary process they were related to the claimant's disability. Some adjustments were made for the claimant.

110. Mr Lane then addressed the Tribunal on the question of remedy.

The Relevant Law

111. In an unfair dismissal case, where the reason for dismissal is said to be conduct, it is necessary for the Tribunal to have regard to the statutory provisions of section 98 of ERA. The Tribunal considered the requirements of section 98(1) of the Employment Rights Act 1996 ("ERA"), which sets out the need to establish the reason for the dismissal; section 98(2) of ERA, which sets out the potentially fair reasons for dismissal; and section 98(4) of ERA, which sets out the general test of fairness as expressed as follows:

> "Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) -
>
> > (a) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and
> >
> > (b) shall be determined in accordance with the equity and substantial merits of the case."

112. Further, in determining the issues before it the Tribunal had regard to, in particular, the cases of **Burchell** and **Iceland Frozen Foods Ltd,** to which we were referred by the parties in submission. These well known cases set out the tests to be applied by Tribunals in considering cases of alleged misconduct.

113. **Burchell** reminds Tribunals that they should approach the requirements of section 98(4) by considering whether there was evidence before it about three distinct matters. Firstly was it established, as a fact, that the employer had a belief in the claimants conduct? Secondly, was it established that the employer had in its mind reasonable grounds upon which to sustain that belief? Finally, that at the stage at which that belief was formed on those grounds, was it established that the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

114. The case of **Quadrant Catering Ltd v Ms B Smith UKEAT/0362/10/RN** reminds the Tribunal that it is for the employer to satisfy the Tribunal as to the potentially fair reason for dismissal, and he does that by satisfying the Tribunal that he has a genuine belief in the misconduct alleged. Peter Clark J goes on to state that "the further questions as to whether he had reasonable grounds for that belief based on a reasonable investigation, going to the fairness question under section 98(4) of the Employment Rights Act 1996, are to be answered by the Tribunal in circumstances where there is no burden of proof placed on either party."

115. The Tribunal reminded itself, therefore, that in establishing whether the Respondents had reasonable grounds for their genuine belief, following a reasonable investigation, the burden of proof is neutral.

116. Reference having been made to the **Iceland Frozen Foods Ltd** decision, it is appropriate to refer to the well-known passage from that case in the judgment of Browne-Wilkinson J:

'Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by S.57(3) of the 1978 Act is as follows:

(1) the starting point should always be the words of S.57(3) themselves;

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

(3) in Judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

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

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

117. Section 15(1) of the 2010 Act provides,

"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."

118. Section 20 of the 2010 Act sets out requirements which form part of the duty to make reasonable adjustments, and a person on whom that duty is imposed is to be known as A. The relevant sub-section for the purposes of this case is sub-section (3): *"The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

119. Section 21 of the 2010 Act provides as follows:

"(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person. .."

120. The Tribunal also had reference to section 26(1) of the 2010 Act:

"A person (A) harasses another (B) if -
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of-
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B..."

Discussion and Decision

121. The issues for determination by the Tribunal in this case were set out on the Agreed List of Issues (65). The Tribunal addresses each of these in turn.

122. Before doing so, it is appropriate to make some observations on the evidence which we heard.

123. While we heard evidence from a number of witnesses, it is our view that the two crucial witnesses in this case were the claimant and George Ross. However, we require to address the evidence given by others.

124. The claimant called Dylan Melbourne and Heather Carpenter as witnesses in support of his case. Mr Melbourne asserted before us that the statements which he had given to the internal investigation had been extracted from him under duress. Whether he simply signed what had been typed for him or wrote down what he was told, we were not entirely clear: however, we concluded that while he may have felt under some pressure about what he had to say, it was very unlikely that he would sign statements in writing making the comments he did without there being some basis for doing so. He did not emerge as an individual who was unable to stand up for himself, and indeed since the investigation was being conducted by an independent consultant on behalf of the respondent, it was open to him to contact that consultant to recant or revise his statements. We were very unclear as to Mr Melbourne's intentions but ultimately felt that he was speaking on behalf of the claimant, whom he regarded as a friend. His approach was contradictory and in the end we concluded that since the respondent was unaware until after the decision was taken that he had decided to recant his statements it was legitimate for them to take them into consideration in reaching their decision.

