Case No: 2500012/2021

EMPLOYMENT TRIBUNALS

Claimant: Miss G A Cairns

Respondent: Daemma Trading Ltd T/a Cash Converters

Heard at: Newcastle (CVP) **On: 29-31 March 2022**

Before: (1) Employment Judge A.M.S. Green
(2) Mr R Dobson
(3) Mr R Greig

Representation

Claimant: Ms N Twine - Counsel
Respondent: Ms S Harkins - Consultant

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claimant's claim for constructive unfair dismissal is well founded. The respondent will pay the claimant £29,029.60. The prescribed element is £20,614.60. The prescribed period is 1 December 2020 to 10 April 2022. The balance is £9,240.25.

2. The claimant's claims for discrimination arising from disability and failure to make reasonable adjustments are well founded. The respondent will pay the claimant £49,007.25.

REASONS

Introduction

1. For ease of reading, we refer to the claimant as Miss Cairns and the respondent as Cash Converters.

2. Miss Cairns presented her claim form to the Tribunal on 30 December 2020 claiming constructive unfair dismissal, disability discrimination and holiday pay. This followed a period of early conciliation which started on 11 December 2020 and ended on 17 December 2020. The employment dates given in her claim form are 1 November 2009 to 1 December 2020. She subsequently withdrew her holiday pay claim.

3. We conducted a CVP remote hearing and worked from a digital bundle comprising 544 pages. The following people adopted their witness statements and gave oral evidence:

    a. Miss Cairns;

    b. Mr G Mackay;

    c. Mrs G Cairns;

    d. Mr G Lowes;

    e. Mr R Pilgrim;

    f. Mr P Harrison.

    We also had a statement from Mr P Dunn. He did not adopt the statement and was not present to give evidence. We have considered it.

    In order to accommodate Miss Cairns' anxiety, stress, and depression, we were requested to allow her to give evidence using an audio channel only without anyone from Cash Converters watching her give evidence. In other words she would switch off her video camera, and we would not be able to see her giving her evidence. We would only hear her. Eventually we decided that, in accordance with the overriding objective, the most appropriate reasonable adjustment would be for Miss Cairns to give her evidence using the video and oral channel on the CVP platform. The Tribunal and the representatives would switch off their cameras while she was giving her evidence. No one from Cash Converters would be permitted to observe Miss Cairns giving her evidence. In this regard, we were guided by the relevant sections of the Equal Treatment Bench Book. We also allowed Miss Cairns to take regular breaks every 30 minutes. Ms Twine and Ms Carmichael exchanged written representations at the end of the oral evidence and provided copies of these to the Tribunal. Given that they were very extensive, we agreed that there was no need to hear oral submissions.

4. The Equality Act, section 136 ("EQA") provides that once Miss Cairns has proved facts from which the Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof 'shifts' to Cash Converters to prove a non-discriminatory explanation. In the context of a claim of discrimination arising from discrimination, in order to prove a prima facie case of discrimination and shift the burden to Cash Converters to disprove her case, Miss Cairns will need to show:

a. that she has been subjected to unfavourable treatment;

b. that she is disabled, and that the employer had actual or constructive knowledge of this;

c. a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment;

d. some evidence from which it could be inferred that the 'something' was the reason for the treatment.

5. If the prima facie case is established and the burden then shifts, Cash Converters can defeat the claim by proving either:

   a. that the reason or reasons for the unfavourable treatment was/were not in fact the 'something' that is relied upon as arising in consequence of Miss Cairns' disability; or

   b. that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

6. Miss Cairns must establish her claims on a balance of probabilities.

7. In reaching our decision, we have carefully considered the oral and documentary evidence and the representatives' written submissions. The fact that we have not referred to every document produced in the bundle should not be taken to mean that we have not considered it.

The Claims

8. Miss Cairns claims to suffer from stress, anxiety, and depression. Cash Converters accept that she has a mental impairment, but she was not disabled at the material time.

9. The claims are set out in the original claim form and in further and better particulars ("FBPs"). Miss Cairns is claiming:

   a. Constructive unfair dismissal pursuant to the Employment Rights Act 1996, section 95(1)(c) ("ERA");

   b. Discrimination arising from disability pursuant to the EQA, section 15; and

   c. Failure to make reasonable adjustments pursuant to EQA, section 20.

10. Cash Converters denies liability.

The issues

11. The parties have agreed a list of issues which the Tribunal will determine. These are as follows.

Constructive unfair dismissal

12. Repudiatory breach - did Miss Cairns suffer a repudiatory breach of contract entitling her to resign – having regard to acts/ omissions in the FBPs at paragraph 11 [50/11a-gg]?

13. What was the most recent act (or omission) on the part of Cash Converters which Miss Cairns says caused, or triggered, her resignation? Chronologically it was the invitations to a Some Other Substantial Reasons ("SOSR") meeting.

14. Has Miss Cairns affirmed the contract since that act?

    a. If not, was that act (or omission) by itself a repudiatory breach of contract?

    b. If not, was it nevertheless a part of a course of conduct comprising acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

15. In considering the acts and omissions relied on:

    a. Are any of the instances of unfavourable treatment complained of by Miss Cairns at paragraph 11 of the FBPs [50] time barred?

    b. Do the instances of unfavourable treatment form part of a continuing course of conduct?

16. Did Miss Cairns resign in response (or partly in response) to that breach or course of conduct?

Disability

17. Cash Converters accepts Miss Cairns suffers mental impairment of stress, anxiety, and depression.

18. Is Miss Cairns' mental impairment long term?

    a. If yes, from what point in time?

    b. Does the impairment have a substantial adverse effect on Miss Cairns' ability to carry out normal day to day activities pursuant to EQA, section 6?

    c. If yes, from what point in time?

19. Could Cash Converters have reasonably been expected to know of Miss Cairns' disability?

Discrimination arising from disability (EQA, section 15)

20. Did Cash Converters treat Miss Cairns unfavourably because of something arising in consequence of her disability?

21. If so:

a. What was the unfavourable treatment complained of? Miss Cairns relies on the 33 acts in the FBPs at paragraph 11 [50/11].

b. What was the something arising in consequence of Miss Cairns' disability? Miss Cairns relies on the following in particular, set out in the FBPs at paragraph 14 [55/14]:

   i. Miss Cairns' anxiety;

   ii. Miss Cairns' way of expressing her views/ opinions due to anxiety;

   iii. Miss Cairns' fear of further bullying on return to work ("RTW");

   iv. Miss Cairns' sickness absence;

   v. Miss Cairns' inability to commit to a RTW date;

   vi. Miss Cairns' inability to engage more in RTW discussions;

   vii. The adverse reaction of Miss Cairns to Cash Converters' correspondence.

22. Was Cash Converters' treatment (including dismissal) a proportionate means of achieving a legitimate aim? Cash Converters relies on the potentially legitimate aim of combatting absenteeism, pleaded in the Response to the FBPs at paragraph 18 [64].

23. If so:

a. What was Cash Converters' aim?

b. Was it legitimate?

c. What means did Cash Converters use to achieve that aim?

d. Were those means proportionate?

Failure to make reasonable adjustments (EQA, section 20)

24. Did Cash Converters apply any Provision Criterion or Practice ("PCPs") which put Miss Cairns at a substantial disadvantage compared to a person who is not disabled (EQA, section 20)?

25. The PCPs asserted are [56/18]:

a. Involving the same managers in the absence process;

b. Standard/ blunt correspondence to absent employees;

c. Managing absence by strict adherence to policies and seeking a RTW date;

d. Requirement to maintain a consistent attendance at work failing which the employee would be subject to disciplinary sanctions;

e. Dealing with allegations of internal bullying by making firm conclusions as to whether Cash Converters believed the bullying had occurred and/ or seeking corroborative evidence;

f. Dealing with perceived conduct issues or breakdowns in a relationship by formal disciplinary process or meeting;

g. Dealing with absence by way of formal capability process not tailored;

h. Informing employees in letters inviting them to a formal meeting that decisions will be made in their absence.

26. Did Cash converters know, or ought Cash converters reasonably to have been expected to know, that Miss Cairns was suffering from a disability and that the PCP would have put her at a substantial disadvantage because of it?

27. Miss Cairns relies on substantial disadvantage set out at FBPs [57/20 a-d], summarised as:

    a. Substantial disadvantage because of anxiety and fear about (i) further bullying on RTW (ii) intentions or motivations of Ms E Lynn/Mr G Lowes (or Cash Converters generally) in managing the absence process and (ii) the possibility of losing her job;

    b. Substantial disadvantage as Miss Cairns was more likely or was susceptible to:

        i. Feel somewhat conscious about the intention behind Cash Converters' letters;

        ii. Expect more pro-active approach to questions and queries and the assistance she required once she raised that she felt bullied;

        iii. Have a prolonged absence or find the prospect of RTW more difficult;

        iv. Find formal attendance meetings (in particular managed by Mr Lowes) difficult;

        v. Find a lack of empathy or compassion unhelpful and distressing.

    c. Substantial disadvantage as Miss Cairns' inability to engage meant she was at greater risk of dismissal than an employee not suffering her mental health condition.

28. Cash Converters relies on the fact that the PCPs did not put Miss Cairns at a substantial disadvantage because the PCPs treat disabled and non-disabled in the same way, pleaded in the Response to the FBPs at paragraph 17 [64].

29. Did Cash Converters take such steps as was reasonable to have taken to avoid the disadvantage(s)? Did it take any steps?

30. Was Cash converters under a duty to make reasonable adjustments of the kind described at paragraph 4 of the FBPs [47], namely:

    a. Between 26/11/19 and 2/11/20, removing Mr Lowes and Ms Lynn from the absence review process;

    b. Between 26/11/19 and 24/11/20 adopting more sensitive and less accusatory language in correspondence;

    c. Between 26/11/19 and 24/11/20 proposing or completing a stress risk assessment;

    d. Between May/ June 2020 and 24 November 2020 proposing or developing a workable RTW programme;

    e. Between May/ June 2020 and 24 November 2020 appointing a mentor or providing C with other opportunity to discuss matters informally;

    f. Between July 2020 and 24 November 2020 providing training and awareness on bullying/ mental health in the workplace;

    g. In November 2020 delaying the proposed termination of Miss Cairns' employment for SOSR.

Findings of fact

31. Cash Converters is the trading name of Daemma Trading Ltd. It is a franchise outlet and forms part of a chain of second-hand shops with over 700 stores across 21 countries worldwide. In the United Kingdom there are more than 200 shops, comprised of franchise outlets and corporately owned shops.

32. The following people at Cash Converters are relevant to Miss Cairns' claims:

    a. Mr David Thomson is Cash Converters' franchise owner. He was the subject of Miss Cairns' grievance.

    b. Ms Emma Lynn is Head of Compliance and Administration. She was the subject of Miss Cairns' grievance.

    c. Mr Gary Lowes is the Operational Manager. He was the subject of Miss Cairns' grievance.

    d. Mr Richard Pilgrim is the Operations Director. He investigated and determined Miss Cairns' grievance;

    e. Mr Paul Harrison is the Area manager. He dealt with Miss Cairns' appeal against her grievance decision.

33. According to her contract of employment [65], Miss Cairns started her employment at Cash Converters on 23 November 2009. Her contract also provided the following, amongst other things:

    a. Her job title was “manager”.

    b. Her normal place of work was the North East stores however, she might also be required to work at other stores or locations as reasonably required or at any future site within reasonable travelling distance of the above address.

    c. Her normal hours of work were 38.75 per week. Her normal days and hours of work were Monday to Saturday from 9:30 AM to 5:30 PM inclusive of a 30-minute unpaid lunch break with a rota day off. She was expected to keep her working hours flexible to a reasonable extent and at times, the needs of the business will require her normal working hours to be modified.

34. Cash Converters has a sickness absence policy [88]. It provides, amongst other things:

    Disabilities

    We are aware that sickness absence may result from a disability. At each stage of the sickness absence meetings procedure (set out in paragraph 13 of this policy), particular consideration will be given to whether there are reasonable adjustments that could be made to the requirements of the job or other aspects of working arrangements that will provide support at work and/or assist a return to work.

35. Miss Cairns had originally started working for Cash Converters on a temporary basis over the Christmas period at the Byker store. Her role then became permanent. In April 2011, Miss Cairns took up a new role as Assistant Manager in the new Wallsend shop. She oversaw the fit out of the shop. In April 2013, Miss Cairns agreed to work as a manager in the Glasgow store. She was not contractually obliged to do this and lived in Glasgow Monday to Friday which was agreed to by Mr Thomson. She was initially told that this would be for 4 weeks but in fact the secondment lasted 4 months. Glasgow was one of the busiest stores and had more than double the staff than the Wallsend store. We note in paragraph 3 of her witness statement that Miss Cairns says that she did a good job and Mr Thomson asked her if she wanted to permanently relocate to Glasgow to become the store manager there. She did not want to do that because it would mean moving away from her home. In September 2013, Miss Cairns returned to Newcastle to manage the central Newcastle store in Clayton Street which was the flagship in the North East. This evidence went unchallenged, and we have no reason to doubt it. In her statement, she says that the store was consistently the most profitable in the North-east whilst under Miss Cairns’ management. This evidence was not challenged under cross-examination, and we have no reason to doubt what is being said.

36. In 2016, Miss Cairns started a relationship with Mr Galvin Mackay who, at the time, was Cash Converters’ Operational Manager.

37. Mr Mackay's employment with Cash Converters terminated in August 2019 following a settlement agreement.

38. On 5 September 2019, Mr Lowes wrote a "letter of concern" to Miss Cairns [113]. It said, amongst other things:

> *This letter is written in response to your email request of 19th August 2019 within which you ask to be permitted Saturday's off shift due to childcare commitments.*
>
> *In the first instance your request is declined not least on account of the fact that your position of Store Manager is one with managerial responsibility and it is wholly unacceptable that you would not be working on site on weekend days when all other staff are required to work a rota system in this regard. Furthermore, to my knowledge you are not a primary carer of any dependant and equally you are not a parent with primary care duties. In such circumstances, I am not willing to grant your request.*
>
> *It is relevant to note that historically you appear to have taken Saturday's off on a frequent and continuous basis, records show that you have failed to work on a Saturday for a substantial period of time. It is equally noted that approval for these days were granted by former Operational Manager Mr Galvin Mackay, your partner. It is clear that in granting permission for you to take these days off that Mr Mackay was acting in breach of company policy; without authority to depart from company policy and to the detriment of other staff. For the avoidance of doubt, you are not permitted Saturday as a regular day off and you will be expected to work on these days. Failure to report for work on these days will be considered as a deliberate failure on your part to follow company procedure and disciplinary action will be invoked against you which, depending on the circumstances, may be considered as gross misconduct.*
>
> *For the sake of completeness, and in view of the recent departure of Mr Galvin Mackay, I believe it is appropriate to also bring to your attention other matters of concern in relation to your work contribution, attitude, adherence to company policy and your overall demeanour.*
>
> *It is accepted, given your personal relationship with Mr Galvin Mackay that you may be aware of all, or some of the circumstances leading to the termination of his employment; in regard to yourself specifically, it is known that he permitted you to arrive for work beyond that of your normal start time and to leave work before your normal finish time without reprimand or deduction of wages. He also allowed you days off to without considering others despite his approval being unreasonable and in breach of company policy. He is known to have not logged all of your annual leave requests distorting the true reflection of your accrued but untaken leave entitlement. Furthermore, he has allowed you to attend your place of work without wearing branded company clothing and turned a blind eye to your overall attitude and demeanour which is considered disrespectful, undermining, arrogant, privileged and wholly unacceptable.*

Whilst your own actions in the aforementioned are considered culpable, it is accepted that Mr Galvin Mackay has contributed to and equally condoned your actions, it is for this reason that I consider it appropriate to bring my concerns to your attention in order to ensure that you are clear of company expectations and fully understand what is considered acceptable and unacceptable behaviour. To be clear, your actions to date are not considered acceptable and an immediate and maintained improvement is required.

Turning to each element currently causing me concern;

Working Hours

As you are aware, your normal working hours are 9.30am to 5.45pm Monday to Saturday and you are expected to attend work in good time in order to be able to start at your start time not after your start time. Persistent lateness will be dealt with in accordance with the disciplinary policy and early departure without permission will be considered as unauthorised leave will will be considered as gross misconduct.

Contribution

Having reviewed buys staff performance and retail staff performance reports covering the first half of the year (1st Jan to 30th June) for all stores on the area, it is clear that tasks undertaken by you are minimal, this causes an obvious cause for concern and raises questions as to what you are actually doing during your working day. For the avoidance of doubt, you are expected to at least be in line with the average of other managers across the area which is 69 transactions per week. Currently the highest weekly average is 143 transactions, and you are bottom with only 23 transactions per week. Another way of analysing this is that across the area, on average, 19.5% of all deals (buys, buybacks & sales) in stores are done by the manager. Only 5% of Newcastle's deals are done by you.

Annual Leave

Having viewed timesheets and payment of monies made in your salary payments it appears that you have exhausted all of your annual leave entitlement for this year despite not yet fully accruing your full entitlement. Please note therefore that any future leave requests are unlikely to be granted and any leave required during periods of shop shutdown will be unpaid.

Dress Code

It has been recognised that you fail to wear company branded clothing as part of your dress attire to work, this is a breach to company policy and is wholly unacceptable. If you attend your place of work without the proper attire you will be sent home without pay in order to change and asked to return to work wearing the proper attire.

Overall Attitude

Dealing finally with your overall attitude and demeanour. As mentioned your behaviour is considered as disrespectful, undermining, arrogant and privileged. This viewpoint is my own and shared by other members of the management team who have witnessed your behaviours at various times. My viewpoint is not a matter open to discussion or one to be disputed by you. As your employer I am confirming, as a matter of fact, that your behaviours are unacceptable and that an immediate and sustained improvement is required. You should at all times, treat your colleagues and management alike with the utmost of respect and dignity.

I consider it appropriate to bring my perspective of matters to your attention in order to provide you with reasonable notice of my expectations and the need for you to improve as indicated. At this time, I am content not to proceed with formal disciplinary action, as I feel that it is appropriate in view of the circumstances to clearly highlight the Company's thought process and expectations of you going forward. Therefore, this letter is to be treated as confirmation that I have discussed my concerns with you; I hope that you will accept responsibility and will make every effort to address the issues I have identified.

As advised, this letter is not intended to be a formal warning and does not form part of the Company's disciplinary procedure. It draws a point in time at which I have informed you that I require an immediate and sustained improvement in the areas that I have discussed and as such consider this to be a reasonable written management instruction not to repeat this conduct in the future.

Although this letter does not constitute any formal warning, should I fail to see the necessary areas of improvement and you continue in the same domain as you have until now, the Company will consider your actions as intentional and an act of gross misconduct, consequently, you may be subject to formal disciplinary action up to and including dismissal. A copy of the Company's disciplinary rules and procedures can be found in the Company Handbook, located in the main office, for you to refer to.

If you have any queries regarding the content of this letter, please do not hesitate to contact me.

Yours sincerely

39. Mr Lowes told the Tribunal that the opinion expressed about Miss Cairns' overall attitude was not only his viewpoint but also something that was shared by others in management. He said that it was something that had been discussed and was widely known across the other stores and it was something that had been going on for months, even years and pressure had been building up because of the relationship that she had with Mr Mackay. He said that the management team had spoken about it periodically. Mr Lowes also told the Tribunal that he had decided to issue the letter of concern rather than instigating formal disciplinary action against Miss Cairns because "we did not want that, we knew these things happened in the past, we wanted to draw a line in the sand and get to behave like the other managers". Given the serious nature of

the allegations particularly with regard to her overall attitude and the fact that the letter expressly stated that she had no right of reply, we consider the approach taken to be harsh bordering on oppressive. The same outcome could have been achieved with disciplinary action and it would have enabled Miss Cairns to put her point of view across. She was denied that opportunity.

