



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms K Hetherington

**respondent:** C B Ventures Ltd

**Heard via CVP (London Central)**

**On:** 3, 4, 5, 9, 10 May 2022  
11 May 2022 (in chambers)

**Before:** Employment Judge Davidson  
Ms C Brayson  
Mr R Baber

## Representation

**Claimant:** in person  
**respondent:** Ms H Winstone, Counsel

# RESERVED JUDGMENT

It is the unanimous decision of the tribunal that:

1. the claimant's complaints of wrongful dismissal, unfair dismissal, direct disability discrimination, failure to make reasonable adjustments, discrimination arising from disability and harassment on grounds of disability fail and are hereby dismissed;
2. the claimant's complaint under section 4 of the Employment Rights Act succeeds. As her substantive claim was unsuccessful, no compensation is payable.

# REASONS

## Issues

*Failure to give statement of employment particulars (s.1(1) and 4(1) ERA)*

1. Was the respondent in breach of its duty to give the claimant a written statement of initial employment particulars under s.1(1) of ERA?

2. Was the respondent in breach of its duty to give the claimant a written statement of particulars of change under s.4(1) of ERA?
3. If so, (provided the claimant has succeeded in her substantive claim) the Tribunal must make an award of the minimum amount of two weeks' pay and consider whether it is just and equitable to make an award of four weeks' pay, unless it considers that there are exceptional circumstances which would make an award or increase unjust or inequitable (s.38 Employment Act 2002).

*Contractual issues/determinations*

4. What were the terms and conditions (including, without limitation, in respect of (a) her pay (salary/responsibility allowance), (b) her sick pay entitlement, (c) her duties and responsibilities and (d) her entitlement to notice of termination of employment) that the claimant was employed under at the material time?
5. What was the claimant's contractual entitlement to salary/a responsibility allowance from 27 January 2020 until the point at which she should have handed over the respondent's Fulham Store to Vlad Lazar? The claimant contends that she was entitled to receive a £32,000 basic annual salary (inclusive of what the respondent has asserted to be a £5,000 per annum responsibility allowance) in full over that period.
6. What was the claimant's contractual entitlement to sick pay when off work sick due to an accident whilst at work over the period from 9 to 23 March 2020? The claimant contends that she should have received her full pay on an ongoing basis. The respondent contends that she was entitled to SSP only.
7. What were the claimant's duties and responsibilities when covering the respondent's Fulham Store, pending it appointing a permanent Store Manager to work there?

*Unlawful deduction from wages (s.23 ERA 1996)/ breach of contract*

8. In the light of the above, did the respondent make unlawful deductions from the claimant's wages and/or breach her contract of employment by:
9. Not paying her pay to her in full for the period from 27 January 2020 up to and including the point at which she should have handed the respondent's Fulham Store over to Vlad Lazar.
10. Not paying anything in excess of SSP to her over the period from 9 to 23 March 2020 when she was off work sick due to an accident whilst at work?
11. Did any such deductions constitute a series of deductions, with the result that the limitation period starts to run from the date of the last deduction

and/or was the failure to pay any of the sums a breach of contract which was outstanding on the claimant's dismissal?

*Wrongful dismissal / notice pay*

12. The respondent admits that it dismissed the claimant without notice or payment in lieu of notice. Was the respondent entitled to do so when and as it did for the reasons it gave in its ET3?
13. If the claimant is entitled to any notice pay, what is its value?

*Unfair dismissal*

14. What was the reason or principal reason for the claimant's dismissal? The respondent relies upon alleged gross misconduct.
15. If so, in the circumstances of the case did the respondent act reasonably in treating that reason as sufficient reason for dismissal? In particular:
  - 15.1 Did the respondent have reasonable grounds for believing that the claimant was guilty of gross misconduct at the time of the dismissal?
  - 15.2 Did the respondent properly and fairly investigate the incidence of misconduct as far as would be considered reasonable?
  - 15.3 Was the decision to dismiss the claimant summarily in all the circumstances of her case reasonable?
16. Did the respondent follow a fair procedure in dismissing the claimant? Without limitation and relying on all matters within the ET1, the claimant asserts that Colin Mclatchie should not have investigated the events leading up to her dismissal, that there was a lack of independence and that she should not have been suspended from work as she was barred from contacting staff and accessing work and did not have a fair opportunity to collect evidence.
17. Did the respondent follow its own internal policies and procedures?
18. Was the claimant's dismissal fair and reasonable in all the circumstances (including the size and administrative resources of the respondent, the particular circumstances the claimant was working under as an Acting Manager at the time and the previous good conduct of the claimant)?
19. Was the dismissal tainted by discrimination or was it an act of discrimination such that the dismissal was not fair and reasonable in all the circumstances?

