

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No S/4103360/17**

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**Held in Glasgow on 9, 10, 11 and 15 January and 27 February 2018**

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**Employment Judge: F Jane Garvie  
Members: Mrs P McColl  
Mr P Kelman**

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**Mr X**

**Claimant  
In Person**

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**Tony Macaroni Limited**

**Respondent  
Represented by:  
Ms J Barnett -  
HR Consultant**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The unanimous judgment of the Tribunal is that-

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1. the claimant was unfairly dismissed by the respondent and the Monetary Award is £6,723 (Six Thousand, Seven Hundred and Twenty Three Pounds and Ninety Pence); the Recoupment Regulations do not apply as the claimant was not in receipt of benefits and

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2. the claim presented under Section 120 of the Equality Act 2010 is well-founded and the claimant is entitled to an award against the respondent in respect of injury to feelings of £12,882.36 (Twelve Thousand Eight Hundred and Eighty Two Pounds and Thirty Six Pence) being £12,100 and a 10% uplift and interest.

**E.T. Z4 (WR)**

## REASONS

### Background

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1. In his claim, (the ET1) presented on 29 August 2017 the claimant alleges that he was unfairly dismissed. He also alleges that he was discriminated against on the grounds of disability and he seeks notice pay and outstanding wages.
- 10 The respondent lodged a response, (the ET3) in which they denied all allegations made against them. A Preliminary Hearing for case management purposes was held on 2 November 2017 before the Vice President, Employment Judge Susan Walker. She issued a Note of that date setting out orders and also reasons for those orders. In relation to the Hearing it was to
- 15 be held over 3 days and the issues were set out under a section entitled, "The Issues". These were as follows:-

### Equality Act 2010

- 20 (i) Did the claimant have a disability in terms of the Equality Act 2010 at the relevant time?
- (ii) Did the respondent know, or could it reasonably have been expected to know that he had a disability?

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### Section 15

- (iii) Were the performance issues for which he was dismissed "*something arising in consequence of his disability?*"

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- (iv) If so, was dismissal a proportionate means of achieving a legitimate aim?

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**Section 20**

(v) Did the respondent impose a provision, criterion or practice (PCP) by requiring him to work in a kitchen that had insufficient staff?

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(vi) If so, did that PCP place the claimant at a substantial disadvantage in comparison with people who are not disabled because the additional pressure aggravated his condition and impacted on his performance?

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(vii) If so, did the respondent know, or could it reasonably have been expected to know of that disadvantage?

(viii) If so, would it have been a reasonable adjustment to employ more staff?

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**Section 19**

(ix) Did the PCP (if established) put people with the claimant's disability at a particular disadvantage?

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(x) Did it put the claimant at that disadvantage?

(xi) Was the PCP a proportionate means of achieving a legitimate aim?

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**Unfair Dismissal**

(i) Did the respondent have a genuine belief that the claimant was guilty of the alleged misconduct?

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(ii) Did they have reasonable grounds for that belief following a reasonable investigation?

- (iii) Was it within the range of reasonable responses to dismiss the claimant for that misconduct?

### The Final Hearing

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2. The claimant indicated that he was not seeking arrears of pay as he was paid all pay due to him as at termination of his employment on 17 May 2017. He does seek notice pay. The respondent maintains that they were entitled to dismiss him on the grounds of gross misconduct and so the claimant is not entitled to notice pay. It is appropriate to note that the respondent confirmed that their designation had incorrectly been given without reference to "Limited" although it was confirmed by Ms Barnett that the respondent is indeed a limited company.

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3. It was agreed at the start of the Hearing that the respondent would give evidence first. As had been directed by Judge Walker, witness statements had been exchanged. In the case of the claimant this was by way of a document entitled, "*To Whom It May Concern*".

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4. During the course of the Hearing some additional documents had to be provided. In particular, the claimant had sent to Ms Barnett a letter from his General Practitioner by recorded delivery post but it had not been received by her in time to lodge it with the Tribunal. It was added as page 157. There were also additional payslips provided for the respondent and these were also added to the bundle.

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5. It was agreed during the course of the Hearing that it would be appropriate to anonymise the claimant given the discussion and evidence provided as to the claimant's mental health. The claimant provided a very detailed medical record. It is relevant to note that the respondent did not concede the claimant is disabled in terms of the Equality Act 2010 until the start of the Final Hearing. It was also agreed at the conclusion of the Hearing that in relation to one of the employees who was mentioned during the course of the evidence and in

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the essential facts (see below) it would be appropriate to refer to this individual as Mr L rather than by his full name.

- 5 6. Evidence was given on behalf of the respondent by Mr Gavin Clark, who was the Restaurant Manager in the restaurant where the claimant worked as Head Chef. A Ms Nicola McDevitt, who is an HR Consultant with Ms Barnett's organisation, Holly Blue Employment Law gave evidence as well on the respondent's behalf. The claimant gave evidence on his own behalf. He did not call any witnesses. The respondent had considered calling Mr L to give
- 10 evidence and a witness statement from him was provided. However, Ms Barnett decided not to call him to give evidence on the respondent's behalf. The Tribunal did not therefore take his witness statement into account when reaching its decision.

15 **Findings of Fact**

7. The Tribunal found the following essential facts to have been established or agreed.
- 20 8. The claimant commenced employment with the respondent on 12 February 2011. Throughout his employment with the respondent he worked as the Head Chef at one of a chain of restaurants operated by the respondent. He indicated in the ET 1 that his gross pay was £595 per week giving a normal take home pay of £450.
- 25 9. Initially, the claimant enjoyed a good working relationship with the respondent such that the owner of the business, Mr Giuseppe ("Sip") Marini attended the claimant's wedding. The claimant also had regular contact with the Area or General Manager, Mr Chris Bryce. Mr Bryce was in attendance
- 30 throughout the Hearing in order to give instructions to Ms Barnett although he was not called to give evidence.

10. In terms of his claim at Section 8.2, (page 7 of the bundle) the claimant wrote:-

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*“always had a great relationship with the company and in 2014 I developed severe depression and anxiety which the company knew about and they were supportive over a period of time as I was eventually put into hospital as I had a breakdown march 2015, but was still experiencing mental health problems for which I was seeing a cpn and psychologist to help me through, so going into 2016 a new manager started and I had to take a few days off work which the general manager Chris Bryce authorised as to the annoyance of the restaurant manager Gavin Clark ....”*

11. The claimant had also enjoyed a very good relationship with the Restaurant Manager over a period of 6 years from the start of his employment as Head Chef. This was a Mr Fabio Quintilani but when a new Restaurant Manager, Mr Clark took over from him on 14 November 2016 it seems that things changed.

12. The claimant was diagnosed in November 2014 with clinical depression and severe anxiety. At that time he had discussions with both Mr and Mr Bryce and he found both of them to be supportive. Unfortunately, the claimant began self harming in early 2015 and made an attempt on his own life. He took some sickness leave. Mr Quintiliani and Mr Bryce were aware of the reason for his absence from work at that time. In addition, the claimant was referred to counselling by the respondent.

13. In March 2016 the claimant had a further breakdown which resulted in him being admitted to hospital. He thought this was for a period of about one week. His wife kept Mr Bryce informed of progress. Thereafter, the claimant returned to work and he continued to find that he was being supported by Mr Quintiliani with help during his working hours. The claimant felt he was able to confide in him without feeling *“either Judged or pressured\*.*

14. As indicated, Mr Clark started as the new Restaurant manager in late 2016. Initially, the claimant thought they had a good working relationship and he was able to continue to maintain a high standard of work.

5 15. However, the claimant had an informal discussion with Mr Clark in February 2017 about family matters. According to the claimant, Mr Clark mentioned that his partner's uncle had been admitted to hospital for mental health issues. Mr Clark told the claimant that the hospital staff removed the patient's phone charger cable so as to prevent any suicide attempt which Mr Clark  
10 thought was "funny". The claimant knew that Mr Clark was not aware of his mental health condition at this time. Nevertheless, the comment by Mr Clark made the claimant feel "extremely uncomfortable".

16. Mr Clark denied that he had had any such discussion with the claimant. The  
15 issues was therefore one of whether the claimant's explanation of that discussion was credible or not, (see below under the heading, "Observations on the witnesses").

17. The claimant was again absent from work though illness on 9 and 10 March  
20 2017 as his self harming had continued and his mental health deteriorated. The claimant knew that Mr Bryce was aware of this and that he had informed Mr Clark that the claimant would not be at work.

18. The claimant returned to work on Saturday, 11 March 2017 at which point Mr  
25 Clark said that he wanted to have a chat with him as to the reason for his absence. The claimant understood from Mr Clark that Mr Bryce had not told Mr Clark about the reason for the claimant's absence. The claimant understood from his discussion with Mr Clark that Mr Clark was becoming annoyed. The claimant e believed this was because he did not know the  
30 reason for the claimant's absence. The claimant felt very uncomfortable. He was again pressed by Mr Clark as to the reason for his absence and it was suggested to him that there could not be trust between the two of them without Mr Clark knowing the reasons for his absence. The claimant then felt

pressured into explaining what had happened and so he told Mr Clark about his mental health.

19. The claimant's impression from Mr Clark was that Mr Clark reacted by saying that he *"couldn't handle this as he did not know how to deal with people with mental health issues"*. So far as the claimant understood it, Mr Clark's position was that from then on the claimant would have to have any further discussions with Mr Bryce about his health.
20. Up until this point the claimant had thought that they had had a good working relationship and had been able to talk about family and other social topics. After this incident the working relationship deteriorated *"badly"* and this, in turn, had a detrimental effect on the claimant's mental health.
21. From then on, so far as the claimant was concerned they no longer had the kind of informal conversations about family that they had enjoyed in the past.
22. On a number of occasions the claimant attempted to speak to Mr Clark about the extent of his anxiety and how this was preventing him delegating tasks to his team of staff in the kitchen. The reaction from Mr Clark, so far as the claimant was concerned, was that he (the claimant) *"would just have to deal with it"*. This put the claimant under pressure. In addition, he felt that the previous support he had been given from Mr Bryce also stopped. The claimant now felt that the kitchen was continually being left understaffed and he was being told that he had to carry on working more hours than other staff were working. So far as the claimant was concerned, he believed that he was now having to work up to 60 hours rather than 50 or 55 hours per week. Mr Clark disputed there was an increase in the claimant's weekly hours. He did accept that there were some occasions when the kitchen was short staffed. As a result, the claimant was having to undertake other tasks which would normally be carried out by other members of staff in the kitchen.



23. The claimant approached both Mr Clark and Mr Bryce about staff shortages but was told that he had to *"get on with it"*. The claimant accepted that the respondent did advertise for new kitchen staff and the claimant was encouraged to try and find new staff who might be available to work in the kitchen. For whatever reason, it did not prove possible to recruit new kitchen staff.
24. The claimant realised that he was increasingly struggling at work. He did not find he was receiving any help from Mr Clark when he raised the issue of staffing levels. Some weeks before this, Mr Clark had offered to have a weekly meeting with the claimant but these meetings did not materialise.
25. By this stage which was in or around April 2017, the claimant's anxiety became *"extremely bad"*. He realised that he was trying to do too much on his own but was too emotional to delegate tasks to his staff. This caused the claimant to lose track of the paper work which was his responsibility. He again became so unwell that he knew he was becoming suicidal. He was again self harming which he knew was a coping mechanism. He believed this was as a result of lack of support from Mr Clark and Mr Bryce.
26. The claimant was clearly of the view that if he had continued to enjoy the same level of support that he with Mr Quintilian!, this would not have happened. The claimant understood that Mr Clark was reporting to Mr Bryce that the claimant was not doing his work. So far as the claimant was concerned, until Mr Clark became aware of his mental health issues he had always been able to carry out his work to an exceptionally high standard without complaint. It was only once Mr Clark knew of the claimant's mental health issues that he found there was a change in Mr Clark and his attitude towards him.

27. Mr Clark had a very different version of events although he accepted that when he discovered the claimant had mental health issues and was told that he suffered from periods of low mood and poor mental health, his reaction had been to inform the claimant that he was not qualified to provide professional help but that he would try to assist him and support him in any way that he could and that he only needed to ask Mr Clark for assistance.
28. Mr Clark accepted that their working relationship was not always easy and that he found the claimant difficult to manage which he believed was because the claimant was unwilling to listen to instructions or accept constructive criticism. Mr Clark disputed that he ever became angry with the claimant or told him that he could not deal with someone who had mental health problems.
29. Mr Clark confirmed that he had offered to hold weekly meetings to discuss the week's planning and to ensure the claimant was not becoming stressed by issues such as staffing, workloads or rota formations.
30. Mr Clark was adamant that he suggested to the claimant that he should buy a notebook and write down everything and use the book as a reminder of tasks and responsibilities. He believed that the claimant accepted that this help had been offered. Against this, the claimant's view was that any such help and the suggestion of using a notebook came at a much later stage and only shortly before the investigatory meeting which then led to a disciplinary hearing.
31. So far as Mr Clark was concerned, the claimant was very skilled as a Chef. However, he had concerns about the claimant's ability to lead, guide and treat the kitchen staff fairly. Mr Clark was aware that some of the staff were approaching him to make complaints about the way the claimant was treating them and there had been some requests made by some of the staff to be transferred to other restaurants within the respondent's restaurant chain.