40. On 9 September 2019, Miss Cairns submitted a sick note to Cash Converters. She was signed off sick for two weeks with stress and anxiety.

41. On 16 September 2019, Miss Cairns submitted a sick note to Cash Converters [297]. She was signed off sick until 30 September 2019 with low mood, stress, and anxiety.

42. On 30 September 2019, Miss Cairns submitted a sick note to Cash Converters [298]. She was signed off sick for 8 weeks with depression.

43. On 21 November 2019, Miss Cairns submitted a sick note to Cash Converters [299]. She was signed off sick for 6 weeks with low mood, stress, anxiety.

44. On 26 November 2019, Mr Lowes invited Miss Cairns to attend an absence review meeting to take place on 11 December 2019 [142]. In that letter, Mr Lowes said, amongst other things:

> *The meeting will be held in accordance with the Capability Policy, this means that a possible outcome to your meeting will be the issuing of a formal warning for unsustainable levels of absence.*

45. On 2 December 2019, Miss Cairns replied to Mr Lowes in an email [114]. She said amongst other things:

> *As you know I am currently off ill due to work related stress anxiety and depression with a Doctor's note taking me up until the 6th of January 2020. My current state of mental health will not enable me to attend the meeting as my levels of anxiety and stress are extremely high. I am willing to ask my GP to clarify that I am not well enough to attend when she returns from annual leave next week if needed. I can discuss any additional issues about my health upon my return to work as and when my GP agrees I am well enough to return.*

46. Mr Lowes replied to Miss Cairns' email on 2 December 2019. He noted that she was unable to attend the absence review meeting and then said that her medical certificates did not state that her absence was due to work related stress and went on to say:

> *… But in any event and on the basis you suggest this is a contributing factor it is clear that such matters will not lessen until we have an opportunity to discuss the specifics of your source of perceived work related contributing factors.*
>
> *Accordingly, please confirm if you are willing to attend a meeting off-site at a mutual location and away from your place of work. Alternatively, please do provide further correspondence from your GP to include your GP's opinion as to why discussions in facilitating your return to work would be inappropriate at this time.*

47. On 4 December 2019, Miss Cairns emailed Mr Lowes [115]. She told him that she had contacted her GP head of practice who advised her not to attend because of her current health either in Gateshead (where Mr Lowes was based) or at a different venue. She confirmed that she had made an appointment with Dr Gooding and would be happy for Mr Lowes to follow the normal protocol to obtain her records relating to her current health.

48. On 5 December 2019, Mr Lowes emailed Ms Julie Barnett of Holly Blue for advice on next steps [115]. Holly Blue are an HR and employment law consultancy retained by Cash Converters. They are not a firm of solicitors.

49. On 11 December 2019, Mr Lowes emailed Ms Cairns responding to her earlier email of 4 December 2019 [144]. He said, amongst other things:

> *I write in response to your email of 4th December 2019 and wish to confirm that company policy has been invoked and adhered to in all instances in regard to your absence from work.*
>
> *As an organisation we are entirely entitled to invite you to attend an absence review meeting and given the circumstances and timing of your absence from work it is wholly appropriate that all parties make every effort in order to facilitate your return to work.*
>
> *In view of the comments passed by you please find attached a medical mandate which I expect you to sign and return no late than Tuesday 17th December 2019.*
>
> *Failure to return the form on time will result in a rescheduled absence review hearing being arranged which, should you also fail to attend will leave the company with no alternative but to consider your actions intentional and an act of gross misconduct, which will be dealt with in accordance with the company disciplinary procedure.*

50. Mr Lowes wrote to Miss Cairns' GP on 18 December 2019 [145]. He said, amongst other things:

> *We are writing to request medical information concerning the above-named employee. We believe our employee has visited your practice on a few occasions and that you are aware of the background to her absence from work.*
>
> *For ease of reference, I confirm that Gemma's life partner mutually left our employment following matters of underperformance. Gemma was subsequently informed that some changes to her own behaviours were required and reminded of obligation to properly follow internal policy and procedures. Gemma's absence from work commenced the day after we informed her of the improvement required and our expectations going forward.*
>
> *Gemma has indicated that she wishes to see any information before it is supplied to us. We have advised her to contact you with the 21 days to arrange to view the report. We have copied this letter to her.*

We enclose a list of questions which we would be grateful if you could deal with in your report.

51. These are the list of questions that the GP was requested to answer in their report:

> *1. The employee has indicated that she is absent due to stress at work and that she is unwilling to attend an absence review meeting with us. The intention behind the absence review meeting is to discuss how we can facilitate their return to work and look at ways of reducing the source of the employee's absence, in this instance the employee says her absence is related to work-related stress and therefore it is important that we meet with the employee in order to determine what assistance we can give to facilitate a return to work.*
>
> *2. Is there an underlying medical condition affecting the employee's performance or attendance at work?*
>
> *3. What is the likely timescale for recovery and when you anticipate a return to work?*
>
> *4. Please outline any measures which have been or are being taken to treat or correct the employee's illness. Measures include medical treatment of any kind in the use of any aids. Please indicate if these measures are continuing.*
>
> *5. If measures are being undertaken, please indicate what the effect of stopping those measures would be on the employee and in particular whether any improvement in the employee's health may be temporary (with the likelihood of a relapse or recurrence) or permanent.*
>
> *6. Do you anticipate that the employee will need to continue with any medication and/or medical treatment following their return to work? If so, please indicate whether the medication and/or treatment will affect the employee's ability to undertake their duties and/or necessitate any time off work, how much?*
>
> *7. Is the health problem likely to recur or affect future attendance?*
>
> *8. The employee's sickness pay is due to expire in 14 weeks. Do you consider it probable that the employee will return to work within this period?*

52. On 30 December 2019, Miss Cairns submitted a sick note to Cash Converters [300]. She was signed off sick for 6 weeks with low mood, stress, anxiety.

53. On 13 January 2020, Ms Cairns' GP issued their report [148]. It stated, amongst other things:

> *I have received your request for further information regarding my patient Gemma Cairns Medical problems that are preventing her from returning to work currently. I enclose copies of the relevant consultations for your information.*

I began seeing Gemma on the 9th September when she presented with severe anxiety due to her work-related stress. She was started on an anti-anxiety medication which will hopefully with time improve her anxiety symptoms. I would expect her to need to be on these medications continuously for at least 12 months, stopping these medications could be highly detrimental to her recovery. It is very apparent from our consultations that one of the overriding factors in Gemma's anxiety is her work situation. She feels unable to return to the work place and I feel that currently this is not appropriate for her to do so. I also believe that it could be very difficult the Gemma to attend face to face meetings currently with yourselves as it would trigger her anxiety symptoms which are very severe and include panic attacks.

I continue to assess Gemma on a regular basis and provide treatment. It is difficult to say how long she will take to respond to treatment and how long it will be before she will be fit to return to work and I continue to assess this on an ongoing basis at our review appointments. An average length of recovery for an episode of anxiety would be 6 months. It would be possible with therapy and medication Gemma could make a complete recovery but would be vulnerable to relapse in her condition if the stressful circumstances at work which triggered her illness were still present.

54. On 16 January 2020, Mr Lowes emailed Miss Cairns in the following terms:

Gemma,

I have been informed from your GP that they are waiting for you to attend the practice in order view your medical report before it is provided to us. Can I ask as a better of urgency that you make the time to attend to permit the release of the report?

I believe that timescales that have passed to date have been more than reasonable and that should you fail to act timeously in this regard in attending your GP in order to facilitate its return to us will amount to an unacceptable delay. In any event should you not view the document within a period of 21 days your GP will be permitted in law to provide it to us whether or not you have viewed the document.

Accordingly, you may wish to make the necessary arrangements in order to ensure you have sight of the document before it is received by me.

Thanks

Garry Lowes

Regional Support Manager

55. Miss Cairns responded to Mr Lowes in an email dated 16 January 2020 on the following terms:

Garry

> *I find the tone of the email quite offensive and intimidating as I had called my GP last week on 6/1st as I was getting concerned about the time scale and the GP told me she was dealing with it as work was delayed due to the Christmas period I only got a call from my GP on Monday 13/1 3pm to say it was ready to view. I was too ill with my anxiety to attend until Wednesday 15/1 when I viewed the report and agreed for it to be sent on. I have adhered to all the requested timescales and ask you to retract your email as it is adding to my stress. If there is any doubt about any time delays as I only was first told that the report was ready on Monday 13/1 please contact DR Gooding she only works at this practice Monday and Thursday.*
>
> *Gemma*

56. The medical report was sent to Mr Lowes on or around 18 January 2020.

57. On 25 January 2020, Mr Lowes forwarded a copy of the medical report to Holly Blue [117].

58. On 6 February 2020, Miss Cairns submitted a sick note to Cash Converters [301]. She was signed off sick for 6 weeks with low mood, stress, anxiety.

59. On 19 March 2020, Miss Cairns submitted a sick note to Cash Converters [302]. She was signed off sick for 4 weeks with low mood, stress, anxiety.

60. On 16 April 2020, Miss Cairns submitted a sick note to Cash Converters [303]. She was signed off sick for until 18 May 2020 with low mood, anxiety, and stress.

61. On 8 May 2020, Miss Cairns emailed Mr Lowes [150]. She referred to the fact that her current sick note was due to expire on 18 May and went on to say:

> *If I am fit to return then and the stores are still on lockdown what would the situation be for me? Will I be furloughed or laid off with a change of my contract to reflect that and my contract reinstated when the stores reopen. I have had no contact from company which is against furlough rules and has caused me additional stress.*
>
> *On a separate matter I have a grievance against the company can you supply me an address that I can post it out to?*
>
> *Thanks Gemma*

62. Mr Lowes responded to that email on 11 May 2020 [152]. He said, amongst other things:

> *I am pleased to hear that you appear to be moving towards better health. In the event that you are fit to return to work on or around the 18th May please inform us at your earliest opportunity. I confirm that the ongoing COVID-19 pandemic including the current restrictions imposed by the government continues to impact the business and at this time we remain unable to operate the business as normal. We are however actively*

working hard behind the scenes in order to assess how best we can adapt and modify in what may be restricted reopening. Whilst absolute prediction is not known at this time, it is known that any impending return will be on a reduced capacity.

Accordingly, should you be fit to return to work it is likely that we will provide work for you albeit this will be on significantly reduced working hours that at times may be as little as 5 hours per week. Any change in this regard will be automatically invoked in accordance with your contract of employment. Payment will be made only for the hours worked by you. As we will have work for you, you will not be eligible for furlough.

In response to your view that no communication has been made with you please note as a matter of fact that as your absence from work is attributable to your underlying ill health and you have not, at any point been placed on a period of furlough or considered for being placed on furlough, there is no requirement in which to communicate with you in this regard. It cannot therefore be said that rules have been breached.

It is relevant to note however that you have been invited to attend absence review meetings and declined to attend these meetings. We have made every effort to communicate with you in order to assist you in returning to your role and will continue to do so. It is equally relevant to note that your own efforts in regard to communication are rarely followed in accordance with company policy as on many occasions you have attempted to have your partner, a former employee of the Company communicate directly with Mr David Thomson and in all or many of these instances your representative has been redirected to ensure that you communicate in accordance with policy requirements as all other employees are required to do.

Any grievance should be submitted to myself as your line manager, in the current circumstances I suggest that this is sent electronically via email.

I trust this clarifies matters for you and I look forward to the possibility of your return.

63. Miss Cairns responded to that email on 11 May 2020 [153] and said, amongst other things:

In my opinion as my employer there is a lack of duty of care to inform me that I was not to be furloughed or laid off with a change to my contract or that there was even any work available.

Can you confirm that other employees are not on furlough and been encouraged to return to work for little as 5 hours a week? Or is it only myself? I can't understand the reasoning for asking me to return to work on one eighth of my standard hours when there is the option for me to be furloughed and receive 80% of my salary. I can only interpret this as another form of victimisation and bullying towards me from you or the company. Just to be 100% clear I am not rejecting the offer of return to work I am merely questioning the reasoning.

As you know I had one invite to attend a return to work interview on the 11th of December 2019 but was instructed by my GP not to attend due to my high levels of work related stress and anxiety. Since then I have had no communication re attending any other meeting since the request to obtain a medical report from my GP. I feel that there has been no effort from yourself to enquire about my illness or progress even though you state you have made every effort to contact me to assist me in any return.

I was unaware that your ex-employee had any contact with Mr Thomson as I have followed company procedure with regard to contact whilst off ill and my emails to yourself will confirm that. The only communication I have had during this period has been with you.

Due to the nature of the grievance and those involved I am not willing to email you this and request an address so I can send it recorded delivery. It is not standard process to send a grievance to your manager if they are indeed part of the grievance. Can I suggest Mr Pilgrims as he is not involved in the grievance I am raising.

64. Under cross-examination, Miss Cairns explained why she had raised the furlough issue notwithstanding that, at the time, she was signed off work because of her illness. She replied that she had heard nothing from Cash Converters, and it would have been courteous for them to have contacted her and she wanted to know where she stood. She accepted that Cash Converters was entitled to keep her on sick leave rather than furloughing her, but she then said that she had been given three different answers from them. She had been told that she would not go back to work or that she could return to work for five hours per week or that, according to government guidelines, if she was on sick leave, she could stay on sick leave. She found the message confusing and acknowledged that whilst there were many difficulties because of the pandemic and lockdown, she still believed that she should have been given a clear message. We agree, particularly given that she had heard nothing from Mr Lowes or anyone else at Cash Converters since 16 January 2020 (i.e. nearly four months).

65. Mr Lowes responded to that email on 13 May 2020 [154]. He said, amongst other things:

Whilst we appreciate that this is an unsettling and worrying time, we do not accept that there has been any lack of duty of care on our part in respect of informing you that you were not to be furloughed. To be clear, you have been on long term sick leave since 9th September 2019 and have continued to provide us with medical certificates in relation to your absence. The government's guidance was clear that those on sick leave or any other statutory leave should continue as normal. If you are not fit to work, you cannot be placed on furlough as furlough is for those who would have continued to work had it not been for the pandemic.

I can confirm that the vast majority of our staff are on furlough at the moment, save for those who are in a position like yourself and are on sick leave or other statutory leave. In view of the government's most recent announcement, we will look to assess how and when we can start

to reopen some of our shops, in line with the relevant restrictions and social distancing measures. At this moment, it is not clear what a return to work will look like, but any return will need to include members of the management team. In no way is this any form of victimisation or bullying against you as you allege, we are simply looking at how best to support as many of our staff back to work as possible as the business cannot sustain long term closure.

We appreciate that you are not rejecting to return to work, however, you can only return if you are fit to do so. Once you confirm if you will be fit to return to work on 18th May, we will confirm whether you would need to be placed on furlough for a period of time or if we require to ask you work at reduced hours.

In regards to your absence from work, please allow me to remind you of your own obligations to maintain regular contact with ourselves in accordance with the absence management policy. It is the case that you have made very few direct attempts to contact the company and effective communications requires all parties to participate. It is a matter of fact that you advised that our contact with you was adding to your stress and that is why you declined to attend our absence review meeting. Notwithstanding this, please know that it is not the decision of your GP to instruct you in regard to matters of your employment and such a decision appears perverse in view of the fact that the purpose of our meeting was to find a way to alleviate your stress. In any event, it was following this approach that your partner Galvin communicated directly with Mr Thomson to advise of your continued absences and based on those discussions it is not accepted that this was done without your knowledge despite your assertion in this regard. Our efforts to communicate with you have never ceased, we have simply tried to find a balance between helping you and giving you time to recover. Since this appears to be an area of discontent for you may I suggest that you email me directly on a 7 day basis to inform me of your wellbeing as this will facilitate effective and meaningful discussions and will, hopefully expediate your return to work.

66. Miss Cairns replied to Mr Lowes' email on 15 May 2020 [155]. She said, amongst other things:

I have contacted my GP who will speak to me on Monday as there are still no face to face appointments. I was starting to feel a little bit better however due to the content and tone of the correspondence this week my stress and anxiety has severely increased. As I am sure you can understand the thought of coming back to work for approximately half of the sick benefit I am getting now is making me very anxious about my financial stability which is already in a bad state, although I do understand that we are living in unprecedented times and that presents challenges for the business and this cannot be helped. However the tone of your emails which could be changed is accusatory, unsupportive and shows total lack of empathy for me. This tone is consistent throughout all verbal and written communication since the day you handed me the letter of concern. We haven't had much correspondence since you saw the medical report from my doctor and I was hoping you had realised the

severity of my situation and how much I need the support of my employer. I now realise that the medical report has clearly not had that effect on you so that is an unwelcome realisation which is causing grave concern.

With regards to my question about furlough the government advice on furloughing staff who are off sick clearly states that I can be furloughed albeit at the companies discretion. Therefore your statement that I cannot be furloughed appears at best ill-informed and at worst untrue. I feel that I am being singled out by not being furloughed along with all the other employees of Daemma Trading. This to me is another form of victimisation and bullying which has further increased my work related stress levels. It feels to me that yourself as line management are actively trying to force my hand and therefore force me out of the business by making my position unviable financially.

I am confused that your email on the 11th of May clearly states that I will not be furloughed however in your email on the 13th of May states if I do return on the 18th of May that you will confirm if I am now going to be furloughed or work at reduced hours. Also Can you please advise if I do return on your stated reduced hours will I be the only employee doing this or will other staff be returning on the proposed 5 hours a week?

I find your use of the word 'perverse' in relation to my GP advising me on matters of work humiliating. It is a fact that my GP's responsibility is to look after my health and advise me of the best course of action to reduce my stress and anxiety. Given that my stress and anxiety is work related it is clearly relevant for my GP to offer advice in relation to my work life and work environment. The fact you clearly do not understand this to the point where you would use a word as strong as "perverse" gives me serious concern about your ability to manage me through my current situation in co-operation with myself and my GP. I have been advised that after long term sick with work related stress the employer and employee need to agree a return to work plan which includes but is not limited to working hours and working duties. My GP will need to know what hours/duties I will be carrying on a proposed return to work to determine if I am capable of returning to work under those terms. The fact that this information is not available is clearly going to be a barrier to that discussion with my GP. Obviously any kind of uncertainty as to exactly what work I will be returning too is causing me serious anxiety as it would anybody who has been on long term sick with work related stress.

In regards to your comment on keeping in touch I have kept in contact at every stage of my illness after speaking to my GP and submitting my sick notes. I also refer to the staff handbook section's 43.3 (page 28) and 48.1 (page 30) where it states it is down to the line manager to contact the employee to ask about my progress. I have until this week not been contacted by you since you received my GP's report. As stated previously I was hoping you had realised the impact the tone of your communication was having following receipt of my medical report, but sadly I now know that is not the case. In answer to the point you raised in your previous email it was never the frequency of your

correspondence that was having a negative impact on my mental health it was the content i.e. the threats of negative outcomes and the total lack of concern for my wellbeing. However I have at no point asked you not to contact me. I did ask you to retract your email dated 16th of January because it was untrue in regards to not contacting my GP in an appropriate time. I have not received a response from you since that date regarding the email. If I was asked to keep in regular contact I would have. Thank you for your recent suggestion for me to contact you every 7 days to advise of my progress, I want to address that directly by stating I will not necessarily contact you every seven days but I will contact you when I feel that it will be constructive to my return to work and when I feel capable . Please be advised that you can reach out to me via email once a week if you want to.

My stress levels are at a peak so this communication is not going to have much further negative impact and I don't want this lack of contact to be held against me in a negative way.

