EMPLOYMENT TRIBUNALS

Claimant: Ms A J Lock

Respondent: G K Retail Services Ltd

Heard at: Leeds **On:** 7, 8, 9 & 10 February and 19, 20 & 21 October 2022

Before: Employment Judge Miller
Mr K Smith
Mr M Lewis

Representation
Claimant: In person
Respondent: Ms B Clayton

JUDGMENT having been sent to the parties on 7 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction and issues

1. The claimant brought a claim against the respondent in a claim form dated 16 December 2020 following a period of early conciliation that started on 11 October 2020 and ended on 29 October 2020. The claim was for unfair constructive dismissal, disability discrimination, notice pay and for payments on termination of her employment for untaken holidays. The claim concerns a period from around January 2020 when a new manager took over at the pub at which the claimant worked, her subsequent absence through ill health and her ultimate resignation.
2. There was a case management hearing on 29 June 2021 at which the issues were identified. That list of issues included reference to further information that the claimant subsequently provided. A consolidated list of issues is set out as an appendix to these written reasons.

The hearing

3. The hearing was originally listed for 4 days on 7 – 10 February 2022. In the event there was insufficient time to hear all the evidence and the hearing was completed on 19, 20 and 21 October 2022 and an oral judgment was given on 21 October 2022.
4. The claimant represented herself at the hearing, supported by her family. The claimant produced a witness statement and gave oral evidence,. The claimant's mother, Mrs Sandra Lock, also provided a witness statement and gave oral evidence.
5. The respondent was represented by Ms Clayton. The respondent produced witness statements from
    a. Mr Gary Fergusson (Pub manager from January 2020)
    b. Mr Paul Harrison (Regional manager)
    c. Mr Jonathan Want (Pub manager after Mr Fergusson)
    d. Mr Matthew Gaunt (Operations Manager)
    e. Mr John Stuart-Clarke (Data protection officer).
6. All witnesses attended to give evidence at the first hearing. We did not hear from Mr Stuart-Clarke. At the second part of the hearing we heard oral submissions from the respondent. The claimant had been given the choice of giving oral submissions, written submissions or not attending at all. The claimant provided written submissions and her mother attended to hear the respondent's oral submissions and had the chance to respond.
7. We record, also, that we made adjustments to the hearing to allow the claimant to participate. This included the respondent's witnesses observing remotely from a different hearing room and taking breaks whenever the claimant needed them. In the resumed hearing, the claimant was permitted to produce written submissions and given the opportunity to not attend the resumed hearing if she felt it would be too difficult.

Findings of fact

8. The claimant was employed by the respondent under a zero hours contract as a team leader of front of house at its Quakerwood Park in York from 8 February 2016.
9. The claimant moved into the pub with the then manager and her partner at the time Mr Neil Prior. The claimant remained living at the pub until some point in 2018 when it appears the relationship ended, although they remained on good terms, with the claimant staying over at the pub from time to time.
10. The claimant's job involved assisting the manager and management team generally in running the pub, opening and closing as well as working in the pub behind the bar and taking food orders and serving customers. There is no dispute that the claimant worked hard. Although she was employed under a zero hours contract we accept her evidence that she often worked well in excess of 40 hours, that her contract says she was likely to be required to work. The parties also agreed that the pub was not generously staffed.
11. Having heard the evidence, in our view the claimant probably took on more jobs and assumed more responsibility when working under Mr Prior than her team

leader role strictly required. There seems to have been a perception amongst customers that the claimant was the de facto landlady and we think this is likely to have been because of how hard the claimant worked, how much responsibility she took on and her previous relationship with Mr Prior.

12. The evidence of Paul Harrison is that there were however problems with Mr Prior's performance and Mr Prior decided to leave the business. This resulted in the appointment of Mr Gary Ferguson as manager from January 2020.

13. Mr Ferguson attended the pub before formally starting his role. He met the claimant with Mr Prior about three weeks before his formal start date. He moved into the pub on a Monday, we think probably 13 January 2020, although the exact date is not particularly crucial, and he started work on the Tuesday. He held a team meeting that the claimant was at when he started. There was a limited handover between Mr Prior and Mr Ferguson. Mr Ferguson said in his witness statement, and we accept, "I have met the staff at Neil's leaving do and had also been in to the pub to drink with friends".

14. The claimant said that Mr Prior had told her that he would let Mr Ferguson know about the claimant's anxiety but in the absence of any other direct evidence about what happened we prefer the evidence of Mr Ferguson that he was not in fact told by Mr Prior, or anyone else, that the claimant had anxiety.

15. There was a team meeting with Mr Ferguson and the staff when he started, which the claimant attended. Mr Ferguson said at that meeting that he aimed to make improvements to the pub because of poor customer feedback which was arising, at least in part, because the pub was not adhering to the Greene King way of doing things. It was clear that he intended to make some changes in the pub.

16. The claimant says that she had a discussion in the sports area of the pub with Mr Ferguson. Mr Ferguson did not deny this, but said that he could not remember. The claimant said in her witness statement "Gary had an informal chat with me in the sports area of the pub before he officially took over as manager or before he had another shift. I do not know what date this was. We talked through potential changes he might make but that they would not be done all at once. This was reassuring and I let him know I understood."

17. In oral evidence the claimant put it to Mr Ferguson that she had told him about her anxieties at that meeting and she referred to page 46 of the bundle to support this. The document to which she referred was her further information provided after the preliminary hearing and what is set out there is ambiguous.

18. Mr Ferguson denied that the claimant ever told him about her anxiety. In oral evidence it was put to the claimant that she did not mention her anxiety to Mr Ferguson at the meeting. She said that Mr Ferguson told her that the changes he intended to implement would be slow and she said that she was pleased because of her anxiety. The claimant did not mention in any of her subsequent grievances that she had told Mr Ferguson about her anxiety. In her witness statement the claimant refers to the email in 2017 to Mr Harrison explaining her mental health problems and she refers to her manager being aware. We conclude that references to her manager in this context is a means to Mr Prior.

19. In the grievance appeal Mrs Lock said that neither Neil nor Paul were aware of the claimant's mental issues but she believed that Gary had not been made aware. We think that if the claimant had told Mr Ferguson, it is likely that Mrs Lock would

have been aware of this and in any event what Mrs Lock said at the appeal meeting was not contradicted by the claimant.

20. So we find that on the balance of probabilities the claimant did not disclose her anxiety and depression to Mr Ferguson at that meeting at the beginning of his employment. We feel that if she had been explicit she would have referred to this previously and would have not sought to rely on the email from 2017 or the knowledge of Mr Prior. We think it likely there may have been the discussion about the claimant being anxious or worried about changes, but this is not the same as disclosing information about anxiety as an illness on disability.

21. In respect of that email from 2 December 2017 the claimant wrote to Mr Harrison about the difficulties at Christmas that year. She said in the body of that email "On a personal note I cannot do it. I've put my heart and soul into Quakerwood and I've really struggled over the past few months. I went through a bereavement and still put this pub first, working from literally the day after I watched my grandma pass. I've been unable to have any proper quality time away from work even with a week's holiday being impossible. I suffer from stress, anxiety and depression and have fought so hard to overcome the difficult days when I don't want to get out of bed and work but I continue to go on."

22. Mr Harrison said that he spoke to Mr Prior about this. He was the claimant's manager and partner at the time. Mr Prior reportedly said that the claimant was just getting stressed about Christmas. Mr Harrison did not take any further steps in response to that email. The claimant's evidence was that she was managing her anxiety when working for Mr Prior. She said the workplace was supportive and she was able to avoid the most stressful situations like large meetings or training events and she had strategies for coping with difficult or aggressive customers. We find that by December 2017 Mr Harrison knew that the claimant suffered with stress, anxiety and depression. She was explicit about it. We also find on the balance of probabilities in light of the claimant's evidence and their undisputed relationship that Mr Prior knew that the claimant lived with stress, anxiety and depression and he understood how it impacted on her and to which we will return below.

23. We do not know why Mr Prior minimised the claimant's difficulties. It may have been out of loyalty to the claimant or for some other reason but we find that he did do so.

24. Almost immediately after Mr Ferguson started the claimant went on holiday for three weeks from 15 January 2020. Her first shift back was on 3 February. Just before her leave and on 6 January the claimant put in a further request for leave for the period from 19 to 29 February. The claimant said that this was just over six weeks' notice from the start of her leave and the leave was refused by Mr Ferguson on 30 January 2020. The claimant returned from her leave on 3 February. She says that she asked Mr Ferguson about her leave request then. He said there was no cover for those days and the claimant says that she did not know at that time why her leave had been refused. The claimant concern was that if she did not take her leave by 1 March, which was the start of the new leave year, she would lose it. Mr Ferguson offered to pay the claimant in lieu of the holidays. The claimant objected to this as this would affect her tax and student loans. It is also, we note, not consistent with the purpose of paid annual leave during employment to provide a payment in lieu of leave.