Disability Discrimination

*Disability (s.6 Equality Act 2010)*

20. The respondent has already conceded that the claimant had a disability arising from her asthma throughout the course of her employment within the meaning of s6 of and Schedule 1 to the EqA 2020.
21. The Tribunal, in its judgment dated 16 May 2021, found the claimant to have a disability within the meaning of s6 of and Schedule 1 to the EqA 2020 over the material times (9 March 2020 to 15 June 2020).
22. On what date did the respondent have, or ought reasonably to have had, knowledge that the claimant was disabled in respect of each such impairment? The claimant contends that the respondent knew of her of asthma on or around 12 July 2016 and of her shoulder impairment on 9 March 2020.

*Failure to Make Reasonable Adjustments (s.21 EqA 2010)*

23. Did the respondent fail to make reasonable adjustments contrary to sections 20 and 21 of the EqA?
24. Did the respondent apply a provision, criterion or practice (PCP) with which the claimant was required to comply within the meaning of s20 of the EqA 2010? Are the following PCPs?
  - 24.1 Placing employees returning after time off directly into an investigation meeting.
  - 24.2 Not giving advance warning of an investigation meeting into alleged gross misconduct or potentially serious matters.
  - 24.3 Having investigations conducted by managers involved in the allegations made.
  - 24.4 Conducting investigation meetings in an accusatory rather than an open style.
  - 24.5 Suspending employees after an investigating meeting.
  - 24.6 Moving directly into a disciplinary procedure.
  - 24.7 Subjecting them to the disciplinary procedure.
  - 24.8 Not considering alternative employment for an injured employee.
  - 24.9 The convening of meetings during the investigation and disciplinary process at short notice.
  - 24.10 The convening of meetings during the investigation and disciplinary process in person during the pandemic and when in a national lockdown.
  - 24.11 The convening of those in person meetings with a substantial distance for an injured employee to have to drive to.
25. If so, did those PCPs put the claimant at a substantial disadvantage in relation to a relevant matter within the meaning of s20 (3) of the EqA in comparison with persons who are not disabled?

26. The claimant relies without limitation on stress affecting her asthma, being at a higher risk and suffering more anxiety in relation to her breathing difficulties in the pandemic and having great difficulty in travel and sitting for sustained periods of time due to her shoulder injury.
27. Did the respondent know (or ought reasonably to have known) that the claimant was disabled and was likely to be placed at a substantial disadvantage in comparison with persons who are not disabled?
28. If so, did the respondent take such steps as it is reasonable to have to take to avoid the disadvantage?
29. The claimant suggests the following without limitation:
  - 29.1 Giving reasonable notice of any allegations or investigatory meeting or disciplinary hearing.
  - 29.2 Not holding the investigation meeting on the claimant's first day back at work.
  - 29.3 Giving the claimant reasonable time and means before any such meetings to collect any evidence and speak to other parties.
  - 29.4 Holding any meetings remotely.
  - 29.5 Holding investigation and other meetings in an open manner.
  - 29.6 Appointing an independent manager to investigate any issues.
  - 29.7 Fairly investigating issues raised by the claimant and/or any issues in the claimant's favour prior to the disciplinary.
  - 29.8 Delaying the meetings.
  - 29.9 Looking for alternative work for the claimant not involving considerable lifting.
  - 29.10 Allowing the claimant to return to her residual job (prior to her period of acting up).
  - 29.11 Not dismissing the claimant.
  - 29.12 Allowing the claimant's appeal.

*Direct Discrimination (s.13 EqA 2010)*

30. Did the respondent treat the claimant less favourably than it treated or would treat a hypothetical comparator? The conduct relied upon is as follows:
  - 30.1 On 31 March 2020, suspending the claimant.
  - 30.2 On 3 April 2020, questioning the claimant's fitness for work and her fitness to attend the disciplinary hearing due to her asthma cough and then terminating the meeting and instructing her to self-isolate and obtain a fitness for work certificate.
  - 30.3 On 6 and 7 April 2020, HR subjecting the claimant to negative correspondence concerning the above.
  - 30.4 On 23 April 2020, dismissing the claimant.
  - 30.5 On 15 June 2020, rejecting the claimant's appeal against her dismissal.

31. If so, can the respondent show that the treatment of the claimant was proportionate means of achieving a legitimate aim?

32. Was any such treatment because of the claimant's disability?

*Harassment (s.26 EqA 2010)*

33. Did the following conduct occur:

33.1 On 31 March 2020, in a disciplinary hearing, Jayne Baker questioning the claimant's asthma and associated asthma cough and stating that she considered her to be unfit for work and unfit to attend the disciplinary hearing.

33.2 On 6 and 7 April 2020, Clare Slater in HR subjecting the claimant to negative correspondence concerning the above.

34. Was the conduct related to the claimant's disability?

35. Did the conduct have the purpose or effect of:

35.1 Violating the claimant's dignity?

35.2 Creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

*Discrimination arising from disability (s.15 EqA 2010)*

36. Did the following arise from the claimant's disability:

36.1 Being off work for a period prior to 31 March 2020?

36.2 Difficulty driving and/or being in a car for a long period of time?

36.3 Difficulty sitting in meetings for a long period of time?

36.4 Difficulty with manual lifting and tasks and therefore likely inability to carry on as before in her previous roles?