I can confirm your efforts to contact me did cease on the 16th of January. I also confirm that you responded when you received my sick note with a brief one line response "received and understood" acknowledging that you have received. I would point out there was no mention from you about my progress or about any potential measures to aid my return to work. I also note in your letter of 26th of November 2019 a possibility of a meeting with occupational health but no offer since to assist me in that way. However I am aware that when I was last at work Daemma Trading did not employ anybody in this role. If somebody has now been appointed into the role or could be engaged on an ad-hoc basis I would be very keen to have contact with them in order to support me and aid my return to work.

In response to your repeated accusation that I was aware of any contact made to Mr Thomson by your ex-employee, I state again that it is untrue. It is fact that I was not aware. I resent the implication that I am lying about this as I do the implication of lying in many of your correspondences with me. This does not help my stress levels and I feel that you are doing this to deform my character.

67. On 18 May 2020, Miss Cairns submitted a sick note to Cash Converters [304]. She was signed off sick until 15 June 2020 with stress and anxiety.

68. Miss Cairns submitted a grievance to Mr Pilgrim in a letter dated 1 June 2020 [132]. Given the centrality of the grievance to her claims, it is important to set out what Miss Cairns was complaining about. She stated, amongst other things:

In late summer 2018 my partner Galvin Mackay was approached by the business owner David Thomson who suggested that Galvin should somehow remove me from my current role because he had heard gossip from other store managers suggesting my store was given preferential treatment. David Thomson also said although I was a good manager because the other managers had spread gossip to him he felt he had no choice than to relocate me or somehow get rid of me all together. This upset me and I started to panic over my future. Every subsequent visit by the owner put me in a state of high anxiety and stress at the threat of

losing my job or being relocated from the Newcastle store which I had built up to be a high performing store over a number of years. To my knowledge this was not investigated or evidence offered for me to question it was wholly based on perception and gossip.

I approached Emma Lynn the Head of Compliance and Administration to express my concern over my stores internet sales which had dropped significantly over a number of months between July and August 2019. The internet sales are usually distributed between stores but I had noticed a marked reduction in the amount allocated to my Newcastle store.(The Newcastle store internet sales dropped by 50% in that time whilst all other stores did year on year or exceeded year on year). Instead of the support and reassurance I was seeking I actually received incivility and hostility. This belittled me and made me feel like I had no support at all from management.

After Galvin Mackay left the business in late June 2019 Emma Lynn came into the store to collect mail. In light of the previous discussion Galvin Mackay had with David Thomson I raised my concern that I would be performance managed out of the business. This was never confirmed or denied by Emma Lynn. Her response was that I would have to "stop living a life of luxury and exist". This made me extremely upset as she had no grounds to make such a comment as it's not true even though this matches the alleged gossip from other managers to the owner. In my opinion the gossip could have only come from Emma Lynn as I had very little contact with other managers. This uncertainty caused me extreme stress and anxiety and I felt everyone was against me and making untrue statements without proof. This made me feel isolated from the company.

After Galvin Mackay left I know David Thomson visited Clayton Street on a least one occasion however he did not enter the store and just stared at it from the other side of the road this felt very intimidating as it felt that it was unusual behaviour by Mr Thomson as he would usually come into the store. On the occasion he did visit the store there was an obvious atmosphere by him towards me this made me very anxious which was noticed by other staff members.

In August 2019 I was informed that I was losing a member of staff and who would be replaced by a member of staff from the Byker store. I was told that he did something wrong in Byker but Garry Lowes the Regional Support Manager and Emma Lynn refused to tell me what the issue had been. I asked for his file to see for myself but I was never allowed access. When the Byker manager returned from his holidays he rang me and apologised. He stated he would never want to pass on his problems and that I should not trust the employee. I informed Garry Lowes what the Byker manager had told me and again expressed concern that nobody would tell me what he had done prior to being relocated. I also told Garry Lowes I was concerned about his pace of work to which Garry Lowes replied we will monitor it. The new member of staff requested a particular day off, I had to deny it due to staffing levels and he subsequently rang in sick on the day requested as leave. He was then invited to a disciplinary on the 23rd of August 2019 which was held by Garry Lowes and Emma Lynn. I was not informed of any

outcome but was just sent a letter to print off to give to him. This made me feel undermined and belittled again. As a store manager I believe I should be informed on outcomes for my staff to allow me to manage them accordingly and effectively.

On the same day at 5.20pm just before I was due to go on a few days leave Garry Lowes called me stating that during the disciplinary the employee had said I was telling my staff about his poor performance and speed of work. I advised Garry Lowes that I would never do that. At this point I felt that Garry Lowes was speaking derogatively towards me as he repeatedly insinuated I was lying. This made me feel extremely upset. I could not believe that someone with such a short and tarnished service within the company would be believed over myself with 10 years' exemplary service. He then told me that I should be disappointed with myself and my team. At this stage I was crying whilst on the phone. When asked if I was ok I told him no. I then had my few days leave which was totally ruined because I was that upset and stressed because the conversation had left me feeling very unsettled and added to my ongoing anxiety about my job security. Upon my return Garry Lowes did not ring to enquire about my welfare instead it was me that rang him to apologise that I got upset on the phone the previous Friday, again he didn't ask if I was ok showing a total lack of empathy and no duty of care.

On Thursday the 5th of September Garry Lowes and Emma Lynn turned up unannounced at 5pm again just before I was taking some leave. They looked around the store and complimented how great it looked. We went upstairs and had a general catch up for a few moments then Garry Lowes suddenly handed me an envelope (See attached 1. Letter of Concern) and said "You're not going to like this". Before I opened it he informed me of the new structure and how Garry Lowes and Emma Lynn were in charge. I turned to Emma Lynn and said this is exactly what I thought would happen. At this point I was upset, crying, shaking and shocked. Even in this distressed state Garry Lowes said we can just leave you with it and ring me with any questions. To me this was very unprofessional as they could see I was visibly in a state of extreme distress and panic. I started to read the letter and turned to Emma Lynn to engage in conversation when she told me that she was just there to observe. When I got to the section about me leaving work early that I commented that it was not just me who left early Emma Lynn became aggressive and screamed at me that she "hoped I was not referring to her". This made me feel very intimidated and I feel this level of aggression towards somebody who is visibly distressed, crying and on their own was totally inappropriate and exemplifies Emma Lynn's character. After reading the letter I said this was bullying and that it felt like it was a witch hunt but I got no response. There was a section of the letter that stated I was "disrespectful, undermining, arrogant and privileged" but no evidence to back it up. The letter also stated "my view point is not a matter for discussion or one to be disputed by you" essentially giving me no chance to defend my character. If this was peoples opinion of me I could not understand why I was being informed of this now, after 10 years of working for the company without any issues or concerns ever being expressed formally or informally. I asked many questions to which Garry Lowes said he "can't comment" or "did not know the answer". I asked for the policies stated in the letter but they

could not produce any evidence of any such polices. The letter contains concerns about my performance which brought into question my capability but I was not given any time to prepare a response or given advance notice that this was a capability meeting. I have since realised that I should have been given the opportunity to take a witness into the meeting with me. They then stood up and I commented that I thought at least one person in the company would have my back they didn't reply and just left me by myself in the room crying, shaking and visibly distressed. Neither of them tried to comfort me or ask about my wellbeing but instead I was left in a state of distress, shock and panic.

As a result of the actions described above I could not help but feel I was being bullied and victimised by Emma Lynn and Garry Lowes. I know certain sections of the letter could also be attributed to other managers but none of them have been reprimanded. I can also state I have attended managers meeting that all the managers agree about Emma Lynn's bullying attitude with some them even scared to phone her if they have an issue as they do not want to cross her and are intimidated by her and as they knew she would not focus her efforts on their stores by not selling stock on the internet. So this pattern of bullying by Emma Lynn has gone on for some time and this should be addressed. I am fully aware during my 10 years with the company that Emma Lynn has been reprimanded for her bullying attitude.

I rang Garry 9th of September 2019 informing him that I was on sick leave due to work related stress and advised him what medication I had been prescribed. I was not offered any support or care by him at this point all he wanted to know was a possible date of my return. A few days later I received a text from Garry Lowes asking when I would be handing in my sick note. He also asked if I could hand my store keys back. I was not asked about my wellbeing in that text showing a total lack of duty of care. Due to the level of my stress, anxiety and uncertainty about my job security I ensured that all sick notes were delivered on my behalf by hand addressed to Garry Lowes.

On the 26th of November I received a letter (See attachment 2 Request for Face to Face Meeting) inviting me to a return to work interview and informing me my failure to attend could result in disciplinary action. My stress levels were very high at this stage and this letter heightened that even further. I visited my GP who advised me not to attend. I emailed Garry Lowes on 2nd of December (See attached 3 GL letter acknowledging GC declining meeting) advising I couldn't attend because my stress levels were extremely high. He replied the same day stating that "none of my sick notes stated work related stress" and that he wanted to find out more about my "perceived work related stress issues". This upset me as it intimated I was lying to him even though I knew my medical records would state clearly it was work related stress. The email asked if they could contact my GP for a medical report if I wasn't attending the meeting. My GP advised me that they needed to follow proper protocol to obtain my records. On the 4th of December I emailed Garry Lowes stating my GP's advice on obtaining my records. (See attached 4 GC
response GP 4/12/19).

On the 11th of December Garry Lowes emailed me(See attached 5 GL response medical mandate), in my opinion the tone of the email is quite intimidating. It should also be noted that at this point Garry Lowes was fully aware I was suffering from work related stress and that one of the main causes of anxiety was fear of losing my job. The email demands me to fill in a medical mandate so they could obtain my records. Stating that if I didn't do what he was asking I would be invited to a disciplinary and if I failed to attend the meeting would still be conducted and could result in a charge of gross misconduct. Even though I was going to agree to the mandate anyway I still feel the tone of the email taking into account my ongoing work related stress issues was very unprofessional, inappropriate and showed a total lack of concern for my wellbeing. In my opinion this can only be construed as intimidating and bullying. This again increased my anxiety levels further. Can I then refer to (attachment 6 GL request to GP for medical report 18/12/19).

On the 16th of January 2020 Garry Lowes sent yet another intimidating email (See attached 7 GL email accusing GC of delaying medical report). demanding me to go and view my medical records before they were sent. Also stating they contacted my GP and they were told they were waiting for me to go to the GP to view the records. In fact it was ready on the 13th of January and was going to view it the following day but was unable to attend due to my stress and anxiety levels were that high. I did contact my GP on that day to inform I was too ill to attend and was told there was no rush. I attended the following day the 15th and agreed for it to be sent out.

I read Garry Lowes cover letter to the GP and he had no right to disclose to the GP that my partner had been dismissed. Firstly as it breaks data protection and secondly that it is untrue. I firmly believe that Garry Lowes was trying to influence my GP's assesment of my condition. This was confirmed by my GP on my next visit. I replied to Garry Lowes on the 16th of January (See attached 8 GC response to GL accusation) asking for him to retract his email on the 16th as I had not held up the process as stated. The fact it had been requested over the Christmas period and my GP only works on a Monday and Thursday had caused some delay to the production of the report. The report was only made available for me to view on the 13th of January and I had up to 21 days to view it. If I was trying to hold up the process I could have waited 21 days as opposed to going in on the 15th of January (See attached 9 GP Medical Report produced 13/1/20 but not sent until GC viewed 15/1/20). I also stated I felt the tone of the email quite intimidating. To date I still have not received a reply on this matter.

On the 8th of May 2020 I sent Garry Lowes an email (See attached 10 GC Sick note) that included my most up to date sick note and enquired that if I was able to return to work when it expired would I be furloughed. This prompted a response on the 11th of May 2020 (See attached 11 GL Response to Sick note and question). This email sent my stress levels back to where I started as it made me feel victimised as to my knowledge all Daemma Trading employees had been furloughed. I replied on the same day (See attached 12 GC response 11/5/20). Garry Lowes replied on the 13th of May 2020 (See attached 13 GL Response 13/5/20). This to me totally contradicted the email he sent to me on the

11th May 2020 and made me very upset again as Garry Lowes made me out as a liar. I replied on the 15th May 2020 (See attched 14 GL response 15/5/20) to highlight my concerns. As of yet I have not had a reply.

I raised this matter informally prior to me going on sick leave, but haven't been satisfied with the outcome. I informed Emma Lynn that I would be next to be exited from the company. Emma Lynn did not confirm or deny this and offered me no comfort or support over my concerns. I have been off ill since September 2019 and I have endured an incredible amount of stress and anxiety which impacts my daily life and have practically withdrawn from all outside contact. My financial status is poor due to only recieving SSP for the past 6 months which is resulting in additional stress.

I would welcome the chance to talk this through with you at a convenient time and place. I whole heartedly want to resume my role within the organisation but due to the way I have been treated and the total lack of empathy shown I am very anxious and fearful of how I will be treated when I returned to work. I genuinely feel if I had been offered support and some level of phased return I could have been back to work months ago. However I have received the exact opposite which has resulted in my stress and anxiety being increased. Every time I have had interaction with the managers who should be supporting me I have felt bullied, intimidated and more anxious and stressed.

69. Miss Cairns agreed that Mr Pilgrim would determine her grievance without a hearing.

70. Although Mr Pilgrim had some experience of investigating grievances, this was gained before he had been employed by Cash Converters. He was aware of the grievance policy in the staff handbook [105-108] but accepted under cross examination that he had not specifically referred to it during his investigation. He also admitted that Holly Blue provided advice to him on the conduct of the investigation. This was during the pandemic and Holly Blue modified the procedure to be followed. He also took advice from them about how to communicate with Miss Cairns. Holly Blue drafted the letters that were sent out and the body of many of the emails. They also wrote the grievance outcome letter. Mr Pilgrim identified the personnel at Cash Converters whom he needed to interview as part of the investigation. Under cross-examination, Mr Pilgrim admitted that at the time he knew that Miss Cairns was on sick leave because of her mental health. She was off work with stress. He also accepted under cross examination that when he received the grievance letter, the severity of her condition must have been apparent to him because she was saying that she had effectively withdrawn from all outside contact. He accepted that this was not something that someone suffering from mild stress symptoms would say and pointed to something much more serious.

71. Mr Pilgrim admitted under cross-examination that as part of his investigation he did not go back to Miss Cairns to clarify any of the issues that she had raised in her grievance, and he accepted that it would have been open to him at any point for him to do so. This points to a closed mind on the matters raised in the grievance.

72. We heard evidence on the structure, manner and process followed by Mr Pilgrim in investigating Miss Cairns' grievance. Mr Pilgrim was asked about a list of prepared questions which were submitted to Mr Thomson [170], Ms Lynn [171], Mr Lowes [172], Ms Church [176]. He said that he had not prepared these questions and they were not used as part of his investigation. These were used at the appeal stage by Mr Harrison. Mr Pilgrim explained that he used a separate set of documents for his investigation which have been produced [177-183]. Mr Pilgrim said that he conducted interviews and took notes but admitted that his interview notes had not been produced in the bundle. He said that he had conducted telephone interviews and had written notes in his notebook. The Tribunal asked if these notes could be produced. We were told that the notebooks in question were in Mr Pilgrim's office in Stockport. Mr Pilgrim was giving his evidence from his home in Shropshire. It was agreed that the office manager in Stockport would conduct a reasonable search for the notebooks as guided my Mr Pilgrim. We adjourned the hearing to facilitate this. The search was conducted but did not yield any of the notes that Mr Pilgrim took during the telephone interviews.

73. Mr Pilgrim explained he used the documentation referred to above which was revised to contain written responses from the relevant individuals. He thought that this process was transparent. However, he was taken to a statement produced by Mr Lowes [177] and he agreed under cross-examination that this was not a record of a conversation with him, but he suggested that it covered the points that had been discussed. It was further put to him that it was simply a response to each paragraph in the grievance letter and not a record of questions that Mr Pilgrim asked him with the responses given by Mr Lowes. Mr Pilgrim acknowledged that. The same also applied with the statement from Ms Lynn [184]. This did not record the conversation that he had with her. Mr Pilgrim agreed with that proposition. He also agreed under cross examination in that by submitting these pro forma lists of questions, he had obtained each of the individuals detailed responses after they had time to think about what they wanted to say, and he had not recorded when he raised the grievance complaints with them. This left the process open to the risk of contamination of evidence in that Mr Lowes and Ms Lynn and others could have colluded with each other before submitting their responses. It was put to him that whilst no one was suggesting that he should have conducted face-to-face meetings, but in order to have a transparent and fair process he should have made a record of what the witnesses had said during the interviews and whatever had written down, the Tribunal did not have the benefit of seeing what was written. There was nothing to stop Mr Lowes and Ms Lynn speaking to each other and coming up with an agreed response given the process that Mr Pilgrim had adopted. He also admitted that once he received the written responses, there was no further discussion with the witnesses about their answers. When he was asked whether any of the witnesses have been challenged in any way regarding their responses he replied, "I was satisfied with what they had said over the phone". He simply took their answers at face value. He also admitted that he did not ask Miss Cairns for her comments on the responses.

74. On 15 June 2020, Miss Cairns submitted a sick note to Cash Converters [305]. She was signed off sick until 29 June 2020 with stress and anxiety.