25. The claimant said she did not know why her leave requests were refused at the time and has not had any explanation until these proceedings. Mr Ferguson does not address this in his witness statement but it is considered as part of the claimant's grievance. At the grievance investigation meeting Mr Ferguson said he refused the claimant's holiday request because they did not have enough people to work. He said he can't remember talking to the claimant about the reasons for rejecting her holiday request. He said that he told her if they had people in place she could have it. Mr Ferguson did take some time off in the period the claimant asked for time off as did his partner who also worked at the pub Hayley O'Callaghan. The claimant says that Mr Ferguson did not in fact tell her to try to get cover from other pubs. However it seems unlikely that Mr Ferguson would not have said we're too busy or words to that effect. We also find that Mr Ferguson told the claimant he had also lost holiday. This is consistent with his grievance statement and that he and his partner took time off in the same period during which the claimant's leave had been refused.

26. There is a reference to a requirement for a 21 day period for leave requests, but the claimant had given over six weeks' notice. The grievance outcome was that the claimant's leave had not been processed in a timely manner and there had been no resolution to address her potentially losing holiday. We find that Mr Ferguson did not deal with this well. It is certainly appeared poor practice that he appeared to prioritise his and his partner's leave over the claimant's and while the justification that his partner needed time off for her childcare is a relevant factor in his managerial decision making, there is a clear lack of concern for the claimant's needs. In the event, however, the claimant was first offered to carry over the leave and then was paid in lieu of the 58 hours she said she had lost.

27. The claimant then makes a number of allegations about the conduct of Mr Ferguson which form the basis of her claim. The first allegation relates to change in the way the staff in the pub checked with the customers that their meal was okay and this is referred to as the check back system. The system that Mr Ferguson introduced was that once customers had received their food, a member of staff would check with them that everything was okay - the check back. At this point the member of staff will be required to remove the pot of crockery, referred to as the crock pot, from the table as a visual reminder that the check back had or had not been done. Prior to this the claimant had introduced a different system which involved marking on a board whether the check back had been done. The claimant thought her way was preferable because it did not disrupt the customers when trying to receive the crock pot. Mr Ferguson preferred his way as it was a simple and clear visual prompt.

28. The claimant says that as Mr Ferguson was the general manager she accepted that he had the right to change this and she takes no issue with this in that sense. She says however that when she had the discussion about this with Mr Ferguson she became flustered and upset because of her anxiety. The claimant describes this in her witness statement as follows

    "with the crock pots which is where Gary first starting attacking my weakness of anxiousness. I listened to him and took on board what he said. I also asked about certain tables where it may not always be practical. For example some tables you would have to ask a customer to physically pass it over to you which disrupts their meal, often having to put their knife and fork or drink down. Some customers also asked if they could keep the crock pot for the spare napkins or that they might order

food later and need more cutlery at that point. I was not confident in the way I said this to Gary, my stomach was flipping, my words were wobbly and my hands were sweating. Gary dismissed this and told me that he had never had any issues and was to carry out the task no matter what and if I did not do this he would be having words with me. This immediately left me feeling threatened and anxious."

29. The claimant believes that Mr Ferguson saw her reaction and interpreted this as a weakness which he subsequently exploited to attack the claimant. Mr Ferguson said that the claimant was not implementing the new standards and everyone was expected to do them. He said it was important for the brand to be consistent across his pubs and effectively whether he agreed with the system or not it needed to be implemented. This is, of course, in the context of Mr Ferguson being brought into the Quakerwood pub to help turn around a poor performing pub. He denied observing the claimant being particularly upset and said he would have been sympathetic and dealt with it had he seen that. In oral evidence Mr Ferguson said at no time in the limited period during which he worked with the claimant did he have any inkling that she had mental health problems.

30. We accept that the claimant was feeling how she said she was feeling. It is apparent that the claimant does not cope well with change, and we will make some findings about the claimant's disability further on. We also accept, however, that Mr Ferguson was not aware of it. The claimant describes very clearly and very eloquently how she was feeling, but she goes on to say that she obliged, or she tried to comply with her obligations, to the best of her ability. We think that the claimant's feelings were just not as externally visible as she perceives. We find therefore that Mr Ferguson did not in the course of his own interactions with here see the claimant becoming visibly upset. She appeared from his perspective to eventually do as he asked albeit reluctantly. We think that the claimant's perception of this incident set the tone in her expectations of a subsequent incident. We address now the particular allegations the claimant made about Mr Ferguson.

31. As far as we can establish the first incident relied on was on 10 February 2020. The allegation is that Gary Ferguson unreasonably criticised the claimant for not removing a crock pot to show that the check back had been done. The claimant was carrying glasses and realised she had not done the check back on that table. She went back to do it still carrying the glasses and was unable to remove the crock pot because her hands were full. She then went straight to the bar to serve waiting customers. The claimant said that Mr Ferguson came out of his office and asked if the check had been done on that table. The claimant said yes and Mr Ferguson asked why the crock pot had not been removed. The claimant explained as calmly as she could. She said that her hands were full and then she was serving. In her claim she says she was intimidated and Mr Ferguson answered her only with a smirk. In her witness statement the claimant says that she walked away upset saying "I'm doing what you've asked me to do, I can't do anymore". Mr Ferguson had no recollection of this particular conversation but said as previously mentioned that he did not see the claimant upset or tearful on that occasion.

32. We find, again, that although the claimant may well have been very upset by this, the evidence tends to suggest that it was not visible. Mr Ferguson had a perfectly good reason for making sure the check backs were done as instructed and that, we think, was the reason he asked the claimant about it and he did not ask why she was upset because he did not realise that she was.

33. The next specific allegation is that the claimant says she was singled out on other operational tasks such as whether cutlery should be polished. The claimant was polishing cutlery in the kitchen. Mr Ferguson asked her to do it in front of house and the claimant says again this was not of itself an objectionable instruction but she was singled out to do it. She also said that doing it in the kitchen was a better way of doing it as it did not cause a slip hazard.

34. Again we find that Mr Ferguson's instruction was a reasonable one. In the grievance interview, Mr Ferguson said the claimant was in the kitchen polishing cutlery when there were people waiting to be served. He also said that people hide in the kitchen, not singling out the claimant particularly. We find that the reason Mr Ferguson asked the claimant to polish the forks in the front of house was to improve visibility of staff out front and thereby help to improve customer standards. The claimant was not singled out for this. In her witness statement the claimant describes Mr Ferguson as coming into the kitchen when she was polishing cutlery and asking her "would it not be better done out front?". So even on the claimant's own evidence this is not an aggressive or intimidating conversation. We think that the claimant's perception of this incident is again coloured by her own feelings. We certainly do not criticise her for that but objectively this was a perfectly reasonable interaction.

35. The next allegation is that Gary Ferguson told the claimant to place "Gastros" in the pot wash area differently and to also make sure they were filled with hot soapy water ready for the day. Again this is not a problem of itself to the claimant but once again it was a change, the claimant said, only suggested to the claimant. This is what she sets out in the further information. We heard no evidence about this at all in the claimant's witness statement or in oral evidence. To the extent therefore that Mr Ferguson did require the process to be changed we think it most likely that this was part of his drive to improve standards and for no other reason.

36. Similarly the next allegation is that Mr Ferguson told the claimant, and only the claimant, to leave the kitchen if there was no food to run. Again, we heard no evidence about this specific allegation in the hearing and it is not in the claimant's witness statement. As with the last allegation though, to the extent that it happened, it seems clear to us that it was a reasonable request and part of increasing staff visibility to customers and improving standards generally.

37. The next allegation which chronologically was slightly early on 8 February is set out in the claimant's further information as follows.

    "The claimant arrived to work Saturday 8 February to find two chairs placed in the middle of the back dining area causing a hazard. This was due to a table for a larger party being set up. Due to limited space in the workplace there was nowhere for these chairs to be placed out of the way more safely. The claimant could see a way in which the table could be set up without causing a hazard allowing the large table better access to their seats and another table of four being created. Gary Ferguson walked into the area and demanded the table be moved back to how he had set it up and said this is how it is done now".