36.5 A cough?

36.6 More significant asthma symptoms if stressed?

36.7 More stress and/or anxiety if suffering from asthma symptoms?

36.8 A higher risk or fear of a higher risk to more serious outcomes if she caught the Covid 19 virus?

36.9 A fear of unnecessary travel, in person meetings and/or public transport during national lockdown?

36.10 Higher levels of anxiety during the pandemic?

37. Did the respondent subject the claimant to any of the following unfavourable treatment because of any of the above:

37.1 Failing to inform the claimant of the issues prior to 31 March 2020 which were raised at that meeting?

37.2 Removal from work WhatsApp groups?

37.3 On and from 31 March 2020, suspending the claimant?

- 37.4 From 31 March 2020 onwards failing to make any reasonable assessment of her health and its impact on work and the respondent's processes?
- 37.5 From 31 March 2020 onwards failing to fairly investigate the claimant's contentions and explanations?
- 37.6 On 3 April 2020, comments from Jayne Baker ?
- 37.7 On 6 and 7 April 2020, negative correspondence from HR?
- 37.8 Failing to fairly consider the claimant's mitigation and arguments?
- 37.9 On 23 April 2020, dismissing the claimant?
- 37.10 On 15 June 2020, rejecting the claimant's appeal against her dismissal?

38. If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

*Remedy*

*Section 1 & s4 ERA*

39. Should the Tribunal make the minimum award of two weeks' pay or make an award of four weeks' pay?

*Unpaid salary/responsibility allowance*

40. What are the claimant's losses for unpaid salary/responsibility allowance during the period from 27 January 2020 to the point of when the claimant should have handed over the respondent's Fulham Store to Vlad Lazar?

*Unpaid sick pay*

41. What are the claimant's losses for unpaid sick pay for the period from 9 to 23 March 2020?

*Wrongful dismissal and/or contractual notice pay*

42. What is the claimant's notice pay entitlement?

*Unfair dismissal*

43. In general, what loss has the claimant suffered as a consequence of her dismissal?

44. Has the claimant taken reasonable steps to mitigate her loss?

*Polkey issues*

45. In assessing compensation the Tribunal will need to determine whether, but for the dismissal, the claimant's employment would or could have ended in any event.

*Contributory fault*

46. Did the claimant engage in any culpable or blameworthy conduct and, if so, did any such conduct cause or contribute to the decision to dismiss her?

*Uplift to reflect any breach of the ACAS code of Practice*

47. If there was any such conduct, whether, and to what extent, the basic and compensatory awards should be reduced as provided for in Sections 122 and 123 of the ERA 1996.
48. Did the Acas Code of Practice on Disciplinary and Grievance Procedures apply to the claimant's dismissal?
49. If so, did the respondent fail to follow that Code?
50. If so, the Tribunal will need to determine whether, in the circumstances of the case, the failure to follow the Code was unreasonable (Sub-section 207A(2)(b) TU&LR(C) Act 1992) and, if so, whether it is just and equitable to increase any award to the claimant (up to a maximum of 25% as the claimant contends)?

*Unlawful discrimination*

51. What is the value of the claimant's claim for injury to feelings? In particular, which band of the Vento Guidelines applies to any such award?
52. Should the Tribunal make an award of aggravated damages and, if so, what is the value of such an award?
53. Is the claimant entitled to recover financial loss and, if so, what is the value of such financial loss (subject to any applicable quantum issues)?
54. Is the claimant entitled to damages for personal injury in addition to injury to feelings?

**Evidence**

55. The tribunal heard from the claimant on her own account and from Jayne Baker (Managing Director), Clare Slater (HR Manager) and Niels Ladefoged (non-executive Director) on behalf of the respondent. There was a bundle of 823 pages and the claimant added further documents as exhibits to her witness statement, including a statement from Andy Crimmin, who did not attend the hearing.

**Facts**

The tribunal found the following facts on the balance of probabilities.

56. The respondent operates a chain of three fast foods restaurants with branches in Fulham, Oxford and Cambridge. It is within the same group of companies as Smashburger and Dominos.
57. The claimant joined the respondent in July 2016 as Assistant Operations Manager, having been recruited by her husband, Ian Hetherington who was at the time Head of Operations. The claimant had approximately 30 years'



experience in the industry, having worked for McDonalds and having run her own hospitality business.