75. On 25 June 2020, Mr Pilgrim wrote to Miss Cairns notifying her that her grievance had not been upheld [217]. Holly Blue drafted the letter. He was cross examined about the reasons he gave for not upholding each of the grievances. We note the following:

    a. The first complaint was that Mr Thomson had requested Mr Mackay to dismiss Miss Cairns in 2018. Mr Thomson denied this. Mr Pilgrim accepted that denial. It was put to him that it was unlikely that Mr Thomson would ever have accepted what was alleged and Mr Pilgrim agreed with him.

    b. The second complaint regarded Ms Lynn's lack of support Miss Cairns in respect of Internet sales. Mr Pilgrim accepted what Miss Lynn said and he had not gone back to Miss Cairns for her to comment on this. He was asked why he preferred Ms Lynn's version of events over Miss Cairns'. He said "as previously stated, it was a matter of her word against the others. The claimant made the accusation but there was no further evidence." He then went on to say that Miss Lynn was very motivated to get the best out of her department and that she was responsible for online sales and wanted to improve Miss Cairns' performance. It was put to him that he had not actually said it was Miss Cairns' word against Ms Lynn's in the outcome letter. Instead he said:

        > *Emma did not believe that she was being unsupportive, hostile or negative towards you at any point during this conversation but stated that she would apologise if she came across that way as it was certainly not her intention. Furthermore, Emma denies that she ever made the comment "stop living a life of luxury and exist" to you or to any other member of staff. I was satisfied by Emma's responses that she was not hostile and belittling towards you and that she treated you as she would any other member of staff.*

        In other words, Mr Pilgrim simply took Ms Lynn's version of events at face value.

    c. The third complaint related to Miss Cairns' concerns that Mr Thomson had been waiting outside in Clayton Street which she found intimidating. In the outcome letter, Mr Pilgrim set out Mr Thomson's response and made the positive finding that he was satisfied that he was not seeking to intimidate Miss Cairns' or to create an atmosphere. He was asked how he reached that conclusion and he replied that it was what Mr Thomson had said to him. He was also asked whether this was his finding or Holly Blue's finding. He replied that it was his finding but using wording suggested by Holly Blue.

    d. The third complaint related to Miss Cairns' concerns about the employee called Tom who was relocated to her store and how she felt undermined by Mr Lowes and Ms Lynn. In the outcome letter, Mr Pilgrim said that there was no record of any evidence of intentional undermining by either of those people. He was asked under cross examination whether he considered undermining might have occurred even if it had been unintentional. He accepted that he had not considered that. It was also put to him that Miss Cairns felt undermined because, being a manager, it would have been reasonable for her to be given details about a staff

member being moved to her store. Mr Pilgrim accepted that. In the outcome letter, Mr Pilgrim also records that Mr Lowes did not think that he had spoken in derogatory way to Miss Cairns and denied that he had made insinuations. He then made the positive finding that Mr Lowes had not acted aggressively when he spoke to her or that he showed any lack of care. It was put to him that he had made this finding without any supporting evidence. Mr Pilgrim agreed with that. He was then asked on what basis he could reach that conclusion without any corroboration in his favour. He replied that he had assessed what he had in front of him and decided about what he believed, and he repeated that it was another example of "she said, he said" and it was for Miss Cairns to prove what had been said.

e. Under cross examination Mr Pilgrim acknowledged that the way in which the letter had been worded gave the impression that he had dismissed the grievance that she was a liar because there was lack of evidence. Instead, Mr Pilgrim had preferred Mr Lowes' account to Miss Cairns' account and he was asked once more what the rationale for that was. He replied it was because of the conversation that he had with him, that he knew Mr Lowes well and there was no previous evidence of him acting in that way. He said, "that would have influenced my decision". It was put to him in cross examination that what he was saying was that his friendship with Mr Lowes influenced his decision. Mr Pilgrim responded that it was his working relationship with Mr Lowes. He was then asked how he concluded that there were no previous complaints about bullying and harassment against Mr Lowes. He replied that was something that was not to his knowledge.

f. Regarding Miss Cairns' complaint about the letter of concern and the way it was handled by Mr Lowes and Ms Lynn, Mr Pilgrim made a positive finding that there was no evidence of bullying or harassment or aggressive behaviour towards Miss Cairns at the meeting when the letter of concern was handed to her. This was based on Mr Lowes and Miss Lynn's denials. In the outcome letter, Mr Pilgrim said the following:

> *Both managers have never had complaints of bullying or victimisation made against them before, and nothing in their statements led me to believe that they had acted inappropriately towards you.* [219]

g. Mr Pilgrim also admitted did not consider whether any complaints had been made against Ms Lynn in the past.

h. In the outcome letter, Mr Pilgrim referred to the letter of concern and said:

> *Whilst I accept that the content of the letter may have come as a shock to you, it was necessary for the Company to highlight its concerns and ensure that you were clear of its expectations of you going forward. Furthermore, it was not appropriate for both Gary and Emma to attend the meeting but as it was an informal meeting and the letter of concern did not form part of the Company's disciplinary procedure, there was no entitlement for you to bring a companion to that meeting.* [219]

Mr Pilgrim was asked under cross examination whether the letter of concern was reasonable in its content or tone. He replied that he had read the letter and understood that the content might have been upsetting but that Mr Lowes and Ms Lynn were within their rights to draw a line and to move things forward. He was asked whether he considered whether the paragraphs relating to Miss Cairns' attitude were reasonable. He replied, "I would have considered that". We found that a curious and an equivocal response.

i. Mr Pilgrim was taken to the letter of concern again and was referred to the section detailing Miss Cairns' overall attitude where it was stated that her behaviour was considered as disrespectful, undermining, arrogant and privileged. Under cross examination he said that this was reasonable but was then challenged about this in circumstances when no context was provided, or any examples of unacceptable behaviour and attitude had been given. He replied that he was aware of some of the issues and the points that had been made by Mr Lowes on the way that Miss Cairns had been conducting herself in the store. When Mr Pilgrim was asked whether this was a reasonable statement for a manager to make about an employee he replied, "I know that the letter would have been worded by Holly Blue and we followed the advice". It was put to him that regardless of whether the letter had been worded by Holly Blue, it should not have influenced his grievance investigation. Mr Pilgrim agreed.

j. In the letter of concern, Miss Cairns had been criticised for not working on Saturdays. Mr Pilgrim was asked whether there was a contractual requirement for Saturday working or if Miss Cairns had ever previously been told that not working on Saturdays was unacceptable. He replied that he understood that Mr Mackay had permitted Miss Cairns not to work on Saturdays and it was time to draw a line in the sand.

k. Mr Pilgrim also acknowledged that the letter of concern warned that Miss Cairns could be disciplined for gross misconduct if she did not change her behaviour.

l. Mr Pilgrim was taken to the outcome letter where he refers to Miss Cairns feeling stressed and upset [219]. In particular, Mr Pilgrim stated:

> *Gary also stated that at no point during your telephone conversation on 9th September did you inform him that your stress was work-related, he equally clarified that none of your medical certificates ever cited "work-related stress".*

Under cross examination Mr Pilgrim was asked what basis he had to prefer Mr Lowes' conclusion that Miss Cairns was not suffering from work-related stress. It was suggested that he reached that conclusion simply because he preferred Mr Lowes as a person. Mr Pilgrim responded saying that he had come to his decision based on medical certificates that did not state work-related stress. However he also admitted that at no point did he investigate whether Mr Lowes was aware that Miss Cairns' stress was work-related. He also admitted that during the grievance investigation, he simply asked each of the individuals to

respond to the grievance and did not ask any additional questions. This might have yielded further information about the causes of Miss Cairns' stress.

m. We have serious concerns about the lack of transparency of the process. It was also suggested to Mr Pilgrim that in most situations where someone says that they are being bullied by their manager, those allegations are unlikely to be admitted to. Mr Pilgrim agreed with that. It was also put to him that it was rare to find supporting evidence to corroborate bullying. Mr Pilgrim agreed with that proposition. It was also put to him that without interviewing the witnesses and putting conflicting evidence to them, it would be difficult to make a credibility assessment. Mr Pilgrim agreed that it would be difficult, but he said that he had looked at what Miss Cairns had said, and he operated on the premise that a person is innocent until proven guilty. He said the evidence did not back up the allegations which justified his decision. However, he was taken to the grievance letter [134] where Miss Cairns stated that she had attended a managers' meeting during which other managers had agreed that Ms Lynn had a bullying attitude. It was put to him that he had not investigated that, and it simply chosen to ignore what she had said. There was a lengthy pause before Mr Pilgrim answered that question and he eventually accepted that he had not investigated that allegation. The length of the pause was telling given that he had been asked a straightforward question. It was put to him that if he had looked at it, he might have obtained some evidence that could corroborate what Miss Cairns was saying about Ms Lynn's bullying behaviour to which he replied "possibly, yes". He also agreed that if he had investigated it, he might have discovered that there been complaints by others concerning Ms Lynn's behaviour. He accepted that he had not done that.

n. Mr Pilgrim was taken to the final paragraph of Miss Cairns' grievance letter where she refers to being very anxious and fearful about how she would be treated when she returned to work. She had also said that if she had been offered support and some level of phased return, she could have been back at work months ago. Instead, Miss Cairns felt that the exact opposite had happened which had caused her stress and anxiety to be increased. She concluded her letter by saying:

> *Every time I had interaction with the managers who should be supporting me I have felt bullied, intimidated and more anxious and stressed.*

It was put to Mr Pilgrim under cross examination that regardless of the outcome of the grievance, it would have been open to him to have recommended that someone else should have taken over Miss Cairns' absence management to which he replied, "we were being advised by Holly Blue". He admitted that he had not given any thought to this independently. We formed the impression that he simply did what Holly Blue advised him to do. It was put to him that he had been given the responsibility for investigating and dealing with Miss Cairns' grievance. She had been off work for nine months and yet he had failed independently to give any thought to what could be done to facilitate her return to work. He replied that he would have given this thought but she

was coming back into an area where Mr Lowes was the regional support manager but removing her did not come to mind because he would be her line manager. He eventually admitted that this was something he was now only thinking about but, at the time, he had given no thought whatsoever to change the way in which Miss Cairns' absence was being managed. He also admitted that he gave no thought to referring the matter to occupational health and once again said "I was advised by Holly Blue at the time". It was put to Mr Pilgrim that he had signed off the letter and had not offered any reassurance to Miss Cairns to enable her to return to work and are not suggested ways in which Cash Converters could support her. Once again, his response was he was following Holly Blue's advice.

76. Members of the Tribunal panel asked Mr Pilgrim questions to clarify their understanding and from this, we find the following:

    a. Mr Pilgrim was aware of comments regarding Miss Cairns' attitude set out in the letter of concern prior to conducting his investigation into her grievance. He was aware that other members of management shared that view of Miss Cairns and said that they felt that those phrases were relevant given the time off that had been afforded to her, issues with her timekeeping et cetera. He knew that at the time that the letter was issued. He admitted that he shared that view with other members of management. He admitted that he formed that view when the letter was first issued. Although Mr Pilgrim said that he did not think this undermined his impartiality and could jeopardise the fairness of the investigation, we disagree. We believe that he had already formed an opinion Ms Cairns' attitude long before she raised her grievance. This suggests that he was not approaching the process with an open mind.

    b. We also have concerns that Mr Pilgrim believed that failing to give any examples justifying the conclusions regarding Miss Cairns was unacceptable notwithstanding his belief that the letter of concern was a less formal way of dealing with the problem rather than going down a formal disciplinary route. Regarding Miss Cairns' attitude, Mr Lowes had stated in the letter:

        > *Is not a matter open to discussion or want to be disputed by you. As employer I am confirming, as a matter of fact, that your behaviours are unacceptable and that an immediate and sustained improvement is required.*

    c. If this matter had been dealt with under the formal disciplinary procedure, Miss Cairns would have had a right to reply to these allegations concerning her attitude at work. She was denied that right. That was unfair.

    d. We also had concerns about how Mr Pilgrim formed his opinion of Miss Cairns' credibility. In paragraph 14 of his witness statement, he refers to the circumstances under which Mr Mackay's employment ended with Cash Converters. We do not see how that is relevant to the grievance. Once again, Mr Pilgrim said that Holly Blue had suggested the wording and he agreed.

e. Mr Pilgrim was aware of a letter of concern addressed to Ms Lynn concerning her behaviour [110]. He said that this only came to his attention after he had completed his investigation.

77. Miss Cairns appealed the grievance outcome in a letter to Mr Harrison [222]. We note that Mr Harrison had some experience of dealing with grievances and appeals both during his former employment with the Ministry of Defence and also with Cash Converters. Although Mr Harrison was not involved with absence management of staff, and he was aware that Miss Cairns had raised concerns about Mr Lowes, Ms Lynn and Mr Thomson. At the time, he did not know that Mr Lowes was managing Miss Cairns' absence. He was aware that at the time when he dealt with the appeal, Miss Cairns had been on sick leave for 11 months and he knew that she was suffering from stress, anxiety, and depression. He admitted that initially he did not note that it was work-related but then having reviewed emails, he accepted that it was work-related stress. He believed that she had initially been signed off with stress and that it became work-related stress although he could not be sure given that it was over two years ago. However, he accepted that it must have been apparent that Miss Cairns could not attend meetings because of her mental health. He also accepted that it would have been better if she had attended a meeting with him to deal with the appeal. Mr Harrison worked in a different area of the business and had no role to play in managing Miss Cairns and he was not aware of issues regarding her prior to handling the appeal. He also did not recognise the behaviours complained of in the letter of concern because he had not been involved with managing Miss Cairns. He was unsure if he had in fact looked at the letter of concern when preparing for the appeal and could only speculate that it was probable that he had done so. However, he went back and interviewed everyone again.

78. Holly Blue provided the appeal documentation to Mr Harrison. He recalled that he was not given any documents other than the original grievance and supporting documents. He could not recall whether he had referred to Cash Converters' staff handbook and the relevant policies although he did say that he was familiar with the handbook because he had it in the shop and in the staff room. When he was asked whether he had referred to it when he was conducting the appeal he said "a lot of the stuff was from Holly Blue. I spoke to them quite a bit about things about what I should or should not do". When he was asked whether he had looked at matters himself or was guided by Holly Blue he replied, "I might have looked at it, but I was guided by them". Holly Blue gave advice on how to conduct the appeal.

79. Mr Harrison was aware that Miss Cairns was not well enough to have a face-to-face meeting for the appeal. He was asked whether she would be disadvantaged by that to which he replied, "I would think it was an advantage to give her time to think about what to say and not a disadvantage". He accepted that he hadn't really thought about whether not having a face-to-face meeting would put her at an advantage or a disadvantage. However, he said that during his previous employment he had been a similar situation himself, so he understood where she was coming from.

80. On 29 June 2020, Miss Cairns submitted a sick note to Cash Converters [306]. She was signed off sick until 27 July 2020 with stress and anxiety.

81. On 27 July 2020, Miss Cairns submitted a sick note to Cash Converters [307]. She was signed off sick until 31 August 2020 with stress and anxiety.

82. On 20 August 2020, Mr Harrison wrote to Miss Cairns notifying her that he had dismissed her appeal [266]. The letter was largely prepared by Holly Blue because Mr Harrison has dyslexia. Mr Harrison provided input on what he felt about each point in the appeal and the evidence that he had gathered when he had come to Newcastle to carry out investigations. When he was asked why he had reached that conclusion, he said it had been very difficult because it was about one person's word against another's. He said that he had tried to find witnesses to speak about what Miss Cairns had been complaining of. He had to go on what Miss Cairns told him and what Mr Lowes and Ms Lynn had told him. He had suggested mediation to resolve their differences.

83. Prior to issuing his appeal outcome letter, Mr Harrison had come to Newcastle to interview the witnesses. The interview documents are in the bundle [234 onwards]. It was clear from these notes that it was a question-and-answer process. Mr Harrison and Holly Blue had prepared a list of questions [e.g. for Mr Lowes, 171]. Mr Harrison then conducted the interviews. He had not provided the list of questions to the interviewees prior to the interview. It was put to him that many of the questions were closed with the intention of eliciting either a yes or a no answer. Mr Harrison acknowledged that but said that he hadn't prepared the questions but then went on to say that these were the kind of questions that he would ask. It was also put to him that no follow-up questions appeared to have been asked and he said that he was happy with the responses and there was no need to ask any further questions. It was put to Mr Harrison that one of the questions for Ms Lynn was about the statement accusing Miss Cairns of living a life of luxury. Ms Lynn simply denied it. Mr Harrison was asked why he had not asked more questions about that to which he replied that he could not remember but he must have been happy with the answer. It was put to Mr Harrison that this was one of the main points being made in Miss Cairns' grievance which had made her very upset because she felt she was being managed out of the business and he simply accepted Ms Lynn's answer at face value and went on to the next question. It was suggested that he had not properly looked into the matter to which he replied that he did not know that she was Miss Cairns' line manager and, in any event, "she would not do that kind of thing".

84. Under cross-examination, it was put to Mr Harrison that if it was a matter of one person's word against Miss Cairns', he preferred the other person's version of events. In relation to the allegation that Ms Lynn had screamed at Miss Cairns, Ms Lynn had denied that allegation, but he accepted that he had only dealt with Ms Lynn by email, and it was difficult to make a conclusion and that it would have been better if she had come in for a face-to-face conversation. He also thought that it would have been better if the matter had been resolved through mediation. He did not think it necessary to challenge Ms Lynn's account notwithstanding the fact that Mr Harrison acknowledged that Miss Cairns had said that Ms Lynn had a history of bullying. He was aware that there was a letter of concern [110] written to Ms Lynn about her conduct about another member of staff but he did not appear to have given it much weight because it was unsigned. Indeed, when it was put to him that this letter of concern had been presented to him, he had not investigated where it had come from or spoken to Mr Lowes to see how he could assist. In response, he said that he could not remember. He was also asked whether he had looked at Ms Lynn's

personnel file and he replied that he thought that he might have asked about it and he vaguely remembered that he had asked someone. When he was asked who he had spoken to, he thought it might have been Mr Pilgrim, but he was vague in his recollection. He was then taken to a list of questions that had been prepared for Mr Pilgrim [176] where he was specifically asked if he was aware if Ms Lynn had ever been spoken to about having her bullying attitude towards staff. In his interview record notes [257], Mr Harrison had noted that Mr Pilgrim had responded that he was not aware whether Ms Lynn had ever been spoken to about bullying. It was put to him that he had not asked the same question of Mr Lowes, and he did not appear to have looked at Ms Lynn's personnel file or had asked anybody else to do that. All that he could say in response to that was that he thought that he had done that. Had he done so, it is possible that that he could have found evidence that supported what Miss Cairns was alleging about Ms Lynn.

85. Mr Harrison had read the letter of concern that was sent to Miss Cairns, and he understood that a central element of her grievance was the way that letter had been given to her and the contents of it. This was why he had decided to go to Newcastle to speak to everybody about it. He remembered speaking to Mr Lowes about it. In the appeal outcome letter [269] Mr Harrison had accepted that Ms Lynn had not screamed at Miss Cairns at any point during the meeting when the letter was given to her. It was put to him that the letter of concern contained a lot of complaints about Miss Cairns' behaviour. When Mr Harrison was asked if he was really satisfied that all the issues in the letter of concern had been appropriately raised, he replied that he wore a staff uniform and that he worked the correct hours and why should other people be exempt? In his view, the letter of concern raised points about which there was a need "to have a chat, to draw a line in the sand and to start again". It was put to him that dealing with this as part of a "chat" was inappropriate because the letter of concern contained a number of statements and accusations rather than simply expressing concern. Mr Harrison replied by saying that it raised concerns, but the letter was not a formal warning, and it was not part of the disciplinary process. When Mr Harrison was asked whether he had investigated each of the issues raised in the letter of concern he was unable to answer that question. Although the question was straightforward, it had to be rephrased. For example, he was asked his view on the allegation regarding Miss Cairns not working on Saturdays. Her complaint was that it did never been raised previously and Mr Harrison was asked whether it was reasonable to express concern in the way that had been set out in the letter in circumstances where it had never previously been a problem. In response, Mr Harrison said "I think so, I thought the letter of concern was okay". It was then put to him that there was no policy written down that required employees to work on Saturdays. In response to that, Mr Harrison appeared to diminish the significance of the allegation by saying that it was only one point, and yet he did not realise that there was no policy requiring employees to work on Saturdays. When he was asked if he had looked at the individual concerns to determine whether the letter was reasonable, he admitted that he hadn't done so as far as the allegation of Saturday working was concerned.

86. Mr Harrison was then asked about the allegation in the letter of concern regarding Miss Cairns' alleged under contribution to the business targets of the store. In this regard, she had been pulled up for not recording the same level of transactions as other managers [112]. He was asked whether he had

investigated the reasonableness of that statement and he admitted that he had not. He assumed Mr Lowes or Mr Pilgrim would have done that.

87. Mr Harrison was then asked about the statement regarding Miss Cairns' overall attitude of being disrespectful etc. He was asked whether he had investigated what that meant and whether it was reasonable to make such a statement to which he replied that it was one of his questions to Mr Lowes at the time. He was taken to list of questions for Mr Lowes [173] and to Mr Lowes' answer [246] where he is recorded as saying:

> *Her behaviour/tone of voice towards colleagues and other managers was often unacceptable she often talked over people during meetings. She was privileged to having more staff that cost weren't attributed to her store her and Galvin used to go round all stores taking premium stock.*

When he was asked whether this answer seemed right to him and warranted the level of investigation that he had conducted he said that it did. He was satisfied that the response made in the statement and in the letter of concern was reasonable. He thought that Mr Lowes had dealt with the problem in the letter of concern, but he did not think that he was supposed to investigate the concerns that Mr Lowes had raised with Miss Cairns. He accepted the letter of concern on face value and acknowledged that he had only looked at a couple of points in it because it was not part of the disciplinary process. He thought that he had conducted a fair appeal notwithstanding this even though it was suggested to him that his role as the appeal officer was to look into all of the grounds of appeal in detail. This was essentially a rehearing.