38. There was no real dispute about this event except for the manner in which Mr Ferguson is alleged to have spoken to the claimant. In our view it is clear from the way the allegation is put that the claimant thought her arrangement was better. Whether it was or not it was up to Mr Ferguson to arrange the tables as he sees fit as manager. We know that the claimant says in her witness statement the table

arrangement was part of her role previously. In our view the claimant's perception of this interaction was again coloured by how she was feeling, combined with the view that it had been her job to make these kind of decisions previously. We find that Mr Ferguson acted reasonably in this interaction and if he said this is how it is done now, we think it most likely that he was referring to the way the tables would now be set up.

39. The next allegation is that on 11 February 2020 when the claimant turned up to work, Ms O'Callaghan was already setting up the bar which was the claimant's job. This caused the claimant to feel very anxious. The claimant then went on to do the beer delivery only to find Ms O'Callaghan already there doing it leaving the claimant feeling like her role had been taken away from her. When the claimant went to answer the phone Ms O'Callaghan put down the bottle she was carrying hastily and answered it. The claimant also said that Ms O'Callaghan and Mr Ferguson ignored her all morning. The claimant said this left her feeling like an outsider and not welcome in the workplace.

40. Mr Ferguson evidence was that there was a limited time in which to get the pub ready and Ms O'Callaghan was helping out. Even if she was not rostered on that day she was trying to be helpful. If the claimant wanted to do the beer delivery, he said, she could have asked. He said that Ms O'Callaghan was concerned for Mr Ferguson's health because he was working very long hours and had Type 1 Diabetes. He said the claimant was not ignored.

41. We prefer Mr Ferguson's evidence. Again, we accept that the claimant found this incident to be upsetting and that it caused her to be very anxious. However we find that neither Mr Ferguson nor Ms O'Callaghan were, objectively speaking, acting unreasonably at this point.

42. On 16 February 2020 the claimant says that she requested sick leave on the system and provided a fit note and the request was denied on 18 February 2020. The claimant says this caused her stress as it would leave her without an income and she had to seek higher authority to ensure it was processed correctly. In her witness statement the claimant says that Mr Ferguson was never questioned about this in her grievance.

43. Mr Ferguson said that the claimant had put her sickness absence on the system herself which was contrary to policy. It needed to be done by a line manager. He therefore denied the claimant's sickness leave that she had input and then put it on the system himself. This is broadly consistent with the claimant's version of events as set out in her grievance. Again there was poor communication and Mr Ferguson could definitely have dealt with this better by communicating with the claimant. He did say in his grievance that he effectively avoided speaking to the claimant. However, we find that the reason the sickness leave was denied was because it had been input on the system contrary to procedure, or at least Mr Ferguson believed it had been, and it was approved very soon after the claimant input it and payments were made.

44. We note that that related to a period of sickness from 13 to 27 February 2020 and with the claimant's leave and her sickness and then her subsequent sickness she had very limited contact with Mr Ferguson overall.

45. There is a further allegation against Mr Ferguson which arises after the claimant submitted her grievance on 27 February to Mr Harrison, and we will come to that chronologically.

46. In her grievance on 27 February the claimant raised the following issues –

    a. a refusal of leave in January including the offer to pay in lieu and the fact that Mr Ferguson and Ms O'Callaghan were taking holiday,

    b. a reduction in her hours while Mr Ferguson's brother was given 45 hours work,

    c. that the claimant had been bullied and victimised by Mr Ferguson,

    d. that the claimant had been singled out on tasks like polishing cutlery and the pot wash,

    e. the issue about declining sick leave,

    f. that work related stress was on her sick note and she had not been contacted by Mr Ferguson,

    g. a stress risk assessment should have been done and

    h. her hours were reduced and that her job had been advertised.

47. The claimant also raised issues about Mr Ferguson and Ms O'Callaghan commenting about the claimant being out (socially) while off sick. The claimant concludes by saying that she had been subjected to disability discrimination, bullying and victimisation in relation to depression and her mental health issues. It is clear, and we find, that while the claimant was raising specific issues she was also making a clear allegation that she had been subjected to disability discrimination.

48. Shortly after this and before the grievance meeting with Mr Harrison the claimant received a message from Will Fulthorpe, the kitchen manager which is said to be about Mr Ferguson. We do not have the full message trail but the part we have seen says "I've told him I barely talk to you and first thing he said when I got in was you need to stop talking to Jay she's poison."

49. The claimant raised this in the grievance meeting itself on 5 March 2020 with Mr Harrison. In that grievance meeting the claimant was accompanied by her mother for emotional support. The respondent agreed in submissions that it was their PCP to only allow colleagues and trade union representatives to attend such meetings, so we find therefore that by this time Mr Harrison must have been aware that the claimant was struggling in some way because of her mental health, otherwise he is unlikely to have made this concession to allow Mrs Lock to attend.

50. In the meeting the claimant expanded on her complaints. In respect of the allegations about bullying, Mr Harrison asked what made the claimant feel like this. The claimant explained and provided the names of witnesses to her allegations. The claimant was asked what the stress risk assessment was and she said that she had been informed it was the law. It is what should happen when off with stress to help resolve issues for returning to work. They discussed the issue of the job being advertised and the claimant said it had been brought to her attention by someone called Amy another colleague. The job had been forwarded to Amy by Aiden Ballanger, the assistant manager at the time.

51. In respect of many of the allegations Mr Harrison asked the claimant if she had spoken directly to Mr Ferguson about it and she said she had not because the complaints were about him and it would not have been reasonable to do so, or she had just not been speaking to Mr Ferguson, or she had not had the opportunity. When asked if there was anything else the claimant said that Mr Ballenger had sent a message to Amy saying that Mr Ferguson hated her and that a customer the claimant had banned had been allowed back in the pub which the claimant perceived as a way of stopping her coming back to work.

52. After the first grievance meeting Mr Harrison started to investigate the claimant's grievances but this was delayed because of the onset of the Covid-19 pandemic. The claimant was informed of this delay on 19 March and around that time, although it is not clear when, Mr Ferguson went off sick. He did not return to work before the end of the claimant's employment. The claimant also went off sick from 24 March 2020 with stress at work.

53. On 15 April the claimant had a welfare meeting with Roz Baxter from HR. This meeting was on the phone and the claimant takes no issue with the meeting itself. She was given details of the respondent's employee assistant programme. The claimant says, and we accept, that this was the first time she had heard about this. At that meeting the claimant says "I want to be back at the Quakerwood, its constructive dismissal. I've not handed my notice in but I don't want to go back." The claimant said in oral evidence that she did want to go back to Quakerwood and it is clear that that is what she said. It is unclear what outcome she wanted in respect of Mr Ferguson but she did say her complaints were always about behaviours, not the substantive changes that Mr Ferguson was implementing.

54. We find on the balance of probabilities that the claimant was referring to constructive dismissal in a non-technical way in that meeting. We find that she did, at that point, still want to go back to work and was expressing that she perceived the problems to be very serious.

55. On 3 July 2020, Joanne Bond interviewed Mr Ferguson about the claimant's grievance and we have already made some findings about that meeting. Mr Ferguson paints a different picture of the claimant. He describes her as swearing over the bar, he refers to seeing a sexual act between her and another staff member on CCTV in the pub which could amount to gross misconduct and that the claimant had been telling staff not to implement some of his changes. In respect of the poison comment specifically Mr Ferguson said

    "I can't recall if I did in the heat of the moment, it was a situation I didn't need after audit came in. He sounded off to me about Jay one morning. First thing I knew was her and Will going on a five week holiday and when they came back for a week and wanted to go off again it's a tough conversation".

56. In evidence Mr Ferguson said he would not use the word. We find on the balance of probabilities that Mr Ferguson did say something negative about the claimant. It might have been "poison" or that might have been the paraphrase by the person sending the message. The evidence is third hand at least and there was no other direct evidence.

57. However we think that the reason for these negative comments was Mr Ferguson's view of the claimant as a disruptive influence on the staff and his perception that she was blocking his changes. His view of the claimant is clear from his evidence

and the grievance meeting. We think it is, however, unconnected with the claimant's disability. We find that Mr Ferguson rightly or wrongly did not perceive the claimant was duly anxious or upset but rather that she was resistant to changes that he was bringing in because of her previous status as de facto and landlady.

58. Mr Ferguson suggested mediation at that meeting as a way to resolve the issues. That appears to be the extent of the investigation conducted via or on behalf of Mr Harrison.