32. Mr Clark thought that he had spoken to the claimant informally on several occasions between November 2016 and April 2017 about his treatment of staff and the underperformance, as he saw it, of the claimant failing to manage rotas and deal with food labelling.
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33. Mr Clark was adamant that he had asked the claimant if his underlying health had contributed to this but he understood that the claimant maintained that he was 100% fit to fulfil his role and so his health was not a contributory factor.
- 10 34. On that basis, he believed the claimant should improve his overall contribution and attitude. So far as Mr Clark was concerned, the claimant was being lazy in handling his role. He understood the claimant intended to fulfil his role in the way that he was expected to do.
- 15 35. Then, over a relatively short time scale, Mr Clark became concerned about the claimant's ability to dispose of out of date food and complete the requisite health and safety documentation. He was aware of two female employees raising a grievance about the claimant's inability to treat them, as they saw it, fairly. He understood that the claimant had terminated a number of
- 20 employees' employment by way of a text message. Finally, an issue arose when one of the kitchen staff, Mr L cut his finger. Mr L later required hospital treatment. The claimant was the kitchen's First Aider and should have been the person to deal with Mr L's injury. However, Mr Clark was concerned to learn that the claimant had failed to offer assistance. Indeed, he then refused
- 25 Mr Clark's instruction that he, the claimant, should clear up the spilt blood. He also understood that the claimant failed to allocate tips to Mr L on the basis that the claimant understood Mr L had left his shift early in order to go to hospital to have his finger treated.
- 30 36. Generally, Mr Clark had become very concerned about the claimant's actions or lack thereof and, while he was aware of the claimant's underlying mental health, he was uncertain how to deal with this.

37. In any event, Mr Clark decided to take advice from Head Office. He was advised he should carry out an investigation and afford the claimant the opportunity to explain his actions.
- 5 38. During the claimant's shift on 5 May 2017 Mr Clark indicated that he wanted to have a discussion with him at the end of the shift. This took place on the evening of 5 May 2017 at about 9.15pm in the restaurant.
39. Mr Clark outlined his concerns to the claimant and these were set out in writing, (pages 30/33). Mr Clark set out this information out to the claimant having taken advice from the respondent's HR Consultant. He believed that he had spoken to Ms McDevitt although she maintained that he had not done so and must instead have spoken to another member of staff within the Holly Blue Employment Consultant team.
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40. The issues raised with the claimant by Mr Clark are set out in detail at pages 30/33. There are boxes within these pages where what is set out is said to be the claimant's response. The headings are: Failure to effectively manage staff wage costs and timeously draft rotas; Failure to show due care to an employee in case of accident; Failure to follow health and safety procedures in case of accident; Failure to treat employee fairly and reasonably, abuse of position as Head Chef; Creating an intimidating, hostile and bullying working environment and Failure to properly fulfil duties as Head Chef.
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41. During the course of their discussion Mr Clark had available various records in relation to temperature monitoring of fridges and freezers, (pages 35/45).
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42. Following the conclusion of that meeting Mr Clark arranged for the minutes to be typed and passed to Head Office The minutes are not signed either by Mr Clark or the claimant, (page 33). Mr Clark understood that the Head Office would instruct someone from Holly Blue to carry out a disciplinary hearing and this would include the allegations of gross misconduct. Mr Clark was not involved beyond the investigatory meeting.
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43. By letter dated 13 May 2017, (pages 46/47), Mr Clark wrote to the claimant informing him that there was to be a disciplinary hearing on 16 May 2017 to be held in the restaurant. The letter explained that the purpose of the hearing was to consider "allegations of gross misconduct against you".

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44. The letter referred to the investigation on 5 May 2017. It then set out the various allegations as follows:-

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- *Failed to effectively manage staff wage costs and timeously draft rotas, in that the wage cost for the kitchen is extremely high with cuts not being completed in the correct places, rotas are not being completed for the minimum term requested (2 weeks at a time), WB 30/4/17 there was not a kitchen rota and rotas only completed when asked, holidays have been taken without authorisation from Line Manager (Saturday 6<sup>th</sup> May 2017), and you have been accepting employment holidays with their expectation of it being paid despite the fact it has not yet been accrued, furthermore you terminated a KP by text message.*

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- *Failed to show due care to your colleague in the case of an accident at work, in that on 15<sup>th</sup> April you did not attend, or show consideration to your injured colleague in any way despite being the kitchen's first aider.*

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- *Failed to follow health and safety procedures in relation to the above accident in that you left the blood from the accident to sit in the kitchen, which also covered produce, for up to an hour after the accident and that when asked to clean the blood you refused to do so.*

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- *Failed to properly fulfil your duties as Head Chef in that upon finding many out of date items in the walk in fridge on Friday*

5                   21/04, you failed to act appropriately to remove the out of date items and organise the fridge. A total of 60 items (some of which were the ones discovered on Friday 21/04) were then found on Sunday 23/04. It was also discovered that Temperature Monitoring sheets, Food Safety Daily checklists and Daily Cleaning schedules were not recorded from Wednesday 18/04 to 23/04 (when you were on duty), including that records were missing for Friday 28/04 and Saturday 29/04.

10                   •       Failed to treat employee fairly and reasonably, abusing your position as Head Chef in that you withheld tips from the aforementioned member of staff after he went to hospital mid-shift following his accident.

15                   •       Created an intimidating, hostile and bullying working environment in the withholding of tips from staff as mentioned earlier and confronting a member of staff in relation to a holiday disagreement/

20   45.   There is reference to investigation minutes, rotas and HACCP records.

46.   The claimant was told that there would be no witnesses at hearing but, if the claimant wished to bring witnesses, he would have to inform the respondent who these would be at least 24 hours before the disciplinary hearing/

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47.   There was reference to the hearing being held in accordance with the respondent's disciplinary procedure as set out in the staff handbook. There was no indication that the respondent had a staff handbook or if they did whether it was given to staff, including the claimant. The letter continued :-

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*“If you are found guilty of gross misconduct, you may be dismissed without notice or pay in lieu of notice/*

48. The letter advised that the hearing was to be conducted by Ms McDevitt from:-

5                   *"the company 's external HR Provider. You are entitled to bring a fellow employee or a trade union representative to the meeting in accordance with our Disciplinary Procedure. If you wish to bring a companion, please let me know their name as soon as possible."*

49. The letter closed by asking the claimant to confirm that he had received the letter and, as indicated above, it was sent by Mr Clark on behalf of the respondent.

50. The claimant had a fixed rota whereby he worked shifts on Wednesdays through to Sundays inclusive. The disciplinary hearing was to be held on Tuesday 16 May 2017. The claimant attended the meeting on 16 May 2017 which was held upstairs in the restaurant. It was conducted by Ms McDevitt. She did not have anyone present as a notetaker. Her notes indicate a start time of 11am and a finish time of approximately 12.20pm, (page 61).

20 51. Ms McDevitt insisted she had informed the claimant of his right to have a companion either a fellow employee or a trade union representative. The claimant denied this had been said to him. He accepted that he had been told this in the letter summoning him to the disciplinary hearing. Ms McDevitt explained that she was unable to take as detailed notes as would have happened had there been a notetaker present which would have been the normal procedure. She accepted that she had failed to record that she had offered the claimant the opportunity to have someone present although she accepted that this was an important aspect to the disciplinary hearing and was therefore unable to offer an explanation as to why she did not do so. Her handwritten notes are set out at pages 48/61 .

52. There was a discussion as to the rotas and why the claimant had not been able to complete these, (pages 48/49). There was also a discussion about how holiday requests were dealt with, (page 49). There was reference to the claimant explaining that he had anxiety and depression and that this caused him to *"lose track of what I am doing which creates the communication issues"* (page 51).
53. Discussion took place as to the issues of budgets and the rotas for staff.
54. There was also discussion as to what happened on the occasion when Mr L cut himself while using a knife. The claimant's position was that one of the other staff had been assisting Mr L in putting a plaster on his finger but the claimant had not been aware of this until he noticed this was happening. Mr L did not approach the claimant. Thereafter, the claimant noticed there was blood on the floor and he asked Mr L to clean up the blood. The claimant's position was that Mr L then became very aggressive towards him and started shouting at the claimant in Italian. Mr L threw something at the bin and came towards the claimant and then said in Italian, *"I go home"*. The claimant was *"gobsmacked"* by this outburst by Mr L, (page 52). The claimant realised that what had been thrown in his direction was a knife.
55. The claimant was surprised as to why Mr L had behaved in this way as he had never known him to be aggressive before.
56. He was aware, however, that Mr L had been shouting at another member of kitchen staff earlier in the morning. This was approximately half an hour or hour before Mr L cut his finger.
57. The claimant was adamant that he did not realise Mr L was going to go to hospital until later in the shift.



58. He later discovered that one of Mr L's friends had collected him and taken him to the hospital, but he had assumed that when Mr L had said to him *\*7go home\** what he had meant was the he had quit his shift.
- 5 59. Mr L returned to work the next day. The claimant understood that when Mr L attended hospital he had been given butterfly stitches in his finger.
60. The spilt blood was removed by another member of the kitchen staff. The claimant accepted that he did not do so himself, despite Mr Clark's direction  
10 that he should do so.
61. The claimant also accepted that he had contacted another individual, Ross Thomson by sending him a text and asking him to come in earlier than he was expected so as to assist in the kitchen, A copy of his text to Ross was  
15 provided, (page 34). The claimant accepted it was his responsibility to have cleaned up the blood and that he should have done so and, in future, he would do so promptly.
62. The claimant thought that he had too much to do on that particular shift,  
20 coupled with his anxiety being very bad over the previous few weeks. He explained to Ms McDevitt that he had concerns about his mental health and that, so far as he was concerned, Mr Clark did not know how to deal with *"people with mental health issues"*. This had taken the claimant aback and he did not feel comfortable speaking to Mr Clark so that from then on, he did not  
25 feel able to approach him either about work or personal issues.
63. The claimant thought that he had now put coping mechanisms in place. He  
30 accepted that the respondent had been "good to me" and he felt he had let them down and was upset.
64. The claimant indicated to Ms McDevitt that he would like to have regular weekly discussions with Mr Clark as he thought this would assist and although it had been suggested before it had not happened.

65. The claimant also indicated that he did not want Ms McDevitt to come back to him after she had spoken to his colleagues. Ms McDevitt took a statement from Ross Thomson, (pages 62/65) and also one from another member of the kitchen staff, Stephen Little, (pages 66/70).

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66. By letter dated 23 May 2017 Ms McDevitt wrote to the claimant, setting out the decision following the disciplinary hearing, (pages 71/74). However, before the claimant received this letter he was informed of the decision by a telephone call from Mr Clark on 17 May 2017 when he was advised that his employment with the respondent was being terminated without notice on the grounds of gross misconduct and without there being any warnings in place.

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67. In terms of her letter Ms McDevitt set out that allegations against the claimant were:-

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*“substantiated against you, specifically that you have -*

- *failed to properly fulfil your duties as Head Chef in that you have not been timeously drafting rotas, not been ensuring the organisation of the fridge including the removal of out of date items, failed to complete various pieces of health and safety documentation relating to Temperature Monitoring, Food Safety Daily Checklists and Daily Cleaning Schedules, and that you terminated a member of staff by way of text message;*
- *failed to show due care to your colleague in the case of an accident at work, in that on 15<sup>th</sup> April you did not attend or show consideration to your injured colleague in any way despite being the kitchen 's first aider;*
- *failed to follow health and safety procedures in relation to the above accident in that you left the blood from the accident to sit in the kitchen, which also covered produce, for up to an hour*

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*after the accident and that when asked to clean the blood you refused to do so; and*

- *failed to treat employee fairly and reasonably, abusing your position as Head Chef in that you withheld tips from the aforementioned member of staff after he went to hospital mid-shift following his accident"*

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68. Separately, in relation to the other allegations about managing staff wage costs, taking holidays without authorisation on 6 May and accepting employee holidays with no expectation of it being paid despite the fact it had not yet accrued, Ms McDevitt accepted the claimant's explanation and so did not take these allegations into account when reaching her decision. Also, she did not take into account the allegation that the claimant had created an intimidating, hostile and bullying working environment in confronting a member of staff in relation to holiday disagreement as, while she felt the way the claimant had handled the situation was inappropriate and could be construed as intimidating and/or bullying, she accepted that the claimant's position was verified by Ross (Thomson) in terms of the statement she took from him. Accordingly, that allegation did not play a part in her reaching her decision.