88. Mr Harrison's approach to corroboration and making positive findings in the appeal outcome letter was inconsistent. In paragraph 2 regarding Miss Cairns' complaint that Ms Lynn had treated her with hostility and had belittled her regarding her Internet sales, Mr Harrison had said that because there were no witnesses to the interaction, he was unable to verify either version of events and, therefore, could not decide one way or another. The same applied in relation to paragraph 3 regarding Ms Lynn allegedly telling Miss Cairns to stop living a life of luxury. However regarding the allegation that Mr Lowes and Ms Lynn had belittled Miss Cairns in relation to the staff member being transferred to her store, Mr Harrison had taken what Mr Lowes and Ms Lynn had said at face value. In response to this, Mr Harrison accepted that he should have gone along the lines that he had followed in paragraphs 2 and 3 of the outcome letter. It was put him that if there were no witnesses to an incident, it would be very difficult for Miss Cairns to prove her allegations. Mr Harrison acknowledged that and said should he go against what Mr Lowes and Ms Lynn said or go against what Miss Cairns said. He went on to say, "at the end of it all, I wanted everyone to sit down and discuss how to take it forward". Whilst we accept that mediation can often be an effective way to resolve workplace disputes, Mr Harrison's function was to conduct a fair appeal. It appeared that he had not given credence to the substance of the complaints that had been made and had not been influenced by the number and the nature of those complaints which suggested that there was merit to what Miss Cairns was saying.

89. Mr Harrison was also asked whether he had considered that Miss Cairns' long-term sickness absence started almost immediately after she was given the letter of concern. That was a closed question, and we would have expected Mr

Harrison to answer it either by saying yes or no. Instead he said it must have been a shock for her to get the letter of concern and the best thing would have been for her to speak to her line manager to put her point of view across to Mr Lowes and have a conversation. We think that is a disingenuous answer given the fact that the letter of concern specifically concluded with stating that it was intended to be an end of the matter and there could be no further representations about what was said in the letter. Mr Harrison appeared to acknowledge that but then went on to suggest that Miss Cairns could have asked for a meeting. We find it difficult to see how Mr Harrison could reach that conclusion.

90. Mr Harrison also acknowledged that at the time when he prepared the outcome letter, Miss Cairns was suffering deep depression and she would require some management help her to get back to work. We acknowledge his suggestion that mediation might have helped this. He also acknowledged that there had been virtually no communication with Miss Cairns for many months, but he attributed this to her requesting this because she felt that getting in touch with her amounted to harassment. It was put to him under cross examination that Miss Cairns' GP had reported about her health in January but there had been no contact at all with her until she made an enquiry about furlough in May. He was asked whether it was good for a manager not to have contacted an employee. Mr Harrison thought this was an HR matter and believed that it might have been suggested that Miss Cairns should be left in peace for a couple of months to settle down. It was put to him that it might have been open to Mr Harrison to suggest other steps to help Miss Cairns return to work such as changing her line management, going to occupational health, and agreeing a phased return to work. He was asked whether he discussed these options with Holly Blue to help Miss Cairns. Mr Harrison could not remember if he had done so. We found his answer vague and equivocal particularly as he also made the point that he had been in a similar situation himself with his previous employer. Given that was the case, we would have expected him to have been more empathetic and to have taken advice from Holly Blue and made recommendations to help Miss Cairns return to work.

91. On 2 September 2020, Miss Cairns submitted a sick note to Cash Converters [308]. She was signed off sick until 1 October 2020 with depression.

92. On 1 October 2020, Miss Cairns submitted a sick note to Cash Converters [309]. She was signed off sick for weeks with depression.

93. On 12 October 2020, Miss Cairns was invited to attend an absence review meeting. She agreed to answer set questions for the purposes of that meeting.

94. On 29 October 2020, Miss Cairns submitted a sick note to Cash Converters [310]. She was signed off sick until 30 November with depressive disorder.

95. Miss Cairns provided her answers for the absence review [283-284] on 9 November 2020. Mr Lowes did not respond to her and did not send any communication to Miss Cairns offering support. He did not offer any practical solution.

96. On 18 November 2020, Mr Lowes invited Miss Cairns to a "Some Other Substantial Reason Meeting" [466]. The letter stated, amongst other things:

> *Further to our previous communications regarding the issues surrounding your long-term absence and perceived unwillingness to return to work, this letter is to advise that you are required to attend a meeting via zoom on 25th November 2020 at 10 am. I have to make you aware that one outcome of the meeting could be the termination of your employment on the grounds of some other substantial reason (SOSR).*
>
> *The purpose of this meeting is to discuss the following concerns in relation to your employment; your unjustified sense of grievance and your unwillingness to allow the company to facilitate a return to work.*

97. Mr Lowes under cross examination accepted that language such as "perceived unwillingness to return to work" and "unjustified sense of grievance" could be seen as both accusatory and harsh for an employee who had been on long-term sickness absence particularly in circumstances where she had made it clear that she was not well enough to return to work and where there was no correspondence trying to facilitate a return to work. Mr Lowes also accepted there was no indication that he had considered supporting her or referring Miss Cairns to occupational health.

98. Miss Cairns expressed unwillingness to attend the SOSR meeting and, as a consequence, Mr Lowes wrote to her again on 23 November 2020 [467] in the following terms:

> *I write in response to your email dated 22/11/20 in regard to your formal invite to an SOSR meeting. In view of that fact you have confirmed your non-attendance to the meeting, the meeting will go ahead as scheduled on 25/11/20 at 10 am and the company will reach a decision based on the information already provided by you in your response to your absence review meeting.*
>
> *Should you wish to provide any further information that you would like to be considered upon the decision making process then please send this through to me no later than the end of the working day on Wednesday the 25th of November.*

99. Under cross examination, it was put to Mr Lowes that Miss Cairns had been on long-term sickness leave since September 2019 (i.e. 14 months). Mr Lowes had largely been silent over that time. He would have seen the GP report in January 2020 and yet he did nothing for several months until Miss Cairns contacted him about furlough in May 2020. It was also put to him that several more months elapsed until there was initially an invitation to an absence review meeting which quickly changed into an SOSR meeting. It was put to him that he had not supported her, and he had not managed her absence. She did not feel supported. In response, Mr Lowes said "those facts are right to some extent". We agree; there appeared to be an almost complete breakdown in communication and the letter that was sent on 18 November 2020 was not only accusatory in tone but also harsh and unsupportive of an employee who had been, and still was, on long-term sick leave. The letter of 23 November 2020 points to a closed mindset suggesting a decision had already been made to dismiss Miss Cairns. Given that she had been on sick leave for so long, it was open to Mr Lowes to consider alternatives such as referring Miss Cairns to occupational health or to consider a phased return to work. He did not appear to consider those alternatives.

100. On 24 November 2020, Dr Gooding, the claimant's GP wrote a "To whom it may concern" letter [508].

> *I am the GP for the above patient. Gemma informs me that she has been asked to attend a zoom meeting with your selves to discuss the possibility of termination of her contract. Currently her mental health is not in a good place at all and we are doing our best to treat her. Gemma has not been out of the house for several months and does not see anyone but her parents (who have to come to her) and her partner who lives with her. This is due to extreme levels of anxiety. Gemma has requested that's she is too unwell to participate in a zoom face to face meeting currently and I would support this. We hope she can improve and will be able to make progress with this but at present I am unable to suggest a time frame to this.*

101. On 24 November 2020, Miss Cairns wrote to Mr Thomson to tender her resignation [290]. The reasons she gave were as follows:

> *It is with deep regret and sadness that I have been forced to resign from the company. After 10 loyal years of service, to feel like I have been forced to leave a job I loved and excelled at to in this manner is incredibly stressful and upsetting.*
>
> *As you know from the outset my absence has been caused through constant bullying and harassment caused by your senior management and undoubtedly supported and encouraged by you. As you are aware my mental health issues have been closely monitored by my GP. My GP has provided a written statement advising my stress, anxiety and depression is due to work related bullying and harassment. This has been constantly ignored throughout the grievance process. I have been prescribed a high dosage of medication and I am being given therapy to try to help my recovery. Both of which continue at present. The pressure of it all has made me contemplate suicide on several occasions.*
>
> *As you know I did submit a grievance to Mr. Pilgrim whose investigation was not thorough and did not follow ACAS guidelines. Then my appeal to Mr. Harrison followed the same pattern and increased my stress by him not replying for 8 weeks. The whole process of going over the stressful events and detailing in them in writing was a very challenging one for me. No action was taken on any of the issues I raised which means this whole process and additional stress was in vein.*
>
> *Mr. Lowes and Mrs. Lynn's actions towards me have been nothing short of disgraceful. I am sure any other business owner would have condemned them for their actions which have clearly constructive in my departure.*
>
> *In the future when I am well and strong enough it I intend to have my say and contemplate any further actions regarding this matter or anything untoward that may have occurred during my 10 loyal years of service.*

102. Under cross examination, Miss Cairns said that she had not resigned after learning that her appeal against her grievance was unsuccessful because she hoped that someone would give her something positive. She was trying to be optimistic. She said she wanted her job. She said that she needed her job. She said that she loved her job. She said that what had changed was being invited to the SOSR interview. She thought that things had come to an end, and she would not have a fair chance to express her viewpoint. She thought that Cash Converters had made up their mind to get rid of her.

103. On 30 November 2020, Miss Cairns submitted a sick note [311]. She was signed off sick for 6 weeks with depressive order.

104. On 11 January 2021, Miss Cairns submitted a sick note [312]. She was signed off sick until 8 February 2021 with depressive disorder.

105. On 8 February 2021, Miss Cairns submitted a sick note [313]. She was signed off sick until 8 March 2021 with depressive disorder.

106. On 11 February 2021, Dr Gooding wrote a "To whom it may concern" letter [514]. The letter states:

> *I am the general practitioner for the above patient. I can confirm I have been treating Miss Cairns since September 2019 when she first presented to me with severe anxiety and low mood related to the stress in the workplace. Since that time she has been unable to return to work due to the severity of her symptoms which are greatly triggered by contact from her employer. She is severely affected by her anxiety and is unable even to leave the house alone, has lost weight and has very poor sleep due to her symptoms. It has been very difficult to treat her due to the ongoing stress on her from her workplace.*

107. On 8 March 2021, Miss Cairns submitted a sick note [314]. She was signed off sick for 2 months with depressive disorder.

108. On 12 March 2021, Miss Cairns prepared a disability impact statement [36]. We note the following in particular:

a. She started to feel anxiety and stress in August 2018 when Mr Thomson allegedly instructed Mr Mackay to manage her out of the business. This was despite her being good at her job and she felt insecure and anxious.

b. In June 2019 Mr Mackay's employment ended at Cash Converters and Miss Cairns started to feel extremely anxious and stressed about losing her job because of her poor working relationship with Mr Lowes and Ms Lynn. She suffered panic attacks daily. Under cross-examination she explained that these would happen at work, and she would have to go to the office or the toilet.

c. From early September 2019, she became withdrawn and feared crowds and spaces. She lost contact with her friends because if she socialised, she worried that her symptoms would get worse and trigger a panic attack.

d. On 9 September 2019, Miss Cairns saw her GP who prescribed her with propranolol and sertraline to help her anxiety. Propranolol was prescribed as a temporary measure to reduce her blood pressure and her shaking. When she came off that drug, her GP increased her sertraline dosage, but this has had no effect in reducing her anxiety because the issues at work which caused her mental health problems remained unresolved. She continues to see her GP on a regular basis.

e. From March 2020, Miss Cairns was feeling depressed and by July 2020, she had become severely depressed. At that point, she said to her GP that she felt suicidal.

f. Miss Cairns was referred by her GP to Talking Helps in Newcastle where she received CBT from 28 September 2020 until 18 December 2020. Her outcome measures were severe depression, severe anxiety, and severe functional impairment. Her therapist believed that she needed further support and she was referred for high-intensity CBT for which she is on a waiting list. The Talking Help therapy has not had any significant impact because the dates on which she received therapy coincided with correspondence from Cash Converters. She says that some coping techniques help slightly, such as breathing, but she got extremely anxious leading up to phone calls which would trigger a panic attack. She was always tearful during her therapy sessions.

g. Miss Cairns has only been out of her house three or four times in the last year for short walks with her partner. Under cross-examination she believed that this started very quickly after being signed off sick, perhaps a couple of months after. She panics when she is in open spaces and her mood is constantly low. We note that when her mother, Mrs Cairns, was cross examined, she said that she thought that Miss Cairns stopped going out of the house about six months after she ceased her employment, but it was a deteriorating process which we interpret to mean from going out occasionally to not going at all.

h. Miss Cairns feels tearful almost every day and she no longer feels like socialising with her family apart from her partner with whom she lives and her parents. She over thinks during every conversation with partner and every situation. She finds it difficult to concentrate and to remember things. She has to take notes to enable her to remember what she has done or said which caused her a lot of stress and anxiety. She has a poor sleeping pattern, and she only sleeps for short periods during the day and remains awake most of the night. She believes that she gets between two and five hours sleep each day. Her first waking thought is about Mr Thomson, Mr Lowes and Ms Lynn and how she was treated by them. She feels irritable for no reason.

i. Miss Cairns says that she used to take great pride in her appearance and always dressed smartly but now she makes no effort and wears a tracksuit and no makeup. She has lost her appetite which initially resulted in significant weight loss. However, her weight has fluctuated because feeling depressed has caused her to gain weight because of comfort eating. She says that she gained no pleasure from anything. She says that she feels totally worthless and helpless which brings on suicidal thoughts. These feelings fluctuate and are heightened during

any interaction with Cash Converters and what she perceives to be their constant denial of any wrongdoing towards her. She felt that when her grievance was dismissed, Cash Converters believed that she was lying. She also feels that she has let her family down. She says, “when I feel like this, I wish I could go to sleep and never wake up”.

j. Miss Cairns suffers from severe and debilitating migraine attacks which can last a few days each time. These are triggered by stress.

k. Miss Cairns says she used to be a self-confident person but now she feels she can speak to nobody even on the telephone. She has become increasingly withdrawn, unhappy and emotional. She feels anxious and fearful all the time when she is outside. She needs to keep all doors and windows locked and the curtains closed.

109. We have no reason to doubt what Miss Cairns has said in her disability impact statement regarding her mental health and the impact that its deterioration has had upon her day-to-day life. It is noteworthy that most of it went unchallenged under cross-examination. We also observed her when she was giving her evidence and we formed the impression that she was vulnerable and psychologically very fragile and emotionally labile. We give her statement regarding her mental health weight.

110. On 23 March 2021, Dr Gooding wrote a “To whom it may concern” letter [535]. The letter states:

> *I have been asked as the General Medical Practitioner for this patient whether in my medical opinion her current medical issues of anxiety and low mood are likely to be long term. In her current presentation I think it is highly unlikely that these issues will be treated within the next six months particularly as they have been longstanding since September 2019. It is my hope that over the next year she would be able to make some way towards recovery with psychological intervention alongside medication but I strongly believe that should she continue to be subjected to the stressors in her job situation this would be delayed significantly 'and will worsen her mental health.*

111. On 30 April 2021, Miss Cairns submitted a sick note [495]. She was signed off sick for 2 months with depression.

112. We have noted an Employment and Support Allowance Medical Report Form prepared in respect of Miss Cairns following an interview on 4 May 2021 [515]. The condition medically identified is anxiety and depression. The report notes that Miss Cairns is taking sertraline regularly every day at 150 mg per day. We note the following:

> ***Anxiety and Depression***
>
> *Onset was 2 years ago.*
>
> *Symptoms are constant panic, daily anxiety, over analysing, panic attacks, low mood/ These are daily, every day is the same. Anxiety can*

be worse if having a telephone assessment or appointment but Diagnosed by the GP. last saw GP end of 2020.

Takes medication. This was increased few months ago. This was due to ongoing ·issues· and suicidal thoughts.

Been referred to Cognitive behavioural therapy (CBT), had 6 sessions, but minimal improvement. Stopped in December 2020

On the waiting list for intense CBT.

Never been hospitalized

Description of Functional Ability

Panic attack symptoms are shaking, crying, heart racing, breathing problems. Becomes disorientated

Panic attacks are most days. It can be several in one day.

They are triggered by anything, over thinking.

They last 5-10 minutes until able to calm down.

Last panic attack was yesterday, this was due to this phone call. another one was the day before, it was for the same reason, knew this appointment was coming.
sleep is disturbed by mental health. will mainly nap during the day, does not sleep at night, brain will not switch off

appetite is not too bad

Mood is low, has been for many months

Reports fleeting thoughts of not wanting to be here, but reports family is protective factor. Denies plans or attempt to self harm or suicide past or present

GP is aware.

denies behavioural problems

denies agoraphobia but has not left the house in over 1 year due to anxiety and panic attack.

Description of a Typical Day

Is stated that:

Wakes up independently, mostly does not sleep at all during the night
Can get washed and dressed daily independently, no prompt needed
able to make a cup of tea, no issues with kettle.

Can cook for herself daily, has no issues using kitchen equipment.

does online shopping, able to use phone or computer for this.
food shopping is done by parents. This is due to not being able to leave the house.

Description of Functional Ability

able to write the shopping list with items required. does this weekly.
able to wait for deliveries despite being late, has anxiety, but despite being able to wait for this will not open the door for the deliveries, this is due to panic attack of fear of the outside world or having to speak to anyone unfamiliar

Does housework weekly, keeps room tidy and helps around the house.
does all finances, able to open letters.

Can book own appointments, but on a bad day mom has to help with telephone assessments. This is due to anxiety of speaking to people. On a bad day is unable to speak to receptionist or GP.

Unable to remember last time she left the house. This was more then (sic) 1 year ago.

Refuses to leave the house for any reason at present Not even if with someone this is due to mental health and panic attacks

does not leave the house due to having panic attacks when thinking about it. unable to explain why this is happening.
Had all appointments over the phone due to this.

Had to cancel work meetings in the past due to not being able to leave the house to go there.

Has difficulty speaking to people, has days when can Speak to GP, but has days when cannot

Will not answer land line, does not answer own mobile unless knows who rings, this is due to not being able to speak to unfamiliar people due to mental health.

If an appointment is changed or cancelled suddenly, she will be very anxious but could get something to eat and drink.

If knows about a change in advance, would still be anxious but less, despite this would carry on with day.

If had to change an appointment herself, she managed to send an email and request a different appointment for counselling if felt not able to attend will watch TV during the day but spends most day worrying.

Will cook, play with the dog, will tidy room.

Has not been able to go in the back garden due to being outside, this is causing a panic attack.

Reports she could not leave the house, despite being accompanied for any reason

Can speak to parent, but does not speak to any other friends or family members

…

Substantial Mental or Physical Risk:

The condition history, mental state examination and medical knowledge of the condition indicates that there would be substantial mental or physical risk if the client were found capable of work (LCW). However the evidence does not suggest that there would be a substantial mental or physical risk if they were to undertake appropriate, tailored work related activity. she is under the care of her GP for mental health problems, awaiting intensive CBT therapy and had recent increase in her medication. Reports fleeting thoughts of not wanting to be here. Denies any plans or attempt to self harm or suicide

Personalised Summary Statement

Miss Cairns has anxiety and depression for which she is under the care of her GP. Awaiting Intensive Cognitive behavioural therapy (CBT) and on regular medication.

Clarified on assessment has no speech, vision or hearing problems, and only filled in questionnaire with mental health in mind. Therefore significant disability is unlikely in the area of sensory functions.

Typical day shows she looks after herself, gets washed and dressed, able to cook and write shopping list, can order things online. Reports no problems using kitchen equipment. Deals with own finances and opens own letters. Can book her own appointments. Therefore significant disability is unlikely in the area of understanding and focus.

Despite anxiety she can manage with changes to her appointments whether sudden or planned. Able to wait for her deliveries, even if they are late. Therefore significant disability is unlikely in the area of coping with change.

Parents do the food shopping and she orders everything else online. Has not left the house for over 1 year, due to her mental health, and reports had to cancel work meeting in the past due to this. Unable to give example of last been out the house. Does not go to the back garden either, due to mental health. If would be accompanied, this would not make a difference, would still not attend anywhere. The evidence suggests significant disability is likely in the area of going out.