58. The claimant is asthmatic. There is no evidence that the claimant disclosed this at the time of her appointment but her manager was her husband who, presumably, was aware. There is no evidence that HR or other senior managers were aware and it was accepted by the claimant that she never took any time off due to her asthma.
59. The claimant was an 'above store' employee which meant that her contract of employment should have been issued at the start of her employment by her manager, in this case her husband. There is no evidence that a contract was issued.
60. The standard terms and conditions of employment include a provision that employees received SSP only for periods of sickness. Any other payments are purely discretionary.
61. The respondent's business is providing food to the public and therefore food safety and health and safety standards are fundamental. The respondent engages an external consultant, VG Technical, which carries out unannounced quarterly audits of the premises. In addition, 'coaching audits' are carried out from time to time to assist in induction of new managers so they see the standards the business is working to and how to follow up from the audit. These are not generally scored.
62. Ian Hetherington left the business in January 2018 and the claimant continued to work for the respondent. Andy Crimmin was appointed Head of Operations in March 2018 and became the claimant's manager.
63. The Store manager at Fulham in 2019 was OT. In March 2019, the store failed its quarterly audit with a score of 71.22%. Following the audit, OT put together an Action Plan (with the assistance of the claimant) which set out the problem identified, the corrective action, responsibility for corrective action and a column for signature once actioned. This was signed and annotated, some actions being taken immediately, others on an ongoing basis.
64. As a result of the failed audit, the claimant investigated and recommended disciplinary action against OT. He was issued with a written warning by Andy Crimmin.
65. In the Summer of 2019, the claimant covered management of the Cambridge store on an interim basis following the departure of the Store Manager.
66. In August 2019, the claimant asked Clare Slater whether she could get hold of the claimant's contract. Clare Slater replied that she did not hold a signed copy of the contract as the appointment was dealt with by Ian Hetherington

and not HR. She asked if she could help with anything to which the claimant did not reply. The claimant asked her manager, Andy Crimmin, what her notice period was and he told her it would be four weeks.

67. In December 2019, there was a quarterly audit at Fulham which scored over 90%. OT was still the Manager of Fulham at the time but he left on 24 December 2019.
68. In advance of his departure, and in view of the failure to recruit a replacement, Jayne Baker instructed Andy Crimmin to move the claimant in to hold the Fulham store. As store manager, the claimant (and the other store managers) would not have the support of an Assistant Operations Manager. The Operations Manager should have provided this support and senior management believed he was, but it now transpires that Andy Crimmin was away from the business frequently at the time for personal reasons and the claimant covered for him.
69. From early January 2020, to all intents and purposes, the claimant was the store manager at Fulham. She started receiving a responsibility allowance from 27 January 2020. This had been negotiated between Andy Crimmin and the claimant and approved by Jayne Baker. After a delay due to Andy Crimmin not filling out the necessary paperwork, the claimant received this additional allowance with effect from 27 January 2020 until the new manager took over at Fulham on 20 March 2020.
70. The claimant stated that she was not supported at this time, particularly with the need to recruit and the understaffing at the store. We note that HR offered to assist with recruitment and did take some steps to help her. The claimant regarded this as unwelcome interference and took exception to HR helping her in this way.
71. At about this time, the claimant was looking for jobs elsewhere although the respondent did not know this at the time.
72. On 27 January 2020 Colin Mclatchie started his employment as Area Manager, taking over from Andy Crimmin. The first few weeks of his employment involved induction training. He introduced himself to the claimant in late January 2020 and she told him that she saw herself as having no future in the business.
73. On 18 February 2020, as part of Colin Mclatchie's induction, VG Technical did a coaching audit at Fulham, in the presence of the claimant. This was not scored but identified a number of failings including four safety critical failings. These related to falsifying freezer temperature records, incorrect water bath temperature record, incorrect cooking temperature records regarding chicken and a breach of jewellery policy (by the claimant herself). There were also other numerous non-critical failings. The audit concluded with a number of recommended actions.

74. Temperature checks need to be taken at the start of the day, before the early evening rush and in the middle of the evening rush. However, no temperature checks are taken of items which are not ordered.
75. The following day, on 19 February 2020, Colin Mclatchie sent a message to the claimant and to the Fulham store email address addressed 'Dear Team'. From the content of the email, it is apparent to us that the claimant was the intended recipient. He asked her to get a full action plan in place and to email it to him by Friday (21<sup>st</sup>), ensuring that she implemented what was needed promptly and to coach the team so that they understand the audit and the expectations from it.
76. On 19 February 2020, the claimant drew up an Audit Action Plan with headed 'issues', 'actions', 'owner' and 'due date'. The due dates were either 29 February 2020 or 'ongoing'. This document did not address all the issues in the audit.
77. She communicated the action plan to the staff on 22 February by putting the action plan document on Teams and putting a copy in the branch. She sent a photo of the audit and action plan folder via Whatsapp and asked the team to read the audit and implement the action plan.
78. On 24 February 2020, the claimant commenced a period of annual leave.
79. On 1 March 2020, the duty manager, Ed, took an order for Chicken Burger (grilled chicken fillet) and then ended his shift. Devon was the manager on shift at the time the order was fulfilled. He sent out the Chicken Burger with raw chicken. No temperature checks were taken that day.
80. On 2 March 2020 the customer raised a complaint about the raw chicken, both to the respondent and to Deliveroo, who had delivered the order. The claimant, as store manager, was asked to investigate the complaint. She had returned from holiday that day.
81. The claimant found out who was on duty at the time the order was dealt with and she checked the Operations Book where the temperatures are recorded. She also gathered information for VG Technical's independent investigation and sent it to them. She contacted her team via Whatsapp to remind them of the importance of temperature checks and introduced a stricter protocol of checking the temperature of every grilled chicken and chicken burger item before it was sold.
82. She updated Colin Mclatchie just after midday on 9 March 2020 giving her breakdown of the incident on 1 March. This did not include any disciplinary investigation into her team members.
83. Shortly after sending this email, the claimant had a fall during the working day when she was outside. The fall happened on neighbouring premises. She was off work for two weeks with her fit note stating 'Shoulder injury'.

