RM

EMPLOYMENT TRIBUNALS

Claimant: **Miss R Harkness**

Respondent: **Holland & Barrett Retail Limited**

Heard at: **East London Hearing Centre**
On: **22-25 October 2019 and 12 November 2019 (in chambers)**

Before: **Employment Judge Moor**
Members: **Mr P Pendle**
Mr P Quinn

Representation

Claimant: in person
Respondent: Mr C Ludlow, counsel

JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. **The Respondent failed to comply with its obligation to make reasonable adjustments under the Equality Act 2010 in that:**
   a. **it failed to provide the Culver store with the additional staff hours and/or allocating an additional key-holder to avoid the risk of the Claimant lone working;**
   b. **it failed to provide the Claimant with mentoring support.**
2. **The complaint of constructive unfair dismissal is well-founded.**

REASONS

1. The Respondent runs a well-known retail business, selling health products in high street stores. It employs approximately 8,000 employees. The Claimant, Miss Harkness, worked at the Respondent from 30 October 2011 until her resignation on 27 June 2018. She worked latterly as a Store Manager.

2. This case concerns whether the Claimant was entitled to treat herself as unfairly dismissed because of the Respondent's conduct towards her and/or whether, if it knew she was a disabled person within the meaning of the Equality Act 2010

('EQA'), the Respondent failed to comply with any duty upon it to make reasonable adjustments for her.

3. The Respondent admits that at the relevant time, the Claimant was a disabled person because she had the condition interstitial cystitis. At the end of the evidence, the Respondent also conceded that the Claimant was a disabled person because she experiences the mental health condition, Emotionally Unstable Personality Disorder. The Respondent denies that it knew or reasonably ought to have known that the Claimant was a disabled person at the relevant time.

The Hearing Day

4. At the outset, we explained the hearing day to the Claimant, who attended the Tribunal supported by her mother, Ms Harkness. The Employment Judge explained that we would have a comfort break half-way through the morning and afternoon and asked whether the Claimant needed any further adjustments to assist her. She said she may have to go to the toilet more frequently or urgently and we agreed that, if so, she would tell the Tribunal and leave quickly. This happened on one occasion during the hearing. We took more and longer breaks where necessary to allow the Claimant to compose herself

5. By the third day of hearing Ms Harkness took over the representation of the Claimant's case as she had become tired. We thank both of them and Mr Ludlow for the courteous and careful way in which they presented their respective cases.

Issues

6. The issues were clarified at a Preliminary Hearing before EJ Jones on 28 January 2019, and, in certain respects, at our hearing. They are as follows (we retain the original numbering for ease of reference and identify where the issue is no longer pursued or has been conceded):

Constructive unfair dismissal

9. *Was the Claimant dismissed? 9.2 Did the Respondent without reasonable and proper cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee? Specifically, did the Respondent breach the implied term of trust and confidence by any of the following, individually or cumulatively: -*

    9.2.1. Instruct the Claimant to continue trading after the sewage leak?

    9.2.2. Remove all her stock, when the sewage leak was eventually cleaned up?

    9.2.3. Inform the Claimant that the lift that had been previously designated as staff lift only, was now a goods lift only after the Claimant had got stuck in it?

    9.2.4. Failing to replace the stock that had been removed so that she was likely to lose out on stock bonuses?

9.2.5. Take away the Claimant's staff and hours so that she was going to be trading alone and informing her that she would be a lone trader knowing that the condition of interstitial cystitis requires her to have regular access to the toilet and that in order to do so she would have to close the store which would affect trading?

9.2.6. Informing the Claimant that she could not be transferred to head office according to her request but that she would have to apply for a job and go through the normal recruitment process in order to be able to move from her store?

9.2.7. Refusing to transfer the Claimant to head office to any job even with a pay cut, to enable her to get away from the situation at the store?

9.2.8. Requiring the Claimant to work in a store which where the nearest toilet was two floors up and the only way to access the toilet quickly was in a lift which had initially been designated as staff lift and had been used by members of management or when they attended the store and was lately designated as a goods lift only, after the Claimant got stuck in it?

9.2.9. Informing the Claimant in a meeting with her area manager that she would have to deal with deliveries on her own which could amount to as much as 18 cages on any one day?

9.2.10. Requiring the Claimant to work with cages that were sometimes broken and without being flagged as being so, so that she cut her hand on one of those cages?

9.3. If yes to (13.2) then:

9.3.1. Did the Claimant resign in response to the breach?

9.3.2. Did the Claimant resign promptly in response to the breach or wait too long before resigning and in so doing, waive the fundamental breach and/or affirm her contract of employment?

9.4. [Not pursued]

<u>Disability</u>

9.5. [Now conceded]

<u>Failure to make reasonable adjustments</u>

9.6. Did the Respondent apply the following PCPs (provision, criterion or practices) that caused her substantial disadvantage because of her disabilities:

9.6.1. Requiring the Claimant to carry out the duties of her role at the Colchester store?

9.6.2. Advising her that she would be losing more assistant hours in store, which would mean that she was likely to be operating/trading in store alone. It is the Claimant's case that this put her at a substantial disadvantage because with the condition, interstitial cystitis, she needs

to go to the toilet regularly and urgently on every occasion. The toilet at the store she was managing at the time was two floors up from the shop floor. If she was in store alone she would need to shut the shop every time she went to the toilet, which would mean a loss in sales and an inability/difficulty in achieving her targets. The Respondent were aware of the Claimant's disability but had made no adjustment to accommodate it.