125. So far as Heather Carpenter is concerned, her evidence related largely to matters which were outwith the issues which the Tribunal has to address. She did not complain that her statement was induced from her against her will, which further casts doubt on Mr Melbourne's position.

126. In addition, the claimant called his father, Mr Lowe, to give evidence. He was, in our view, a good and helpful witness, seeking to be honest but also supportive of his son. Ultimately we found his evidence to be reliable.

127. For the respondent, other than Mr Ross, we heard from Mrs Joan Ross. Her evidence, particularly in chief, was notably brief, and her disposition before us was of one who did not wish to be in attendance. Her tendency to look either to her husband or her legal adviser before giving answers, and her combative and somewhat dismissive attitude under cross-examination, undermined the utility of her evidence. Again, however, hers was not a central role in this case.

128. We considered that Mr Ross was a straightforward witness who was able to explain the stance taken by the respondent in reaching the decision to dismiss the claimant. We felt that his evidence illuminated and assisted the Tribunal in understanding the rather brief letters in which he issued his decision to dismiss the claimant and to reject his appeal. He remained calm under cross-examination and in our judgment emerged as an honest witness.

129. The claimant's evidence gave us some difficulties. While remaining relatively good-humoured and apparently open in his manner, we found his evidence to be confusing and at times incredible.

130. We accepted, of course, that the claimant has undergone a deeply unpleasant and distressing medical condition which required significant input and treatment over a period of time, and that this must have affected him at times during the internal processes.

131. However, there were three areas in particular where we found the claimant's evidence difficult to reconcile. Firstly, his position with regard to the respondent's decision to proceed with the investigation, disciplinary and appeal hearings was very unclear, taking all of the evidence into account. While he made clear before us that he thought the respondent should not have proceeded with the hearings at the time they did, he did not quite convey that to the respondent at the time. While he did suggest that they had not appreciated how ill he was, he also agreed to attend at each of the hearings, and at no stage did he protest or seek an adjournment of any of the hearings due to ill health.

132. The claimant clearly felt that the respondent over-emphasized the point that he was anxious to press on with the hearings so as to bring the matter to a conclusion, but in our judgment, he repeated this statement both in writing and in person, and in the absence of any clear application by him to defer the process we considered that the respondent was entitled to proceed as scheduled. His criticisms appeared to us to be an attempt to revise his true position before us.

133. Secondly, we were very unimpressed by the claimant's evidence about the events of the evening of 21 September 2017. In the disciplinary process, the claimant suggested that the reason he had returned to the shop was to retrieve his mobile phone, something which he had had to do on a number of occasions before. However, under re-examination, his evidence became confused and confusing. He said that he had been trying to remember what did occur there; that one of the reasons he would be late in the shop (though it was not clear whether he meant this occasion) would be because customers were trying to get into the shop; that he would sometimes go in late to check everything after customers top coming in; that something had not balanced so he would have to stay a lot longer in the shop. He went on to describe this as "not a satisfactory answer". We would agree with that.

134. In our view, the claimant's evidence about this was entirely unsatisfactory. He appeared to us to be seeking to cast around for possible explanations as to why he was in the shop, which caused us to believe that he was avoiding the truthful explanation, supported by the CCTV system records, that he had gone in late, alone, to the shop in order to carry out a transaction on his own, and then destroy the evidence that he had been there. His evidence on this point entirely lacked credibility and we rejected it.

135. Thirdly, the claimant spent a great deal of time complaining about the inaccuracies and gaps in the notes of the investigation meeting of 15 November 2017. Indeed, it formed the core of his appeal against dismissal. His approach, both before us and in the internal process, was to decline to

answer specific questions as to what he considered the inaccuracies and gaps in the notes to be. His attitude seemed to be that it was sufficient for him to say that there were inaccuracies, and that it was for the respondent to find them. They investigated the matter - the independent consultant listened to the recording and compared it to the notes - and were unable to understand the claimant's criticisms. In our judgment, the claimant's evidence on this point was not only unsatisfactory but inexplicable. He raised a criticism but was not prepared to say what he meant by it. This was conduct which was not designed to help the internal process, nor the Tribunal in trying to establish what his concern was. We were left to conclude that he simply wanted the Tribunal to infer that the notes were inaccurate, without having to commit himself and point to them; and that his criticism was therefore baseless and unfairly designed to heap criticism upon the respondent.