59. On that same day, 3 July 2020, Mr Harrison phoned the claimant. The claimant was upset on the call and crying and Mr Harrison asked her why she was crying. She said in evidence, although not at the time ,that this was because Mr Harrison had called her out of the blue. We find that the claimant did not explain that the reason she was upset because she had been called out by the blue. We also find that the claimant had not said this to Mr Harrison previously. We think it was obvious to the claimant but without making it explicit there is no obvious reason why the lack of notice rather than the content of the call or something else would cause the claimant to be upset. It was the respondent's case that this call was an update but it is agreed that in that meeting Mr Harrison said that Mr Ferguson was "out of the business" so the claimant could return to work. The claimant was not willing to do that at that time as Mr Ferguson was still living in the pub and she was concerned about running into him at work.

60. We find that at this point Mr Harrison was genuinely trying to find a way to get the claimant back to work and Mr Ferguson, because of his suggestion about mediation, was also wanting her back. It is common ground that the pub was short staffed and we know that Mr Ferguson had decided not to pursue disciplinary action for the sexual activity he had seen. It is not plausible therefore to suggest that Mr Harrison or Mr Ferguson were trying to force the claimant out in these circumstances.

61. The claimant was sent the grievance outcome on 16 July and Mr Harrison called her on 17 July. He initially called and left a voicemail about the reason for the call. The claimant was out with her mother at the time and her mother discouraged her from calling straight back but the claimant did nonetheless. In the course of that phone call the claimant's mother interrupted when the claimant became upset and Mr Harrison told the claimant that her mum should not be there. Mr Harrison said he thought it was a private meeting.

62. In our view it was unreasonable for Mr Harrison to tell the claimant, who was obviously upset, that her mother could not be there. He was perfectly aware of her mental health problems by this stage and was aware that the claimant had been upset in the previous telephone conversation even if he was not explicitly aware why. Although we have found that the claimant had not explicitly said she needed advance warning, if Mr Harrison intended it to be a formal meeting he ought to have treated it as such and given the claimant the opportunity to prepare and have support.

63. We refer to the grievance outcome. The claimant's complaint about holiday pay was upheld and we understand that she was eventually paid in lieu. None of the other complaints were upheld although Mr Harrison did make recommendations in respect of each of them. Mediation was not offered but Mr Harrison's evidence, which we accept, was that the claimant was not willing to enter into mediation at that time. That is certainly consistent with her apparent view of Mr Ferguson.

64. The grievance outcome conspicuously fails to address the claimant's allegations of disability discrimination at all. Mr Harrison says that there is no evidence to support the allegations against Mr Ferguson, but in fact Mr Ferguson was not asked any significant questions about the claimant's health or disability and there was no consideration at all given to speaking to any of the other witnesses the claimant had named in her grievance.

65. The claimant appealed against the grievance outcome on 24 July 2020 and attended the grievance appeal meeting with Matthew Gaunt Mr Harrison's line manager on 3 August. The basis of the claimant's appeal was that her holiday pay grievance had not been dealt with adequately; evidence about hours had not been considered - we heard evidence about the publishing of rotas online but we do not need to address that here; that no other staff had been asked about her allegations against Mr Ferguson; that the recommendations would not make any difference; and generally there had been no acknowledgement by the respondent of the impact of the respondent's actions on her. The claimant explained that the call on 17 July out of the blue made her very distressed and makes the point that had this been intended to be a formal meeting she should have been notified of it with which we agree. She does not say however that she had previously informed Mr Harrison that she needed advance warning of calls generally. The claimant concluded her appeal by saying

    "I'm sure there are rules about how to treat an employee who has known mental health issues. I am also ensure for an employee to return to work after a period of sickness due to mental health issues that a mediation meeting should be set up between the employee and her or his manager. I feel failed on so many levels that I still think I should seek legal advice regarding my next actions."

66. The claimant attended the appeal hearing by video and was again accompanied by her mother. Mr Gaunt describes the claimant as extremely emotional at that meeting. In that meeting the claimant said she was not sure that she could return to Greene King or Quakerwood. There is limited discussion about the investigation and Mr Gaunt does acknowledge that Mr Harrison ought to have spoken to other witnesses. The claimant makes clear in that meeting that she would struggle to work anywhere else than Quakerwood because of her anxiety. Mr Gaunt said that he undertook a further investigation. This comprised of reading notes, looking into the publishing of the rotas and speaking to Mr Harrison and Mr Ferguson about whether they were aware of the claimant's mental health issues. He did not speak to any of the witnesses the claimant had suggested. The claimant did acknowledge in the appeal meeting they did not all work there anymore, although Amy still did.

67. In his witness statement Mr Gaunt said that Mr Harrison investigated all the points raised by the claimant and that she simply disagreed with his decision. The appeal outcome upheld the grievance outcome. Mr Gaunt found that Mr Harrison was unaware of the claimant's anxiety. He does not say how he investigated this and we do not know what evidence he took into account in coming to this decision as he has not explained it. Mr Gaunt does not make any further recommendations about getting the claimant back to work as part of the grievance appeal outcome. He said in evidence that the claimant did not want to return to work as the same place as Mr Ferguson and nor was she able to work elsewhere and this appears to reflect what the claimant said in the appeal meeting. Mr Gaunt did produce a separate list of actions from Mr Harrison which reflected exactly the actions that Mr Harrison had identified as part of the grievance outcome.

68. The next relevant thing to happen was that on 14 August 2020 the claimant attended a return to work meeting with Jonathan Want. Mr Want was at that time the manager at Quakerwood and was managing the claimant's sickness absence. Mr Harrison had written to Mr Want on 12 August asking him to conduct this meeting, setting out some steps to help the claimant back to work including the slow re-integration of the phased return and he said "Jay is suffering from anxiety so we need to be aware and manage the return to work sensitively". It is abundantly clear that by this time Mr Harrison was aware that the claimant was suffering with anxiety and that it was affecting her significantly. He clearly communicated this fact to Mr Want. The meeting was conducted by MS Teams and the claimant's complaint about this is that Mr Want's mother appeared on screen during the meeting which was, after all, about the claimant's health and return to work.

69. We recognise that this was during the Covid pandemic when people were required to work from home. We prefer the claimant's evidence that Mr Want said words to the effect of "don't mind my mum". However, the claimant and Mr Want agreed that Mr Want's mother was there momentarily and we accept Mr Want's evidence that she would have had no interest in what he was talking about and that you could not always guarantee that the house would be empty.

70. In our view it was not appropriate for Mr Want's mother to be there and at the very least it was inconsiderate and thoughtless, given that Mr Want was clearly aware of the reasons for the claimant's absence.

71. The outcome of that meeting is recorded in an email from Mr Want to Mr Harrison. Although the claimant had not seen this at the time, she conceded that they had had the conversation and we find on the balance of probabilities that this does broadly reflect the discussions. Relevant, it addresses the following points:

72. They spoke about a rough view of what the return to work would look like - there would be a few shifts with the general manager to go over the new Covid ways and being safe at work; to build up with shifts as an extra base to ease the work impact on the claimant; doing an open/close with support as a refresher prior to doing a normal shift; and then running a shift and this taking around four to six weeks depending on how she was getting on. There would be weekly chats with the general manager and she was asked if there was anything else she would like put in place. Nothing was asked for but the claimant was left to think about that and she was asked if there was anything else she was worried about. She spoke about Mr Ferguson and some of the team members and was assured that no one would be doing anything or saying anything and that if they did then she needed to report it to the general manager.

73. It is recorded that they went through the grievance actions and the claimant was fine with all this and it is finished by saying that Mr Want would do face to face meetings when the claimant returned from sick leave and that he would keep in touch. Finally Mr Want reminded the claimant that she needs to make sure she did the sick notes when needed and to ask for help when she needs uploading them so that things didn't proceed to her being AWOL in line with the Greene King policy.

74. In our view at that meeting Mr Want was clearly consulting with the claimant on a plan to get her back to work. He also reminded the claimant about the importance of submitting sick notes.

75. The next issue related to Mr Want informing the team that the claimant would be returning to work and there would be no hard feelings. The claimant did not give any evidence of this in her witness statement but in cross-examination said that it implied that the claimant might have had issues with other staff – not just Mr Ferguson. Mr Want said he could not remember the exact words he used but he wanted the claimant's return to work to be as smooth as possible. The claimant's main complaint is that she was not informed or consulted about what was said to colleagues. In our view she obviously should have been. However we find that Mr Want was seeking to facilitate the claimant's return to work and we do not know where the claimant got the words "no hard feelings" from as she was necessarily not at work to hear them. However, the failure to agree what was said has inevitably caused the claimant to be concerned about what was said.