9.6.3. Informing the Claimant was informed that her supervisor was going to be demoted and she would have to deal with deliveries on her own which could be as much as 18 cages at any one time. Again, it is her case that this would put her at a substantial disadvantage because of her interstitial cystitis.

9.6.4. The Claimant reported a sewage leak from the floor above into the store and the Respondent wanted her to continue trading before the matter was cleaned-up. The Claimant considered this to be a health and safety risk. When the local authority health and safety office insisted that she close the store, a clean-up team came to clean away the waste. They also took away her stock and failed to replace it. It is the Claimant's case that this would have made it difficult for her to achieve stock bonus. It would have made it impossible for her to rectify the situation.

9.6.5. The Claimant needed to use the lift to get to the toilet and the lift had been used as an ordinary lift by the Claimant and visiting managers since she moved to that store. Following her being stuck in the lift and calling for assistance on her telephone as there was no phone in the lift, the Respondent then informed her that it should have been designated as a goods only lift. If she had remained in store this would have meant that she could not use the lift to go to the toilet upstairs.

9.6.6. Another PCP applied was whenever the Claimant tried to get support from her manager, Nick Gold with matters that she was dealing with or things that affected her health, he advised her that it was HR's problem and that it was nothing to do with him. He did not try to help her.

10. *The Claimant asked the Respondent to make an adjustment which was to transfer her to head office to do any job that was available as the store at Colchester no longer suited her for the reasons set out above. The Respondent refused to enable that to happen.*
11. *Instead, the Respondent told her that she needed to apply for positions that became available.*
12. *The Respondent denies treating the Claimant less favourably because of her disability or breaching any duty to make reasonable adjustments.*

12.1.1 Did the Respondent apply those provision, criterion or practices to the Claimant?

12.1.2 Did the application of those provisions, criterion or practices put disabled persons at a substantial disadvantage in relation to their employment?

12.1.3 Was the Claimant put to that substantial disadvantage?

12.1.4 Did the Respondent know, or could the Respondent have been reasonably expected to know, that: -

12.1.5 The Claimant was disabled; and

12.1.6 The Claimant was likely to be placed at the disadvantage referred to above.

12.1.7 It is the Respondent's case that it had asked the Claimant to provide consent for an occupational health report but consent had not been provided as at the time of resignation.

12.1.8 It is the Claimant's case that the Respondent was aware of her mental health condition in 2016 as she was off sick for some time and when she returned to work, there was a return to work meeting at which she shared her discharge information and medical information with the managers.

12.2 Would the following have been a reasonable step for the Respondent to take to avoid the disadvantage: -

12.2.1 Transferring the Claimant to fill an existing vacancy, at head office, including the possibility that the Claimant should be placed at the same, lower, or higher grade without any competitive interview that is reasonable under the circumstances?

12.2.2 Was there an existing vacancy at the time? The Claimant relies on the vacancy of Management Development Trainer.

12.2.3 Was there also a vacancy for store support, which the Claimant had done, before which she was willing to do on this occasion?

12.2.4 Would it have been reasonable in the circumstances to transfer the Claimant to the office to work without application? It was not clear whether the Claimant was saying that she ought to have been transferred without interview.

12.2.5 Extra support. (We clarified, during the hearing, that this was the adjustment to mirror the PCP at issue 9.5.).

Findings of Fact

13 Having read and heard the evidence of Miss Hewitt, Miss E Twin, Mrs E Cepparulo, Mr N Gold, Miss M Ellwood, and having read the unchallenged evidence of Mr G Pearce, and having considered the documents referred to us in the evidence, we make the following findings of fact.

Policies and Procedures

14 At the relevant time the Respondent's sickness absence policy was set out in its 'Staff Rules';

14.1 Paragraph 7(a) provided: *If you are unable to work because of illness… you must notify your … ASM on the first day of absence at least one hour before your normal starting time.*

14.2 Paragraph 7(e) provided: *The Company reserves the right to insist on a medical examination by its own nominated doctor or to obtain a medical report from the member of staff's Doctor in order to validate a sickness absence claim, should this be thought necessary.*

15 Contrary to Mrs Cepparulo's evidence, the policy did allow HR to seek the opinion of an occupational health provider. Miss Ellwood stated that her practice would be to go to the GP first and ask for a bespoke occupational health request after that if it were necessary.

16 The Respondent's Equality Policy (322) at the time did not refer to any positive obligation that might arise to make adjustments in respect of disabled employees. And the Respondent's training of managers on obligations towards disabled employees was limited. Of training on disability Mr Gold said had not received 'much'.

17 The Respondent's personnel files were paper based. There appears to have been two: one held centrally and one in each store. After a sickness absence, a return to work meeting was held and a Return to Work form filled out in triplicate: one copy for the employee, one to be kept on the store file and one sent to Head Office for the central personnel file.

Summary of Work History and Management Structure

18 The Claimant started her employment in October 2011 as a part-time supervisor. She was promoted to become a Store Manager at Witham in July 2013.

19 In June 2016, the Claimant worked in a troubleshooting role across the region, covering for Store managers' absences and deputising for her manager on occasions. During this period she was 'based' for pay purposes at the small Pelhams store in Colchester. She also worked some shifts there. The Culver Walk store opened in November 2016 and the Claimant became its manager.