136. Accordingly, we were unable to find that the claimant was a credible or reliable witness.

137. The issues before us, then, were separated into the different heads of claim, and we addressed them under those headings.

Unfair dismissal

- ***What was the reason for the claimant's dismissal?***
- **Was *it a fair reason ?***
- **Was *it fair under section 98(4) Employment Rights Act 1996?***

138. The respondent dismissed the claimant on 10 January 2018 by a letter from Mr Ross (195). The letter was not well drafted. Essentially, Mr Ross referred to the report by Rachel Waugh, the independent consultant who had been contracted to carry out the disciplinary hearing, and then said, in the simplest terms, "This report represents my decision."

139. In one sense, this was unclear. The report had made a number of recommendations (193), including that the claimant be dismissed without

notice. However, it went on to say that it was a matter for the employer to decide whether they wish to accept any or all of the recommendations. As a result, it would have been much clearer if Mr Ross had explained that he was accepting those recommendations in full (as he did before us) in the letter of dismissal.

140. We have concluded that Mr Ross's letter is sufficient to set out the basis of the decision to dismiss the claimant. We have had the benefit of Mr Ross's explanation before us that he did accept the recommendations, having read the report, and that he accepted that it was his decision to dismiss the claimant

141. On that basis, we have found that the reason for the claimant's dismissal was that of conduct, which is a potentially fair reason under the Employment Rights Act 1996 (ERA).

142. The conduct of which he was found to be guilty was set out at 193:

- *"that on 21st September 2017 at 19.18pm and 20.42pm, CL tampered with CCTV recordings, despite there being no requirement to do so, and no requirement to be on the premises at that time.*
- *that on 21st September 2017 at 17.27pm and 18.30pm, you processed two transaction agreements yourself, as renewals for the same person*
- *that on 28th September 2017 you allegedly failed to seek authorisation from the owners of Cashing Inn before making the decision not to open the shop*
- *that on 26th September 2017, you allegedly failed to seek authorisation from the owners of Cashing Inn, before making the decision to close the shop earlier than the business hours state."*

143. The issues ask if this was a fair reason. In our judgment, this is slightly vague, particularly when followed by the same question in reference to section 98(4) of ERA. Accordingly, we consider that the appropriate way

to determine both of these questions is to follow the approach taken in **Burchell.**

144. Firstly, having determined that the reason for dismissal was conduct, we then considered whether the respondent had a genuine belief that the claimant had been guilty of the allegations found, and therefore of gross misconduct. Having heard the evidence of Mr Ross, we were of the view that he did have such a genuine belief. It was suggested that the real reason for dismissal was that the respondent was unwilling to keep the claimant in employment when facing a lengthy absence from work. We found no basis for this suggestion. The reasons given by Mr Ross were credible and substantial.

145. Secondly, then, did the respondent have reasonable grounds upon which to have such a genuine belief? It is appropriate to consider each of the allegations which were upheld.

146. The first allegation upheld was that the claimant tampered with the CCTV system on the evening of 21 September 2021. The respondent obtained a report from the company overseeing the CCTV system for them, and their report confirmed that the system was re-booted twice on that evening. Mr Ross's understanding was that the claimant had sought to clear the system, but that when he rebooted it, discovered that he had not deleted enough footage, and accordingly had to go back in and repeat the exercise. The claimant's explanation was, in our judgment, quite inadequate. He maintained that he could not recollect having deleted parts of the system before, and then refused to accept the provenance of the report from Advanced Aerials. He did not, however, address the allegation in a credible and open way, and indeed we found it unsurprising that the respondent did not accept his response. We found his position on this to be evasive.

147. What the claimant could not explain was why he was in the shop at that hour in the first place. He told the investigation that he may have gone back in to retrieve his mobile phone, but clearly he was in the shop for much longer than would have been required. He gave evidence to us that there

were a number of possible explanations for his presence there after hours, but he did not say that any of them were actually the explanation for that evening. In other words, the respondent was entitled to come to the view that the claimant had no explanation for his attendance at the shop after hours on 21 September, and were entitled, further, to reach the conclusion that he had deleted the CCTV footage for that period.