76. The next thing that happened was on 10 and 14 September and the claimant's fit note was due to run out on 11 September which was a Friday. On 10 September Mr Want called the claimant and left a voicemail. He said in that voicemail "hi Jay its Johnny Want calling. Just picking up to see what's happening and if you're ready for the next part of returning to work. Can you let me know as soon as possible". He did not remind the claimant about her fit note or ask about it in that voicemail.

77. It is apparent however from the email to employee relations on page 155 on the same day, that Mr Want did intend if he was able to speak to the claimant. to ask about the fit note but the claimant did not answer the phone. The claimant, in any event, contacted her GP the next day to get a new fit note but it was not available until the surgery opened on Monday 14 September and when the claimant attained a fit note backdated to 11 September. Mr Want said in another email to employee relations on the Monday 14 September that the claimant's fit note expired and he had tried to phone but there was no answer. He asked ER if he should write to the claimant warning that the AWOL procedure would apply if there was no fit note or go straight to the AWOL letter. Hannah Davies from ER advised to send the AWOL letter straightaway.

78. The claimant disputes whether Mr Want phoned again after 10 September. He said that he called from two different phones and we think that on the balance of probabilities he did try to contact the claimant again. We also recognise the claimant is very anxious about answering the phone. In any event, Mr Want was clearly alight to the possible impact on the claimant of sending the AWOL letter but on the advice of Employee Relations he did so.

79. The claimant said that that had a very bad impact on her and we find that it did. The letter invited her directly to a disciplinary meeting and warned that dismissal was a possible outcome. She said in her email reply to Mr Want

    "I have sick note. I asked for it in a timely manner from the doctors but only just received it due to Covid there are delays. I have had no warning and cannot get something to you before I have it. This is not helping my anxiety. I'm now sat on my kitchen floor distressed. Pleased find attached fit note."

80. Mr Want forwarded this email to Employee Relations along with his expressed concerns that the claimant might use this incident against the respondent. We find that Mr Want and Hannah Davies who had been involved throughout were aware of the claimant's condition and how that affected her. We also find that she was caused significant distress by this letter. Ms Davies drafted a reply from Mr Want

to send to the claimant effectively apologising for sending the AWOL letter and saying they would remind her about sick notes. In the email a number of adjustments to welfare meetings to discuss her return to work are proposed, and Mr Want sent that email from him to the claimant.

81. In her witness statement the claimant says this about that email:

"I received an email from Johnny thanking me for being so candid with him. I thought finally someone has acknowledged my feelings and this person was the current general manager at Quakerwood, only now to find out these weren't kind and emphatic words from him but were the words of Hannah Davies in employee relations. I feel completely deceived. Johnny had also said that I may use the disciplinary action against the company. Why was this an assumption of something I would do and why would he be worried if he thought it reasonable to bring disciplinary action towards me. I could not take anymore and on 29 September I resigned from the company with four weeks' notice".

82. It is part of the claimant's claim of constructive unfair dismissal that it was a breach of the implied term for the respondent to fail to comply with her subject access request properly the first time. It was, we conclude, in the second disclosure on 11 September that the correspondence between Ms Davies and Mr Want came to light. We find there was nothing wrong at all with the email from Mr Want or the fact that it had been drafted by Ms Davies. It is wholly proper for a manager to take advice and the fact that someone else drafted the email does not make it deceitful or underhand in any way. The genuine consideration Mr Want had in any event is reflected in his hesitation in sending the AWOL letter which he only did on advice. We further find on the basis of the evidence of the claimant about this that until she discovered that Ms Davies had in fact drafted the email she was prepared to continue working with the respondent to come back to work. She believed that they were finally taking her concerns seriously and it was only the claimant's perception that she had been deceived by Mr Want that finally caused her to hand in her notice.

83. On that note we address briefly the subject access request complaints. The claimant said that the respondent failed to properly comply with the subject access request in February 2020. We have seen the evidence of Mr Stuart-Clarke, data protection officer. Although he was not called to give evidence we have heard nothing to contradict what he says and we find that the respondent ought to comply in good faith with his data protection obligations. It would not be appropriate nor is it necessary for us to decide whether in fact they did comply in full with the relevant data protection legislation but we find that they did intend and try to.

84. Our final findings of facts before we talk about law and conclusions are in relation to disability. We accept the claimant's evidence that she has had anxiety and depression for many years following the death of her father. The claimant sets out the impact that has on her day to day activities including her ability to sleep, socialise and go out alone. This is clearly supported by the evidence of her GP. The claimant has had treatment in the forms of medication and counselling. Her GP describes as flaring classical anxiety and stress.

85. We conclude that it is a long term condition that has recurred on many occasions and is likely to do so again at any given point. We note that the claimant has subsequently sought to establish her own business. There is nothing in this context about that that is inconsistent with the effects and symptoms she describes.

Law and conclusions

Disability

86. Dealing firstly with disability, section 6 of the Equality Act 2010 says as far is relevant:

A person (P) has a disability if—

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

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

87. We were referred to the case of *Aderemi v London South Eastern Railway Limited* UKEAT/0316/12/KN in which Langstaff J considered the meaning of substantial adverse effect. We are required to consider what the claimant cannot do rather than what she can do as a result of her mental impairment. Once we have determined that the claimant's impairment has an adverse effect on her ability to undertake day to day functions, we must decide whether that effect is more than minor or trivial. If it is more than minor or trivial then, within the meaning of the Act, it is substantial.

88. Paragraph 2 of Schedule 1 of the Equality Act 2010 says that the affects of the impairment is long term if it has lasted for 12 months or more, it is likely to last for at least 12 months or as far, as is relevant, if an impairment ceases to have substantial adverse effect on a person's ability to carry out normal day to day activities it is to be treated as continuing to have an effect if that effect is likely to occur.

89. We have also have regard to the relevant provisions of Appendix 1 of the Code of Practice on Employment and the Meaning of Disability. It says that in determining whether something has a substantial adverse effect account should be taken also of where a person avoids doing things which cause pain, fatigue or substantial social embarrassment, or because of the loss of energy and motivation. The Code says that normal day to day activities are those activities which are carried out by most men or women on a fairly regular and frequent basis including such activities as walking, driving, using public transport, cooking, eating, lifting and carrying, typing, writing, going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships. This is not an exhaustive list. Where someone receives treatment that should be ignored and the impairment should be taken to have the effect that it would have had without such treatment.

90. We are required to consider all of this at the time of the alleged discrimination.

91. In our view the claimant did satisfy the definition of disability at all relevant times. The respondent accepts that the claimant had an impairment of anxiety, stress and depression. We have had regard to the medical evidence. The information from the claimant's GP demonstrates that the claimant has had a history of increased anxiety and distress over several years, those notes having been made in 2021.

92. Helpfully Dr Gupta sets out some of the impacts that that has on the claimant which include restlessness, agitation, poor concentration, circling worrying thoughts and poor sleep. The claimant is also recorded as struggling going out without support

from her partner or her mum. The doctor concludes "I have re-assured her that there is clear contemporaneous documentation of her flaring classical anxiety and stress presentation in her records."

93. The claimant has been treated on and off with medication and counselling and her problems started in 2004. Some of the impacts are an inability to go out to busy places on her own, like food shopping; an inability to engage in socialising with friends and sleeping. The claimant also says that she is highly irritable, argumentative and feels like people are getting at her.

94. The claimant's disability impact statement is wholly consistent with the medical evidence. The claimant's impairment clearly has an impact on her ability to sleep, socialise and go out and all day to day activities and in all cases that impact is more than minor or trivial.

95. In our view having regard to the medical evidence this is clearly a long term problem. It had been controlled by treatment but as is clear from the medical evidence about flare ups this is a recurring problem that has continued for a number of years.

96. Long term means, in the case of a fluctuating condition, if at the relevant time the condition is likely to recur. We have found that it was, at the relevant time, to likely to recur so the claimant was throughout disabled by reason of stress, anxiety and depression.

Unfair dismissal

97. Dealing with the constructive unfair dismissal claim, the question is whether the claimant was dismissed within the meaning of section 95(1) of the Employment Rights Act 1996 in that she resigned in response to a repudiatory breach of contract.

98. Section 95, which defines dismissal, says that dismissal includes circumstances where the employee terminates the contract under which they are employed with or without notice in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct.

99. In the case of *Western Excavating v Sharp* [1978] ICR 221 the Court of Appeal confirmed that the questions of constructive dismissal should be determined according to the terms of the contract or relationship and not in accordance with the test of reasonable conduct. In the case of Malik and Bank of Credit and Commerce International SA 1997] UKHL 23 it was held that all contracts of employment include the following implied term:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".