She has difficulty speaking to health care professionals on some days due to her mental health but can speak to GP and managed to speak to myself today on assessment. will not answer her phone or the land line, unless knows who is calling, this is due to anxiety of speaking to anyone unfamiliar. able to speak to parents, but does not speak to any other

family members or friends. No examples provided, due to not being out of the house for over 1 year, therefore significant disability is likely in the area of coping socially and I have no evidence of the contrary.

She does not report any behavioural problems, therefore significant disability is unlikely in the area of appropriateness of behaviour.

Substantial mental or physical risk is likely if she was found fit for work. For her mental health she is under the care the GP and awaiting intensive CBT. Had recent increase in her medication. Denies any self harm or suicide plans or attempt, past or present, but reports fleeting thoughts of not wanting to be here.

However, substantial mental or physical risk is unlikely if she was found fit for appropriately tailored work related activities. She looks after herself, engages with her treatment. Reports strong protective factors her parent and never acted on her thoughts.

Prognosis

…

I advise that work could be considered within 12 months.

113. On 8 June 2021, Jobcentre plus wrote to Dr Gooding to confirm that Ms Cairns was always treated as meeting the eligibility criteria for Employment and Support Allowance. Dr Gooding was no longer required to issue NHS medical certificates for Miss Cairns' claim for benefits [537].

114. On 25 June 2021, Miss Cairns submitted a sick note [496]. She was signed off for 2 months with depression.

115. On 20 August 2021, Miss Cairns submitted a sick note [331]. She was signed off sick for 2 months with depressive disorder.

116. On 20 October 2021, Miss Cairns submitted a sick note [497]. She was signed off sick for 1 month with depressive disorder.

117. On 22 November 2021, Miss Cairns submitted a sick note [313]. She was signed off sick until 21 February 2022 with depressive disorder.

Applicable law

Disability

118. EQA defines a 'disabled person' as a person who has a 'disability' — section 6(2). A person has a disability if he or she has 'a physical or mental impairment' which has a 'substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities' — section 6(1). The burden of proof is on the claimant to show that he satisfies this definition.

119. Although the definition in section 6(1) is the starting point for establishing the meaning of 'disability', it is not the only source that must be considered. There are supplementary provisions for determining whether a person has a

disability in Part 1 of Schedule 1 EQA. Furthermore, a number of regulations were made under the Disability Discrimination Act 1995 ("DDA") to supplement the statutory provisions and the Government has indicated an intention to replace them all in due course. The relevant regulations are the Equality Act 2010 (Disability) Regulations 2010.

120. In addition, the Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ('the Guidance') undersection 6(5) EQA. This Guidance, which came into force on 1 May 2011. The Guidance does not impose any legal obligations in itself, but courts and tribunals must take account of it where they consider it to be relevant. In **Goodwin v Patent Office 1999 ICR 302, EAT,** the EAT's then President, Mr Justice Morison, stated that tribunals should refer to any relevant parts of the Guidance they have taken into account and that it was an error of law for them not to do so. However, more recently, in **Ahmed v Metroline Travel Ltd EAT 0400/10** the EAT qualified the **Goodwin** approach, noting that the observations made in that case were now long-standing, well established and well understood by tribunals. Mrs Justice Cox said that it was especially important for the correct approach to using the Guidance to be understood in the early years of the DDA. However, it was more than 15 years since disability discrimination legislation had been introduced. In this particular case the employment judge had understood the potential relevance of the Guidance and the importance of using it correctly, and no error of law was disclosed by his failure to refer to the Guidance in more detail, particularly when his attention had been drawn to it so extensively in written submissions. Furthermore, where, as in the instant case, the lack of credibility as to the claimant's evidence of his disability was the main reason for concluding he was not disabled within the meaning of the DDA, there could be no error of law if the tribunal failed to refer to the official Guidance.

121. Finally, the Equality and Human Rights Commission (EHRC) has published the Code of Practice on Employment (2015) ('the EHRC Employment Code'), which has some bearing on the meaning of 'disability' under the EQA. Like the Guidance, the Code does not impose legal obligations, but tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

122. Note that the requirement to 'take account' of the Guidance or Code applies only where the tribunal considers them relevant, and, while the Code and Guidance often provide great assistance, they must always give way to the statutory provisions if, on a proper construction, these differ. In **Elliott v Dorset County Council EAT 0197/20** the EAT noted that where 'consideration of the statutory provision provides a simple answer, it is erroneous to find additional complexity by considering the Code or Guidance'. In that case, the tribunal erred by, among other things, failing to give the statutory definition of 'substantial' in section 212(1) – that is, 'more than minor or trivial' – the precedence it required. The EAT noted that 'whether an impairment has a more than minor or trivial effect on a person's ability to carry out day-to-day activities will often be straightforward. The application of this statutory definition must always be the starting point. We all know what the words "minor" and "trivial" mean. If the answer to the question of whether an impairment has a more than minor or trivial adverse effect on a person's ability to perform day-to-day activities is "yes", that is likely to be the end of the matter. It is hard to see how

the answer could be changed from “yes” to “no” by further pondering the Code or Guidance’.

123. In **J v DLA Piper UK LLP 2010 ICR, EAT** The appellant (J) appealed against a decision of the employment tribunal that she was not disabled within the meaning of the DDA. J had had a history of depression from 2005, including a period when she had been certified unfit for work in December 2005. The respondent firm of solicitors (D) offered her a job in June 2008, subject to completion of a medical questionnaire. She disclosed her history of depression. D withdrew the offer, blaming a recruitment freeze. J believed that the true reason was her medical history and brought proceedings under the DDA s.4(1)(c) and s.3A. The tribunal determined whether she was disabled within the meaning of s.1 at the relevant time. The medical reports before the tribunal included reports from J's general practitioner (M) and a psychiatrist (G) instructed by D. M summarised J's treatment and her diagnosis of mild to moderate depression. She considered that in June 2008, J was suffering from a depression which had a substantial adverse effect on her ability to carry out normal day-to-day activities and which, but for the treatment, would have a more substantial effect. G considered that the medical evidence adduced in relation to that adverse effect was weak. The tribunal found that there was no conclusive expert evidence regarding J's condition and that she had not established a sufficiently well-defined impairment at the material time, or in 2005, and that even if she was suffering from an impairment, it did not have a substantial adverse effect on her ability to carry out normal day-to-day activities. There was no statutory definition of "impairment" following the repeal of Sch.1 para.1(1) of the DDA. J contended that the effect of the repeal of Sch.1 para.1(1) was that the question of whether there was impairment would need to be deduced from whether there was a substantial adverse effect on a claimant's ability to carry out normal day-to-day activities. The EAT held:

a. It remained good practice for a tribunal to state its conclusions separately on the questions of impairment and of adverse effect, **Goodwin v Patent Office [1999] I.C.R. 302**, applied. However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. In cases where there might be a dispute about the existence of an impairment, where identifying the nature of the impairment involved difficult medical questions, it would make sense to start by making findings about whether the claimant's ability to carry out normal day-to-day activities was adversely affected on a long-term basis, and to consider the question of impairment in the light of those findings. If it found that the claimant's ability had been adversely affected, in most cases it would follow that the claimant was suffering from an impairment. If that inference could be drawn, it would be unnecessary for the tribunal to try to resolve the difficult medical issues, **College of Ripon and York St John v Hobbs [2002] I.R.L.R. 185, [2001**] and **McNicol v Balfour Beatty Rail Maintenance Ltd [2002] EWCA Civ 1074**, applied.

b. J had suffered a mental impairment between 2005 and 2006 which substantially adversely affected her ability to carry out normal day-to-day activities. She had been unequivocally diagnosed as suffering from moderate depression and had been unfit for work for four months. There was nothing to suggest that that was not a true clinical depression and

the tribunal's finding that she had not established that she had an impairment in 2005 was perverse.

c. The tribunal had not taken all relevant factors into account. It had deliberately made no reference to M's evidence as it had not apparently regarded her as an expert, which had been wrong. A general practitioner was fully qualified to express an opinion on whether a patient was suffering from depression. Their evidence might carry less weight than that of a specialist but could not be ignored if specialist evidence was inconclusive. Had the tribunal taken M's evidence into account, it would not necessarily have reached the same view and its decision on the issue of impairment could not stand. That conclusion would not matter if the tribunal's alternative reasoning that any impairment had not substantially affected J's ability to carry out day-to-day activities was sustainable, but it was not. The tribunal was entitled to find that J's impairment did not have a sufficiently substantial adverse effect on her ability in June 2008. However, it should have found that she was suffering from an impairment in 2005 and 2006 which had a substantial adverse effect on her ability, and the effect of Sch.1 para.2(2) of the DDA was that that adverse effect, rather than "depression", was to be treated as continuing if it was likely to recur. Additionally, the tribunal's statement that J had not adduced any clear or cogent evidence of deduced effect could indicate that again, M's evidence had been wrongly discounted. The question to be addressed by the tribunal was whether, on the hypothesis that J's ability to carry out normal day-to-day activities was not, in June 2008, substantially affected, there would have been such an effect but for her treatment. The matter would be remitted to be determined by a fresh tribunal.

124. The time at which to assess the disability (i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act — **Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT**. This is also the material time when determining whether the impairment has a long-term effect. An employment tribunal is entitled to infer, on the basis of the evidence presented to it, that an impairment found to have existed by a medical expert at the date of a medical examination was also in existence at the time of the alleged act of discrimination — **John Grooms Housing Association v Burdett EAT 0937/03** and **McKechnie Plastic Components v Grant EAT 0284/08**.

125. The evidence of the extent of someone's capabilities some months after the act of discrimination may be relevant where there is no suggestion that the condition has improved in the meantime — **Pendragon Motor Co Ltd t/a Stratstone (Wilmslow) Ltd v Ridge EAT 0962/00**. That case involved the admissibility of a video recording taken of the claimant six months after he had left work. The tribunal refused to admit the evidence but was overturned on appeal by the EAT, which remitted the case to a different tribunal for a rehearing on all the evidence, including any properly adduced and proved video evidence. In the EAT's view, video evidence taken at a later date may be relevant to the question of the extent of the claimant's actual capabilities at the time of the discriminatory act, especially where there is no suggestion that the condition has improved in the meantime. The video evidence may also be relevant when determining the reasonableness or otherwise of any adjustments that might need to be made.

126. In particular, where an individual is relying on an impairment that may not manifest itself consistently, a tribunal will not necessarily err if it considers evidence at around the time of the alleged discriminatory act, albeit not on the specific date in question. In **C and ors v A and anor EAT 0023/20** the EAT did not accept that it was illegitimate to examine evidence arising before and after the acts of discrimination in order to determine whether it shed light on the existence of the impairment at the material time. Given that the alleged impairment was stress, an anxiety disorder and depression, the EAT did not expect every day to offer evidence of disability. Thus, while the EAT accepted that the tribunal did not focus on the dates of the relevant acts, the tribunal's enquiry necessarily embraced them.

127. However, the Court of Appeal has now allowed an appeal against the EAT's decision in **C v A. In All Answers Ltd v W 2021 EWCA Civ 606, CA**, the Court held that the EAT was wrong to decide that the tribunal's failure to focus on the date of the alleged discriminatory act was not fatal to its conclusion that the claimants satisfied the definition of disability. The Court held that, following **McDougall v Richmond Adult Community College 2008 ICR 431, CA**, the key question is whether, as at the time of the alleged discrimination, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at that date and so the tribunal is not entitled to have regard to events occurring subsequently. The Court held that it was clear that the tribunal did not ask the correct question and so its decision could not stand. The Court noted that the EAT had identified the tribunal's failure in this regard but had considered that this was not fatal as the tribunal had focused on the position before and after the relevant date. That, however, was not an answer to the difficulty and the EAT was wrong to overlook the tribunal's error.

128. There is no definition of 'mental impairment' in the EQA but Appendix 1 to the Code states: 'The term "mental impairment" is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities' — para 6.

129. Mr Justice Lindsay, then President of the EAT, set out guidelines for parties seeking to establish the existence of a mental impairment under the DDA in **Morgan v Staffordshire University 2002 ICR 475, EAT**, and although this decision has less significance now in light of the changes introduced by the DDA, it still contains some useful pointers:

a. Tribunal members cannot be expected to have anything more than rudimentary familiarity with psychiatric classification. Matters therefore need to be spelt out. Claimants should identify clearly and in good time before the hearing exactly what their impairment is and respondents should indicate whether that impairment is an issue and, if so, why. The parties will then be clear as to what has to be proved or rebutted, in medical terms, at the hearing.

b. Tribunals are unlikely to be satisfied of the existence of a mental impairment in the absence of suitable expert evidence. However, this does not mean that a full consultant psychiatrist's report is required in every case. There will be many cases where the illness is sufficiently marked for the claimant's GP to prove it. Whoever deposes, it will be

prudent for the specific requirements of the legislation to be drawn to that person's attention.

c. If it becomes clear that, despite a GP's letter or other initially available indication, an impairment is to be disputed on technical medical grounds, then thought will need to be given to further expert evidence.

d. There will be many cases, particularly if the failure to make adjustments is in issue, where the medical evidence will need to cover not merely a description of the mental illness but when, over what periods and how it can be expected to have manifested itself in the course of the claimant's employment.

e. The dangers of a tribunal forming a view on mental impairment from the way the claimant gives evidence on the day cannot be overstated. Tribunal members need to remind themselves that few mental illnesses are such that the symptoms are obvious all the time and that they have no training or, as is likely, expertise in the detection of real or simulated psychiatric disorders. Furthermore, the date of the hearing itself will seldom be a date on which the presence of the impairment will need to be proved or disproved.

130. Since the late 1990s, stress has become one of the key employment law issues. Although it is not a psychiatric injury or even a mental illness, stress can lead to feelings of anxiety and depression and may exacerbate other conditions such as dyslexia or epilepsy or even physical conditions. In **Walton v Nescot ET Case No.2305250/00**, an employee's diabetes was aggravated by his stressful working conditions. Furthermore, employees complaining of stress may in fact be suffering from a stress-related illness, such as clinical depression, which has been triggered or exacerbated by the levels of stress with which they have to cope. Since the removal of the requirement in 2005 to show a clinically well-recognised illness in order for a mental impairment to qualify as a 'disability', it has become easier for claimants to show that depression and stress-related conditions comprise such impairments. But for the reasons outlined immediately below, this does not mean that these conditions will comprise a disability in every case.

131. It is not uncommon for employees who are absent from work to say that they are suffering from 'stress', 'work stress', 'anxiety', 'nervous debility' or 'depression'. But this does not necessarily mean that they are disabled for the purposes of the EQA. As noted above, they must demonstrate a physical or mental impairment. Because stress itself does not constitute a disability, a failure to recruit or a dismissal based on a person's propensity to suffer from stress will not amount to unlawful discrimination. In order for an individual to succeed in such a claim, he or she must show that the stress related to a disability. For example, in **Hull v Tamar Science Park ET Case No.1702199/08** H was diagnosed in 2004 as suffering from moderately severe agitated depression and hypertension. She had endured a particularly stressful year in 2007, which included a car accident, two deaths and the end of a relationship. All this was compounded by ongoing work stress that left H suffering from low moods, poor sleep, and difficulty in coping with everyday matters. Although she felt much better by the end of 2007, by January 2008 she was again experiencing stress — for example, she felt anxious about official letters and waited a day or two before a friend could open them for her.

The tribunal accepted that H suffered from a stress-related illness and that she was disabled for the purposes of the DDA.

132. By way of contrast, in **Herry v Dudley Metropolitan Council 2017 ICR 610, EAT**, the EAT upheld an employment tribunal's decision that an employee was not disabled, even though he had to take a long-time off work because of stress, where his condition had been a reaction to difficulties at work rather than a mental impairment. The EAT noted that work-related issues can result in real mental impairment, especially for those who are susceptible to anxiety and depression. However, it indicated that unhappiness with a decision or a colleague, a tendency to nurse grievances or a refusal to compromise are not, of themselves, mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment should therefore be considered by an employment tribunal with great care. Where a person suffers an adverse reaction to workplace circumstances that becomes entrenched so that they will not return to work, but in other respects suffers no or little apparent adverse effect on normal day-to-day activities, this does not necessitate a finding of mental impairment.

133. To amount to a disability the impairment must have a 'substantial adverse effect' on the person's ability to carry out normal day-to-day activities.

134. In **Goodwin**, the EAT said that of the four component parts to the definition of a disability, judging whether the effects of a condition are substantial is the most difficult. The EAT went on to set out its explanation of the requirement as follows:

> *What the Act is concerned with is an impairment on the person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. Thus a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be "yes", yet their ability to lead a "normal" life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they could use the telephone, or ask for directions or which bus to take, the answer would be "no". Those might be regarded as day-to-day activities contemplated by the legislation, and that person's ability to carry them out would clearly be regarded as adversely affected.*

135. This approach reflects the advice in Appendix 1 to the Code that account should be taken not only of evidence that a person is performing a particular

activity less well but also of evidence that 'a person avoids doing things which, for example, cause pain, fatigue, or substantial social embarrassment; or because of a loss of energy and motivation'— para 9.

136. Whether a particular impairment has a substantial effect is a matter for the employment tribunal to decide. When considering this question, the EAT in **Goodwin** advised tribunals to take into account the version of the Guidance in force at the time, which — like the current version — contained a number of examples of 'substantial' effects. The EAT's advice is echoed by para 12(1) of Schedule 1 to the EQA, which provides that a tribunal must take into account 'such guidance as it thinks is relevant'. However, in **Vicary v British Telecommunications plc 1999 IRLR 680, EAT**, the EAT concluded that the Guidance is of assistance in marginal cases only. Also, in **Leonard v Southern Derbyshire Chamber of Commerce 2001 IRLR 19, EAT**, the EAT said that the Guidance should not be used too literally. This was because the examples it gives are illustrative only and should not be used as a checklist.

137. There must be a causal link between the impairment and the substantial adverse effect, but it need not be a direct link. In **Sussex Partnership NHS Foundation Trust v Norris EAT 0031/12** N was diagnosed with selective immunoglobulin A deficiency, a defect of the immune system. Discounting the effect of her medication (as required by para 5(1), schedule 1, EQA), an employment tribunal found that the deduced effect of the impairment was an increased susceptibility to infections, and that such infections, in turn, would result in a substantial adverse effect on N's ability to carry out day-to-day activities. Allowing an appeal against that decision, the EAT noted that in many cases the causal link between the impairment and the substantial adverse effect will be direct but held that the EQA does not require a direct link. If, on the evidence, the impairment causes the substantial adverse effect, it is immaterial that there is an intermediate step between the two. In this case, however, the tribunal's conclusion that increased frequency of infections would have a substantial adverse effect was unsupported by the evidence.

138. Given that the focus of the tribunal's examination must be on the extent to which the impairment adversely affects the claimant's ability to carry out normal day-to-day activities, it is irrelevant if a particular claimant cannot carry out a normal day-to-day activity, such as riding a bicycle, because he or she has never learnt to do so. In **Lalli v Spirita Housing Ltd 2012 EWCA Civ 497, CA** (a non-employment case), the Court of Appeal considered it immaterial that an individual would have been unable to read (because he was illiterate) even if he had not been mentally impaired. His impairment was functional: it had a substantial adverse effect on his ability to read and so was covered by the DDA. (Nevertheless, such cases may pose evidential difficulties: if a claimant never in practice carried out a particular activity, he or she may have problems demonstrating that his or her ability to do so is substantially adversely affected.

139. Substantial is defined in section 212(1) EQA as meaning 'more than minor or trivial'. This definition did not appear in the DDA but was used in the original Guidance and in the Code of Practice issued under the DDA (the 'Code of Practice for the elimination of discrimination in the field of employment against disabled persons or persons who have had a disability').