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69. In relation to the claimant having acknowledged that he had not been managing rotas in a timely manner and had failed to ensure the proper organisation of the fridge, had not completed some of the required health and safety documentation relating to the temperature monitoring, food safety daily checklists and daily cleaning schedules and that it was inappropriate for the claimant to have terminated an employee's employment by way of text message, she had accepted his explanation that he was very busy in his job and many of these issues were to do with miscommunication on the claimant's part. She also noted he had said that he was trying to do too much himself instead of delegating duties to other kitchen staff and that he felt anxiety had played a part in that he often lost track of what he was doing

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which then contributed to lack of communication. She also noted that he accepted full responsibility for his actions as Head Chef and that he had put measures in place to ensure these issues did not happen again,

5 70. In relation to the incident on 15 April 2017 with Mr L and the injury he sustained at work she noted the claimant's explanation was that he had been in the middle of cooking and saw Mr L pass him. He then saw another colleague, Rafa completing the placing of a plaster on Mr L's finger and that the claimant had been unaware until that point that Mr L had cut himself. She  
10 noted the claimant's explanation that he thought Mr L had been laughing while his finger was being plastered and that the claimant had asked him if he was okay. He thought everything was fine and so the staff went back to work. The claimant, at that point, noticed blood on the floor and so asked Mr L to clean it up. Mr L, in turn, had responded *"very aggressively, shouting in  
15 Italian and threw something in the bin which the claimant later discovered was a knife"*.

71. She noted the claimant's explanation that Mr L had come towards the claimant shouting, *"7 go home"*. The claimant would assume this meant he  
20 was quitting. The claimant had explained that he was *"gobsmacked"* by Mr L's behaviour and that he normally had a good working relationship with him and so he did not understand why Mr L had become so aggressive.

72. Ms McDevitt's decision was that this was a different explanation to that  
25 provided at the investigation with Mr Clark. She noted that the claimant had not been able to explain everything at the investigation as he had been taken back as to the cause of his being investigated and so he could not think properly about what had happened.

30 73. In relation to why he would not clean up the blood and why he refused to do so when Mr Clark asked him to do so, the claimant's explanation was that he was angry with Mr L but, in hindsight, he realised this was wrong and, as the Head Chef, should have done so. The claimant's position was that, in future,

he would act differently if anything like that happened again and he would ensure that blood was cleared up immediately.

- 5 74. Ms McDevitt noted the claimant's position was that he did not know until it was later in the day that Mr L was going to hospital. The claimant had admitted withholding tips from Mr L although he knew he had gone to hospital and he had done so because he was still "*a little angry with him*". The claimant had accepted that this was wrong and that he should have allocated tips to Mr L.
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75. In relation to the discussion Ms McDevitt later had with Mr Little, she explained that his version of events was very different to that of the claimant and she provided a copy of his statement to him. She enclosed a copy of the statement from Mr Little. His version of events was that the claimant had
- 15 asked Mr L to clean up the blood and Mr L had responded by shouting angrily at the claimant in Italian. Mr Little maintained that the claimant had not asked Mr L if he was okay or offered to help him and he had not heard Mr L say, "*7 go home*". He did, however, accept that Mr L had said something along the line of "*Via Casa*" which means "*away home*" in Italian.
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76. Mr Little's recollection was that the claimant had then left the kitchen for some time, possibly 10 minutes and it was while the claimant was away that Rafa had helped Mr L to bandage his finger. Mr Little had also heard the claimant tell Rafa not to clean up the blood as Mr L was to do so. He denied that Mr
- 25 L had laughed during the incident. He believed that all the kitchen staff knew that Mr L was going to hospital. This was validated by the text sent to Ross Thomson by the claimant when he asked Ross to start early as Mr L was going to hospital.
- 30 77. Ms McDevitt's conclusion was that she was inclined to believe Mr Little as his was a very clear, detailed and confident recollection of events. She did not feel she had received the same candour from the claimant when she

discussed the incident with him. Instead, she felt that he was *“cautious and reserved in giving his account of what happened”*.

5 78. While she thought the claimant was honest in his response to the majority of the allegations she was not persuaded by the version of events he gave about the incident on 15 April 2017.

79. Her letter continued as follows:-

10 *“The only explanation I can consider for such a contrast in your honesty during the hearing is that you knew that your actions on 15<sup>th</sup> April had been wholly unacceptable, and so you tried to give a version of events which conveyed your behaviour as being more reasonable than it was.*

15

*Furthermore, I was appalled when Stephen told me that you have instructed him not to clean up the blood. Notwithstanding the fact that you refused to clean up the blood yourself, it is shocking that you would then actively seek to prevent it from being cleaned up in a timely manner by instructing another member of your kitchen staff not to clean it, thus amplifying the health and safety risks. Whilst I appreciate that you did not have the opportunity to give an answer as to whether or not you did give this instruction to Stephen, I did ask you during the hearing, to bear in mind that I still had to speak with the two witnesses as per your request, and that if they had any differing version of events as to the incident on 15<sup>th</sup> April, would this alter your recollection of events in any way; and you responded that it would not. I also considered that there were only two possible answers that you could have given to the question; you would have either admitted to giving the instruction or you would have denied it; had you denied it, I am not of the opinion that I would have believed you, given the fact that I feel you had been dishonest regarding the incident.*

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*It is a fundamental and critical duty of a Head chef to ensure that the health and safety standards of a kitchen are maintained to the highest standard at all times, and therefore your behaviour on 15<sup>th</sup> April wholly unacceptable in all of the circumstances. ”*

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80. Her letter then continued that it was for the above reasons that she found the allegations had been substantiated against the claimant and consequently:-

10 *\*7 have no alternative but to terminate your employment for gross misconduct. That said, I wish to make clear that if your conduct issues had not included the incident of 15<sup>th</sup> April, I would have considered a different, and less severe, outcome to your disciplinary hearing.”*

- 15 81. The letter continued by informing the claimant of his right to appeal against dismissal and that, if he wished to do so, to put it in writing to Ms Barnett within one week of receiving the letter stating his grounds of appeal in full.

- 20 82. The letter concluded that the claimant was dismissed with immediate effect and his final date of employment was 17 May 2017. He was not entitled to any notice or payment in lieu of notice. He had no outstanding holiday entitlement and his final salary up to 17 May 2017 was paid and a P45 was sent to him. He was informed that, if he had any questions about his dismissal, he should contact Mr Clark who would then contact Ms McDevitt.

- 25 83. The claimant did not immediately appeal against his dismissal but later did so I by letter dated 25 July 2017, (page 75). His letter was addressed to Mr Bryce. He explained that he considered he had been a valued employee of the respondent for six years and had worked *“extremely hard and regularly worked more hours than I was contracted to do which I was not paid for.*

30

84. He made reference to his mental health condition *"which at the time of the miss (sic) conduct I was suffering from a low point in my health and I feel that you have not taken that into consideration which I feel is discrimination on your part"*

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85. He also considered that Mr Clark failed to show him support regarding his mental health and that "he wanted me out of the company as he verbally stated to me that he didn't know how to deal with someone with mental health issues".

10

86. His letter continued as follows:-

*"I strongly feel that the company had been trying to force me out of the role, rather than acting on their duty of care by helping and supporting me to correct my wrongs during a low period in my health.*

15

*I have started legal proceedings; however I hope we can come to a mutual arrangement over this matter.*

20

*I look forward to your response"*

87. By letter dated 1 August 2017, (pages 76/77) Mr Marini wrote to the claimant, noting the terms of his letter. He confirmed that the decision had been taken to terminate his employment on 17 May 2017. His letter continued that he did not accept the contention that the organisation was not supportive of the claimant's underlying health or that it failed to take this into consideration when taking the decision to terminate his employment.

25

88. He then continued that, as detailed in the claimant's letter of dismissal, the reason for dismissal was the allegations that he had:-

30

- *"failed to properly fulfil your duties as Head Chef in that you have not been timeously drafting rotas, not been ensuring the*



organisation of the fridge including the removal of out of date items, failed to complete various pieces of health and safety documentation relating to Temperature Monitoring, Food Safety Daily Checklists and Daily Cleaning Schedules, and that you terminated a member of staff by way of text message;

5

- failed to show due care to your colleague in the case of an accident at work, in that on 15<sup>th</sup> April you did not attend, or show consideration to your injured colleague in any way despite being the kitchen's first aider;

10

- failed to follow health and safety procedures in relation to the above accident in that you left blood from the accident to sit in the kitchen, which also covered produce, for up to an hour after the accident and that when asked to clean the blood you refused to do so; and

15

- failed to treat employee fairly and reasonably, abusing your position as Head Chef in that you withheld tips from the aforementioned member of staff after he went to hospital mid-shift following his accident"

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89. The letter stated that the disciplining officer was quite clear that she felt that you had:-

25

*"lied to her and failed, substantially in your responsibilities. She equally explained, in her view that she did not feel that your levels of anxiety had impacted on your actions."*

30

90. The letter concluded:-

*"As you failed to appeal timeously; on account of the significant time lapse that has passed and in view of the disciplining officer's reasons*

*for your dismissal, your request to now appeal is not accepted and will not be permitted. ”*

5 91. Following the termination of his employment, the claimant became severely depressed and suffered from low mood. He was unfit to work. He received fitness to work notes from his GP and although these were not available to the Tribunal there was a letter from the claimant's GP marked, "To Whom It May Concern" which refers to the dates and reasons given for the claimant illness for the period from 11 May to 6 November 2017. The reasons given were "anxiety and depression/depression and anxiety".

15 92. The claimant made several attempts to find alternative employment. He visited two restaurants where he was offered trial periods and was then offered the opportunity to become Head Chef. The claimant decided that he was not fit enough to take on the responsibilities of a Head Chef. He then approached another restaurant and, following a short trial, was informed that he would be employed by them as the Second Chef. The claimant was happy to do so as he decided it was preferable for him to be a Second Chef rather than a Head Chef given his ongoing mental health issues. The claimant continues in that employment which commenced in early November 2017. The claimant has continued to have ongoing mental health issues but, for the moment, he is coping in this new role. There was no suggestion that he would be unable to continue to do so.

25 93. The claimant is paid £150 net per week less than he was with the respondent since he is now employed as a Second Chef rather than Head Chef. He earns £300 per week from this restaurant. He is paid "cash in hand". He understands that tax and national insurance are deducted and that, accordingly, what he is taking home is net pay of £300 and hence there is a difference of £150 against the net take home pay of £450 which he received as Head Chef while working with the respondent. The claimant did not apply for any benefits during the period between his employment ending and his obtaining new employment in November 2017.

Closing Submissions

94. When the Hearing convened on 11 January 2018 Ms Barnett was unwell and it was clear to the Tribunal that it would not be appropriate to conclude the Hearing on that date. It was possible to reconvene the Hearing on the following Monday, 15 January 2018 at which point the claimant's evidence was concluded. Ms Barnett provided a written submission and the claimant was offered the opportunity to read this through and inform the Tribunal if there was anything he wished to say. He did not wish to say anything specific and accepted that he had had the opportunity to read the detailed submission which is set out in full below. In addition, Ms Barnett provided to the Tribunal a copy of one of the decisions referred to namely **Basildon & Thurrock NHS Foundation Trust -v- Mr S G Arjuna Weerasinghe** which is a judgment of the Employment Appeal Tribunal. Ms Barnett did not provide the Tribunal with copies of the other judgments which are referred to in her written submission.

96. It is relevant to note that the Tribunal met in private on 15 January 2018 to consider the submissions (see below) and make findings on the evidence, The Judge prepared a draft judgment and reasons which were sent to the members for consideration at a further meeting, again held in private on 27 February 2018. The intention had been to meet in Glasgow but due to the then pending inclement weather the meeting was held by telephone conference call when the judgment and reasons were finalised. It was not possible to issue the judgment later that week as a result of the adverse weather conditions and so the date of the judgment is 7 March 2018.

Claimants Oral Submission

96. The claimant's position is that he was unfairly dismissed and that he was also subjected to discrimination on account of his disability. The claimant did not have anything to add to what he has already set out in the ET1. At the conclusion of the Hearing it was confirmed that the Tribunal would hear

closing submissions but the claimant was not required to provide anything in writing and indeed if he did not wish to clarify his position it seemed to the Tribunal that it had sufficient information before it as to the basis of his claims.

- 5 97. In reaching its decision the Tribunal gave careful attention to the respondent's submission and it also noted the issues as previously set out both at the Preliminary Hearing and in the Note provided by Ms Barnett that set out those issue again.

10 Respondents Written Submission

98. **CLAIMS**

- 15 1. The Claimant makes a claim for disability discrimination in terms of unfavourable treatment because of something arising in consequence of his disability pursuant to Section 15 of the Equality Act 2010.
- 20 2. He also claims that there was a failure on the Respondents part to make reasonable adjustments pursuant to Section 20 and 21 of the Equality Act 2010.
- 25 3. In addition, the Claimant alleges that his dismissal was unfair in terms of Section 98(4) (a) and (b) of the Employment Rights Act.

**ISSUES**

- 30 4. The Respondent submits that the following issues fall to be determined:

EQA 2010

S15

- 5
1. Were there performance issues for which the Claimant was dismissed "something arising in consequence of his disability"?
  2. If so, was the dismissal a proportionate means of achieving a legitimate aim?

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S20

3. Did the Respondent impose a provision, criterion or practice (PCP) by requiring him to work in a kitchen that had insufficient staff?
4. If so, did that PCP place the claimant at a substantial disadvantage in comparison with people who are not disabled because the additional pressure aggravated his condition and impacted on his performance?
5. If so, did the respondent know, or could reasonably have been expected to know of that disadvantage?
6. If so, would it have been a reasonable adjustment to employ more staff?

25

S19

7. Did the PCP (if established) put people with the claimant's disability at a particular disadvantage?
8. Did it put the claimant at that disadvantage?
9. Was the PCP a proportionate means of achieving a legitimate aim?