100. This was considered further in the case of Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727, in which the EAT said:

"22. *In order to determine whether there has been a breach of the implied term two matters have to be determined. The first is whether ignoring their cause there have been acts which are likely on the face of them to seriously damage or destroy the relationship of trust and confidence. The second is whether that act has no reasonable and proper cause. There is an element of artificiality which must be recognised in dividing a test in this way because it may be that the act is seen by*

the employee and employer as so bound up with legitimate reasons for doing it that it is unlikely to damage the relation of trust and confidence between them or that conversely it is certain to do so. It is not therefore a test to be applied to any set of facts by rote. Nonetheless, in circumstances such as the present, it is helpful.

23. To take an example, any employer who proposes to suspend or discipline an employee for lack of capability or misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence between employer and employee whatever the result of the disciplinary process. Yet it can never be argued that an employer was in breach of the term of trust and confidence if he had reasonable and proper cause of the suspension of taking the disciplinary action."

101. In another case of *Omilaju v Waltham Forest London Borough Council* [2004] EWCA Civ1493the Court of Appeal referred to the last straw principle as the repudiatory conduct consisting of a series of acts or incidents which cumulatively amount to a repudiatory breach of the implied term of mutual trust and confidence. The last straw is the final act that causes the employee to finally hand in their notice.

102. The Court of Appeal said at paragraph 20:

"I see no need to characterise the final straw as unreasonable or blameworthy conduct. It may be true that an act which is the last in a series of acts which taken together amount to a breach of the implied term of trust and confidence which will usually be unreasonable and perhaps even blameworthy but viewed in isolation the final straw may not always be unreasonable still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incident which cumulatively amount to a repudiation of contract by the employer. The last straw must contribute however slightly to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred. If the final straw is not capable of contributing to the series of earlier acts there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect…

Moreover an entirely innocuous act on the part of the employer cannot be a final straw even if the employee generally but mistakenly interprets the act as hurtful and destructive of his trust and confidence of his employer. The test of whether the employee's trust and confidence has been undermined is objective."

103. Section 98 of the Employment Rights Act 1996 sets out the circumstances in which dismissal, including a constructive dismissal, will be fair. The respondent must show a potentially fair reason and the dismissal must be fair in all the circumstances if there is such a reason. However the respondent has not in this case pleaded a potentially fair reason which means that if we find that the claimant was constructively dismissed she would have been unfairly dismissed.

104. In terms of the respondent's conduct we found that the conduct of Mr Ferguson prior to the claimant's grievance was reasonable and was undertaken for the purposes of managing the pub and furthering the business. Although his conduct was not always perfect, he did have reasonable and proper cause for doing what he did. In our view the claimant had a perception of the conduct of Mr Ferguson at that stage that was influenced by her disability. We accept that she perceived

Mr Ferguson as acting unreasonably towards her but, viewed objectively, we have found that he did not act unreasonably and we factor into that the fact that Mr Ferguson was not (as we have found) aware of the difficulties that the claimant was having at that time.

105. We have found that Mr Ferguson did, after the claimant submitted her grievance, on the balance of probabilities tell another member of staff that they should stop talking to the claimant as she was poison, or words to that effect. We think that this was probably because Mr Ferguson perceived the claimant as disruptive as evidenced by Mr Ferguson's view expressed in the grievance investigation meeting that the claimant had been telling the other employees not to work to his instructions and he was frustrated with the claimant. This was in our view an act likely to destroy the trust and confidence between the claimant and the respondent and Mr Fergusson had no reasonable and proper cause for saying this.

106. This was done in March or thereabouts. The claimant raised this in her grievance meeting and it was dealt with although not necessarily to the claimant's satisfaction.

107. In our judgment the claimant's grievance over all was not dealt with adequately. The respondent did not investigate adequately and they did not interview Will or Amy or anyone else but, more importantly, they did not address at all the key part of the claimant's grievance and particularly that she believed that she had been discriminated against. There was some consideration of the claimant's mental health but there was too much focus on the presenting complaints rather than the underlying allegations of discrimination.

108. It is likely, as we have found, that Mr Ferguson was acting as a manager but that the claimant's perception, as coloured by her disability, was that he was discriminating against her or subjecting her to unreasonable treatment and that could have been addressed more sensitively and more sympathetically in their grievance.

109. This addresses the issues relating to the investigation and the grievance in the appeal. In respect of Mr Harrison's telephone contact we have found that it could have been handled more sensitively but the claimant's allegation was that he contacted her out of the blue despite her request not to.

110. We have found there was no such request and that while his actions in respect of 17 July were left wanting he was not acting contrary to the claimant's request. The way Mr Harrison conducted the meeting on 17 July was not appropriate. If it was to be a formal meeting he ought to have notified the claimant in advance. There is simply no explanation that we can think of for taking issue with the claimant's mother being there particularly when she had been permitted to attend at previous meetings.

111. However, even though this was unacceptable it is not the allegation that is pleaded and in any event it does not by itself reach the high threshold of a repudiatory breach of contract.

112. In respect of dealing with the grievance outcome and a return to work plan we find that this is what Mr Want was trying to do – to agree and implement a return to work plan with the claimant. Ultimately the claimant resigned before it was able to be put in place. There was no requirement specifically for a stress risk assessment but it is reasonable to expect an employer to help an employee back

to work. The later acts of Mr Want and Ms Davies and the communications of Mr Harrison demonstrated a clear intention in our view to help the claimant back to work. Unfortunately the claimant was unable to consider either returning to work where Mr Ferguson was, or working somewhere else. The Quakerwood was Mr Ferguson's home. The respondent had considered mediation and/or reviewing the situation if and when Mr Ferguson returned from sick but there is little else they could do.

113. In terms of the acts of Mr Want, again the presence of his mother briefly in a meeting was not professional or acceptable but it does not of itself amount to a repudiatory breach of contract. In respect of the communications about the claimant's return to work we found that Mr Want was effectively acting reasonably and with proper cause in seeking to facilitate the claimant's return to work.

114. Finally, in respect of the pleaded acts, we find that the respondent did not act unreasonably or without proper cause at all in respect of the subject access request. In our view it is possible that the inadequate way the grievance was considered combined with the poor way Mr Harrison communicated with the claimant, Mr Want failing to ensure adequate privacy, and failing to consult with the claimant about communicating her return to work could together amount to a repudiatory breach of contract.

115. We conclude however that even after all that and after problems with the AWOL letter, which is of itself not pleaded as part of a repudiatory breach, the claimant was prepared on the basis of the communication from Mr Want to try to return to work. She said that finally someone is taking her seriously. We conclude, therefore, that following the email from Mr Want the claimant had affirmed her contract or waived the breach. It was only when she discovered that Ms Davies had drafted the email that she then decided, at least six weeks after the last pleaded act (the appeal outcome), that she decided to hand in her notice.

116. In reality it has been difficult to identify the trigger or the final straw but we can only conclude that it was in fact on the basis of the claimant's evidence this discovery (namely that Ms Davies had drafted the email sent by Mr Want) that prompted it. Applying the test in *Omilaju* we find that the acts Mr Want and Ms Davies together in writing that email were entirely and wholly innocuous. It could not act as a final straw even if it had been pleaded as such and it was certainly not sufficient to revive any of the earlier acts on which the claimant relies if they did to amount to repudiatory breach. As we have already found it was perfectly reasonable and proper for Mr Want to take advice from Ms Davies about writing the email and it was perfectly acceptable for him to use the whole of that email to communicate with the claimant.

117. For these reasons the claimant was not constructively dismissed and the claimant's claim of constructive unfair dismissal is unsuccessful.

Direct disability discrimination

118. We deal now with the claim for direct discrimination. Section 13 of the Equality Act 2010 says that 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. By virtue of section 6 of the Equality Act 2010 disability is a protected characteristic. We found that the claimant was disabled at the relevant time.

119. Section 23 of the Equality Act 2010 says that on comparison of cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case although the claimant does not rely on an identified comparator but a hypothetical one.

120. Section 136 of the Equality Act 2010 says that if there are facts from which the court could decide in the absence of any other explanation that a person contravened the provisions concerned the court must hold that the contravention occurred but that does not apply if the respondent is able to show that they did not contravene the provision. This is commonly referred to as the reversal of the burden of Proof.

121. In the case of *IGEN Ltd & Ors v Wong* [2005] IRLR 258 it was said that the Tribunal must consider all the evidence before it to determine whether the claimant has proved facts from which we could conclude that the respondent committed the discriminatory acts complained of. We are entitled at that stage to take account of all of the evidence but must initially disregard the respondent's explanation for the acts.