20 An Area Sales Manager ('ASM') managed Store Managers within a region. The Claimant's first ASM was Mr Bristow with whom she got on well. Ms Wilson-Saunders took over and the Claimant made a grievance about her in July 2016. This was resolved and thereafter they worked well together, becoming friends. From April 2017-late August Mr Solanki then Ms Beldycka covered the ASM role until Mr Gold was appointed. The ASM was managed by the Regional Sales Manager ('RSM'), Ms Still.

21 Ms Cepparulo was initially the regional HR contact before she was promoted in January 2018, when Miss Ellwood took over the HR role in the region. The administrative functions of HR were undertaken by 'people services'.

22 As well as being a Store Manager, until August 2017, the Claimant was a Team Leader for a cluster of stores within the region. This was not a paid role but it had some status. The ASM selected Team Leaders. They were a link between a cluster of stores and the region's ASM. They would pass on information from the ASM to other store managers, and assist the ASM in tasks, if necessary, for example, searching for cover for other stores.

Grievances

23 During her time working with the Respondent, the Claimant raised three grievances about colleagues. We have referred to the one about Ms Wilson-Saunders, her ASM, above. Another, against a co-worker, was also resolved. Mr Bristow suggested to the Claimant not to grieve as much if she wanted to progress. This did not stop her from making a third grievance. Her evidence to us was that she would bring a grievance if she felt it was necessary.

Disabilities

24 The Claimant has had the condition interstitial cystitis ('IC') since about 2015. From the written and oral evidence of the Claimant, we find that she experienced the following symptoms:

24.1. pain on filling and voiding of the bladder, which reduced after an operation when Mr Bristow was her manager;

24.2. the need to urinate more frequently;

24.3. on occasions, a stress-induced urgent need to urinate.

25. We do not accept the Respondent's interpretation of the text the Claimant sent to Mr Gold **(**210). We find she informed him that her bladder flare-up had not affected her back for a couple of years, not that she had not had a bladder flare up at all in that time.

26. The Claimant wears incontinence pads every day. She always carries spare underwear with her in case of leaks. The Claimant organised her working day to deal with her IC symptoms where she could. When a delivery had to be taken she made sure to go to the toilet beforehand to reduce the risk of having an accident during delivery.

27. What did the Respondent know and when about the interstitial cystitis?

27.1. We accept the Claimant's evidence that, once diagnosed, she informed Mr Bristow of her condition of interstitial cystitis. He had reorganised the rota to enable the Claimant to go to 6 weeks of treatment post-operatively.

27.2. We find it likely that, in her discussions with Mrs Cepparulo set out below, on one occasion she had to go to toilet urgently and told Mrs Cepparulo then about her condition. The Claimant was open about her medical conditions and we find would not have held this back.

27.3. In January 2018, the Claimant told Mr Gold she was experiencing a flare-

up of a bladder issue (210). In their March 2018 discussion about a reduction in staffing hours, when the prospect of some lone working came up, she told Mr Gold she had to go to the toilet more frequently because of her cystitis.

27.4. During the telephone welfare meeting with Miss Ellwood on 18 May 2018 the Claimant informed her that 'reasonable adjustments to support cystitis needs' had stopped.

Mental Health

28. On 26 April 2016 the Claimant experienced a nervous breakdown. She was hospitalised after having suicidal thoughts, panic attacks and low mood (332). She was discharged on 13 May 2016. The discharge sheet (84 and 284) records a diagnosis of 'EUPD F60.31'. The Claimant knew at the time that this meant 'Emotional Unstable Personality Disorder'. Her GP letter of 4 October 2019 confirms this as the diagnosis (332). The cause of this breakdown was not work-related.

29. The Claimant was prescribed propranolol, climaval, zopiclone, fluoxetine, pregabalin and clonazepam for this condition. Having described low mood, tearfulness, difficulty sleeping and eating, her GP explains in the 4 October 2019 letter that, without this medication, the Claimant would have difficulty with normal day-to-day activities. In her impact statement to the Tribunal the Claimant states that her medication means her conditions are 'manageable' (58).

30. The Claimant's evidence, that we accept, is that her mental health condition meant that she experienced 'stress induced anxiety' (57). If she was stressed she was more vulnerable to panic attacks.

31. What did the Respondent know and when about this condition?

31.1. It received sick notes for the period immediately after the breakdown stating 'anxiety and depression'.

31.2. On returning to work, the Claimant met with Ms Still, RSM, on 14 June 2016. They signed a Return to Work form that records the reasons for the absence as 'anxiety/depression', that the symptoms were 'on-going – on anxiety medication', and that the Claimant was continuing to take this medication. On balance, given the Claimant's clear evidence and the lack of clear evidence that anyone at the Respondent read her personnel file in full, we find that she provided Ms Still with the discharge sheet.

31.3. Mrs Cepparulo knew at the time the Claimant had experienced a 'complete breakdown' and had been hospitalised because her friend sent an email of explanation. Mrs Cepparulo knew initially that the Claimant had a 'mental health condition' in a general way.

31.4. After her return to work, the Claimant developed a rapport with Mrs Cepparulo and they discussed the mental health condition in more detail a series of conversations. Mrs Cepparulo, by her own description, became the Claimant's 'confidante'. The Claimant told her what medication she

was taking. Mrs Cepparulo saw that the Claimant had 'emotional outbursts' and was extremely emotional about work matters. She thought at the time that this was associated with her mental health condition. She understood the Claimant was vulnerable to anxiety. Mrs Cepparulo referred, in their conversations, to her sister who was a mental health practitioner. She understood that the Claimant had serious mental health issues. Despite this knowledge Mrs Cepparulo did not seek the Claimant's consent to obtain advice from her GP or advice from an occupational health provider. In hindsight she thinks she should have obtained GP reports.