30

Unfair Dismissal

10. What was the reason for dismissal?

5 11. Did the Respondent hold a genuine belief in misconduct;

12. Were there reasonable grounds for the belief;

10 13. Was there a reasonable investigation and procedure;

14. Was the dismissal within the range of reasonable responses;

15. If found to be unfair, did the claimant contribute to his own dismissal?

15 **BACKGROUND**

20 5. The Claimant was employed by the Respondent as a head chef from the 12<sup>th</sup> February 2011 to 17<sup>th</sup> May 2017. The Respondent is a chain of 11 restaurants in Scotland specialising in Italian cuisine and employ, approximately 365 employees.

6. His gross weekly wage was £674. His net pay £450.

25 7. The Respondent considered the Claimant to be exceptional in providing a good food service with very little mistakes; he was not faulted in this regard. The Claimant managed a team of 12 employees within the kitchen.

30 8. Following a complaint received from 2 female members of staff alleging the Claimants inability to treat them fairly and reasonably and following a health and safety incident within the kitchen within which it was alleged that the Claimant failed to show consideration to the injured colleague despite being the kitchens first aider, he was invited

to an investigation hearing.

5 9. The Claimant was dismissed following a Disciplinary Hearing held on the 16<sup>th</sup> May 2017. The Respondent contends that he was dismissed on the grounds of conduct.

10 10. The Claimant admitted that he had not been managing the rotas in a timely manner and that he had failed to ensure the proper organisation of the fridge. He also accepted that he had not completed some of the required health and safety documentation relating to Temperature Monitoring, Food Safety Daily Checklists and Daily Cleaning Schedules and that it was inappropriate that he had terminated an employee by way of text message.

15 11. The Claimant also admitted that he did not clean up the blood following the incident in the kitchen, and accepted that he had refused to clean up even after his manager asked him to do so. The Claimant also admitted that he had withheld tips from that day despite knowing that the employee had gone to hospital.

20 12. Specifically, the Respondent submits that the Claimant was guilty of the following actions:

25 • that he failed to properly fulfil his duties as Head Chef in that he had not been timeously drafting rotas, not been ensuring the organisation of the fridge including the removal of out of date items, failed to complete various pieces of health and safety documentation relating to Temperature Monitoring, Food Safety Daily Checklists and Daily Cleaning Schedules, and that  
30 he terminated a member of staff by way of text message;

- 5 • that he failed to show due care to his colleague in the case of an accident at work, in that on 15<sup>th</sup> April he did not attend, or show consideration to his injured colleague in any way despite being the kitchen's first aider;
- 10 • that he failed to follow health and safety procedures in relation to the aforementioned accident in that he left the blood from the accident to sit in the kitchen, which also covered produce, for up to an hour after the accident and that when asked to clean the blood he refused to do so, and;
- 15 • that he failed to treat employees fairly and reasonably, abused his position as Head Chef in that he withheld tips from the aforementioned member of staff after he went to hospital mid-shift following his accident.

20 13. The Respondent submits that although there were 4 allegations found against the Claimant, the action for which the Claimant was dismissed was his failure to show due care to a colleague following an accident at work and his subsequent failure to apply the appropriate health & safety procedure. It is evidenced in the letter of dismissal [pages 71-74] that the Claimant would not have been dismissed had the conduct issues not included the incident of the 15<sup>th</sup> April 2017.

25 14. The Claimant did not exercise his right of appeal against the decision until the 25<sup>th</sup> July 2017; the Respondent denied the Claimant the opportunity to an appeal on account of the significant time lapse that had passed and in view of the disciplining officer's reasons for dismissal. [76-77]

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**DISABILITY DISCRIMINATION**

5 15. From a consideration of the preliminary hearing [Page 27] in this claim, the Claimant claims that his employment was terminated due to his performance and that his under performance was due to his disability.

io 16. He claims that the kitchen was understaffed and that the lack of staff caused him a detriment as he felt it more difficult to deal with pressure as this made him feel worse and that it impacted on his performance. The Claimant believes that the Respondent should have made an adjustment and that that adjustment was to employ more staff.

17. Section 15(1) of the Equality Act 2010 ("EqA") provides:-

15 "(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

20 (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

25 18. The interplay between disability discrimination law and unfair dismissal law is often complex. The decision to proceed when dealing with disciplinary charges is a difficult judgment for any employer due to its obvious risk and the Respondent is no different in this regard.

30 S15

19. Nicola McDevitt informed the Tribunal that in acknowledgement of the Claimants underlying health that the Respondent had stated that they

did not wish to interview any other member of staff in regard to the allegations as they felt it would assist the Claimant if his subordinates were not involved and had knowledge of the process being taken against him.

5

20. Nicola McDevitt stated that she did consider there to be a connection between the Claimants health and the 1st allegation found against him in view of the Claimants openness as to how he felt his illness had impacted on his actions. Primarily the Claimant advised that his communication suffers and he forgets what tasks need to be done.

10

21. In relation to the allegation of the incident involving Mr L, Nicola McDevitt did not consider there to be a causal link. She did not consider that there was something arising in consequence of his disability and proceeded with the normal standards of reasonableness to the conduct of his dismissal.

15

22. This decision was made on the basis that the Claimant did not indicate or hint at any suggestion that he himself considered that his actions in this regard were consequential of his underlying health.

20

23. She did not accept the Claimant's position to the tribunal that, at the point of discussing the incident of the 15<sup>th</sup> April 2017 that he had become nervous and anxious. She said that she felt she worked hard at putting the Claimant at ease throughout the hearing and that he had been open with her about aspects of his health that he felt had impacted on his actions and that he had not said that there was any connection with his health that had or could have impacted his actions that day.

25

24. The Claimant's own evidence in this regard is undisputable. He said that his anger towards his colleague was due to Mr L's verbal outcry (described as an outburst by the Claimant and Nicola McDevitt)

30

towards him, which included Mr L being in the Claimant's 'face' and having something thrown in the bin beside him (later found to be a knife.)

5           25.    The Claimant's failure to show due care and attention to his colleague following an accident at work; to follow health and safety procedures and the withholding the tips of the injured employee were acts of misconduct. It is submitted that it cannot be said that the Claimant's indignation that day arose because of something arising in  
10           consequence of his disability, his anger was consequential of his perception of the actions of Mr L towards him.

          26.    Nicola McDevitt did say however, that if she had found there to be a connection between his actions and his underlying health then she  
15           would have still made the decision to dismiss on account of the fact that she considered the behavior of the Claimant to be unacceptable and appalling (the later being used in her letter of outcome)

          27.    If the Tribunal is not with the Respondent in this regard, then it is  
20           submitted that the dismissal of the Claimant was a proportionate means of achieving a legitimate aim. The Respondent is an employer of credibility and reputation. Tony Macaroni work hard at building their brand name, as an organization they spend in excess of 250k per year on advertising. They have standards, high expectations, the livelihood  
25           of the business starts in the kitchen, the responsibility of the kitchen starts and finishes with the head chef.

          28.    The Respondent could not have condoned the behavior of the Claimant, not only did he hold the position of the head chef but he was  
30           also the kitchen first aider, they have a duty of care to employees and equally to the public and that became relevant in view of the hygiene issues the accident caused.

S20

5 29. The Respondent does not accept that there was a provision, criterion or practice (PCP) requiring the Claimant to work in a kitchen that had insufficient staff.

10 30. The initial burden is on the Claimant (B) to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that B has been unlawfully discriminated against. This means that the Claimant must establish facts from which the Tribunal could conclude that the relevant PCP places B and persons with B's protected characteristic at a particular disadvantage before the burden moves to the employer. It is submitted that the Claimant has not satisfied this burden.

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20 31. At point 12, page 3 of Gavin Clark's statement it is asserted that there was no 'understaffing' as they had the ability to transfer in staff from other restaurants. What is accepted is that the restaurant struggled at times to secure permanent staff but that the restaurant did not operate understaffed.

25 32. The Claimant's position is that there had been understaffing within the restaurant for a period of about a year, that is May 2016 to May 2017. He claims to have raised the matter with Chris Bryce, Operations Manager via email at some point and at various other points but could not recall any indicative date. The Claimant's position is that the Respondent's response was to inform him that adverts had been placed. He did not say that he raised the matter with his previous manager Fabio, whom he describes as having a good relationship with despite the allegation that the understaffing had been ongoing during his time with the Company. He also says that he felt that his role was impacted from March 2017 following his discussion with Gavin Clark and that he had no problems prior to this.

30

5 33. The Claimant's witness statement (Page 2 under examples of deterioration) states that he raised the issue of understaffing with Gavin Clark and that he was simply told "to get on with it". The Tribunal will recollect that Gavin Clark stated that he could not recall a time whereby the Claimant had informed him that he considered the restaurant to be understaffed and in any event, he did not accept that he would have said to the Claimant to get on with it.

10 34. I refer the Tribunal to the evidence of the witness at his disciplinary hearing and indeed, to this tribunal, at page 51 the Claimant says that that he believed he was running with a minimum that he could to run the kitchen. When asked what he meant by this he said the kitchen had to un with 2 chefs and that is what he ran with. There is no evidence of the Claimant informing the Tribunal that he felt his illness  
15 was impacted on account of understaffing.

20 35. It is submitted that there was no PCP that placed the Claimant at a substantial disadvantage in comparison with people who are not disabled because there was additional pressure aggravating his condition and impacted on his performance.

25 36. If the Tribunal were to find otherwise, then the Respondent accepts that they would know, or could reasonably have been expected to know of that disadvantage.

### REASONABLE ADJUSTMENTS

30 37. The Respondent does not accept that any request was made from the Claimant in relation to being understaffed and reiterate their position that there was no shortage of staffing from an operational headcount point of view as they had the capacity to brings in staff from other restaurants.

38. Gavin Clark informed the Tribunal that this was done frequently, primarily for relief cover due to sickness and holiday's but also done when covering periods of permanent staff vacancy's that did occur during the Claimant's employment.

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39. The Respondent will accept, on the basis the Tribunal finds that there was a PCP applied and an understaffing within the restaurant that this would amount to failure to make reasonable adjustments.

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### AUTHORITY

40. I refer the Tribunal to the case Basildon & Thurrock NHS Foundation Trust v Weerasinghe UAEAT/0397/14/RN within which the Court clarifies the correct test when deciding whether an employee has been treated unfavourably because of a disability.

15

41. In that case the employee was on sick leave because of a serious lung condition but he was able to attend interviews for another job, and attend a course abroad, but could not attend an appointment with his Clinical Director. This was because the impact of his condition on his ability to carry out day-to-day activities fluctuated. His employer wrongly assumed he had deliberately refused to attend the appointment and dismissed him.

20

42. The Employment Tribunal (ET) ruled that this amounted to unfavourable treatment arising from his disability. The value in this case is its relevance is to the clarity of the test to be applied by the Tribunal.

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43. The Employment Appeal Tribunal said that the ET had not applied the right test: the correct test was whether there had been two separate, causative steps:-

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- That there was a 'something' that was the consequence of a disability
- That the alleged unfavourable treatment of the employee was because of that particular 'something'

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44. When dealing with matters of misconduct useful discussions are entered into at pages 4 and 5 of the authority where there are a total of 9 allegations of misconduct listed against the Claimant. On page 5 the Tribunal is noted to having said: "170 .... *We have found that there were such breaches. We considered whether these acts amounted to unfavourable treatment. This is a low threshold and we are satisfied that in each of the cases the Claimant had crossed it. The real issue was whether they arose in consequence of disability and, if so, whether they were Justified.*"

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45. The Respondent reiterates the points made at 25 and 26.

46. Pages 11, 12 and 13 discuss the ingredients of a claim arising from a disability and make reference to the cases of Malcom v London Borough of Lewisham [2008] and the Trustees of Swansea University Pension & Assurance and Anor V Williams UKEAT/0415/14

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#### **UNFAIR DISMISSAL**

1. In any event, it is the Respondents submission that the Claimant's dismissal was not resultant of performance issues but by reason of conduct.

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2. The relevant law is well known. Section 98(1) of the ERA 1996 provides that in determining whether the dismissal of an employee is fair or unfair it is for the employer to show the "potentially fair" reason

for dismissal. If the employer is able to do this, s98(4) provides that the determination of the question of whether the dismissal is fair or unfair depends on whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee (this is a neutral test)

5

3. The Respondent relies on the potentially fair reason of misconduct. The Claimant was dismissed following a disciplinary hearing on the ground that he was guilty of misconduct.

10

4. We refer the tribunal to the well established approach in '**Burchell**' *British Home Stores Ltd v Burchell* [1978] IRLR where the EAT found that "The test, and the test all the way through, is reasonableness and a conclusion on the balance of probabilities". (EAT at page 304) It is that the employer must show that:

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i. It believed the Claimant was guilty of misconduct;

ii. It had reasonable grounds upon which to sustain that belief; and

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iii. At the stage at which it formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances of the case

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#### **INVESTIGATION**

5. When dismissing an employee, the employer must be satisfied on the balance of probabilities that the employee whose conduct is in question had actually done what he (or she) has alleged to have done.

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6. In this case there was no doubting the Claimant's actions in regards to the allegations against him.