148. The respondent had reasonable grounds not only to find that the claimant had tampered with the CCTV footage, but also that this amounted to an act of misconduct as it demonstrated his desire to conceal his activities on that evening from the respondent.

149. The second allegation upheld was that on the same evening he processed two transaction agreements himself. In support of this was the email from Kathryn Edge, from the company which provided the system, confirming that the two transactions were processed at those times as renewals for the same person.

150. The claimant essentially declined to address this allegation, insisting that the email from Ms Edge had to be signed. In our judgment, the evidence on this allegation was clear and straightforward. Two renewals had been processed by the same person on that evening; it was known that the claimant was in the shop on that evening, after hours; there was no evidence that anyone else was there and responsible for those transactions; there was no reason why such transactions required to be processed after hours; and in the circumstances, the claimant's failure to address the allegation fortified the respondent's belief that he was responsible for processing a transaction which was designed to benefit only himself, and was dishonest. In the Tribunal's view, it also strengthened the finding that the claimant had a reason for wishing to delete the CCTV footage that evening.

151. Accordingly, we consider that the respondent had reasonable grounds for their belief that this allegation should be upheld.

152. The third and fourth allegations upheld related to the claimant's early closure of the shop and then failure to open the shop on 26 and 28 September 2017. As the respondent explained, it was not so much that the claimant was unwell and therefore unable to remain at work or attend on the second occasion, but that he had failed to seek authorisation from the owners before doing so. The claimant did not deny this allegation. He accepted that he did not seek to contact the respondent before he took the decision to close the shop.

153. The question which then arises is whether this amounts to gross misconduct. In our judgment, Mr Ross explained clearly and cogently why it did. There was an arrangement in place whereby if the claimant needed to be absent from the shop he would contact Mr or Mrs Ross to notify them, and they could contact their daughter who would then attend the shop in their absence. The claimant ignored that arrangement. The significance of doing so was that the shop required to close on one day early, and then simply not open on another; and that as a result, customers may miss out on their date for redemption of an item earlier sold to the shop, or may be unable to rely upon the shop in order to sell an item to obtain short term cash, as many of their customers do. In addition, he was very concerned that customers may be anxious that the shop had closed permanently, and that there was no information available to them as to its reopening, particularly in the period following a global pandemic.

154. In our judgment, given the nature of the business which the respondent operates, they had reasonable grounds upon which to conclude that the claimant's failure to seek authorisation to close the shop amounted to gross misconduct.

155. Thirdly, then, did the respondent conduct a reasonable investigation, and follow a fair procedure.

156. In our judgment the respondent did carry out such investigation as was reasonable in all the circumstances. They obtained technical reports from Advanced Aerials and Kathryn Edge, and scrutinised the footage and

the technical information available in their systems. They took statements from the staff who were available and involved, and they instructed an independent HR firm to carry out the investigation and the hearings in this case.

5 157. They were able to place before the claimant the evidence which they had secured, and to offer him a full opportunity to respond to the allegations made. They had an investigatory meeting, a disciplinary hearing and an appeal hearing. They provided the claimant with the evidence being relied upon, and allowed him to be accompanied at each of the hearings.

10 158. In our judgment, the respondent acted reasonably in proceeding with each of the hearings. The decision to do so was taken by an independent company acting on their behalf, and given that the claimant both attended at all of the hearings and confirmed his willingness to proceed at each one, they were justified in proceeding at the times when they did. At no stage did 15 the claimant refuse to attend, or produce evidence to suggest that he was incapable of doing so. When he asked for adjustments to be put in place for him, the respondent (as we shall see below) assented to his request.

159. The involvement of Ashleigh Hamilton was not a significant issue, in our judgment, notwithstanding the unhappiness of the claimant at her 20 participation once he discovered her relationship with the respondent. She did not take an active role in the hearings, nor did she take any part in the decision-making processes. The hearings were recorded and available for checking against her notes. The respondent is a small business with limited staff, and accordingly, having instructed an independent consultant to 25 conduct the hearings we were not persuaded that it amounted to an unfairness in the procedure to have asked Ms Hamilton to take notes, partly to save money for them.