After the expiry of her fit note, the claimant was away on pre-arranged holiday.

84. Her return to work date was 31 March 2020. The previous day, she and Colin Mclatchie were in communication over Whatsapp arranging to meet on 31 March. They agreed to meet in Cambridge as it was easier for the claimant. She was not able to claim expenses for travel or parking at Fulham as it was her 'home store' and she did not want to travel on public transport, due to the emerging pandemic.
85. The claimant went into the meeting expecting a catch-up session following her absence. She had not been at work at the same time as Colin Mclatchie since mid-February, other than half a day on 9 March 2020 before her fall. When the meeting started, Colin Mclatchie asked how the claimant's health was. She said that she was at the tail end of a cold and that her arm was hurting. He then said that he was conducting an investigation into the food safety issue that had arisen on 1 March and the follow up from the Coaching Audit. During the course of that meeting, she was asked about the Action plan following the Coaching Audit. She replied that she had put together an action plan and it was on the wall. She did not make any mention of a second copy in the office. When Colin Mclatchie looked for it in the store, he found an action plan attached to the back to the audit and pinned to a wall but this not been signed off or actioned.
86. Following the meeting, the claimant was suspended on full pay pending the investigation. On 2 April 2020, she was invited to a disciplinary meeting for the next day, 3 April 2020, at the Cambridge store to be conducted by Jayne Baker. The allegations were that she failed to follow a reasonable management instruction to complete a full action plan after the coaching audit and that she failed to ensure that due diligence and Health & Safety process had been implemented and followed.
87. The time of the meeting was changed from 3pm to 10am and the claimant confirmed her attendance. At the outset of the meeting, the claimant was coughing and had a roll of tissues with her. Jayne Baker was concerned about the claimant's welfare and the welfare of the others around her. This was in the early days of the pandemic when there was no testing and a cough was one of the symptoms of coronavirus. As a result, Jayne Baker brought the meeting to an end and arranged for it to be held at a later date by video. At the end of the meeting, she wiped the surfaces with disinfectant wipes.
88. Following the meeting, there was an exchange of emails between the claimant and Clare Slater regarding the claimant's fitness. She referred to her 'asthma cough' which she had mentioned to Colin Mclatchie on 30 March, and she said that the NHS website questionnaire indicated that she did not have coronavirus. She confirmed that she had checked the website again and a sent Clare Slater a screenshot which said she was unlikely to have COVID-19 as she had reported no high temperature and no cough.

89. The claimant raised her concern that the respondent was breaching the government guidelines by proposing an 'in person' meeting. The respondent's business, as a food takeaway business, was not required to close at this time. Clare Slater assured the claimant that the business was allowed to operate but social distancing measures would be in place.
90. Between 8 and 11 April 2020, the claimant was removed from various work Whatsapp groups.
91. The disciplinary invite letter was sent to the claimant on 10 April 2020 proposing a meeting on 15 April 2020 via Skype. The meeting took place on 15 April 2020 over Skype. The claimant was accompanied by Queenie Lomboy, Store Manager at Cambridge and the note taker was Mark Rush.
92. At the meeting, Jayne Baker put the allegations to the claimant and invited her to make representations. She said that everyone was responsible for health and safety, risk and due diligence, not just her. She also said that the team was understaffed. She disputed that she should be responsible for the failures of the team and pointed out that she was on holiday at the time the undercooked chicken was sent out. Jayne Baker emphasised her view that the overall responsibility for the store was the Store Manager and it was up to the Store Manager to hold her team accountable and to manage processes.
93. The claimant accepted that there was a week in which she had not checked the Ops book and that she had not followed up a task she had given as part of Ed's training. She also stated that she did follow up with team members over Whatsapp by reminding them to take temperature readings. She also accepted that she had worn jewellery in breach of the jewellery policy. When challenged about the action plan she said she thought she had sent it to Colin. She later accepted that she had not done so. We find that she had not sent it and knew she hadn't. The claimant stated that 86% of the action plan was done and ongoing although Jayne Baker was unable to find any evidence to support this.
94. The claimant produced a 'background paper' which set out the timeline and contained the representations she made at the disciplinary hearing to Jayne Baker.
95. Jayne Baker investigated the matters which had been raised by the claimant by contacting Colin Mclatchie who answered her queries.
96. On 23 April 2020, Jayne Baker sent the claimant her outcome letter, summarising the meeting and the follow-up investigation. Her conclusion was that the claimant had failed to take any accountable action after the significant health and safety breaches in the audit. She failed to provide Colin Mclatchie with an action plan after the audit and failed to remedy the safety matters outstanding. The failings had led to a customer alleging food

poisoning after being served raw chicken. Jayne Baker did not have the confidence, despite the claimant's years of experience, that she was able to or even cared to deliver a safe working environment. The claimant was dismissed for gross misconduct with immediate effect. She was told she had the right of appeal.