31.5. We find it likely that, given their closeness and the Claimant's openness, the Claimant did tell Mrs Cepparulo of the diagnosis of EUPD. And, if Mrs Cepparulo had read the personnel file carefully enough, she would have seen the abbreviation for the diagnosis in the discharge sheet.

31.6. The hard-copy personnel files do not appear to have been read as a matter of course on handover. There was no effective procedure put in place by which new managers could be informed of the Claimant's mental health. Mrs Cepparulo explained this by saying she assumed Ms Wilson-Saunders would continue to be the ASM. This is unrealistic. As an HR professional she well knew that managers move on; they relocate; they get promoted.

31.7. Mrs Cepparulo knew that the Claimant had had a further period of sickness for anxiety in May/June 2017 because the Claimant told her she was on a phased return from it when they met to discuss deployment in the store.

31.8. In late August 2017, Mr Gold received a brief verbal handover from the acting ASM who herself had only held the post briefly. If he was not at the time, he ought to have been briefed about what the Respondent knew about the Claimant's illnesses.

31.9. In early October 2017, Mrs Cepparulo conducted a mediation meeting between the Claimant and Mr Gold (see below). It was agreed that the Claimant would use a 'safe word' on the occasions that she felt she was upset by Mr Gold's approach and this would remind Mr Gold to adjust. Mrs Cepparulo saw this as a good mechanism to reduce stress on the Claimant and therefore her anxiety. From this point, Mr Gold understood that the Claimant had a mental health condition including a vulnerability to stress/anxiety.

31.10. Mrs Cepparulo did not brief Miss Ellwood about the Claimant's mental health when she moved on in January 2018. On 18 May 2018, the Claimant told Miss Ellwood in the welfare call that she experienced anxiety/stress (245).

Before Culver

32. The Claimant had been a successful store manager before going to the Culver Walk store, a matter that Mrs Cepparulo accepted in evidence. Before Mr Bristow

left he selected the Claimant as the store manager of Culver Walk on merit. This was a step-up for the Claimant: Culver was to be one of the Respondent's top 100 stores; it was a 'concept store' carrying additional attractions for customers: a pick and mix; a beauty bar; and oils and vinegars. The Culver store's annual turnover was approximately £1 million. It was by far the biggest store she had managed.

33. There was a delay in Culver opening and during this time the Claimant did about 2 shifts per week of lone working all day at the Pelhams store. The toilet was on the third floor. She did not raise a complaint or grievance about this. She was not as stressed at Pelhams as she was later at Culver. It was a very small store and easy to close up if she needed to use the toilet. She was waiting for the Culver store to open and did not want to make a fuss.

Culver

34. The Culver store opened in November 2016. Initially it had 9 members of staff, not all full-time. The Claimant's responsibilities as store manager included recruitment, training, managing stock and staff.

35. In the first year of its operation, the Respondent set targets for the Culver store (known as KPIs) by reference to other stores of a similar size and location. It is not in dispute that Culver did not perform to those targets in its first year of trading.

36. The staff toilet at Culver was on the first floor: accessible by 2 flights of stairs or initially a lift.

Sick Leave 2017

37. In May/June 2017 the Claimant had a further period of about 5 weeks' sickness absence because experiencing anxiety and depression. She returned on a phased return as advised by her GP.

First Hours Reduction

38. In June 2017 Mrs Cepparulo met with the Claimant to discuss how a required reduction in staff hours was to be implemented at the store. Staff deployment was agreed between the two.

39. The Claimant found Mrs Cepparulo to be supportive in this and their meetings and conversations before Mrs Cepparulo's promotion. Mrs Cepparulo lived locally to the store and would pop in and see how the Claimant was getting on. She provided the Claimant with a sounding board, an outlet for stress and gave her support and guidance. In effect, Mrs Cepparulo was a mentor to the Claimant.

Mr Gold as the New ASM

40. Mr Gold was appointed ASM in late August 2017. This was his first ASM role. He was, by his own description, ambitious and driven.

41. From the figures, he saw that Culver was not reaching its targets: it was in what was called the 'red' zone for all its KPIs.

42. On 21 August 2017 Mr Gold sent out a new contact sheet. He had not met any of the managers at this stage. We do not accept the Claimant's evidence that he only sent the sheet out after they had met in October, because this does not fit with the email date to which the contact sheet was attached. Mr Gold chose 4 Team Leaders on the basis of whose stores were performing well and geography. He did not contact the team leaders who were to lose that status beforehand to consult with them or inform them. The Claimant was no longer the Team Leader for her cluster of stores. This understandably caused her upset because the role carried some status.

43. On the same day, 21 August 2017, the Claimant injured her finger on a broken plate on a cage used for the storage and delivery of stock (127). The accident report was filled out. Mr Gold contacted technical services to ensure the cage was red-flagged.

44. Mr Gold's first visited the store when the Claimant was on holiday. He made suggestions and gave tasks to staff about stock storage. He asked the team to put all the Claimant's personal belongings in one place. He thought they represented a safety hazard and intended to ask her to move them. The Claimant was upset that Mr Gold did this in her absence. We can understand that and, in hindsight, so does he. They spoke on the telephone. The Claimant was upset. They agreed he would agree any changes with her first. He acknowledged in his evidence that he should have checked whether she was at the store before his first visit.