140. It might be thought that the words 'minor' and 'trivial' are synonymous. This was not the opinion of the EAT in **Anwar v Tower Hamlets College EAT**

0091/10, however. It held that a tribunal had not erred when it found that the effect of an impairment was 'more than trivial' but still 'minor' as opposed to 'substantial'. In that case the claimant claimed to have a disability by reason of suffering from headaches. The employment judge found that these, while 'by no means negligible, did not give rise to a substantial adverse effect'. Referring to the Guidance, he accepted that the headaches could not be described as trivial and were undoubtedly unpleasant while they lasted but they were, in his view, 'an example of the sort of physical condition experienced by many people which has what can fairly be described as a minor effect'. On appeal, the EAT rejected the argument that the 'substantial adverse effect' requirement must necessarily be satisfied if the adverse effect in question is found to be more than trivial. In any event, the EAT in **Anwar** pointed out that the employment judge had not simply baldly asserted that the effect of the claimant's headaches was minor though more than trivial: he had recorded the number and frequency of the headaches and the effect they had based on the evidence given by the claimant. This made it impossible to say that his decision was insufficiently reasoned or was perverse.

141. The difficulty with the EAT's decision in **Anwar** is that if 'minor' means something more than 'trivial', it is hard to see why Parliament would have bothered to use the word 'trivial' at all. Its judgment seems to imply that there is a continuum and that something that is trivial may be of even less consequence than something that is minor. This was clearly not the view of the EAT in **Aderemi v London and South Eastern Railway Ltd 2013 ICR 591, EAT**. There, the EAT — which did not refer to **Anwar** — commented on the definition of 'substantial' in section 212(1) EQA, stating that 'the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.

142. In determining whether an adverse effect is substantial, the tribunal must compare the claimant's ability to carry out normal day-to-day activities with the ability he or she would have if not impaired. It is important to stress this because the Guidance and the Code both appear to imply that the comparison should be with what is considered to be a 'normal' range of ability in the population at large. Appendix 1 to the Code states: 'The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people' — para 8. This wording is virtually identical to that contained in para B1 of the Guidance. However, this should not be interpreted as meaning that in order to assess whether a particular effect is substantial, a comparison should be made with people of 'normal' ability — which would, in any event, be very difficult to define.

143. In **Paterson v Commissioner of Police of the Metropolis 2007 ICR 1522, EAT**, an employment tribunal decided that P — a dyslexic police officer who wanted adjustments to be made under the DDA in respect of his application for promotion to superintendent — was not disabled. It acknowledged that his dyslexia was disadvantageous to him in comparison with his rivals for the post of superintendent. However, in comparison with 'the ordinary average norm of the population as a whole', the tribunal considered that the dyslexia had no more than a minor or trivial impact on his day-to-day activities. Allowing P's

appeal, the EAT (the President of the EAT, Mr Justice Elias, as he then was, presiding) emphasised that, in assessing an impairment's effect on a claimant's ability to carry out normal day-to-day activities, a tribunal should not compare what the claimant can do with what the average person can do. Rather, the correct comparison is between what the claimant can do and what he or she could do without the impairment. The tribunal's approach had therefore been incorrect. Referring to what is now para B1 of the Guidance, Elias P observed that in order to be substantial 'the effect must fall outwith the normal range of effects that one might expect from a cross section of the population', but 'when assessing the effect, the comparison is not with the population at large… what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out if not impaired.'

144. The decision in **Paterson** was considered in an education case brought under the EQA in **PP and anor v Trustees of Leicester Grammar School 2014 UKUT 520, Upper Tribunal (Administrative Appeals Chamber)**. The parents of a schoolgirl argued that their child had been discriminated against because of her dyslexia, but the first-tier tribunal ruled that she was not disabled within the meaning of the Act. Hearing the parents' appeal, the Upper Tribunal confessed to finding Elias P's reasoning in **Paterson** 'rather confusing' in that at times he suggested that an effect that was more than trivial would satisfy the definition of substantial, and at others that it would have to be outwith the normal range of effects one might expect from a cross-section of the population. In the Upper Tribunal's judgment, the statutory definition of 'substantial' in section 212(1) should be applied 'without any additional gloss'; it would be incompatible with that definition to apply a test that drew a comparison with a cross-section of the population.

145. As **Paterson** suggests, it is vital that tribunals consider, first and foremost, whether an adverse effect is 'substantial' in the light of the statutory definition: the Guidance and Code are strictly supplementary. In **Elliott v Dorset County Council EAT 0197/20** an employment judge found that E was not disabled on the basis that any adverse impact on him as a result of his autism and Asperger's Syndrome was minor. The tribunal noted that 'on occasions he may be obsessive, and he may need a routine' but that he did 'adapt his behaviour and adopt coping strategies'. However, the EAT overturned the judge's decision on the basis that it did not sufficiently identify the day-to-day activities, including work activities, that E could not do, or could only do with difficulty, to found a proper analysis. She only considered public speaking and socialising outside work but failed to focus on the core of E's claim, that he found it very difficult to deal with changes of procedure and, particularly in the context of stressful disciplinary proceedings, was not able to communicate properly with his line manager. Dealing with change at work, being flexible about procedures and communicating with managers are all day-to-day activities. She also focused excessively on coping strategies, without considering whether any coping strategies might break down in certain circumstances. Further, in considering whether the adverse effects of the impairment were 'substantial', she relied too much on a comparison with the general population, rather properly applying the statutory definition of more than minor or trivial.

146. The cumulative effects of an impairment are also relevant. An impairment might not have a substantial adverse effect on a person in any one respect, but its effects in more than one respect taken together could result in a substantial

adverse effect on the person's ability to carry out normal day-to-day activities. The Guidance gives the example of a man with depression who experiences a range of symptoms, which include a loss of energy and motivation that makes even the simplest of tasks or decisions seem quite difficult. He finds it difficult to get up in the morning, get washed and dressed, and prepare breakfast. He is forgetful and cannot plan ahead. As a result he has often run out of food before he thinks of going shopping again. Household tasks are frequently left undone or take much longer to complete than normal. Together, the effects amount to the impairment having a substantial adverse effect on carrying out normal day-to-day activities (see para B5).

147. Paragraph 5(1) of Schedule 1 to the EQA provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard, likely means 'could well happen' — **Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) 2009 ICR 1056**,). This means that in assessing whether there is a substantial adverse effect on the person's ability to carry out normal day-to-day activities, any medical treatment which reduces or extinguishes the effects of the impairment should be ignored. For example, in **Carden v Pickerings Europe Ltd 2005 IRLR 721, EAT**, the EAT held that the equivalent provision in the DDA — para 6(1) of Schedule 1 — applied in circumstances where a plate and pins had been surgically inserted in the claimant's ankle, which meant that he required no further treatment so long as his ankle received the continuing support or assistance that the pins and plate provided.

148. When determining whether a person meets the definition of disability under the EQA the Guidance emphasises that it is important to focus on what an individual cannot do, or can only do with difficulty, rather than on the things that he or she can do (see para B9). As the EAT pointed out in **Goodwin**, even though the claimant may be able to perform a lot of activities, the impairment may still have a substantial adverse effect on other activities, with the result that the claimant is quite properly to be regarded as meeting the statutory definition of disability. Equally, where a person can carry out an act but only with great difficulty, that person's ability has been impaired.

149. Appendix 1 to the Code states that 'normal day-to-day activities' are activities that are carried out by most men or women on a fairly regular and frequent basis, and gives examples such as walking, driving, typing and forming social relationships. The Code adds: 'The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition' — paras 14 and 15.

150. The Guidance emphasises that the term 'normal day-to-day activities' is not intended to include activities that are normal only for a particular person or a small group of people. Account should be taken of how far the activity is carried out by people on a daily or frequent basis. In this context, 'normal' should be given its ordinary, everyday meaning (para D4).

151. The Guidance states that it is not possible to provide an exhaustive list of day-to-day activities. However, in general, day-to-day activities are things people do on a regular or daily basis. The examples given are shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can also include general work-related activities and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern (para D3).

152. The substantial adverse effect of an impairment has to be long term to fall within the definition of 'disability' in S.6(1) EQA, whether the disability is current or a past disability under S.6(4). This requirement ensures that temporary or short-term conditions do not attract EQA's protection, even if they are severe and very disabling while they last, such as acute depression or a strained back.

153. Under para 2(1) of Schedule 1 to the EQA, the effect of an impairment is long term if it:

a. has lasted for at least 12 months;

b. is likely to last for at least 12 months; or

c. is likely to last for the rest of the life of the person affected.

154. To attract the protection from disability discrimination and disability-related harassment in the EQA, a claimant must be disabled at the time of the acts or omissions that form the basis of the complaint. Thus, the tribunal's findings as to the date when the impairment became long term can be very important. In **Tesco Stores Ltd v Tennant EAT 0167/19** an employment judge found that T's depression was a 'long-term' condition on the basis that it had lasted for the 12 months leading up to the date when she presented her claim in September 2017, and that this meant that she was suffering a disability for the whole of that period. TS Ltd appealed to the EAT. Although there was no authority directly on the point, the EAT considered that the employment judge was clearly wrong: as at any of the relevant dates – i.e. the dates of the allegedly discriminatory acts between September 2016 and September 2017 – T's impairment and its adverse effects had not yet lasted for at least 12 months and so she was not disabled at the relevant time. The EAT rejected T's submission that it was enough that the period during which the discriminatory acts occurred coincided with the period during which the impairment was producing the adverse effect. In the EAT's view, it was required to consider whether, as at the date that the acts occurred, there had been 12 months of adverse effect. It therefore held that T could only bring claims of disability discrimination on the basis of acts that occurred on or after 6 September 2017.

155. Clearly, had the tribunal found the impairment to have been likely to last for at least 12 months at an earlier stage, T would have been able to bring claims of disability discrimination in respect of acts or omissions that occurred from that stage onwards. However, T failed to cross-appeal on this basis and on the facts of the case the EAT considered that she should not be allowed to raise the point on remittal.

Constructive dismissal

156. ERA, section 95(1)(c) provides a statutory definition of constructive dismissal:

> *(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …only if) –*
>
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*

157. The employee may resign with or without notice. What matters is that they are entitled to resign without notice. In practice it is uncommon for an employee to resign with notice.

158. In **Western Excavation (ECC) Ltd v Sharp [1978] ICR 221** Lord Denning said:

> *If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.*

159. While Lord Denning's reasoning has stood the test of time, the legal landscape in this area has been altered by the emergence of the implied term of trust and confidence. The distinction between a breach of the implied term of trust and confidence and unreasonable conduct on the part of an employer, while real, is often a narrow one.

160. We are reminded that In **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978** the Court of Appeal listed five questions that it should be sufficient to ask in order to determine whether an employee was constructively dismissed:

a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

b. Has he or she affirmed the contract since that act?

c. If not, was that act (or omission) by itself a repudiatory breach of contract?

d. If not, was it nevertheless a part (applying the approach explained in **Waltham Forest v Omilaju [2004] EWCA Civ 1493**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)

e. Did the employee resign in response (or partly in response) to that breach?

161. In **Chindove v William Morrison Supermarkets Ltd UKEAT/0201/13 (26 March 2014, unreported)**, where a period of sickness absence of six weeks before resigning was held not to amount to affirmation, Langstaff P indicated that in a case such as this, as a general principle, a tribunal might be more indulgent towards the period of delay because the need to make a decision one way or the other is arguably less pressing than if the employee is continuing actually to work for the employer.

Discrimination arising from disability

162. EQA, section 15(1) provides that a person (A) discriminates against a disabled person (B) if:

a. A treats B unfavourably because of something arising in consequence of B's disability; and

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

163. EQA, section 15(1) goes on to state that section 15(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.

164. In establishing unfavourable treatment, there is no requirement to have a comparator.

165. We are reminded that in **Secretary of State for Justice and anor v Dunn EAT 0234/16** four elements must be made out for Miss Cairns to succeed:

c. There must be unfavourable treatment.

d. There must be something that arises in consequence of Miss Cairns' disability.

e. The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability; and

f. Cash Converters cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate end.

166. Unfavourable treatment is what the alleged discriminator does or says, or omits to do or say, which then puts the disabled person at a disadvantage. Dismissal can amount to unfavourable treatment.

167. The discriminatory treatment must be something arising in consequence of Miss Cairns' disability not his disability itself. There must be something that led to the unfavourable treatment and this "something" must have a connection to Miss Cairns' disability. In **Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT** Mr. Justice Langstaff, the then President

of the EAT, explained that there is a need to identify two separate causative steps in order for a claim under section 15 EQA 2010 to be made out. The first is that the disability had the consequence of 'something;' the second is that Miss Cairns was treated unfavourably because of that 'something.' According to Langstaff P, it does not matter in which order the Tribunal approaches these two steps: 'It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability.'

168. In **Dunn** Simler J stated:

> *b [Counsel for the claimant asserts] that motive is irrelevant. Moreover, he submits that the claimant did not have to prove the reason for the unfavourable treatment but simply that disability was a significant influence in the minds of the decision-makers. We agree with him that motive is irrelevant. Nonetheless, the statutory test requires a tribunal to address the question whether the unfavourable treatment is because of something arising in consequence of disability… [I]t need not be the sole reason, but it must be a significant or at least more than trivial reason. Just as with direct discrimination, save in the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary*.

The enquiry into such thought processes is required to ascertain whether the 'something' that is identified as having arisen as a consequence of that claimant's disability formed any part of the reason why the unfavourable treatment was meted out.

169. We are also reminded that in **Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893, EAT**, the EAT clarified that a claimant needs only to establish some kind of connection between the claimant's disability and the unfavourable treatment. A section 15 claim could succeed where the disability had a significant influence on, or was an effective cause of, the unfavourable treatment. The EAT's approach in **Hall** clearly required an influence or cause that operates on the mind of a putative discriminator, whether consciously or subconsciously, to a significant extent and so amounts to an effective cause. Anything less would be insufficient.

170. In **Department for Work and Pensions v Boyers EAT 0282/19** an employee was dismissed for long-term sickness absence. The employment tribunal found the dismissal to be unfair and then went on to find that it was also discrimination arising from disability. Allowing an appeal against the latter finding and remitting the matter of justification to the tribunal, the EAT held that in the tribunal's consideration of proportionality, it had impermissibly focused on the process which led the employer to dismiss, rather than engaging in an objective assessment, balancing the needs of the employer, as represented by the legitimate aims pursued, against the discriminatory effect of the decision to dismiss.

171. A failure to consider whether a lesser measure could have achieved the employer's legitimate aim may mean that the tribunal fails to take a relevant

factor into account in the proportionality exercise required under section15(1)(b). In **Ali v Torrosian and ors (t/a Bedford Hill Family Practice) EAT 0029/18,** A had worked as a GP for BHFP before suffering a heart attack and then going on sick leave. His ongoing heart condition was a disability for the purposes of the EqA. A medical report confirmed that it was unlikely that A would ever be able to return to work full time but advised that he could return to part-time work. On the expiry of his last fitness to work certificate, A was dismissed on the ground of capability. He brought claims of unfair dismissal and disability discrimination. The tribunal concluded that the dismissal was procedurally unfair because BHFP failed to consider A's return to work on a part-time basis. However, it rejected his disability discrimination claims, holding that while his dismissal amounted to unfavourable treatment for the purposes of section 15, and arose in consequence of his disability, it was justified by the legitimate aim of ensuring the best possible care was provided to patients.

Duty to make reasonable adjustments

172. EQA 2010, section 20 imposes a duty on employers to make reasonable adjustments to help disabled employees and former employees in certain circumstances. The duty can arise where a disabled person is placed at a substantial disadvantage by an employer's PCP.

173. If Miss Cairns is to succeed her claim that Cash Converters has failed to make reasonable adjustments based on the first requirement, she must clearly identify the PCP to which it is asserted adjustments ought to have been made. Furthermore, the Tribunal must only consider the claim that has been made to it by her.

174. An employer will not be obliged to make reasonable adjustments unless it knows or ought reasonably to know that the individual in question is disabled and likely to be placed at a substantial disadvantage because of their disability.

Discussion and conclusions on liability

General observations on the witness evidence and credibility

175. Despite the adjustments that were made to accommodate her poor mental health, it was apparent almost immediately that Miss Cairns was going to find giving evidence very difficult. She was shaking uncontrollably. She spoke quickly and sometimes incoherently. She was clearly very distressed and at one point broke down and needed time to compose herself. We had concerns that she might not be able to give oral evidence at all, but after taking several breaks, she was able to steady herself and she completed her evidence. Our overall impression was that Miss Cairns was sincere in what she was saying. Given the context of her mental health, she was a reliable witness and credible. We give her evidence weight. We should also add that Ms Harkins should be given credit for the sensitive way in which she cross-examined Miss Cairns. She was patient, she was not over-bearing or aggressive.

176. We have concerns about the evidence that we heard from Mr Lowes, Mr Pilgrim and Mr Harrison for the following reasons:

a. Mr Lowes' evidence regarding the letter of concern effectively sought to play down its significance. He did not manage Miss Cairns' absence over many months and much of the correspondence that passed between him and her was accusatory and harsh. Despite being in a management position, he frequently sought to abrogate responsibility for his behaviour by explaining that he relied upon Holly Blue.

b. Mr Pilgrim's evidence was internally inconsistent on several important points and not persuasive. We were concerned about his inconsistent approach regarding the weight to be given to Miss Cairns' allegations given the lack of corroboration. He was saying it was one person's word against another and yet he was able to make positive findings of fact by preferring Mr Lowes and Ms Lynn's account rather than simply saying that Miss Cairns had failed to establish her case. He was unable to adequately to explain why he did this. Frequently, when challenged in cross examination about the grievance outcome letter he simply deferred to Holly Blue which might suggest that organisation was not simply acting in an advisory capacity as an external consultant but doing much more and was actively involved in the decision-making process. We also question the extent to which Mr Pilgrim was genuinely independent and impartial. He knew about the letter of concern and agreed with its terms and yet it was the subject of the grievance. We also have concerns about how he conducted and gathered information as part of his investigation (e.g. sending standard questions to witnesses in advance of the interviews and not going to Miss Cairns to ask her views on their responses or even reverting the witnesses with follow up questions). Whilst he said that he had taken contemporaneous notes of the telephone interviews, these were not produced in the hearing bundle. They should have been produced as they are relevant to the issues. We draw adverse inferences from that failure to do so because it calls into question the transparency of the investigation and whether it was approached by Mr Pilgrim with an open mind.

c. Mr Harrison is somebody who had personal experience similar to Miss Cairns. He told the Tribunal that this had occurred when he was employed by a different employer. However, we do not accept that this was effectively translated into how he conducted the appeal. He had not referred to any of Cash Converters' policies. He had not considered whether any adjustments should have been made to accommodate Miss Cairns' mental health problems. He was inconsistent on whether he had actually read and reviewed the letter of concern which we find surprising because it was a document of central importance to Miss Cairns' grievance. Under cross-examination, he conceded that he had not considered the reasonableness of each issue identified in the letter of concern notwithstanding that these had been raised as grounds of Miss Cairns' appeal. He acknowledged that there was an historic complaint against Ms Lynn. She too had received a letter of concern, but despite this, Mr Harrison was sceptical about its provenance (e.g. it was undated and unsigned). If he had reservations about it, he could have followed matters up. For example, he could have asked Ms Lynn about it or he could have asked to see Ms Lynn's personnel file. He did not do that.

Had he done so, he might have found evidence that would have corroborated what Miss Cairns had said about Ms Lynn's bullying behaviour. We also have concerns that Mr Harrison took the responses from the witnesses at face value and did not think it was necessary to ask any follow-up questions of those witnesses.