7. During the investigation the Claimant admitted the 1<sup>st</sup> allegation saying that he knew he had messed up and stated that he has simply lost track of time. [Page 30]
- 5 8. In relation to the 2<sup>nd</sup> allegation the Claimant said that he did not attend to the Claimant because he had pots and pans on and that he did not think the accident was that bad. He also said that he was not up to speed with first aid. [Page 31]
- 10 9. In relation to the 3<sup>rd</sup> allegation the Claimant stated that he was "not cleaning it up" and that "Mr L should have cleaned it up himself" [Page 31]
- 15 10. In relation to the 4<sup>th</sup> allegation the Claimant said that Mr L had never said to him that he was going to the hospital and thought he had just walked out and that the reason for not allocating tips was because of his belief that he had walked out [Page 32]
- 20 11. In relation to the 5<sup>th</sup> allegation the Claimant provided the same response as the aforementioned, that being that he withheld tips due to his belief that Mr L had walked out. [Page 32]
- 25 12. In regard to the final allegation the Claimant had no comment other than to say he knew he had messed up and admitted responsibility. [Page 33]
- 30 13. At no point during his investigation did the Claimant mention that he felt his underlying health had contributed to any of his actions.
14. In all of the circumstances, it is submitted that the Respondent carried out a reasonable investigation.

**MISCONDUCT**

5 15. In considering the Respondents reasonable suspicion amounting to a belief in the guilt of the Claimant, it is submitted that the Respondent genuinely believed that the Claimant had committed an act of gross misconduct.

10 16. In relation to the 1<sup>st</sup> allegation against the Claimant admitted that he had mucked up, should have taken help when it was offered and accepted that dismissing an employee via text message was inappropriate. [Page 48/49] This allegation however, although founded against the Claimant, would not have resulted in his termination of employment. [Page 74 para 3]

15 17. The Claimant also accepted that he had failed to treat Mr L fairly and reasonably when he withheld tips after he went to hospital mid-shift following his accident. [Page 58]

20 18. He disputes the version of events provided by Stephen Little in relation to the accident and his due care and attention. Nicola McDevitt however, did rely on the statement when establishing her facts. She concluded that the Claimant had lied to her.

**REASONABLE GROUNDS**

25 19. Turning to the matter of reasonable grounds to sustain belief, I submit that there is evidence to support the Respondents belief in the Claimants guilt. In addition to the Claimant admittance, Nicola McDevitt relied upon the conflicting statement as provided by the Claimant witness Stephen Little [Pages 66 - 70] Furthermore, she  
30 relied on the statement provided by Ross Thomson [Pages 62 - 65] where he informed her that the Claimant texted him at 12.30 and asked him to attend work early as Mr L was away to hospital. The text

message is also evidenced at page 34. The text message is unequivocal evidence that the Claimant knew of Mr L's whereabouts and that he was being dishonest in his version of events in this regard.

- 5           20. In the dismissal outcome letter (page 73, paras 3,4, 5 and 6 (page 74)) Nicola McDevitt says:-

10                           *"When I spoke to your colleague, Stephen Little, whom you asked as a witness, his version of events regarding the incident was very different to yours (copy of statement enclosed). Stephen said that you had come in from the back area of kitchen and witnessed Mr L at the pizza section trying to stop his finger from bleeding. Stephen said that it was at this point that you asked Mr L to clean up his blood and Mr L responded*  
15                           *by shouting at you in Italian. Stephen said that at no point during the incident did you ask Mr L if he was ok or offer to help him. Stephen also said that Mr L did not speak English at any point when he was shouting at you and that he never heard him say the words "go home", however Stephen did explain that*  
20                           *he had heard Mr L say something along the lines of "via casa" which means "away home" in Italian. Stephen said that you then left the kitchen for some time, which he estimated to be for around ten minutes. He explained that while you were away, Rafa came to help Mr L bandage his finger and that when you*  
25                           *came back into the kitchen you did not say anything. Stephen also told me that a short time later, you later told him not to clean the blood as Mr L was to do it. Furthermore, Stephen confirmed that Mr L did not laugh at any time during the incident and that all staff were aware that Mr L was going to hospital at*  
30                           *the time he left; a point which was equally validated by Ross as he told me that you had texted him, at around 12.30pm, asking him to come in early that day, you said: "Can you start as soon as possible, Mr L cut finger-away to hospital".*

5                    *When considering the conflicting version of events from you and Stephen, I was inclined to believe Stephen as I felt that he was very clear, detailed and confident in his recollection of events. I did not feel that I got the same candour from you when you when you spoke about the incident, but rather I felt that you were cautious and reserved in giving your account of what happened. Whilst I do believe that you were honest in your responses to the majority of the allegations that were made against you, I was not persuaded by your version of events in relation to the incident of the 15<sup>th</sup> April.*

10                    *The only explanation I can consider for such a contract in your honesty during the hearing is that you knew that your actions of the 15<sup>th</sup> April had been wholly unacceptable, and so you tried to give a version of events which conveyed your behavior as being more reasonable than it was.*”

21.                It is then for the tribunal to consider, by the objective standards of the hypothetical reasonable employer, whether in dismissing the employee “the employer had acted within a “band or range of reasonable responses’ to the particular misconduct found of the particular employee”, *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 (EAT) The tribunal will need no reminding that for the purposes of the ‘range of reasonable responses’ test it is irrelevant whether or not it would have dismissed the employee if it had been in the employers shoes or if it would have done things differently, for example, in relation to the disciplinary hearing. The tribunal must not “substitute its view” for that of the employer, *Foley v Post Office; Midland Bank pic v Madden* [2000] IRLR 82. The test applies to the decision to dismiss and to the processes which led to the dismissal, *Sainsbury’s Supermarkets Ltd v Hitt* [2003] IRLR 23.

22. The Respondent submits that the decision to dismiss fits squarely within the band of reasonable responses in all of the circumstances of this case.

5 **CREDIBILITY of WITNESSES**

CLAIMANT

10 47. It is submitted that the Claimant, in his evidence has been untruthful to this Tribunal. The Claimant claims that his relationship with the new restaurant manager Gavin Clark started well but deteriorated after the 11<sup>th</sup> March 2017 following his disclosure that he suffered from mental health issues. Specifically, the Claimant claims that Gavin Clark became cold towards him, stopped talking to him about family and football and was just down the middle and straight to the point when there was a requirement for them to speak.

20 48. Within his statement [Page 2, para 2 (last example)] the Claimant says that if Gavin Clark had shown him the same support as his previous manager had, then the allegations against him would not have happened.

25 49. The Respondent submits support was provided by Gavin Clark. This is evidenced at pages 48 and 49 where the Claimant, during his disciplinary hearing says, *"In hindsight, I should have taken Gavin's help"* and at page 60 where he says *"I'd like to have a week to week chat with Gavin- Gavin suggested it but its never happened"*.

30 50. In response to the claim detailed at paragraph 4, page 1 of the Claimants statement Gavin Clark said that he was disgusted that something personal about his family would be raised and that the allegation was a blatant lie. In cross examination (via the Tribunal)

Gavin Clark was asked if his position remained the same in that he disputed the statement as made and he responded with "absolutely."

5 51. In evidence, Gavin Clark said that the Claimant and him spoke on regular occasions, his door was always open and that he informed him if he needed advice to speak to him. He did not recall ever saying "just need to deal with it" and considered that he was always very supportive.

10 52. Aspects of support provided by Gavin Clark is demonstrated in his statement at point 5 where he say's the support he offered is evidenced within the notes of the disciplinary hearing [Pages 48,49,56]. He makes reference to the notebook and say's that the Claimant bought himself a notebook and for a short period this appeared to assist him. The Claimant however, insists that the suggestion of the notebook came at the same time as the investigation meeting on the 5<sup>th</sup> May 2017. The same meeting, he describes as unprofessional, due to everything being said in a 'friendly way'.

20 53. Surprisingly, earlier in evidence when asked why he did not take the opportunity to inform Gavin Clark that he considered his anxiety and stress levels were affecting his work and ability to do his job at his investigation meeting, despite appreciating that his performance and conduct was being questioned, he responded by saying that he did not raise it because he did not fully understand what the meeting was about. If the investigation meeting had been friendly, to the extent that the manager was suggesting ways in which he could help himself, (notebook) it is submitted that the Claimant's underlying health must have been discussed. It is also submitted that it does not make sense that, on the basis that there was an offer of assistance from Gavin Clark to aid the Claimant with his underlying health that the Claimant would not then, naturally, discuss his underlying health. Furthermore, at Page 56 od the Disciplinary Hearing minutes the Claimant stated

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5 that "I have put measures in place to ensure that this doesn't happen again, note book with everything that has to be done and I mark it of so I don't forget". This does not fit with the Claimants evidence at Tribunal where he said he was only informed of the notebook on the 5<sup>th</sup> May 2017 at his investigation hearing as he only worked a further 2 days thereafter.

10 23. Another matter whereby the Respondent submits that the Claimant's reliability is doubtful is the Claimant claim that he attended his disciplinary hearing and told the truth. The Respondent submits that he did not tell the truth at the disciplinary hearing and that there has been evidence produced to this tribunal in that regard.

15 24. It is clear at page 34 that the Claimant was wholly aware that Mr L had gone to the hospital at around 12.30 on the 15<sup>th</sup> April yet, during his disciplinary hearing he stated that he did not know until later on that he was actually away to the hospital and that it was only when Gavin told him at about 1.30 [Page 53].

20 25. In evidence, it was put to the Claimant that he had been untruthful with Gavin Clark at his investigation hearing relative to this point, the Claimant said the contradiction between the evidence he gave and the text message was resultant of him 'texting in the moment.' He said he had been advised that the claimant was going to hospital but he then subsequently realised that the Claimant was, in actual fact, still in the restaurant, during service, and that he did not know exactly at what point he left or that he even went to hospital.

30 26. This level of information was not provided to either the investigating, or disciplining officer at any point during the respective hearings. It is submitted that the explanation provided to the Tribunal in this regard does not make sense in view of his response to Nicola McDevitt [Page 53] where he said *'7f wasn't until Gavin said Mr L want to go to hospital*

*about 1.30pm that I knew about hospital*" Compounding the rationality of the Claimant's assertion, is Stephen Little's statement [Page 70] where he says *"everyone knew he was going to the hospital"*

5 27. Likewise, the statement provided by Stephen Little suggests that the Claimant was not being honest about his version of events in regard to the seriousness of the accident, the blood spillage or the alleged laughter on the any part of Mr L. It is submitted that whilst Nicola McDevitt, provided her reasons and thought process for choosing to  
10 rely on the statement of Stephen Little it is also appropriate to consider that the witness in question was a friend of the Claimant, had no prior knowledge that he was to be asked to give a statement and had no reason to say anything other than his recollection of what happened on the 15<sup>th</sup> April 2017.

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28. In regards to the Respondents evidence the Tribunal are obviously asked to prefer their evidence over that of the Claimant. It is submitted that all witnesses gave their evidence in good faith.

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## **REMEDY**

29. The Respondent seeks for the Tribunal to find that the real reason for dismissal was one of misconduct and to find in their favour by confirming that their actions amounted to a fair dismissal in terms of  
25 Section 95 (1) (a) of the Employment Rights Act 1996. This is on the basis that the Respondent was entitled to form their belief in the Claimant's guilt and therefore acted reasonably in dismissing the Claimant in accordance with Section 98(4) of the ERA.

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30. The Tribunal are asked to conclude that the dismissal was within the range of reasonable responses on the basis that the belief of misconduct was based on reasonable investigation.



31 . If the tribunal finds in favour of the Claimant, then the tribunal is asked to consider reductions. It is submitted that the Tribunal can, and should make a reduction where the tribunal finds that the Claimant's conduct prior to his dismissal to any extent caused or contributed to the same and/or where it would be just and equitable to make such a reduction: see ss.12292), 123(1) and 123(6) ERA.

### POLKEY

32. Where, regardless of the procedural failings, the employee would have been fairly dismissed in any event then any compensatory award should be reduced accordingly. In assessing compensation, the task of the Tribunal is to assess the loss flowing from the dismissal. If, on the balance of probabilities, it is more likely than not the employee would have been dismissed when he was in any event, then the correct assessment is that no compensation should be awarded: see *Software 2000 Ltd v Andrews* [2007] IRLR 568.

33. The Respondent submits, if the Tribunal considers that there are issues of contention as to whether or not there was a process undertaken within the disciplinary procedure that may amount to a procedurally unfair dismissal, that there are only 2 areas for consideration; the first being whether or not the disciplining offer should have reverted to the Claimant to put matters of contradiction to him and allow him the opportunity to comment and the second being the refusal of the Respondent to allow the Claimant's late appeal in view of his disability.

34. In relation to the matter of reverting to the Claimant, it is submitted that this is not a case whereby the Claimant was flatly denied the opportunity to comment. He was asked if he wished for the disciplining officer to meet with him and discuss matters in the event of his witnesses giving a differing account to his. He was expressly asked if

his position would change and he said it would not and that there was no requirement for them to meet again, this is evidenced in the disciplinary minutes at page 55 and accepted by the Claimant in his evidence. In addition, at page 73/74 of her disciplinary outcome letter Nicola McDevitt went further to explain her thought process saying; 7  
*7 did ask you during the hearing, to bear in mind that I still had to speak with the two witnesses as per your request, and that if they had any differing version of events as to the incident on 15<sup>th</sup> April, would this alter your recollection of events in any way; and you responded that it would not. I also considered that there were only two possible answers that you could have given to the question; you would have either admitted to giving the instruction or you would have denied it. Had you denied it, I am not of the opinion that I would have believed you, given the fact that I feel you have been dishonest regarding the incident"* .