Lift

45. On 13 September 2017 the Claimant became stuck in the store lift with another colleague. In the long wait to be rescued she calmed the other colleague down. She contacted Mr Gold who was driving to Southend. He did not divert to Colchester but contacted another store manager, Gareth, on his mobile phone to call the fire brigade. They were late attending because Google maps did not have the correct latitude and longitude of the store. Contrary to his statement, Mr Gold did not keep in touch with the Claimant and her colleague while they were in the lift, but Gareth, whom he had contacted, did.

46. On balance we find the staff had not been told that the lift was for goods only before the incident. They were only told afterwards and the Claimant was instructed to attach stickers to the lift button stating this.

47. The Claimant complains that using the stairs took longer because she needed to use a touch pad on the door. The lift was called by a button and sometimes waited for depending on where it had been left when used for goods. On balance, as a matter of fact, we are not persuaded that there was more than a minor difference in the speed of accessing the toilet as between the lift and 2 flights of stairs via the keypad.

Mediation between Mr Gold and Claimant

48. Mr Gold made another visit to the store when the Claimant was present. This visit did not go well. She was still upset about his first visit. She perceived him to be critical of the store's performance. We accept this was her genuine perception, but we also accept his evidence that he was making constructive suggestions for the

improvement of the store's performance rather than being merely critical. The visit culminated in the Claimant telling him to 'fuck off' and 'stick his job up his arse'.

49. On 28 September 2017 the Claimant emailed a complaint to Mr Gold copied to Mrs Cepparulo stating that she wanted to leave and was unhappy with his moving of her belongings and his criticisms.

50. In response, Mrs Cepparulo organised a mediation meeting with the Claimant and Mr Gold, which took place on 2 October 2018. They each discussed their perceptions. She saw the Claimant was upset at how she perceived Mr Gold's management. She saw Mr Gold was performance driven and perhaps not as personable as earlier managers. There was a frank discussion about mental health. The Claimant apologised for her abusive language. Mr Gold apologised for the actions on his first visit. They agreed to start afresh.

51. Mr Gold understood that Claimant was vulnerable to stress or anxiety and he agreed at this meeting to work on tasks in store together.

52. At this meeting they agreed that the Claimant would use a 'safe word' when she felt that she was becoming agitated or stressed as a result of Mr Gold's management style. It was 'help' or 'help me'. The idea is that its use would be a trigger for Mr Gold to rethink his approach. The Claimant used it in a What's app message to him once. Mr Gold does not remember it being used. We agree with him that the choice of phrase was not a good one, as it could have been used in ordinary communication and was not sufficiently distinctive.

53. The next day the Claimant sent Mr Gold an email and her tone was very much of a fresh start and renewed enthusiasm for the job.

54. We accept Mr Gold's evidence that after the mediation their relationship improved. The Claimant did not bring a grievance against him as she would have done if matters had been as bad as she suggested: she had experience of bringing grievances in the past that had resolved matters and was prepared to bring necessary grievances again. The tone of their texts and emails was professional and sometimes friendly.

55. We also do not accept the Claimant's evidence that Mr Gold did not respond to her requests for support. He promptly followed up her requests, for example relating to signage, Google, and the printer. The Claimant thanked him for his efforts. Indeed in relation to the problem of the effect upon her bonus from the stock her store had to take when Pelhams closed, Mr Gold fought her case with his managers, see page 162.

56. After the mediation Mr Gold made about 6/7 full store visits between then and her sickness absence. This would amount to about 1 every month and makes sense for an ASM who was concerned about figures and performance. We therefore do not accept the Claimant's evidence that these promised meetings did not occur. We accept his evidence that he walked the store with the Claimant, identifying particular aspects of best practice and that they would discuss how to drive sales.

57. On balance we find that, in these first 6 months, Mr Gold, contrary to his evidence, had not assessed the Claimant's performance as being poor enough to warrant a

formal Performance Improvement Plan ('PIP'). This is because in his assessment of her against the Respondent's values in the 'performance drive' (C2), dated about November 2018, he found that she was meeting expectations in all 'values' except as to 'agility'. What he did was seek to improve the store's performance informally by his full store visits and set objectives for the Claimant in the performance drive (C2).

58. We reject, too, Mr Gold's suggestion, in his witness statement, that the Claimant had 'falsified' shrinkage levels. His explanation in his oral evidence was that after she left he discovered that stock management processes were not completed weekly or accurately and therefore skewed the shrinkage result. This may have been poor conduct by the Claimant, but it does not prove an intention to falsify.

59. We do not accept Mrs Cepparulo's evidence that staff said to her that the Claimant was never at the store. This is because there is no evidence that she followed this up as should would have done if she had heard such a serious allegation. We also reject her inference that the 15K increase in turnover since the Claimant left was significant. Once the Tribunal had established that the store's annual turnover was £1million, then a £15,000 increase, while welcome, was not as significant as she sought to infer, being only 1.5%.

Proposed Further Reduction in Staff Hours – Risk of Lone Working

60. In March 2018, Mr Gold attended the Culver Store to discuss with the Claimant staff availability with a view to a further reduction of staff hours by 10 per week. (Mr Gold had successfully challenged a proposed reduction of 30 hours with his managers.) This reduction in hours raised the prospect of there having to be some lone working for about the first 30 minutes of the morning and for about the last 30 minutes of the day. Mr Gold remembers the Claimant raising the problems caused by her cystitis in that context. Having heard this, he did not explore how lone trading might be avoided at Culver. His solution was that the Claimant could close the store.