97. The claimant appealed by way of email dated 25 April 2020 on the grounds that the decision was too harsh, her answers were not considered satisfactorily and that she was unable to access relevant Whatsapp messages. On 29 April 2020 she gave further details of her grounds of appeal.

98. The appeal hearing took place over Skype on 13 May 2020 and was conducted by Niels Ladefoged. The claimant presented her grounds of appeal, which she then sent to Niels Ladefoged after the meeting. He investigated after the hearing by speaking to Clare Slater, Jayne Baker and VG Technical. He concluded that there was no effective action plan in place, the staff had not been sufficiently retrained in a manner which instilled urgency and diligence regarding health and safety procedures. He did not accept that she had not had sufficient time in the Fulham store to implement procedures. He did not accept that she had been treated differently from other employees in a similar position. He decided that she had not presented him with sufficient or substantiated grounds to overturn Jayne Baker's decision and he rejected her appeal. He confirmed this by letter dated 15 June 2020. The claimant did not refer to her asthma or her shoulder injury in the appeal hearing.

### The law

The relevant law is as follows:

#### *Failure to give statement of employment particulars (s.1(1) and 4(1) ERA)*

99. Section 1 of the Employment Rights Act 1996 requires an employer to provide a statement of terms and conditions of employment including the information listed in the section.
100. If the claimant is successful in the substantive claim and has not received a section 1 statement, the tribunal must award 2 weeks' pay and can award up to 4 weeks' pay.

#### *Direct discrimination*

101. Direct discrimination means less favourable treatment in comparison to a comparator because of a protected characteristic. S. 13 EA 2010 defines direct discrimination as:

*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

*Discrimination arising from disability*

102. Under s. 15 EA 2010 (A) discriminates against (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.

*Duty to make reasonable adjustments*

103. Section 20 EA 2010 sets out the general scope of the duty to make adjustments:

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

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) the third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid...

*Harassment*

104. Section 26 EA 2010 provides that A harasses B if:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

(1)

(2) ...

(3) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

*Unfair Dismissal*

105. When considering whether a conduct dismissal is fair, the tribunal must follow the principles set out in *British Home Stores v Burchell* [1978] IRLR 379 affirmed by the Court of Appeal in *Post Office v Foley* [2000] ICR 1283.

106. Under *Burchell*, the tribunal must consider whether or not the employer had an honest belief that the employee had committed the misconduct, whether

there were reasonable grounds on which to base that belief and whether the employer had carried out a reasonable investigation.

107. The tribunal must also consider whether a fair procedure was followed and whether the employer's decision to dismiss was within a range of reasonable responses to the conduct. It is not for the tribunal to substitute its view for that of the employer.

Determination of the issues

108. We find that in a number of instances (for example, the date she drafted the action plan, whether she intended to take action against the respondent for personal injury and whether the responsibility allowance was actually a travel allowance) the claimant's evidence shifted and was therefore unreliable in relation to those matters

*Failure to give statement of employment particulars (s.1(1) and 4(1) ERA)*

109. We find that the claimant did not receive a written statement of her terms and particulars of employment.

110. We find that the terms and conditions were as follows:

- 110.1 The Responsibility allowance was payable from 27 January until 20 March when Vlad Lazar took over. This was part of her pay and therefore payable during holiday and subject to SSP during sick.
- 110.2 Sick pay entitlement was SSP - any further payments were discretionary
- 110.3 Job title was Assistant Operations Manager
- 110.4 Notice entitlement was four weeks.
- 110.5 The claimant's duties at the time of her dismissal were the duties of a Store Manager

*Unlawful deductions from wages*

111. The claimant alleges that she is owed Responsibility Allowance but has not calculated the amount of her claim. We accept the respondent's evidence that, having confirmed the calculations, this was paid other than during the claimant's period of sickness. We therefore find that there is no outstanding Responsibility Allowance due to her.

112. The claimant has not set out any grounds of entitlement to be paid in excess of SSP other than the fact that her absence was due to an injury while at work. There is no obligation for an employer to continue paying salary at normal rates during absence in these circumstances. We also accept the respondent's submission that, at the time, the injury was not considered significant, she was not off work for more than two weeks and her fit note did not suggest anything more serious than a shoulder injury.