35. Turning to the matter of the appeal, the only information available to the Tribunal in this regard is the letter documented at Page 76/77 of the bundle. The Respondent details in the letter that their reasons were twofold, those being that the Claimant failed to appeal timeously and on account of the disciplining officer's reasons for the Claimants dismissal.

36. The Respondent will accept any criticism the Tribunal may have in relation to the fact that, in the absence of any detailed explanation in the letter of dismissal, that whilst they were clear in their mind that Nicola McDevitt did not consider there to be a connection between the Claimant's disability and his actions that the Claimant most likely was not. However, they maintain their position that submit that it was reasonable in such circumstances to refuse the Claimant's appeal and therefore that this would not prove fatal to the process.

### ACAS UPLIFT

5 37. It is accepted that the opportunity to appeal against a disciplinary decision is essential to natural justice. The Respondent does not accept that there was an obvious disregard for this right in that the Claimant was denied his right of appeal or that it could be considered, in accordance with the ACAS code, that there was a complete failure to follow the guidance.

10 38. The position is, despite his underlying health, that the Claimant was denied the right due to pursue his appeal due to his request to appeal being excessively out of time.

15 39. The timescale within which he had to appeal was 7 days and this was detailed in the Claimant's letter of termination at page 74. Had the Claimant missed the timescale by only a few days, or even a week, then the Respondent would have permitted the appeal.

20 40. It is submitted that there is no clear ACAS guidance for such a situation, the Respondent believes that they acted reasonably in the circumstances.

25 41. The Tribunal are aware that a failure to follow the ACAS code does not mean that an automatic penalty will result.

### CONTRIBUTORY FAULT

30 42. If the Tribunal find that the dismissal was unfair (which is denied) then the Respondents seeks for the Tribunal to apply a reduction of the basic and/or compensatory award for contributory fault. The Respondent seeks a reduction of 100% on account of the fact that the Claimant was not innocent in his actions. He was angry and chose to

treat an employee unfairly on account of that anger and because he could do so in his position as head chef.

**CLAIMANTS CLAIM for LOSSES**

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**Mitigation**

43. The Respondent submits that the Claimant has failed to mitigate his losses.

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44. \*\*\*\*\* [INCLUSION BASED ON FIT NOTES EVIDENCE]

45. In addition, the Claimant says that in total, he was offered 3 jobs at Prego, o Solo Mio and Oscar's before ultimately taking the role at Bella Vita. He say's that his anxiety prevented him from taking the roles and that he was not fit until November 2017.

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46. Evidenced at page 78 is a letter dated 13<sup>th</sup> July 2017 from NHS Adult Mental Health Services, within the body of the letter, paragraph 2, the Psychiatric Nurse states "*Over the last few months Stuarts mood has improved and remained quite stable. A recent change of job only helped this further as his last job was very stressful/chaotic at times. He currently feels brighter in mood, less chaos and has not self harmed or had any suicidal thoughts for some time.*" It is submitted that this is evidence that the Claimant was working as early as July 2017 and if not, had the capacity to seek and work in alternative employment. It is submitted that the document at page 78 is sufficient to raise ambiguity in the Claimants assertion that he was not fit to work until November 2017.

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47. It is submitted that losses should not be made beyond July 2017.

48. Turning to the point of the Claimants new role now with Bella Vita, the Respondent would like the Tribunal to consider 3 points; the first being that it is highly unlikely that the Claimant does not receive wage slips; the second being that there is no evidence other than the Claimants verbal evidence to validate his alleged earnings and lastly the Claimants decision to take a role of 2<sup>nd</sup> Chef,

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49. The first two points are mentioned as matters of credibility, the last being that the Claimant has made a conscious decision to take a position of 2<sup>nd</sup> chef. It is submitted that the Claimant could have taken the head chef role but chose to take the role of second chef, the Respondent should not be required to pay the salary difference between the head chef and the second chef roles.

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### **EARNINGS**

50. The Claimants evidence is that he is paid cash in hand without deductions and therefore the Tribunal is asked to base any calculations upon his gross figure and not the net figure as would be normal practice.

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### **INJURY TO FEELINGS**

51. The Respondents repeats the submission that the Claimants dismissal was for a fair reason and related to conduct and not performance. There was no act of discrimination. Accordingly, it is submitted that there should be no award for injury to feelings. It does not however accept that any award should be made at the higher end of the middle band.

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**REDUCTION TO INJURY TO FEELINGS**

52. In the event the Tribunal finds that the Claimant was discriminated because of something arising in consequence of his disability then the Respondent does not seek for the Tribunal to apply any reduction in this regard.

**Relevant Law**

99. Section 98 of the 1996 Employment Rights Act states:-

**“98 General**

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show -

(a) the reason (or if more than one, the principal reason) for the dismissal and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which he held.

(2) A reason falls within this subsection if it -

(a) ....

(b) relates to the conduct of the employee

(3) .....

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

5 (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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(b) shall be decided in accordance with equity and the substantial merits of the case.”

100. Section 15 of the Equality Act 2010 states:-

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**“15 Discrimination arising from disability**

(1) A person (A) discriminates against a disabled person (B) if -

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(a) A treats B unfavourably because of something in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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(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.”

30 101. Section 19 of the 2010 Act states:-

**“19 Indirect Discrimination**

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

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(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -

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(a) A applies or would apply, it to persons with whom B does not share the characteristic,

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(b) it puts or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts or would put B at that disadvantage, and

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(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are-

...

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Disability

...."

30 102. Section 20 of the 2010 Act states:-

**"20 Duty to make adjustments**



(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply: and for those purposes a person on whom the duty is imposed is referred to as A.

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(2) The duty comprises the following three requirements.

(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.

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(4) .....

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(5) ....."

### Observations on the Witnesses

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103. While the claimant was inclined to give very short answers to some of the questions posed to him in cross examination and in reply to the Tribunal's enquiries of him, the Tribunal concluded, on the balance of probability, that he gave his evidence honestly. He gave his evidence as clearly as he could when setting out his recollection of events. In relation to Mr Clark and the occasion where the claimant alleges that Mr Clark told him about his partner's relative being admitted to hospital and what was then said by him to the claimant, Mr Clark absolutely denied that this conversation had taken place. The Tribunal concluded, again on the balance of probability, that the claimant had been told this in the way he described that Mr Clark had spoken to him about his partner's relative. The Tribunal did so because it seemed to the Tribunal that it was extremely unlikely the claimant would have invented such a conversation between himself and Mr Clark. The Tribunal could see no

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reason why he would have done so. This was the principal conflict of evidence between the claimant and Mr Clark. As indicated, the Tribunal concluded that the claimant's evidence on this issue should be preferred to that of Mr Clark. In relation to the claimant and Ms McDevitt there was very little conflict in their recollection of what they discussed at the disciplinary hearing. The claimant had not expected to be dismissed in relation to the incident on 15 April 2017. He accepted he could have handled this better and that lessons had been learned by him. This appeared to be what he had realised both from the original investigation meeting with Mr Clark as well as from what was discussed during the disciplinary hearing with Ms McDevitt.

#### Deliberation and Determination

104. In relation to the investigation process, the Tribunal was puzzled as to how Mr Clark would have set out all the information that appears in the investigatory minutes unless he had received some assistance from the external consultants in advance. The layout of the information seems much more detailed and professional than would be prepared by someone who, such as Mr Clark who is an experienced Restaurant Manager but who did not appear to be experienced in handling written communications in relation to HR matters. In any event, Mr Clark was clear that he had spoken to Ms McDevitt before he met the claimant. While she did not recollect having a discussion with him and thought it may have been one of her colleagues, there is no doubt that there was a discussion between Mr Clark and someone at Holly Blue before he conducted the investigation with the claimant. There is, of course, no reason why he should not have done so. There was no explanation, however, as to why Mr Clark was the investigating manager given he had already had some involvement in that he had directed the claimant to clean up the spilt blood on 15 April 2017. There was no indication that the respondent could not have found another restaurant manager from a different restaurant to carry out the investigation who would not have had any direct input into the incident on 15 April 2017.

105. In relation to the disciplinary hearing Ms McDevitt was instructed on behalf of the respondent to carry out the disciplinary hearing. As the Tribunal understood it, she had been instructed to do so and to then make recommendations to the respondent. It does not appear that she went back to the respondent to make recommendations but rather she reached the conclusion that the claimant's employment should be terminated on the grounds of gross misconduct. Ms McDevitt was very clear that she was only taking into account the incident on 15 April 2017 in relation to the allegation of gross misconduct. She discounted the other issues which had arisen during the course of the investigation on the basis that she accepted the explanations which were provided to her by the claimant in relation to most of these of these issues.

106. While Ms McDevitt accepted that she was aware that the claimant has anxiety and depression it was apparent that she was not aware of the full extent of the claimant's mental health issues. Against that, the respondent appears, according to the claimant, to have been well aware of the claimant's serious mental health issues and indeed had been extremely supportive of him for a very considerable period of time. What appears to have happened is that matters changed following the transfer of the original Manager, either elsewhere or perhaps he left the company. This was not explained to the Tribunal but, in any event, Mr Clark becoming the new Restaurant Manager in late 2016. While the claimant accepted that they had initially had a good working relationship and had been able to talk about family and other social matters, this changed when the claimant was pressed by Mr Clark about the reason for his absence on 9 and 10 March 2017. On the balance of probability, the Tribunal preferred the claimant's version of events that it was after their meeting on 11 March 2017 that things changed between himself and Mr Clark. Again, on the balance of probability, the Tribunal preferred the claimant's evidence that when he felt he had no alternative but to explain his mental health issues to Mr Clark, their relationship then changed. Thereafter, it appeared that they no longer enjoyed the same working relationship as before. Mr Clark disputed this and maintained that they continued to enjoy a

good working relationship. However, what then transpired in relation to the matters that Mr Clark investigated does seem to suggest that the working relationship did deteriorate. Also, Mr Clark was now aware of the claimant's mental health issues, albeit the claimant had not wanted to inform him about the details which is understandable. The Tribunal concluded, again on the balance of probability, that it preferred the claimant's version of events of what had happened and that his disclosure of his mental health issues to Mr Clark resulted in the claimant becoming or feeling that he was unable to talk to Mr Clark as they had done before.

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107. In relation to the investigation itself and, in particular, the incident with Mr L on 15 April 2017, Mr Clark was directly involved in that. According to him he had gone into the kitchen and instructed the claimant to remove the spilt blood. His position was that the claimant had refused to do so. Mr Clark therefore had a direct input in that incident and it was one of the matters which he then was investigating when he met the claimant on 5 May 2017.

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108. The respondent is not, as the Tribunal understood it, a small organisation. It has a number of restaurants, each operated by a Restaurant Manager, and it was not clear to the Tribunal why another Manager from one of the other restaurants could not have carried out the investigation, rather than it being handled by Mr Clark, given he had direct input into the incident on 15 April 2017.

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109. The Tribunal concluded that it could not say that Mr Clark was an unbiased individual in that he seemed already to have formed a view as to what had happened on 15 April 2017 and therefore he was not well placed to be the person to carry out the investigation which included that incident as well as the other matters which were discussed during the investigation with the claimant and where Mr Clark used his own input as to what the claimant was or was not doing satisfactorily in relation to the general running and management of the kitchen and its staff.

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110. In relation to the disciplinary hearing and the letter informing the claimant of the terms of the disciplinary hearing, the Tribunal noted that the claimant was advised that he had the right to be accompanied either by an employee or a trade union member, and therefore he was not unaware of this prior to attending the disciplinary hearing.

111. The Tribunal found it significant that Ms McDevitt chose to attend this hearing without a note taker and yet she was also alert to the fact that she was unable to take a detailed note of all that was said at the disciplinary hearing. She conceded that her note simply set out the answers to the questions but it does not narrate any of the points that were specifically put to the claimant and which gave rise to his answers being noted by her in her note of the disciplinary hearing. The Tribunal was alert to the fact that the claimant did, of course, already have the notes of the investigation meeting coupled with the letter summoning him to the disciplinary hearing which did also set out the various allegations against him.

112. The Tribunal noted that Ms McDevitt's position appeared to be that once she had carried out the disciplinary hearing she was to make recommendations to the respondent. The letter to the claimant of 23 May 2017 which confirmed her decision and which was intimated to him by way of a telephone call from Mr Clark on 17 May 2017, does make it clear that most of the allegations against the claimant were not taken into account by Ms McDevitt in reaching the decision to terminate the claimant's employment. It was apparent that she took very seriously indeed the incident on 15 April 2017 and that she preferred the version of events provided to her by Mr Little when she interviewed him rather than the claimant's version of events. The Tribunal noted that the allegations which she found substantiated against the claimant appear to be in relation to that specific incident and that much of what occurred in relation to the other matters raised against the claimant were ones which she did not take into account in reaching the decision that the claimant was to be dismissed on the grounds of gross misconduct. In relation to several of these incidents Ms McDevitt indicated that she was not following

through on them and so they did not play a part in her decision-making process.