61. Mr Gold states, and we accept, that it was not necessarily the Claimant who would have to open and close the store and lone trade for the first period: it could have been another member of staff. The problem was that the other key holder, Ms Fairclough, was only part-time and therefore this did not remove the risk of the Claimant having to lone trade because there would be some days when Ms Fairclough was not working. It would not have made sense for the key holder to open the store and then not continue to work or to attend just to close the store.

62. Mr Gold also accepted that there was a blind spot at the Culver store and that therefore closure would involve looking around the store to ensure there were no customers, then locking the door, then using the stairs to go to the toilet.

63. Another problem raised by the reduction of hours was that deliveries might have to be done by one person. Mr Gold said that was not unusual and it was down to the manager's discretion. The Claimant's evidence in cross-examination was that she could take deliveries alone at Pelham without a problem. But her concern was whether she could do this at the Culver store where deliveries were larger.

64. After the meeting, the Claimant contacted Mr Gold to say staff had not agreed to

the changes in hours and it would have to go to consultation.

65. In March 2018 the Claimant and Mr Gold disagreed over the obtaining of staff cover. They each shouted at one another about this. After which Mr Gold agreed with the Claimant's suggestion that they should communicate by email. We observe the Claimant was succumbing to increased stress at this time.

66. The Claimant tried to contact Mrs Cepparulo who was away, and in any event since January 2018 in a more senior HR role. She did not follow up the Claimant's contact on her return.

Sewage Leak

67. On Wednesday 4 April 2018 it was the Claimant's day off. The Claimant had, by chance, gone into the store and discovered that staff were dealing with a leak from upstairs. It turned out to be a leak of sewage from the library toilets. She sought Mr Gold's help. The What's App transcript records the communication between them. At 11.08 he asked what had happened. At 11.15 he said to the Claimant that *if* it was just a section of the store and could be cordoned off and they should to *try* to stay open (our emphases). But by 12.30 he informed her of the RSM's instruction to close. He did not instruct the Claimant or her staff to clean up – the discussion between them was about when cleaners would arrive. In the meantime the Claimant called environmental health and that triggered Ms Still's decision to close.

68. The Claimant was unhappy with the way the cleaners handled matters.

69. Mr Gold says, and we accept, that the normal procedure was followed for the damaged stock after the leak: the losses were put down as fridge-freezer losses and therefore did not affect the store's KPIs. We are not satisfied therefore, that on resignation, the Claimant could have been sure that the lost stock would affect her bonus.

Sickness Absence

70. By early April 2018 the Claimant was experiencing increased symptoms of anxiety, including panic attacks. Her evidence is that she told Mr Gold on one or two occasions that this was happening. She recalls his reply was that it was not his problem but HR's. He recalls her being 'in a state' in one call. He says he responded by trying to talk her through the day by focussing on one thing to relieve the overall pressure. On balance, save for his comment, we find that these were their genuine perceptions. We find the Claimant did call on one occasion in an anxious state. That Mr Gold probably did try to talk her through the day to help her focus on one thing but probably also said that she should speak to HR about her health concerns. We do not find that he is likely to have said that it was 'not his problem', that would not fit with the rest of his approach in that call.

71. The Claimant's mother had tried to send an email to Mr Gold to inform him of the Claimant's planned absence from work but unfortunately misspelled the address and he did not receive it.

72. On 9 April 2018 the Claimant sent Mr Gold a voicemail at 7.30am explaining that

she was too ill with anxiety to attend work. He informed HR the Claimant was absent, without checking his voicemail. HR sent the Claimant an 'AWOL' letter 225, which states incorrectly that Mr Gold had tried to contact her and incorrectly that she had failed to contact him personally. HR asked her to contact him by no later than 10.00 on Wednesday 11 April otherwise her failure would be treated as evidence of her intention to terminate her contract. The Claimant did not immediately see this as it sent to her work email account.

73. Upon picking up the voicemail later in the day, Mr Gold did not inform HR about it until the next day (233). He accepts he should have told them to withdraw the AWOL letter. In any event by the Wednesday the matter was resolved and the Respondent did not treat her as having terminated her contract.

74. During this period of her ill health the Claimant moved to Loughborough for the support of her mother and to allow her mother to rent out the caravan she had been living in, in Essex.

75. On 18 May 208, the Claimant had a welfare telephone call with Miss Ellwood. From the brief notes made of that meeting it is clear that she told Miss Ellwood that:

    75.1. the role was becoming too demanding;

    75.2. because of her cystitis she found lone trading difficult;

    75.3. she would prefer a head office role;

    75.4. she rejected Miss Ellwood's suggestion of thinking about a less stressful role in store.

76. By letter of 14 May 2018 the Respondent asked the Claimant to sign an enclosed GP consent form. She had not done this by the time of her resignation.

77. On 18 May 2018 Miss Ellwood informed the Claimant that internal job vacancies were online and sent her the relevant link (249).

Application for Role Management Development Trainer

78. In May 2018 the Claimant applied for the role of Management Development Trainer. The Claimant accepts she was not best candidate. She thought she had potential to do this role because of her management experience and that she had been a teaching assistant in the past.