122. If we are satisfied that the claimant has proven such facts it is then for the respondent to prove that the treatment suffered by the claimant was in no sense whatsoever on the grounds of disability. Whether the treatment is considered "less favourable" is a matter for the Tribunal. It is not enough for the claimant to say that they felt that the treatment was less favourable and it is not enough just to show less favourable treatment than a person without the protected characteristic. There must be something more to show or to enable us to conclude that on the balance of probabilities it was because of a protected characteristic. There must be something more than just unfavourable treatment and a different in status.

123. The acts that the claimant relies on as direct discrimination are those of Mr Ferguson that we have addressed in our findings about the constructive unfair dismissal claim. For those reasons as we have set out previously all of the alleged acts, except in relation to the detrimental comments, were for the purposes of improving the standards of the pub. Except in relation to that comment the claimant was not treated negatively compared to anybody else.

124. In respect of the allegation about the claimant's work being taken away from her by Ms O'Callaghan, that was unfavourable treatment from the claimant's perspective, but we accept Mr Ferguson's evidence that the reason for that was to get the job done and that Ms O'Callaghan was being helpful. We do not accept that it was any way intended to be detrimental to the claimant and it was certainly not connected with her disability.

125. In respect of the allegation that Mr Ferguson referred to the claimant as poison there is nothing to relate this to the claimant's disability at all. We found that rather than because of her anxiety, it was because of Mr Ferguson's apparent perception of the claimant as disruptive and interfering with his plans to improve the pub. This was wholly unrelated to the claimant's disability and in any event we have found that Mr Ferguson was unaware of the claimant's disability at that time so that it could not have operated on his mind at all. For these reasons the claimant's claim of direct discrimination on the grounds of disability is unsuccessful.

Discrimination arising from disability

126. In respect of the claim of discrimination because of something arising in consequence of disability, section 15 of the Equality Act 2010 says that a person discriminates against a disabled person if they treat them unfavourably because of something arising in consequence of their disability and they cannot show that the treatment is a proportionate means of achieving a legitimate aim. That does not apply if the respondent shows that they did not know or could not reasonably have been expected to know that the claimant had a disability.

127. We do not set out the law in any great detail in this case because the same acts relied on for the section 15 cases are relied on for the direct discrimination. The something arising in this case was said to be the claimant's reaction on 3 February 2020 and the conversation about the crock pots. We found that this did not operate on Mr Ferguson's mind at all. We have also set out our reasons for all of the treatment previously, whether that was unfavourable treatment or not. It follows, therefore, that the claimant's reaction on 3 February was not a reason for any of the allegedly unfavourable treatment to which the claimant was subjected. For those reasons the claim under section 15 is also dismissed.

Failure to make reasonable adjustments

128. In respect of the claim of failure to make reasonable adjustments. There is, under section 20 and 21 Equality Act 2010, a duty to make reasonable adjustments. That includes where there is a requirement, a provision, criterion or practice, which puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with a person who is not disabled, the respondent must take such steps as it is reasonable to have to take to avoid the disadvantage.

129. A provision criterion or practice or PCP must have an element of repetition about it or at least the potential to be repeated. It cannot be a one off act applied solely to the claimant. Practice includes some form of continuum in the sense that it is a way in which things generally are or will be done.

130. Paragraph 20 of schedule 8 to the Equality Act 2010 provides that the respondent is not subject to the duty to make reasonable duties if they do not know and could not reasonably be expected to know that the disabled person has a disability and is likely to be placed at the disadvantage referred to in section 20.

131. In order to determine knowledge the Tribunal must ask itself two questions. Firstly, did the employer both know that the employee was disabled and that the disability was liable to affect them in the manner set out in section 20. The answer to that question is no then the second question is ought the employer to have known the employee was disabled and that their disability was liable to affect them in the manner set out in that section.

132. The claimant must show that there is a PCP; that it subjects them to a particular disadvantage; that they were subjected to that disadvantage; that the respondent had knowledge of both the disability and the disadvantage; and at that point once the proposed adjustment has been identified the burden of showing why that proposed adjustment was not reasonable falls to the respondent.

133. So I address the PCPs that the claimant seeks to rely on. The first is making the phone calls to discuss grievances and related issue without notice. We find that this was a PCP and that it was a practice, there was nothing to suggest that it

was not Mr Harrison's practice to contact people without notifying them first. This would subject the claimant to a substantial disadvantage in that her anxiety caused her to feel particularly anxious about being taken by surprise.

134. However we find that both that Mr Harrison was not aware of this particular disadvantage for the reasons that we have already explained. It was not made explicit to him and there was no basis on which he ought reasonably to have known that specific disadvantage. The claimant was upset but she could have been upset for any number of reasons in those difficult meetings. In the event, however, in the particular case relied on 17 July 2020 we find that the claimant was not subjected to a particular disadvantage. It just so happened that she did have notice of the call in advance because Mr Harrison had left a voicemail and it was the claimant's choice to return the call even against her mother's advice at that time. That allegation of a failure to make a reasonable adjustment is therefore unsuccessful.

135. The second PCP relied on is the respondent's PCP of objecting to an employee's mother taking part in meetings about grievances or related issues. The respondent agreed that it applied that PCP in so far as the standard policy of allowing employees to be accompanied by work colleagues or trade union representatives at such meetings only is applied.

136. Again this did subject the claimant to a particular disadvantage because the impact of not being accompanied by her mother at the grievance meeting made it too difficult for her to take part, she needed support, we find that Mr Harrison was aware of this. If he had not been we do not know why he would have allowed the claimant's mother to attend at the first grievance meeting. It would therefore be a reasonable adjustment to allow the claimant's mother to attend at the meeting on 17 July and the respondent has given no suggestion, let alone evidence, as to why it was not reasonable to make that adjustment at that time.

137. So that claim of failure to make reasonable adjustments is upheld.

138. The third PCP is sending out a disciplinary invitation stating that an employee was classed as AWOL as soon as the current sick note ran out. Again this is agreed as a PCP by the respondent in submissions. We find that this would subject people with anxiety to a particular disadvantage and the claimant was subjected to that disadvantage. A perfectly obvious reasonable adjustment would be to provide a warning letter and in fact Mr Want suggested that but instead followed ER advice and sent the AWOL letter straightaway. There was simply no good reason for not sending a warning letter as far as we can see. That would have been a reasonable adjustment and that claim is also upheld.

139. The fourth PCP is requiring an employee to work for someone who is related to the person against whom they had a grievance. In our view this does not amount to a PCP. As referred to previously a PCP must have the character of repetition or the ability to be repeated. In this particular case it was just a matter of happenstance or coincidence that the claimant would have to return to work with Mr Ferguson and that arose by virtue of the fact that Mr Ferguson happened to live in the pub. It was in effect a one off set of circumstances that would not amount to a PCP.

140. Similarly PCP five - requiring an employee to return to work in the building with the person against whom a grievance has been made was living and/or potentially

returning to work - the same one off circumstances apply and that is also not a PCP.

141. So the last two allegations of failure to make reasonable adjustments are unsuccessful.

142. To that extent the claimant's claim is successful.

143. Finally we address the claim for breach of contract in respect of the failure to pay holiday pay for holiday accruing during the claimant's notice period. The respondent was unable to provide any evidence that the claimant had been paid for the holiday accrued during the last four weeks of her notice period. It was accepted in submissions that the claimant was owed one and a half days' holiday pay and that that should be rounded up under the Working Time Regulations 1998 to 2 days. We allow that the claim that the claimant is entitled to a further two days pay in lieu of untaken holidays.

Employment Judge Miller
Dated: 2 December 2022

Appendix – Consolidated list of issues

Unfair dismissal

1 Was the claimant dismissed?

2 Did the respondent do the following things:

3 Gary Fergusson's treatment of the claimant to be detailed in the further information

3.1 Gary Ferguson unreasonably criticised the claimant for not removing a crockpot to show that the checkback had been done.

3.2 Gary Ferguson continued to badger the claimant thereafter

3.3 Gary Ferguson instructed the claimant (and only the claimant) to polish cutlery in the front of house area rather than the kitchen

3.4 Gary Ferguson told the Claimant to place Gastros in the pot wash area differently and to also make sure they were filled with hot soapy water ready for the day. This was not a problem to claimant, but once again it was a change only suggested to Claimant.

3.5 Gary Ferguson asked one of the chefs to tell the claimant (and only the claimant) to leave the kitchen if there was no food to run

3.6 8 Feb 2020 Gary Ferguson told the claimant, harshly, "this is how it's done now" in response to the claimant moving a table Gary Ferguson had set up and told her to move the table back to how it had been

3.7 11 Feb 2020 – Gary Ferguson's girlfriend took over the claimant's regular jobs (setting up behind bar; checking off beer delivery, answering phone) so that the claimant was left unable to do her normal jobs. The caused feelings of stress and anxiety.