160. Finally, then, was dismissal a decision which fell within the range of reasonable responses open to a reasonable employer? We remined 30 ourselves that it is not for us to substitute our own decision for that of the respondent, but to consider what they did at the time and on the basis of the

information which they had. The claimant continued throughout to be evasive, in our view, when pressed for his explanation for his actions, and at no stage did he accept that he had done anything wrong. He had acted in such a way as to undermine, fundamentally, the trust and confidence which the respondent required to have in him as their shop manager; and he was still subject to a live final written warning for dishonesty which had been issued to him less than 12 months before the decision to dismiss him, and which was taken into account by Mr Ross in reaching his decision.

161. In our judgment, the respondent's decision to dismiss the claimant fell within the range of reasonable responses open to a reasonable employer. The claimant's actions demonstrated a lack of openness and honesty, which are essential in a shop manager but also in one who had previously been given a written warning about his conduct; and a failure to communicate in such a way as to look after the best interests of the business.

162. It is therefore our judgment that the claimant's claim of unfair dismissal must fail, and be dismissed.

Discrimination Arising from Disability (section 15, Equality Act 2010)

- **Was *the claimant subject to unfavourable treatment?***
- ***Did the reason for any unfavourable treatment arising in consequence of disability?***
- ***At the applicable time, did the respondent know, or could the respondent have been reasonably expected to know, that the claimant was disabled?***
- **Was *the unfavourable treatment a proportionate means of achieving a legitimate aim?***

163. The finding of the Employment Tribunal (Employment Judge Young) following an earlier Preliminary Hearing was that the claimant was a disabled person from 27 November 2017 until 24 January 2018.

164. The claimant relies upon two allegations of unfavourable treatment contrary to section 15 of the 2010 Act, namely threats or pressure applied by the respondent to return to work when he was ill, and the decision to proceed with the investigation and disciplinary hearings when he was ill.

5 165. Mr Lane submitted that the only threat relied upon by the claimant was that set out at 110, in the text message (which was sent by Mrs Ross, not Mr Ross, to the claimant) on 28 September 2017. The terms of that text message were related to the claimant having “let us down". Mrs Ross said that she hoped there would be no further sickness and that the shop would 10 be open the following day. The remainder of the message suggested how the claimant should attend the shop and take medication to address his illness, and asked him to make an effort to open.

166. We are not persuaded that the terms of this message amounted to a threat. There is no threat contained within the wording of the message; 15 there are no adverse consequences to be imposed in the event that the claimant did not do what he was being asked to do. In our judgment, this was a rather clumsy and unsympathetic text message to a long-standing employee, but it did not amount to a threatening message, nor did it meet the definition of a detriment to the claimant. It was an attempt to ensure that 20 the shop remained open while the claimant had shut it for a day and part of a day shortly before this.

167. So far as the decision to proceed to the hearings when the claimant was unwell is concerned, we recognise that the claimant was not at work at that time, and that he was still recovering from surgery for a deeply 25 unpleasant and painful illness.

168. There are two points which are of importance here, however: firstly, the investigation and the disciplinary (as well as the appeal) hearings were all conducted on behalf of the respondent by an independent consultant instructed by them. Mr Ross himself did not participate, as we understand 30 the evidence, in any decisions about whether or not the hearings should proceed on the dates given. Some adjustments were made when the

claimant complained about the hearings, but in our judgment, it was open at any time for the claimant to refuse to attend at any of the hearings, and there is no evidence that he did so. He attended and was clearly able to defend himself against the allegations, which he understood, and while he protested, to some extent, at the start of those hearings that he did not feel well, he did express anxiety about allowing the process to be progressed as soon as possible, and agreed quite straightforwardly to proceed with each hearing. We cannot, therefore, find that the claimant was subjected to a detriment by the hearings proceeding when they did.

169. We do note that the allegation is that the decision to investigate was taken after the events of 26 and 27 September, when he closed the shop, and thus at the point when it was known he was unwell. We were slightly uncertain as to whether or not the claimant was seeking to argue that that decision was itself a detriment, but it appeared, from Ms Stein's submissions, that it was not.