*Disability discrimination – failure to make reasonable adjustments (section 20)*

113. We find that the following were PCPs:

- 113.1 placing employees returning after time off directly into an investigation meeting;
- 113.2 not giving advance warning of an investigation meeting into alleged gross misconduct or potentially serious matters;
- 113.3 suspending employees after an investigating meeting;
- 113.4 moving directly into a disciplinary procedure;
- 113.5 subjecting them to the disciplinary procedure;
- 113.6 the convening of meetings during the investigation and disciplinary process at short notice;
- 113.7 the convening of meetings during the investigation and disciplinary process in person during the pandemic and when in a national lockdown.

114. We find that the following were not PCPs:

- 114.1 having investigations conducted by managers involved in the allegations made;
- 114.2 conducting investigation meetings in an accusatory rather than an open style;
- 114.3 not considering alternative employment for an injured employee;
- 114.4 the convening of those in person meetings with a substantial distance for an injured employee to have to drive to.

115. The claimant conceded that those PCPs did not put her at a substantial disadvantage in comparison with person who are not disabled. The claimant has not suggested any way in which she felt disadvantaged in relation to these PCPs and, in essence, these are complaints of general unfairness rather than specific disability discrimination and we address them in our discussion of the unfair dismissal claim.

116. Not only has the claimant failed to provide any evidence of stress arising from asthma being a factor in these events, she has asserted that she was not stressed due to her asthma. The only complaint she has made relating to her asthma was that her 'asthma cough' was misinterpreted as a Covid cough. She objected the meeting being postponed due to her cough.

117. The only PCP which is relevant to her anxiety in the pandemic relates to 'in person' hearings. When her investigatory meeting took place in Cambridge, she had arranged to visit that site for a catch-up and made no reference to being anxious about the pandemic. She was invited to a disciplinary meeting in person which was adjourned shortly after it started. The claimant did not indicate any anxiety about an in person meeting. When the meeting was postponed, she wanted to go ahead. All subsequent meetings were held over Skype.

118. In relation to the shoulder injury, nobody, including the claimant, considered that it might be a disability. At no point did the claimant indicate she had difficulty in travel and sitting for sustained periods of time. The only travel after her injury was travelling to the investigatory and disciplinary hearings in Cambridge. She chose the venue for the first meeting and did not object to travelling for the second meeting.

*Direct discrimination section 13*

119. During cross examination, the claimant conceded that her suspension dismissal and unsuccessful appeal were not connected to her disabilities.

120. In relation to the other conduct relied on, we find that Jayne Baker would have adjourned the meeting when an employee had a cough for whatever reason. It was not because the claimant's cough was an 'asthma cough' that she took that decision. We remind ourselves that in the early days of the pandemic, there was limited information, guidance was frequently and changing and there was no general testing. It was a time of great uncertainty and wiping surfaces with disinfectant was central to the advice being given at the time. We therefore find that this is not an act of direct discrimination. We also find that this was not an act of harassment on grounds of disability.

121. The exchange of correspondence on 6 and 7 April related to asking the claimant to complete the NHS online questionnaire again and to send a screenshot of the conclusion. This was unrelated to the claimant's asthma and was more a reflection of the respondent's wish to comply with covid protocols and to protect the claimant and their staff. We do not find that this is an act of direct discrimination. We also find that this was not an act of harassment on grounds of disability.

*Harassment (section 26)*

122. For the reasons set out above we find that the claimant was not subjected to harassment on grounds of disability.

*Discrimination arising from disability (section 15)*

123. The claimant conceded that none of the items listed arose from her disability. This claim therefore fails.

*Unfair dismissal*

124. We find that the reason for the claimant's dismissal related to the claimant's conduct.

125. Applying the test in *BHS v Burchell* and reminding ourselves not to substitute our view for that of the employer we find as follows.

126. We find that Jayne Baker genuinely believed that the claimant had committed gross misconduct by virtue of gross negligence in the

management of the Fulham Store. We also find that she had reasonable grounds for that belief on the basis of the incomplete action plan, the lack of due diligence checks and the outcome of the underlying coaching audit.