5 113. It is for an employer to conclude whether or not an individual has committed an act of gross misconduct which, here, was restricted to the events on 15 April 2017.

10 114. In reaching her decision Ms McDevitt insisted that she had taken into account the fact that the claimant was suffering from anxiety and depression. However, she did not have any detailed information as to the full extent of his mental health. She does not appear to have discussed this further with the respondent in order to clarify what their position and or knowledge of the claimant's mental health was.

15 115. The Tribunal has no reason to doubt that the claimant was being truthful when he said that both Mr Marini and Mr Bryce had been supportive of him and indeed Mr Clark had initially been supportive of him and they had worked well together until the point when Mr Clark discovered that the claimant had been absent from work as a result of mental health issues.

20 116. Nevertheless, it seemed to the Tribunal that a reasonable employer acting reasonably in these circumstances, being aware of the claimant having, at least according to Ms McDevitt, some knowledge of his ongoing anxiety and depression would have looked further into this in order to establish whether  
25 or not this was a contributing factor in relation to how the claimant behaved on 15 April 2017.

30 117. In relation to the complaint of unfair dismissal, the issues for determination by the Tribunal are:-

- (i) Did the respondent have a genuine belief that the claimant was guilty of the alleged misconduct?**

(ii) Did they have reasonable grounds for that belief following a reasonable investigation?

(iii) Was it within the range of reasonable responses to dismiss the claimant for that misconduct?

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118. In this case the Tribunal concluded that while the respondent or rather Ms McDevitt acting on its behalf, had a genuine belief in the claimant's misconduct during the incident on 15 April 2017, in relation to whether the respondent had reasonable grounds for that belief following a reasonable investigation the Tribunal was not persuaded that it did. The Tribunal has already set out its concern as to Mr Clark having conducted the investigation given his direct involvement on part of what happened on 15 April 2017 when he gave the claimant a specific direction to remove the split blood which the claimant did not do. In relation to the further investigation by Ms McDevitt who spoke to both Mr Thomson and Mr Little after the disciplinary hearing had concluded and took statements from each of them, she did not let the claimant have sight of their statements. The Tribunal noted that the claimant appeared to have indicated that whatever they said to her would not cause him to change his explanation and this appears to be why she did not revert to him and offer to let him see those statements before she reached her decision. However, it may be that had Ms McDevitt shown the two statements to the claimant this would not have altered what he had told her about the incident on 15 April 2017 but it would have meant that he would have had the opportunity to consider the statements and, if he had wanted to do to amplify or clarify his recollection of the incident, he could then have done so. He was not afforded that opportunity.

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119. The Tribunal also took into consideration that Ms McDevitt did not have as much information about the claimant's mental health as might have been expected had the disciplinary hearing been carried out by a member of the respondent's own management, for example, Mr Bryce as Area Manager. It was not clear to the Tribunal why the respondent decided to devolve this

responsibility to the external consultants. Had Ms McDevitt been given a fuller picture as to the claimant's health this might well have had an impact on her decision as to whether or not she should have dismissed the claimant. It was clear from her dismissal letter that, but for the incident on 15 April 2017, she would not have been minded to terminate the claimant's employment. It is therefore unfortunate that she did not seem to have as much knowledge about the claimant's mental health as may have been available to her or which must presumably have been available to the respondent's senior management staff had one of them been involved in the disciplinary meeting and decision making process.

120. Accordingly, the Tribunal concluded, in all these circumstances, that it could not be satisfied that Ms McDevitt's decision to dismiss the claimant for gross misconduct was a decision that came within the range of reasonable responses, open to an employer. In reaching this conclusion, the Tribunal was mindful that it is not for it to substitute its view for that of the employer. The Tribunal also took into consideration that while Ms McDevitt concluded that the claimant's actions on 15 April 2017 amounted to gross misconduct, justifying dismissal, the respondent did not take any steps to suspend the claimant on that date which would normally be the case where an employer alleges there has been an act of misconduct which gives rise to an investigation and then a disciplinary hearing resulting in dismissal. Instead, the claimant continued to attend for his shifts through until 5 May 2017 when Mr Clark advised him that he intended to hold an investigation at the end of that shift. That meeting then took place at about 9.15pm. The claimant was not informed that he was being suspended then but instead a letter was given to him dated 13 May informing him that he was to attend a disciplinary hearing on 16 May and that then took place. The claimant was then telephoned on 17 May by Mr Clark who advised him of the decision taken by Ms McDevitt to terminate his employment. The claimant was told on 17 May by Mr Clark that his employment was ending with immediate effect as was then confirmed by Ms McDevitt in her letter to the claimant dated 23 May 2017. None of these



actions seemed to the Tribunal to be those of a reasonable employer, acting reasonably in all the circumstances.

121. Having reached the conclusion that the claimant's dismissal was unfair the  
5 Tribunal has to take into account whether there was contributory conduct by  
the claimant. It concluded that the claimant was at fault to some extent as to  
how he behaved on 15 April 2017 which was what gave rise to his dismissal  
for gross misconduct. The claimant was frank in recognising that he himself  
was not happy with how he had conducted himself on that day. The Tribunal's  
10 assessment of compensation is set out below.

122. Before turning to quantification of the award in relation to the finding of unfair  
dismissal, the Tribunal reminded itself that, in addition to the complaint of  
unfair dismissal, the claimant complains that he has been discriminated  
15 against on the grounds of disability.

123. It is helpful for the Tribunal to set out the issues and its conclusions in relation  
to the complaint of discrimination. These are as follows:-

20 **(i) Did the claimant have a disability in terms of the Equality Act 2010  
at the relevant time?**

As indicated above, the respondent did not concede that the claimant is  
disabled until the start of the Final Hearing. However, it has now accepted  
25 that he is disabled in terms of the statutory provision.

**(ii) Did the respondent know, or could it reasonably have been  
expected to know that he had a disability?**

30 The Tribunal concluded that the respondent did know of the claimant's  
disability and had done for a very considerable time. Also, as indicated above  
the Tribunal noted that the respondent was supportive of the claimant over a  
long period of his employment but for whatever reason, the support he had

enjoyed appears to have lessened some months after Mr Clark became the Restaurant Manager in November 2016.

Section 15

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**(iii) Were the performance issues for which he was dismissed “something arising in consequence of his disability?”**

The Tribunal concluded that the reason for the claimant’s dismissal which was said to be for gross misconduct only did not take into account the performance issues that were said also to have formed the basis of the disciplinary process in that Ms McDevitt was clear that she would not have dismissed the claimant but for the incident on 15 April 2017 as the other performance related issues would not have justified his dismissal.

15

**(iv) If so, was dismissal a proportionate means of achieving a legitimate aim?**

Since the Tribunal has reached the conclusion set out above this is not applicable.

20

Section 20

**(v) Did the respondent impose a provision, criterion or practice (PCP) by requiring him to work in a kitchen that had insufficient staff?**

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The Tribunal concluded that the respondent did impose a PCP by their lack of active support to the claimant in failing to provide him with extra kitchen staff. While the respondent did not actively refuse to provide additional kitchen staff the impression the Tribunal was given was that it was very much left to the claimant to seek to recruit more staff. The issue of staffing levels clearly played a significant part in the claimant’s difficulties in being able to

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continue to operate as Head Chef and it was apparent to the Tribunal that he was increasingly feeling over burdened by his responsibilities in the kitchen and, in particular, the administration and management of the staff.

- 5           **(vi) If so, did that PCP place the claimant at a substantial disadvantage in comparison with people who are not disabled because the additional pressure aggravated his condition and impacted on his performance?**

10           The Tribunal concluded that the PCP of requiring the claimant to work in a kitchen that had insufficient staff did place him at a substantial disadvantage in comparison with people who are not disabled because the additional pressure aggravated his condition and impacted on his performance.

- 15           **(vii) If so, did the respondent know, or could it reasonably have been expected to know of that disadvantage?**

20           The Tribunal concluded that the respondent did know and if it did not, it could reasonably have been expected to know of that disadvantage. The respondent's senior management, including both Mr Bryce and Mr Marini knew for a long time that the claimant had serious mental health issues. While they respected that the claimant did not want to discuss this with Mr Clark, they must have become aware that Mr Clark had been informed of this when he pressed the claimant as to the reason for his absence from work in  
25           March 2017. It was unclear to the Tribunal why, having been supportive of the claimant for such a long time, that support from senior management appears to have ebbed away from March 2017 onwards.

- 30           **(viii) If so, would it have been a reasonable adjustment to employ more staff?**

The Tribunal concluded that it would have been a reasonable adjustment for the respondent to employ more staff and for senior management to have

taken a much more active role either in recruiting new staff or when necessary, bringing extra staff into the Restaurant from other establishment which they own.

5 Section 19

**(ix) Did the POP (if established) put people with the claimant's disability at a particular disadvantage?**

10 The Tribunal concluded that the PCP being the failure of the respondent to employ more staff did put people with the claimant's disability of having serious mental health issues, including depression and anxiety did put people with such a disability at a particular disadvantage. It was self evident to the Tribunal that the responsibilities of a Head Chef in a busy restaurant  
15 would put people with such a disability at a particular disadvantage as the pressures involved in overseeing the kitchen would create such a disadvantage.

**(x) Did it put the claimant at that disadvantage?**

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The Tribunal concluded this it did put the claimant at that disadvantage.

**(xi) Was the PCP a proportionate means of achieving a legitimate aim?**

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The Tribunal was not satisfied that the PCP of requiring the claimant to work in a kitchen that had insufficient staff was a proportionate means of achieving a legitimate aim.

30 124. From the respondent's written submission, the Tribunal noted that their position in relation to the four allegations found against the claimant was that he would not have been dismissed but for the conduct in relation to the incident on 15 April 2017. The claimant had contended that his employment

was terminated due to under performance and that this was due to disability.

5 He referred to the kitchen being understaffed and lack of staff causing a detriment to him as he felt under more pressure and this impacted on his performance. Accordingly, the claimant believed the respondent should have made an adjustment by employing more staff. Ms Barnett referred to Section 15(1) of the Equality Act 2010, (see above).

10 125. Ms Barnett correctly pointed out that the interplay between discrimination and unfair dismissal is often complex and the decision to deal with disciplinary charges here was a difficult one for any employer.

15 126. The Tribunal gave careful consideration to all that was said in relation to what Ms McDevitt had advised the Tribunal about her knowledge of the claimant's underlying health and specifically in relation to the incident involving Mr L. Ms McDevitt did not think there was a causal link but this was something arising in consequence of the claimant's disability so she proceeded with "normal standard of reasonableness to the conduct of his dismissal".

20 127. However, this does not appear to take into consideration that the claimant was aware that he was suffering from severe anxiety and depression and that he was not coping. Ms McDevitt for her part did not accept that the claimant had become nervous and anxious when discussing the incident and she thought she had worked hard at putting the claimant at his ease during the disciplinary hearing.

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128. Ms McDevitt's position, had she found there to be a connection between his action and underlying health, was that she would still have made the decision to dismiss because she considered the claimant's behaviour to be unacceptable and "*appalling*" as set out in the letter dismissing the claimant.

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129. If the Tribunal did not accept the respondent's position it was asserted that the dismissal of the claimant was a proportionate means of achieving a legitimate aim given the respondent has credibility and a reputation to

maintain for a large organisation which has high standards, high expectations with the livelihood of the business starting in the kitchen and being the responsibility of the kitchen which starts and ends with the Head Chef.

5 130. The respondent's position was that they could not have condoned the claimant's behaviour not only as the Head Chef but also as kitchen first aider.

131. The respondent disputes that there was a Provision, Criterion or Practice (a PCP) requiring the claimant to work in a kitchen that had insufficient staff.

10

132. The initial burden lay on the claimant to prove facts from which the Tribunal could conclude that he had been unlawfully discriminated against and so a Tribunal would have to conclude that the relevant PCP placed the claimant and persons with his protected characteristic at a particular disadvantage before the burden moved to the employer.

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133. It was suggested that the claimant had not satisfied that burden.

134. Mr Clark's position was that there was no understaffing as they had the ability to transfer staff. The Tribunal was not persuaded that this was correct because it did not sit comfortably with the claimant's assertion that the restaurant had struggled to find sufficient permanent staff. Nor did it seem to take into account that the claimant had discussed his mental health issues with the previous Manager and also with the owner of the business as well as with Mr Bryce. For whatever reason, at no point does the respondent seem to have taken into consideration that perhaps the claimant was not coping because of underlying mental health issues and that perhaps they needed to do something more to provide assistance to him.

20

25

30 135. The Tribunal was not persuaded that sufficient support was being given to the claimant and accordingly it concluded that there was a PCP which placed the claimant at a substantial disadvantage in comparison with people who are not disabled because the additional pressure was aggravating his condition

and so, in turn this was affecting his performance. The claimant spoke perfectly openly to the Tribunal on this issue.