3.8 18 Feb 2020 – Gary Ferguson refused the claimant's sick leave on the system.

3.9 After grievance submitted, Gary Ferguson told another member of staff that they should stop talking to the claimant as she is poison

3.10 Grievance raised was not dealt with in regard to the sensitivity of her mental health condition and taking into consideration the evidence I had produced. Furthermore, there was not a reasonable investigation conducted.

3.11 Contact from Paul was not given due consideration and respect to the claimant's mental health condition and her request for him to have pre-agreed times to enable them to be present on such phone calls.

3.12 The grievance appeal advised there was a thorough investigation. The claimant does not believe this to be the case.

3.13 There has been no well being action plan produced for assisting the claimant to return to work earlier.

3.14 The managers showed a distinct lack of knowledge of mental health conditions.

3.15 Failure to adequately deal with the outcome in a proactive way that limited the impact on the claimants mental well being.

3.16 a breach of confidentiality by Johnathan Want in a Zoom return to work meeting on 14th August 2020 whereby it was not disclosed that there was a persons in the background able to hear all of the private meeting.

3.17 Johnathan Want additionally without my consent inaccurately informed the entire team at Quakerwood that I would be returning and there would be 'no hard feelings'. A failure to inform me of the full extent to what had been disclosed to my fellow work colleagues.

3.18 Failure to complete a full Subject Access Request (SAR) at the first request on the 27th February 2020.

4 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

4.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

4.2 whether it had reasonable and proper cause for doing so.

5 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

6 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

7 If the claimant was dismissed, what was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract?

8 Was it a potentially fair reason?

9 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

Wrongful dismissal / Notice pay

10 If the claimant was dismissed, is she entitled to notice pay?

Disability

11 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

12 Did she have a physical or mental impairment: anxiety, stress and depression?

13 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

14 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

15 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

16 Were the effects of the impairment long-term? The Tribunal will decide: did they last at least 12 months, or were they likely to last at least 12 months? if not, were they likely to recur?

S13 Equality Act 2010 – direct disability discrimination

17 Did the respondent do the following things:

18 The treatment by Gary Fergusson to be specified in the further information. This is likely to include:

18.1 Singling out the claimant for criticism;

18.2 Asking his girlfriend to carry out tasks which were part of the claimant's job;

18.3 Implementing changes/asking the claimant to do her work in a certain way without taking account of the claimant's mental health

19 Gary Fergusson's treatment of the claimant to be detailed in the further information

19.1 Gary Ferguson unreasonably criticised the claimant for not removing a crockpot to show that the checkback had been done.

19.2 Gary Ferguson continued to badger the claimant thereafter

19.3 Gary Ferguson instructed the claimant (and only the claimant) to polish cutlery in the front of house area rather than the kitchen

19.4 Gary Ferguson told the Claimant to place Gastros in the pot wash area differently and to also make sure they were filled with hot soapy water ready for the day. This was not a problem to claimant, but once again it was a change only suggested to Claimant.

19.5 Gary Ferguson asked one of the chefs to tell the claimant (and only the claimant) to leave the kitchen if there was no food to run

19.6 8 Feb 2020 Gary Ferguson told the claimant, harshly, "this is how it's done now" in response to the claimant moving a table Gary Ferguson had set up and told her to move the table back to how it had been

19.7 11 Feb 2020 – Gary Ferguson's girlfriend took over the claimant's regular jobs (setting up behind bar; checking off beer delivery, answering phone) so that the claimant was left unable to do her normal jobs. The caused feelings of stress and anxiety.

19.8 18 Feb 2020 – Gary Ferguson refused the claimant's sick leave on the system.

19.9 After grievance submitted, Gary Ferguson told another member of staff that they should stop talking to the claimant as she is poison

20 Was that less favourable treatment?

21 The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

22 If there was nobody in the same circumstances as the claimant, the

23 Tribunal will decide whether she was treated worse than someone else would have been treated.

24 The claimant has not named anyone in particular who s/he says was treated better than she was.

25 If so, was it because of disability? The claimant states that Gary Fergusson was deliberately treating her in this way to cause her increased stress and anxiety/stress and upset because he had seen her reaction to being told to change the way she dealt with the crock pots

Discrimination arising from disability (Equality Act 2010 section 15)

26 Did the respondent treat the claimant unfavourably by:

27 The treatment by Gary Fergusson to be specified in the further information. This is likely to include:

27.1 Singling out the claimant for criticism;

27.2 Asking his girlfriend to carry out tasks which were part of the claimant's job;

27.3 Implementing changes/asking the claimant to do her work in a certain way without taking account of the claimant's mental health.

28 Gary Fergusson's treatment of the claimant to be detailed in the further information

28.1 Gary Ferguson unreasonably criticised the claimant for not removing a crockpot to show that the checkback had been done.

28.2 Gary Ferguson continued to badger the claimant thereafter

28.3 Gary Ferguson instructed the claimant (and only the claimant) to polish cutlery in the front of house area rather than the kitchen

28.4 Gary Ferguson told the Claimant to place Gastros in the pot wash area differently and to also make sure they were filled with hot soapy water ready for the day. This was not a problem to claimant, but once again it was a change only suggested to Claimant.

28.5 Gary Ferguson asked one of the chefs to tell the claimant (and only the claimant) to leave the kitchen if there was no food to run

28.6 8 Feb 2020 Gary Ferguson told the claimant, harshly, "this is how it's done now" in response to the claimant moving a table Gary Ferguson had set up and told her to move the table back to how it had been

28.7 Feb 2020 – Gary Ferguson's girlfriend took over the claimant's regular jobs (setting up behind bar; checking off beer delivery, answering phone) so that the claimant was left unable to do her normal jobs. The caused feelings of stress and anxiety.

28.8 Feb 2020 – Gary Ferguson refused the claimant's sick leave on the system.

28.9 After grievance submitted, Gary Ferguson told another member of staff that they should stop talking to the claimant as she is poison

29 Did the following thing arise in consequence of the claimant's disability:

29.1 The way she reacted when told to change the way she dealt with the crock pots.

30 Was the unfavourable treatment because of any of those things? ?The claimant states that Gary Fergusson was deliberately treating her in this way to cause

her increased stress and anxiety/distress and upset because he had seen her reaction to being told to change the way she dealt with the crock pots.

31 Was the treatment a proportionate means of achieving a legitimate

32 aim?

33 The Tribunal will decide in particular:

33.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

33.2 could something less discriminatory have been done instead;

33.3 how should the needs of the claimant and the respondent be balanced?

34 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

35 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

36 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs (the claimant asserts that these amount to PCPs on the basis that the respondent would treat a similar situation that arose in the future in the same way):

36.1 Making phone calls to discuss grievances and related issues without notice

36.2 Objecting to an employee's mothers taking part in meetings about grievance's or related issues.

36.3 Sending out a disciplinary invite stating that an employee was classed as AWOL as soon as the current sick note ran out

36.4 Requiring an employee to work with someone who was related to the person against they had a grievance

36.5 Requiring an employee to return to work in a building where the person against a grievance has been made was living and/or potentially returning to work

37 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

37.1 Taking part in meetings about her grievance and related matters without notice caused her increased stress and anxiety;

37.2 She needed to have her mother present as support because of her stress and anxiety. This was not possible if no notice was given of a meeting.

37.3 Receiving an invite to a disciplinary meeting caused the claimant increased stress and anxiety

37.4 Working with Mr. Fergusson, or in a building where he lived or with his girlfriend caused the claimant increased stress and anxiety.

38 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

39 What steps could have been taken to avoid the disadvantage? The claimant suggests:

39.1 Giving reasonable notice of meetings;

39.2 Allowing the claimant's mother to attend and take part in meetings for support;

39.3 Sending an email to check out the situation or ask where sick note was before issuing a disciplinary invite;

39.4 Taking steps to help the claimant deal with her anxiety about working with Gary Fergusson/in the building where he lived/ with his girlfriend. This might have included a wellbeing return to work plan, mediation or other steps to rebuild trust and confidence, undertaking a stress risk assessment, offering counselling earlier having an earlier return to work meeting or offering a phased return to work.

40 Was it reasonable for the respondent to have to take those steps and when?

41 Did the respondent fail to take those steps?

Holiday Pay (breach of contract)

42 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken? The claimant says that this relates to holiday entitlement which would have accrued during the notice period.