170. In our judgment, there was therefore no unfavourable treatment meted out to the claimant in these particular respects.

171. We would, however, consider that the decisions which are criticised were not actions arising in consequence of the claimant's disability. The respondent wanted the claimant to ensure that the shop remained open or reopened following his unauthorised decision to close it. If the claimant were unable to open the shop himself, he could have contacted the respondent and arrangements could have been made for their daughter to attend. That would have permitted him to stay at home if he remained unwell. As a result, that text message was sent with the desire to ensure that the business remained open and for that reason rather that a reason which arose out of the claimant's disability.

172. So far as proceeding with the hearings was concerned, again, we consider that the claimant could have made clear to the respondent that he was not willing to attend any hearing due to illness, but he did not; indeed, he attended all of the meetings and set forth his position at each.

173. It is therefore our conclusion that the claimant did not suffer any unfavourable treatment under section 15 of the 2010 Act arising in consequence of his disability.

174. It is also important to consider whether or not the respondent knew or reasonably ought to have known that the claimant was at that time suffering from a disability. It must be borne in mind that the claimant only became ill on 26 or 27 September. The respondent did not at that time know, nor in our judgment could they reasonably be expected to have known, that the claimant was suffering from a disability within the meaning of the 2010 Act. As Mr Lane submitted, it was the long-term nature of the illness that they did not, and could not, know about when these issues arose. It was clear that the claimant was ill and unfit to attend work, but not that he was so ill, and likely to continue to be so ill, as to meet the statutory definition of disability at the time running up to his dismissal.

175. Accordingly, it is our judgment that the respondent had neither actual nor constructive knowledge that the claimant was disabled at the time of the events complained of, and therefore these matters cannot amount to unfavourable treatment arising in consequence of his disability.

176. Since we have not found that the claimant was subjected to unfavourable treatment arising in consequence of his disability, it is not necessary for us to decide whether the respondent acted in such a way as to be the proportionate means of achieving a legitimate aim.

177. In our judgment, the claimant's claim under section 15 of the 2010 Act must fail and be dismissed.

Failure to Make Reasonable Adjustments (sections 20 and 21 of the 2010 Act)

- ***Did the respondent apply any PCP to the claimant?***
- ***What was the PCP?***

- ***Did the application of that PCP subject the claimant to disadvantage?***

- ***What adjustments would have been reasonable for the respondent to make to alleviate the disadvantage suffered by the claimant?***

5
- ***At the applicable time, did the respondent know or could the respondent have been reasonably expected to know that the claimant was a disabled person who was likely to be placed at a substantial disadvantage to persons who are not disabled?***

178. As we understand it, the PCP relied upon by the claimant was the
10 application by the respondent of their disciplinary procedure to him.

179. Mr Lane suggested that a flawed disciplinary procedure does not amount to a PCP, and referred the Tribunal to **Nottingham City Transport Ltd v Harvey UKEAT/0032/12,** in which the Employment Appeal Tribunal stressed the need for the Tribunal to focus on the wording of the statute,
15 and to note that there must be a provision criterion or practice, out of which any substantial disadvantage must arise. In that case, the claimant did not suggest that the employer made a practice of holding disciplinary hearings in a way that eliminated consideration of mitigation or in a way in which there was no reasonable investigation. Given that fact, the EAT found that
20 there was insufficient evidence to show that the application of the respondent's disciplinary process in that case (flawed though that may have been) was a PCP. The one-off application of the procedure could not amount to a PCP.

180. In this case, it is not clear on what basis it is suggested that the
25 application of the respondent's disciplinary procedure could amount to a PCP. It appears that the claimant considered that the respondent applied their procedure to him in a manner which was flawed and unfair, and that that was so because he was a disabled person. They failed to make reasonable adjustments for him because he was a disabled person, and
30 that therefore amounted to discriminatory treatment, in the claimant's argument.