79. Mr Pearce, director of training and development at the Respondent, reviewed her application and decided that the Claimant had no management development training experience and no 'real' training experience. We accept this evidence: it was unchallenged and understandable given how different a teaching assistant role is to the training and development of managers. We observe that, while the Claimant had management experience, she did not have the relevant level of training experience. Mr Pearce decided, therefore, that the Claimant did not fit the minimum role profile to be invited to interview. She was informed of the outcome on 19 July 2018, after she had resigned.

Attempt to Organise Second Welfare Meeting

80. The bladder operation the Claimant was awaiting, originally set for 29 May 2018, was postponed to the 12 June 2018. She remained off sick.

81. On 4 June the Respondent invited the Claimant to a meeting on 26 June, at her home. They sent this letter to her address in Loughborough and confirmed within the letter that that was her current address. Miss Ellwood did not know whether the Loughborough correspondence address was the permanent address. The Claimant and Miss Ellwood, in emails on 6 and 7 June discussed the location and timing of this meeting. The Claimant did not want to meet at home, which she said would increase her anxiety and did not want to meet in store. She informed the Respondent that after she was recovered from her operation she would see if she could drive. In a further call between them on 19 June, the Claimant requested that the welfare meeting was cancelled, given her current location and the logistics of travelling. Miss Ellwood's approach was to await the Claimant's recovery and her consent to obtain GP information in order to progress a plan for return.

Resignation

82. On 28 June the Claimant resigned by email. Her reasons in it were the same reasons she gave in her evidence to us: that she was stressed by the Respondent's behaviour towards her and lack of support; the failure to transfer her to a position in head office and requirement that she had to make applications; the suggestion that she seek a lower level position; and the prospect of lone trading and Mrs Cepparulo failure to respond to her email. In her oral evidence she explained the stresses in the store meant she realised she could not be a store manager. She thought Mrs Cepparulo not willing to talk to her. We accept these were the matters in the Claimant's mind and the reasons for her resignation.

Other Vacancies

83. The Claimant says that when she looked at the link sent by Miss Ellwood, there were no suitable head office vacancies. She suspected there were other vacancies not advertised online, but there was no evidence one way or another to support this.

Submissions

Respondent's Submissions

84. Mr Ludlow submitted that the Respondent knew of the interstitial cystitis through Mr Bristow but that by 2018 she had not been symptomatic for 2 years, as her text evidenced, and that therefore she could not have been put at a comparative substantial disadvantage by her IC.

85. He argued that lone working at Culver had not happened; therefore, no PCP had been applied. In any event, the rotas were in her hands and Ms Fairclough could have opened and closed. The Claimant herself identified her adjustment whereby before a delivery she would use the toilet and afterwards and this could equally have worked for the limited proposed lone working. In the alternative, being

allowed to close the store was a reasonable adjustment.

86. So far as the EUPD was concerned, the Claimant was apt to raise grievances and would have done so if this condition were hampering her ability to do her job, there was therefore, in relation to mental health, no PCP subjecting the Claimant to a substantial disadvantage. He acknowledged, that the Respondent was aware generally that the Claimant had a mental health condition of anxiety/stress.

87. He argued the relationship problems with Mr Gold had been resolved by the mediation and there was no incident thereafter that could be described as a last straw. Mrs Cepparulo had offered support. Mr Gold had supported the Claimant in the full store visits; by responding to each of her requests promptly; by encouraging her to take time off when she informed him of the bladder issue; by jointly discussing the deployment in March; and by avoiding a formal PIP. These were all forms of reasonable adjustment, even if not identified as such at the time.

88. He submitted Miss Ellwood could not have done more: the welfare telephone call went well. She asked for GP consent to find out more. She was seeking to organise a further meeting at which assistance to help the Claimant back to work could have been discussed.

89. On issue 9.2.1 and 2 re the leak: there was no instruction to continue trading after the sewage leak. The What's App transcript supported that and stock was replaced after the leak as per normal procedure.

90. On issue 9.2.3 and 8: the lift issue was an accident and did not amount to a breach of the implied term. In order to ensure it did not happen again staff were not allowed to use the lift.

91. On issue 9.2.4: lost stock was not going to affect bonus, which was discretionary.

92. On issue 9.2.5: Mr Gold and Mrs Cepparulo supported the Claimant when reductions in staffing hours were required and the second change had not yet occurred.

93. On issue 9.2.6 and 7: the Claimant had not requested a transfer and therefore there was no refusal. Miss Ellwood and she had discussed the idea of an alternative role, which the Claimant had refused. The Claimant had accepted there were no suitable vacancies at head office on the website and did not await the outcome of the job application she did make. The welfare process had not got to the stage of considering alternatives. Miss Ellwood, sensibly, wished to gather medical information from the GP first to better understand what the Claimant might be able to do.

94. On issue 9.2.9 he argued that the Claimant was fully involved in reviewing the rota and Ms Fairclough could do the deliveries.

95. On issue 9.2.10 there was no requirement to work with broken cages. He submitted the cage incident was an accident, which Mr Gold dealt with appropriately.

96. Overall, none of these events even taken together, he argued, constituted a breach of the implied term.

Claimant's Submissions

97. Ms Harkness, on behalf of the Claimant, made helpful submissions by reference to the issues. She argued overall that the Claimant's position had become untenable due to a failure to support her.

98. Ms Harkness contended that the Respondent knew about the Claimant's disabilities or should have known. There was a massive failure of communication between managers and HR. New managers should have been briefed as to the Claimant's conditions. For such a large company with likely many disabled employees, this was an important systemic failure.