5 136. Turning to the question of reasonable adjustments, the respondent did not accept that the claimant had asked that consideration be given to the staffing levels in the kitchen but the Tribunal was not satisfied that that was correct. It appears that there were difficulties in recruiting staff to this particular restaurant and while the claimant was told that he could try to recruit additional staff and there were occasions when other staff could be brought  
10 in from other restaurants this did not seem to deal with the core issue, which so far as the Tribunal could see, was that more cover in the kitchen was required, particularly at busy times.

15 137. In relation to the suggestion that the claimant use a notebook the Tribunal preferred the claimant's evidence that this was only suggested to him very close to his employment being terminated.

20 138. The Tribunal gave careful consideration to all the points set out by Ms Barnett in relation to the judgment in *Basildon*, (see above). In this case, the Tribunal could not conclude that the claimant was dismissed for "performance issues" that amounted to "something arising in consequence of his disability". He was dismissed for gross misconduct.

25 139. In reaching its decision the Tribunal concluded that the respondent did not appear to have taken into account the claimant's mental health or to have given this sufficient weight. It seemed to the Tribunal that perhaps insufficient attention was given to the points which the claimant was trying to make both at the investigation and then at the disciplinary hearing in connection with his mental health and the impact this was having on his ability or rather his  
30 inability to perform all the functions of Head Chef as well as covering certain other duties that he might otherwise have delegated had there been more staff in the kitchen.

140. As Ms Barnett indicated, this was a difficult case given the overlay of the claimant's mental health issues which were clearly known to the respondent well prior to the incident on 15 April 2017. It is most unfortunate that, having originally been supportive of the claimant and the claimant recognising this, matters seemed to deteriorate following his being pressed by Mr Clark as to the reasons for his absence on 9 and 10 March 2017 when he met with him on 11 March 2017. It was not clear to the Tribunal that sufficient attention was then given to the issues that were arising as a consequence of the claimant's mental health issues. The Tribunal was alert to the fact that the respondent is an operator of a busy restaurant chain and it will have all sorts of management pressures on the Head Chef and the Restaurant Manager of the individual facilities. Nevertheless, it is unfortunate that had more attention been given to the claimant's mental health and his request for more kitchen staff been followed up then matters might not have come to a head on 15 April 2017 as they did.

141. In making the awards set out below for the complaint of unfair dismissal and of discrimination on the grounds of disability, the Tribunal has applied the law to the above findings of fact.

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#### **Unfair Dismissal - Quantification of the Award**

142. Turning to quantification of the award, in relation to the complaint of unfair dismissal the Tribunal has already concluded that it could not say that a reasonable employer acting reasonably in the circumstances would have dismissed the claimant for gross misconduct.

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143. The claimant's entitlement to a basic award based on his gross pay which calculated at the cap amounts to £2,934 based on 6 years' completed service and the claimant being aged 34 at the date of dismissal.

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144. Ms Barnett, very fairly, accepted that the claimant had not specified loss of statutory rights but she accepted that were the Tribunal to find the claimant was unfairly dismissed then this must be taken into account by the Tribunal and the figure she suggested was £350. The claimant was unfit to work from 5 17 May until 6 November 2017 which is a period of 25 weeks. The ongoing difference between his new employment and his previous employment was £1 50 per week. However, the Tribunal concluded that the claimant's ongoing loss should not continue beyond 6 November 2017 when he secured alternative employment as a Second Chef. It did so on the basis that the 10 claimant had decided that he was not fit to continue to carry the responsibilities associated with a role as Head Chef. The period from 17 May to 6 November 2017 is 25 weeks and so compensation for that period amounts to 25 multiplied by his net weekly pay on the basis that the claimant should be compensated for this period at the original rate of net pay of £450 15 per week. This gives a figure of £11,250. The Tribunal gave careful consideration to the fact that the claimant was unfit to work during this period. However, it concluded that the claimant should be awarded compensation for this period on the basis that it was satisfied that, but for his dismissal, the claimant would have remained in the respondent's employment and so would 20 have continued to earn his weekly wages. In reaching this view it took into consideration what is said in the IDS Handbook on Unfair Dismissal at Chapter 14.92 as follows-

:

25 *"in Dignity Funerals Ltd v Bruce 2005 IRLR 189, Ct Sess (Inner House), the Court of Session agreed with the Scottish EAT that the tribunal had erred in failing to give any satisfactory reason for its decision to make no compensatory award for the period between dismissal and the date of the hearing in a case where the employee who was dismissed for gross misconduct was diagnosed with reactive 30 depression, a condition from which he had suffered for five years before dismissal. The Court of Session noted, referring to Devine v Designer Flowers Wholesale Florist Sundries Ltd (above), that the tribunal should have decided 'whether the depression in the period*

*after the dismissal was caused to any material extent by the dismissal itself; whether, if so, it had continued to be so caused for all or part of the period up to the hearing; and if it was still caused at the date of the hearing, for how long it would continue to be so caused.\* In the absence of any proper basis of findings of fact, however, the EAT should not have substituted its own figure for the compensatory award but rather should have remitted the issue to the tribunal for consideration”*

5

10 145. Here, the Tribunal was satisfied that the claimant’s mental health was severely affected by his dismissal. The letter from his GP indicates that he was suffering from anxiety and depression. The claimant made efforts to find alternative work. He decided not to accept the two positions of Head Chef in other restaurants as he realised he was not sufficiently well to undertake

15 those responsibilities. Instead, when he was offered a position as Second Chef he decided to accept albeit this meant a reduction of £150 per week to his earnings. In reaching this view the Tribunal concluded that it would not be just and equitable to award the claimant the difference in earnings from 6 November 2017 to the conclusion of the tribunal hearing and the date of issue

20 of its judgment. It did so as it seemed to the Tribunal that while it is just and equitable to award the claimant compensation for the period from dismissal to 6 November 2017 as it was satisfied that the claimant’s mental health was seriously impacted by his dismissal, he gradually realised during the period from mid May 2017 onwards that he was not fit to undertake the demanding

25 role of Head Chef, hence he did not accept either of the offers made to him to do so in other restaurants. Instead, he chose to accept lesser responsibility as Second Chef. The Tribunal therefore concluded that the compensatory award should be limited to the period from 17 May until 6 November 2017 which is a period of 25 weeks.

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146. The Tribunal required to consider whether had their investigations not been flawed could the process have been completed in a fair way. Had it been, would there then be an appropriate just and equitable reduction in terms of

**Polkey.** In reaching a conclusion the Tribunal requires to take into account that had Ms McDevitt gone back to the claimant and set out what had been said by Mr Little and Mr Ross and then looked more closely at this, coupled with also having a discussion with the respondent as to why she was recommending dismissal, then there was a possibility that the dismissal could have been fair. The Tribunal concluded that on that basis it would have to say that the percentage likelihood of the dismissal process having been fair was that there would have been a 20% likelihood that the claimant's employment could have been terminated fairly. That reduction therefore has to be made when calculating the compensatory award.

147. The Tribunal also has to take into account whether the claimant contributed to his dismissal. The Tribunal concluded that he did and that the contribution was such that it would be appropriate to reduce the compensatory award by 55%. Where an employee and an employer are almost equally to blame there is case law to suggest it would be appropriate to find the contributory percentage to be 50%. In this case, the Tribunal concluded that the contribution was slightly more that of the claimant than the respondent and so it concluded that the claimant contributed to his dismissal to the extent of setting that at 55%.

148. The Tribunal also concluded that it is appropriate to reduce the award both in relation to the compensatory award as well as to the basic award as there are no particular factors to entitle the Tribunal to do other than to apply the reduction to both the basic and compensatory awards in terms of Section 122(2) and 123(6) of the 1996 Act.

149. In relation to the appeal hearing and the respondent's refusal to hold an appeal, the Tribunal noted that the claimant delayed in taking the appeal but there were grounds for him doing so given the state of his mental health. For whatever reason, the respondent chose not to go through that appeal process and the Tribunal concluded that it would be appropriate to make an

adjustment of 10% (the maximum is 25%) in relation to that failure in terms of Section 207A of TULR(C)A.

5 150. It was accepted by Ms Barnett that, in the event the Tribunal found in favour of the claimant, an adjustment to the award should be made in relation to the failure to provide written particulars in terms of Section 38 of the Employment Act 2002.

10 151. The Tribunal could find no reason not to make the maximum adjustment of four weeks as there was no evidence before it to explain why a statement of written terms had not been provided to the claimant. There is a requirement to make a minimum two weeks' award. Here the Tribunal concluded that it should make the maximum award which is the sum of £450 x 4 weeks which gives a figure of £1,800.

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152. It is also relevant to record that the claimant was not in receipt of benefits and accordingly the Recoupment Regulations do not apply to the Monetary Award, (see below).

20 **Quantification in respect of the Discrimination Complaint**

25 153. In relation to the complaint of discrimination and an award of injury to feelings, the Tribunal noted all that was said by the claimant and Ms Barnett. It concluded that it would be appropriate to award the sum of £11,000 which is a figure at the low end of the mid-range of *Vento*. It did so by taking into account the Presidential Guidance as to claims presented before 11 September 2017. The Tribunal has a discretion as to how much to award and, in this case, it concluded that an award of £11,000 is an amount that is fair, reasonable and just compensation in this case. The Tribunal concluded that  
30 an award at this level is an appropriate amount to make by way of compensation for injury to feelings in respect of the impact on him of the respondent's treatment towards him. The award is for compensation to the claimant not as punishment to the respondent for the way in which they dealt

with him in the knowledge of the mental health issues which affected him, particularly in the latter stages of his employment with them.

154. Next, the Tribunal concluded that it should uplift this award by 10% in accordance with *Simmons*. This give an amount of £1,100 (i.e. 10% of £11,000). Adding on the 10% uplift gives a figure of £12,100 for injury to feelings, (i.e. £11,000 plus £1,100).

As indicated above, in reaching its decision to make an award for injury to feelings the Tribunal reminded itself that, when exercising its discretion to make an award, any such award is intended to compensate the injured party and not to punish the guilty party. The claimant's evidence about the effect of his mental health on his ability to perform his work was compelling. He did not seek to over emphasise the difficulties he was facing in performing his role. The Tribunal could well see why he allowed various administrative duties to get on top of him and that working in a pressured environment of a busy kitchen restaurant he was not able to cope.

155. The Tribunal has therefore concluded that it should make an award for injury to feelings and to do so by awarding a sum that reflects the injury to feelings suffered by the claimant as a result of the respondent's treatment of him. Had more attention been paid to his requests for more kitchen staff by the respondent's senior management taking active steps to recruit more staff then the claimant might have been able to perform to the standards which he had previously achieved in his role as Head Chef. In light of the guidance from *Vento* and *Da'Bell* the Tribunal had to decide which category to use in relation to this award. It concluded that it was appropriate to make the award at the low end of the middle band. As indicated above it took account of the Presidential Guidance. In doing so, the Tribunal decided to award the claimant £11,000. In so doing, the Tribunal has fixed an amount which it considered is an appropriate level by way of compensation for injury to feelings in respect of the impact of the respondent's treatment of the claimant.

156. In terms of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 the Tribunal required to consider whether to make an award of interest in relation to the award of injury to feelings. It concluded that it should do so. The Tribunal has to consider doing so without the need for an application by either party.
- 5
157. In terms of Regulation 3 interest is calculated as simple interest which accrues from day to day. The rate of interest is fixed by section 9 of the Sheriff Courts (Scotland) Extracts Act 1892, that is eight per cent.
- 10
158. Regulation 6 sets out the rules for calculation of interest. There is a provision for a tribunal to depart from the rules where it is of the opinion that a serious injustice would be done if the rules were applied. Here, the Tribunal was not of the view that this would happen.
- 15
159. For injury to feelings the period of an award of interest starts on the day of the act of discrimination complained of and ends on the day that the Tribunal calculates the amount of interest.
- 20
160. Regulation 7 provides that written details must be given of the calculation of interest.
161. The Tribunal concluded that it should award interest at the rate of eight per cent per annum from the date of dismissal being 17 May 2017 to the date of this judgment being 7 March 2018. It is therefore calculated as  $\text{£}12,100 \times 8\% \times 295/365$  days which gives a figure of  $\text{£}782.36$ . This is added to the award of  $\text{£}12,100$  to give the sum of  $\text{£}12,882.36$  which is the award made in relation to injury to feelings, inclusive of interest.
- 25
162. It is relevant to record that no update was provided by the respondent in relation to their paragraph numbered 44, (see above) in their written submission.
- 30

163. The awards are set out below in tabular form.

**Unfair dismissal**

5	<b>Basic Award</b>	£2,934.00
	Less 55% contributory fault (Section 122(2)) of ERA	£1,613.70
		<b>£1,320.30</b>
10	<b>Compensatory Award</b>	
	Loss of Statutory Rights	£350.00
15	Loss of Earnings 25 weeks at £450	£11,250.00
	Sub total	£11,600.00
	Polkey reduction of 20% (Section 123(4) of ERA 1996	£2,320.00
20		£9,280.00
	Increase of 10% for respondent's failure to comply with the ACAS Code (section 207A of TULR(C)A)	£ 928.00
25		£10,208.00
	Adjustment of 4 weeks' pay (Section 38 EA 2002) £450 x 4	£1,800.00
		<b>£12,008.00</b>
30	Less 55% contributory fault (Section 123(6) of ERA 1996)	£6604.40
		<b>£5,403.60</b>