181. The difficulty for us in assessing this is that while it is true that the respondent did apply its disciplinary procedure to the claimant, that fact of itself is not what the claimant is arguing amounted to the PCP. The claimant says that they failed to take account of the claimant's disability in the way in which the procedure was conducted. On the basis of Harvey, that is simply not enough

182. As a result, we are unable to conclude that the claimant has proved that the respondent applied to him a PCP which wrought upon him a substantial disadvantage owing to his being a disabled person. There was no evidence to suggest that if the procedure was flawed it was as a result of consistent practice by the respondent.

183. We did consider, nevertheless, whether the respondent did fail to make reasonable adjustments, and have reached the conclusion that they did not.

184. The claimant argued that the respondent should have delayed the hearings until he was fit and able to attend. It is not clear to us what substantial disadvantage the claimant suffered as a result of the decisions taken by the respondent to proceed with each of the hearings. The claimant was able to attend; did not object to the hearings proceeding; was able to respond to the allegations to the extent he wished to; and appears not to have suffered any disadvantage, in our view, through the manner in which the process was conducted.

185. In submissions, the claimant's representative also suggested that it would have been a reasonable adjustment to have removed Mr Ross's daughter from her role as note-taker. We cannot see the connection between this adjustment and the disability relied upon by the claimant, namely necrotising fasciitis and the consequences thereof (including the depressive illness which arose as a result). The reality is that at the investigatory hearing, the claimant was unaware that the claimant's daughter was the person taking the notes; and thereafter the only role she took was to transcribe recordings. There is no evidence that the

transcriptions were inaccurate or that she had any meaningful impact upon the proceedings. As a result, we are unable to establish any connection between the physical illness suffered by the claimant and the involvement of Ashleigh Hamilton; and are not persuaded that the decision to continue to involve her caused the claimant any disadvantage owing to his depressive illness. We heard that he was uncomfortable but in our judgment the evidence does not lead to a conclusion that he suffered any mental illness as a result, nor that her absence from the process would have prevented any such illness.

186. The respondent did, as a matter of fact, make a number of adjustments at the claimant's request. For example, at the appeal hearing, the hearing was conducted at a neutral venue, in a private room, with ready access to toilet facilities, on a date agreed by the claimant with his father. All of that was accommodated in order to ensure that the claimant was able to attend, and he did attend.

187. Accordingly it is our conclusion that the claimant's claim that the respondent failed to make reasonable adjustments fails, and is dismissed.

Harassment (section 26 of the 2010 Act)

- **Was *the claimant subject to unwanted conduct that had the purpose or effect of violating his dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment?***

188. In submission, Ms Stein said that the respondent had harassed the claimant by their disregard of his medical and mental state, creating a hostile environment, especially in the course of the appeal hearing.

189. She argued that the claimant suffered “indignity and embarrassment” in having to attend the appeal hearing; and that the respondent ignored the claimant's repeated references to his medical state.

190. In our judgment, the evidence does not support the claimant’s contentions in this regard. We considered that the appeal hearing was

conducted in a manner designed to allow the claimant to attend, accompanied by his father, and to respond to the allegations made against him. It was our conclusion that the claimant did not wish to comply with the inquiries made of him, and continually declined to answer questions which he was unhappy to be asked. In our judgment, the claimant was able to attend and set forth his position at these hearings, and had no difficulty in doing so, particularly given that the adjustments he requested were put in place.

191. We found the claimant to be a witness who was prone to exaggerate in order to create a particular impression of the respondent, and, as we have already found, we had cause to doubt the reliability and credibility of his evidence before us. We were not therefore prepared to accept his characterisation of these meetings, and particularly the appeal meeting, as amounting to the creation of an intimidating, hostile, degrading, humiliating or offensive environment. As we have found, the claimant could have decided that he was not prepared to participate in the hearings, and could have obtained medical support of that position, but he decided to proceed. As a result, we are not persuaded that he was subject to harassment on the grounds of disability in the manner he has proposed to us.

192. Accordingly, the claimant's claim of harassment on the grounds of disability under section 26 of the 2010 Act is dismissed.

193. There being no findings in favour of the claimant, we do not require to address the question of remedy, and therefore we do not do so.

Employment Judge: **M MacLeod**
Date of Judgment: **2 December 2021**
Entered in register: **15 December 2021**
and copied to parties