127. We have considered the claimant's submission that it was unreasonable to expect her to complete an action plan following the audit on 18 February 2020. We find that Jayne Baker was entitled to conclude a lack of attention to health and safety on the part of the claimant, illustrated by the fact she wore jewellery at the audit, which was not a surprise audit but a scheduled one.
128. She drew up an action plan the day after the audit but did not disseminate it to her team until three days later. She did not send it to Colin Mclatchie, despite being instructed to do so. The claimant accepted she hadn't checked the Ops book one week. Her action plan was not implemented. Given the urgency of the problems identified by the audit, including four 'critical' issues, Jayne Baker was entitled to find that a failure by the claimant to address the issues immediately, with a dynamic action plan, implemented and signed off as completed was gross negligence.
129. We were taken to other action plans drawn up by other managers, from which we saw that the claimant's action plan was deficient. It did not have any immediate dates for action, nor did it show what had been done, by whom and when. The other action plans we saw had initials and comments by each task. This was missing from the claimant's action plan.
130. There are examples of the claimant's team failing to check temperatures. Jayne Baker's view was that it was the claimant's role to create a culture of health and safety compliance and that she had not taken sufficient steps before or after the audit to achieve this. In the light of her long experience in the industry, Jayne Baker was entitled to conclude that the omissions were not due to a lack of understanding or a lack of support but due to a lack of engagement and action.
131. We find that it was reasonable for Jayne Baker to conclude that the claimant sending Whatsapp messages and putting an action plan on the wall was insufficient. The action plan did not capture all the issues raised in the audit.
132. We have considered whether the claimant can reasonably compare herself with OT who also went through the disciplinary process (following an investigation by the claimant) after a bad audit result. We find that a major factor in the claimant's dismissal was her failure to implement an adequate Action Plan after a failed audit. In the case of OT, the only allegations related to the failings of the audit itself, not a failure to action the recommendations of the audit.
133. We find that the respondent properly and fairly investigated the incidence of misconduct, both in Colin Mclatchie's initial investigation and Jayne Baker's follow-up investigation. We find no fault in Colin Mclatchie holding an

investigatory meeting without prior warning and on the claimant's first day back at work after sickness and holiday. There was no reason for him to interrupt her holiday or sick leave to deal with this, given that the total absence was three weeks. An employer is entitled to hold an investigatory meeting without prior warning but, in this case, he offered the claimant an opportunity to postpone which she declined. We also consider it was appropriate for Colin Mclatchie to do the investigation as the claimant's manager. We also find that, in the context of gross misconduct allegations which were connected to a food safety incident, it was not unreasonable to suspend the claimant. We do not agree with the claimant that it was inappropriate for Colin Mclatchie to bring a suspension letter to the investigation meeting. If the claimant had satisfied Colin Mclatchie that there was a reasonable explanation, he would not have used the letter. Having the letter prepared did not oblige him to use it.

134. The claimant complains that she was disadvantaged by being barred from the office and accessing her team due to her suspension. She did not say to the respondent during the process that she needed this access and she has not identified what evidence she could have collected which would have helped her case. She suggested during her evidence that Ed had signed the action plan but she never said this at her disciplinary hearing, nor did she say that there was a signed plan in the office, as she told us during the hearing.
135. We find that a central element of Jayne Baker's decision is the claimant's refusal to accept any responsibility and to look to pass blame to others. We saw this ourselves in the course of the hearing. She may have had a difficulty adjusting from a general role to having responsibility for a specific store, but she had carried out this role before, had trained other Store Managers and was receiving a responsibility allowance for carrying out the role.
136. In the light of Jayne Baker's conclusions regarding the claimant's culpability, we find that dismissal was within the range of reasonable responses. The claimant contends that her good record was not given sufficient weight as a mitigating factor. Jayne Baker's view was that her considerable experience in the industry and previous good performance were, if anything, exacerbating factors because she knew how to do the job and had chosen not to do it properly.
137. The claimant alleges unfairness because Devon and Ed were not disciplined despite them being on shift on the day of the uncooked chicken being sent out. It is accepted that Ed had gone home before the chicken was sent out. It is not clear whether Devon returned to work after that day. In any event, the claimant was their manager and took no steps to start disciplinary action. Although she went off sick on 9 March, she took no steps between 2 March and 9 March to take disciplinary action against these two individuals. She did not even raise a query about this with HR.

138. The claimant complains that she was not given the correct definition of 'gross misconduct'. We do not understand how the claimant says this disadvantaged her. Jayne Baker considered the allegations and the evidence and reached her conclusion. The claimant had seen the handbook, having worked on it, and it is not clear to us what the basis of the unfairness alleged it.
139. We have considered the respondent's disciplinary procedure and the submissions made by the claimant. We agree with her that a day's notice of a disciplinary hearing is less than ideal. However, we do not agree that the claimant would have been frightened to request more time. We note that she attended without complaint, even when the meeting was brought forward to 10am. As we have set out above, in the event, the hearing was postponed shortly after it began although the claimant objected to this. There is no question that she had sufficient time to prepare before the reconvened meeting.
140. The claimant makes no allegations of unfairness in relation to the appeal.
141. We find that the claimant's dismissal was not unfair and her unfair dismissal claim fails.

*Wrongful dismissal*

142. We find that the claimant committed a fundamental breach of contract and is not entitled to notice or payment in lieu of notice. We base this finding on her failures to take action after the coaching audit, despite the fact that she was an experienced manager who knew what was required. She failed to accept responsibility and, by wearing jewellery on the day of a planned audit, displayed complacency and lack of leadership. These things taken together, in our view, constitute a fundamental breach of contract. Her constructive dismissal claim fails and is hereby dismissed.

Employment Judge Davidson

Date 20 May 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

23 05 2022..

FOR EMPLOYMENT TRIBUNALS

Note

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.