Constructive dismissal

177. Miss Cairns relies upon the invitation to the SOSR meeting [466] and Mr Lowes' subsequent email dated 23 November 2020 [467] as amounting to the repudiatory breach of the implied contractual term of trust and confidence. We agree with Ms Twine that the tone of Mr Lowes' communications was threatening. Miss Cairns is described as being unreasonable and there is no indication of any willingness to support an employee who had been on sickness absence and continued to be signed off sick with a mental health condition that had been known to Cash Converters from at least 16 January 2020 when Miss Cairns' GP issued their report to Mr Lowes. That was a considerable period of time.

178. It was reasonable for Miss Cairns to regard the SOSR communications as hostile and threatening and accusatory when words such as "perceived unwillingness" and "unjustified sense of grievance" were used and which were completely unnecessary. There was no suggestion or attempt to consider alternatives such as a referral to occupational health and a phased return to work. Miss Cairns had said that she was not well enough to attend an absence review meeting and it was then decided to convert that meeting to consider SOSR dismissal. Miss Cairns was justified in believing that the outcome of the SOSR meeting had been predetermined and she believed that she was going to be dismissed in breach of the duty of trust and confidence. She had been dealing with an unsupportive and frequently uncommunicative employer for 14 months. She had no choice but to resign.

179. If we are wrong, we accept the alternative argument put forward in Ms Twine's written submissions concerning the last straw doctrine for the reasons set out therein.

180. We have no hesitation in finding that Miss Cairns resigned in response to that breach of contract. She did not have another job to go to. She was still signed off sick and continued to be signed off sick long after her employment ended.

181. The claim for constructive dismissal is well founded.

Disability

182. Cash Converters accepts that Miss Cairns has a mental impairment. It does not accept that she was disabled at the material time. The Tribunal accepts that Miss Cairns was and continues to be disabled with severe anxiety, stress, and depression for the following reasons:

a. She has provided extensive supporting evidence to corroborate what she has set out in her disability impact statement. We give particular weight to her disability impact statement, the GP correspondence, the

extracts from her GP records, the DWP ESA assessment, and the numerous MED 3 fitness to work certificates. We also had the benefit of hearing and seeing Miss Cairns give her evidence. She was clearly extremely distressed over and beyond what one would normally expect under the circumstances faced by any witness giving evidence and being cross examined in the stressful environment of a Tribunal hearing.

b. Ms Twine submitted that Cash Converters knew that Miss Cairns was disabled from 9 September 2019. Reference is made to the first MED 3 certificate which states that she was signed off work for two weeks with stress and anxiety. At that point, we think it is reasonable to conclude that Mr Lowes did not know that this was work-related stress. However, we believe that Cash Converters first became aware of Miss Cairns' disability on 25 January 2020 when Mr Lowes forwarded a copy of the medical report to Holly Blue. Cash Converters were aware that Miss Cairns was unfit to attend any meeting, she was suffering from work-related stress and depression and her anxiety and stress was detailed in her correspondence.

c. When Miss Cairns submitted her grievance in June 2020, she told Mr Pilgrim that her anxiety impacted on her daily life, and she had essentially withdrawn from all outside contact. By that time, Miss Cairns had been severely ill for reasons of mental impairment a fact which was known to Cash Converters for at least five months.

d. We have the benefit of the disability impact statement and the supporting medical and DWP evidence.

183. We do not accept Cash Converters' position that Miss Cairns was not disabled, even though she had to take a long-time off work because of stress, because her condition had been a reaction to difficulties at work rather than a mental impairment. It is common knowledge that work-related issues can result in real mental impairment, especially for those who are susceptible to anxiety and depression. We acknowledge that unhappiness with a decision or a colleague, or a tendency to nurse grievances or a refusal to compromise are not, of themselves, mental impairments: they may simply reflect a person's character or personality. However, in this case, we have medical evidence that supports a diagnosis of mental impairment which we have carefully considered. That evidence shows that Miss Cairns suffered an adverse reaction to workplace circumstances that became entrenched. She could not return to work. That evidence also shows that Miss Cairns suffered and continues to suffer substantial adverse effects on her normal day-to-day activities justifying our finding a mental impairment of sufficient severity and longevity to qualify as a disability.

Discrimination arising from disability

184. In her paragraph 11 of her FBPs [50], Miss Cairns has relied upon 33 acts that she says amounted to unfavourable treatment. However, Ms Twine concedes that she cannot establish acts a-i as unfavourable treatment because of something arising from her disability. We are invited to find each incident listed in paragraph 11 j-gg arose and constitute unfavourable treatment recognising that pursuant to the paragraph 5.7 of the EHRC Code that

unfavourable should be construed synonymously with disadvantage and that motive is irrelevant. Given the date from which we believe Cash Converters first knew that Miss Cairns was disabled (i.e. 25 January 2020), we find that the following were acts of unfavourable treatment:

a. From 25 January 2020 until mid-May 2020, failing promptly to address the issues in Miss Cairns' medical report dated 13 January 2020 which notified Cash Converters of her severe anxiety due to her work situation.

b. On 11 May 2020, Cash Converters sent Miss Cairns a letter, in response to her query about returning to work, by informing her that if she should be fit to return it was likely that as little as 5 hours of work per week would be offered to her, and that payment will be made only for the hours that she had worked and because they had work for her, she would not be eligible for furlough. She would suffer substantial loss of income.

185. In paragraph 14 [55] of her further and better particulars, Miss Cairns has identified several things that she says are something arising from her disability. We do not accept that her anxiety can be something arising from disability. Her anxiety is one element of her disability. Similarly, we do not accept that her fear of further bullying on return to work can be something arising from her disability. This is a different way of saying it is her anxiety. Anxiety is one of the mental impairments. Consequently, we find the following to be the something arising from Miss Cairns' disability:

a. Her way of expressing her views/opinions due to anxiety.

b. Her sickness absence.

c. Her inability to commit to a return-to-work date.

d. Her inability to engage more in return-to-work discussions.

e. Her adverse reaction to Cash Converters' correspondence.

186. We accept that from the date that Cash Converters first knew of her disability the treatment of Miss Cairns was because of the "something arising" listed above.

187. Cash Converters maintain that any unfavourable treatment, including dismissal, was a proportionate means of achieving a legitimate aim which was to combat absenteeism. Ms Twine submits that Miss Cairns does not dispute the need to manage sickness absence. However, she does not accept that Cash Converters' conduct was a proportionate means of achieving that legitimate aim. She submits that Cash converters did not support Miss Cairns either emotionally or practically. There were significant periods of time where there was no communication with her. Those communications that were sent, were generally hostile and challenging. Furthermore, it is submitted that whilst Cash Converters said that it was managing Miss Cairns' absence, it did not follow its own policy. Eventually, Cash Converters proceeded to the SOSR meeting, and the Tribunal is invited to assume, because it had resolved that it could no longer tolerate absence, Cash Converters failed to adduce any evidence as to adverse impact on Miss Cairns' continued absence. We agree with that proposition. We are also not satisfied that alternatives to an SOSR

meeting were considered such as a phased return to work or referral to occupational health which would have been less discriminatory.

188. The claim for discrimination arising from disability is well founded.

Failure to make reasonable adjustments

189. It is common ground that Cash Converters applied the following PCPs as identified in paragraph 18 of the FBPs [56]. These are as follows:

a. Involving the same managers (Mr Lowes and Ms Lynn) in the absence process.

b. Sending standard/blunt correspondence to employees no matter the reasons for their absence under all the circumstances in the lead up to their absence.

c. Managing absence by way of strict adherence to internal policies and seeking a return-to-work date.

d. Managing absence by way of strict adherence to internal policies and seeking a return-to-work date and/or the requirement to maintain a consistent attendance at work failing which the employee would be subject to disciplinary sanctions up to and including dismissal.

e. Dealing with allegations of internal bullying by making firm conclusions one way or the other as to whether Cash Converters did believe bullying had taken place and/or seeking corroborated evidence or independent witnesses (when such evidence may not exist, or witnesses may fear to come forward).

f. Dealing with perceived conduct issues or breakdowns in a relationship by way of a formal disciplinary process or a meeting and/or dealing with absence by way of formal capability processes (not or ever tailored to the individual or the medical condition) and/or informing employees in letters inviting them to a formal meeting that decisions will be made in their absence

g. The requirement to maintain a consistent attendance at work failing which the employee would be subject to disciplinary sanctions up and including dismissal.

190. For the reasons given above, Cash Converters knew that Miss Cairns was disabled from 25 January 2020. We conclude that the PCPs put Miss Cairns at a substantial disadvantage as follows:

a. Mr Lowes knew that his involvement in the letter of concern contributed or caused Miss Cairns' stress and anxiety and it would have put her at a substantial disadvantage. This was made clear in the grievance letter.

b. Standard/blunt correspondence elicited an emotional response in Miss Cairns that was much more marked than it would have been for someone not suffering her mental impairment. She repeatedly told Cash

Converters that she was struggling with the nature and the tone of the correspondence.

c. Miss Cairns could not comply with the standard absence procedure requests to meet in person or by zoom. She was unable to give a clear return to work date because of her disability and was substantially disadvantaged because of that. She was at risk of dismissal for SOSR. She was left to her own devices for substantial periods of time without any communication with Cash Converters who provided her with no support and were hostile when they did communicate with her.

d. Miss Cairns was unable to maintain consistent attendance at work because of her illness. She fell afoul of the requirement to maintain consistent attendance and was at risk of disciplinary sanctions or an SOSR dismissal.

e. In respect of allegations of internal bullying, Miss Cairns was substantially disadvantaged because it was rare for bullying incidents to be witnessed or that where there is collusion, corroborative evidence will be found.

f. Miss Cairns was unable to engage with Cash Converters in circumstances where there are perceived to be conduct issues and where there was a breakdown in relationships triggering a formal disciplinary process or meeting. No other process was attempted.

g. Miss Cairns was unable to engage with the formal capability process placing her at risk of dismissal.

h. Miss Cairns was unable to attend a formal meeting or make representations that would have assisted her because Cash Converters offered no support.

191. Cash Converters took no steps to avoid the substantial disadvantage identified above. Their own sickness absence policy provides for making reasonable adjustments for disabled employees. We did not see any positive evidence of any adjustments being provided for Miss Cairns or any consideration of adjustments given that it was known that she was disabled. They denied she was disabled.

192. The following reasonable adjustments could have been made:

a. Mr Lowes could have been removed from the absence review process. He was Miss Cairns' line manager, and he knew he had possibly caused or at least contributed to her absence from September 2019 when his letter of concern was given to her. He should have removed himself from that point onwards. The latest date on which he should have been removed was in June 2020 when Miss Cairns unequivocally stated that her managers and Mr Lowes' communications were causing her to condition to deteriorate.

b. Cash Converters could have adopted more sensitive and less accusatory language when corresponding with Miss Cairns. Much was made of the fact that standard letters and communications were

prepared by Holly Blue. That may well have been the case, but it is no excuse not to modify the tone and content of what was written. If these were Holly Blue's precedents, they were a starting point only. This is a case where it was known that Miss Cairns was struggling with her mental health and was not coping with the tone of the correspondence being sent to her. The tone of the letters and emails could have been sympathetic/empathetic and supportive.

c. Cash Converters purported to be following the internal sickness absence policy in seeking a return-to-work date. It sought to obtain a return-to-work date in September 2019 and December 2019 and yet it failed to respond to the GP report that it received on 25 January 2020 which clearly addressed Miss Cairns' fitness to return to work. Cash Converters did not consider the requirements to make adjustments for her disability in accordance with its own policy. This should have been done from at least 25 January 2020.

d. Cash Converters did not propose or develop a return-to-work programme for Miss Cairns. Although she was unfit to attend requested meetings, adjustments should have been made to seek to develop a program liaising with Miss Cairns after seeking appropriate medical advice. This could have been from her GP and/or from occupational health. There was no contact from September to November 2019. From December 2019 until the end of January 2020, there was some contact with Miss Cairns. Thereafter there was a hiatus until early May 2020 which clearly points to Cash Converters failing to make any adjustments in seeking to get her back to work.

e. Cash Converters could have appointed a mentor to help Miss Cairns such as another manager or staff member to help her through the sickness absence process. Mr Harrison had suggested mediation and in his evidence, he believes that this could have facilitated a return to work earlier. Nothing seems to have come of that suggestion.

f. Cash Converters could have provided training and awareness on bullying and mental health in the workplace. There was no evidence of any such training being provided. Cash Converters appear to have little or no regard to their own policies and they were aware that Miss Cairns was off sick possibly in response to management action taken by the giving her the letter of concern and prolonged by the tone of communications dealing with her grievance and her absence.

g. Cash Converters could have delayed Miss Cairns' termination of employment for SOSR. The letter inviting her to a SOSR meeting was triggered by Miss Cairns informing them that she was unfit to attend an absence management meeting. Cash Converters did not consider Miss Cairns' prognosis at the time of the invitation, and it was known that she was unable to attend any meeting.

193. The claim for failure to make reasonable adjustments is well founded.

REMEDY

Constructive unfair dismissal

194. Miss Cairns' effective date of termination of employment was 1 December 2020 and her gross annual salary was £24,996 (based on gross monthly pay of £2,083 as set out in section 6 of her ET1). Her gross weekly pay was £480.

Basic Award (ERA, section 119)

11 years at £480.
Age at dismissal was 34
Total basic award **£5,280**

Compensatory Award (ERA, section 123)

…such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer

Loss of income

Miss Cairns is claiming loss of income from 1 March 2020 until 14 May 2021. A claim for loss of earnings is from the point at which Cash Converters ought to have managed her sickness absence and dealt with her grievance. The compensatory award is based on net annual salary.

Cash Converters contests this in that she is claiming for loss of income from the point where she could no longer work. They say that Miss Cairns was incapacitated for a period spanning 14 months and therefore was only entitled to SSP for a maximum period of 28 weeks. She has not incurred actual losses in relation to earnings because during this period of time she was unable to work.

The Tribunal finds that Miss Cairns was unable to work because of the manner in which she was treated by Cash Converters. In her grievance letter of 1 June 2020, Miss Cairns said, amongst other things

> *I genuinely feel if I had been offered support and some level of phased return, I could have been back to work months ago.*

We believe that is a reasonable assumption and we find that it would be just and equitable to award 52 weeks' gross pay being £24,960. The compensatory award is then subject to deductions for tax and National Insurance. This leaves £20,614.60

Less

SSP £377

Plus

Loss of statutory rights

£500

Loss of employer's contribution to pension

@ £251 per month for 12 months

£3,012.00

Total award (basic + compensatory) **£29,029.60**

Recoupment

A number of awards made by tribunals are subject to recoupment, whereby the state recovers from the respondent the value of certain state benefits paid to the claimant. This involves the tribunal identifying a part of the award that corresponds to a period of loss during which the claimant was in receipt of job seeker's allowance, income-related employment support allowance, income support or universal credit. The respondent is required to not pay the claimant the sum the tribunal identifies, but to wait until the DWP recoups from them any benefits paid, with the remainder then being paid to the claimant by the respondent.

Miss Cairns has received ESA which is subject to recoupment.

The prescribed element is £20,614.60 which should be held back from Miss Cairns. The balance payable is £5,280 + £500 + £3,012.00 = £8,792

Once the actual state benefits that are subject to recoupment are known, the DWP will claim this figure from the prescribed element retained by the respondent and any remaining monies must be paid by Cash Converters to Miss Cairns.

Disability Discrimination (EQA sections 15 and 20)

195. Any award of compensation will be assessed under the same principles as apply to torts (see sections124(6) and 119(2)). The central aim is to put the claimant in the position, so far as is reasonable, that he or she would have been had the tort not occurred (**Ministry of Defence v Wheeler [1998] IRLR 23** and **Chagger v Abbey National plc [2010] IRLR 47**). The sum is not determined by what the tribunal considers just and equitable in the circumstances as it would do in an unfair dismissal award (**Hurley v Mustoe (No 2) [1983] ICR 422**), though the two approaches will often generate the same result. There is no statutory limit to the number of weeks' loss that can be awarded.

Loss of earnings

as above plus **£20,639.08 (no cap on 52 weeks pay as with unfair dismissal) (however there cannot be double recovery for the period of loss covered by the compensatory award for unfair dismissal.)**

Loss of pension

£3,012.00

Injury to feelings

Injury to feelings awards compensate for non-pecuniary loss. Injury to feelings awards are available where a tribunal has upheld a complaint of discrimination (EQA, section 119(4)). The award of injury to feelings is intended to compensate the claimant for the anger, distress and upset caused by the unlawful treatment they have received. It is compensatory, not punitive. Tribunals have a broad discretion about what level of award to make. The matters compensated for by an injury to feelings award encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress depression (**Vento v Chief Constable of West Yorkshire Police (No2) [2003] IRLR 102**).

In **Vento** the Court of Appeal identified three broad bands of compensation for injury to feelings and gave the following guidance (however, see below for revised figures):

1) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000;

2) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band;

3) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings. Within each band there is considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable, and just compensation in the particular circumstances of the case.

The boundaries of the bands have been revised in several subsequent cases, culminating in the decision in **De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879**, which held that the 10% uplift in **Simmons v Castle [2012] EWCA Civ 1288** should apply to awards for injury to feelings.

Following this, the Presidents of the Employment Tribunals in England & Wales and Scotland issued 'Presidential Guidance: Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury Following De Souza v Vinci Construction (UK) Ltd'. This Guidance, the third addendum of which

was released on 27 March 2020 taking into account changes in the RPI All Items Index released on 25 March 2020, updated the bands as follows:

a. Upper Band: £27,000 to £45,000 (the most serious cases);

b. Middle Band: £9,000 to £27,000 (cases that do not merit an award in the upper band); and

c. Lower Band: £900 to £9,000 (less serious cases).

The 'most exceptional cases' are capable of exceeding the maximum of £45,000

In her schedule of loss, Miss Cairns was seeking an award for injury to feelings in the Middle Band for £25,000. However, this has been reduced to £20,000 as per Ms Twine's written submissions. She justifies this figure for the following reasons:

a. Cash Converters caused her stress condition and triggered her long-term sickness absence.

b. Cash Converters failed to support Miss Cairns when she commenced long-term sickness absence thereby preventing her return to work.

c. During her absence, Cash Converters worsened Miss Cairns' condition by their discriminatory behaviour and poor treatment of her.

d. Since commencing her long-term sickness absence, Miss Cairns has had little enjoyment of life, she has been isolated within her home.

e. Miss Cairns continues to suffer from severe stress, anxiety, and depression as demonstrated during her oral evidence and her inability to take an active role for the duration of the claim.

196. We accept that it would be justified to award Miss Cairns **£20,000** for injury to feelings.

Interest

197. A tribunal is able to award interest on awards of compensation made in discrimination claims brought under EQA, section 124(2)(b), to compensate for the fact that compensation has been awarded after the relevant loss has been suffered. The Tribunal may award interest on the discriminatory awards for past financial loss and injury to feelings, amongst other things. Interest is calculated as simple interest.

198. Interest is awarded on injury to feelings awards from the date of the act of discrimination complained of until the date on which the tribunal calculates the compensation. The date of the discrimination complained of starts on 25 January 2020 and ends on 10 April 2022 (i.e. 806 days). The applicable interest rate is 8%. The calculation is: 806 x 0.08 x 1/365 x 20,000 = **£3,533.15**.

199. Interest is awarded on all sums other than injury to feelings awards from the mid-point of the date of the act of discrimination complained of and the date the

tribunal calculates the award. The mid-point date is the date half way through the period between the date of the discrimination complained of and the date the tribunal calculates the award. The calculation is based on past loss. The calculation is 806/2 x 0.08 x 1/365 x 20,639.08 = **£1,823.02**.

Total award for disability discrimination

200. The total award is: **£49,007.25**.

Employment Judge Green

Date 10 April 2022