99. As for what reasonable adjustments could have been made in the Claimant's case she argued Respondent:

    99.1. should have allowed her to use the lift as an exception;

    99.2. should have been offered more support;

    99.3. should have transferred her to a suitable vacancy;

    99.4. should have prevented her from lone trading.

100. In relation to the leak, she argued the Claimant was only allowed to close the store after calling Environmental Health. There was insufficient managerial support over the sewage leak.

101. In relation to the lift incident, she argued Mr Gold gave the Claimant no support during it: he could have diverted to the store on his way to Southend.

102. The cages were a preventable accident.

103. It was a health and safety risk to require her to do deliveries alone.

104. Ms Harkness submitted it was wrong to require the Claimant to apply for a job. The Respondent was or should have been aware of her conditions for a long time and should therefore have been proactive about considering suitable vacancies.

105. Overall the Claimant's job became untenable and she was forced to leave.

Law

Unfair Dismissal

106. In some circumstances, when an employee resigns there might still legally be a dismissal (section 95(1)(c) of the Employment Rights Act 1996 ('the ERA'). This is known as a 'constructive dismissal'.

107. An employee constructively dismissed when the employer has committed a really serious breach of contract.

108. Here the Claimant relies on the implied term existing in all employment contracts '*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', see Malik v BCCC SA [1998] AC 20, 34H-35D ('the implied term'). A breach of this implied term is always a very serious breach.

109. The test of whether there is a breach of the implied term is objective, and not dependent on the employee's subjective view.

110. The Claimant also relies on the principle that a course of conduct can amount to a breach of the implied term: individual actions may not in themselves be sufficient but taken together may amount to such a breach. The last incident relied on does not need to be serious (a breach in and of itself), but it must contribute, however slightly, to the breach of the implied term, see Lewis v Motorworld [1986] ICR 157, and Omilaju v Waltham Forest LBC [2005] ICR 481.

111. If there is a breach of the implied term the employee must show that she resigned, at least in part, in response to the breach, Nottinghamshire County Council v Meikle [2004] IRLR 703 CA.

112. After any very serious breach of contract the employee has a choice: either to affirm the contract and continue to work, or to accept the breach, resign and treat herself as dismissed. Delay in resigning after the breach is not, of itself, affirmation but, in an employment context, it may be evidence of an implied affirmation. This is because, by working and receiving a salary, the employee can be said to be doing acts consistent with further performance of the contract and therefore affirmation of it, see WE Cox Toner Ltd v Crook 1981 ICR 823 EAT.

Equality Act 2010

113. Under section 120 of the EQA the Tribunal has the power to decide a complaint relating to employment under Part 5. The complaint here is that the Respondent discriminated against by failing to comply with a duty to make reasonable adjustments, contrary to section 39(5), section 20-21, as read with Schedule 8.

Disability and Mental Ill Health

114. Although disability in this case is now conceded it is worth noting the following, because it may be relevant to our assessment of the Respondent's knowledge of disability.

115. Section 6 of the EQA provides: '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… '

116. Under section 6(5) of the EQA we are required to refer to any guidance published under that section where we think it relevant. In May 2011 the Secretary of State issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' ('the Guidance').

117. The Guidance at A5 states that mental impairment can include a wide variety of matters including '*mental health conditions with symptoms such as anxiety, low mood, panic attacks, … unshared perceptions; … personality disorders*;…'

118. It is no longer necessary to establish that the mental impairment is a clinically well-

recognised illness. The term 'mental impairment' should be given its 'natural and ordinary meaning*',* and the Tribunal should use its 'good sense*'* to make a decision whether the Claimant is suffering from a mental impairment on the facts of each case: see Mummery J in McNicol v Balfour Beatty Rail Maintenance Ltd [2002] EWCA Civ 1074**.**

119. Similarly, in J v DLA Piper UK LLP 2010 WL, Underhill P suggested (para 40) that, although it was still good practice for the Tribunal to state a conclusion separately on the question of impairment, there will generally be no need to actually consider the 'impairment condition' in detail:

> *In many or most cases it will be easier (and is entirely legitimate) for the tribunal to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues.*

120. Paragraph 5 of Schedule 1 EQA provides '*An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if: (a) measures are being taken to correct it, and (b) but for that, it would be likely to have that effect. Measures include medication and aids.*

121. 'Substantial' means '*more than minor or trivial*', see section 212(1) EQA.

Knowledge of Disability

122. The duty to make reasonable adjustments does not arise if the employer did not know the Claimant was disabled. An employer cannot turn a blind eye to disability. In some circumstances the facts the employer does know about the employee will mean it would have been reasonable to find out more (sometimes known as 'constructive knowledge'). If so, the Tribunal must ask itself what information such further enquiries would have revealed.

123. The knowledge of the disability must be at the relevant time. It may be that at the outset there was no constructive knowledge, but as events occurred, there will come a time at which a Tribunal considers the employer ought reasonably to have known of disability. It is to be remembered that it is not just knowledge of the adverse impact of any condition that fixes the employer but knowledge that it is long term or likely to be.

Duty to Make Reasonable Adjustments

124. If knowledge is established then the duty to make reasonable adjustments arises under section 20 EQA:

> *'where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. …'*

125. Tribunals are encouraged to take a structured, step-by-step approach to the consideration of whether there was a duty to make reasonable adjustments. It is not in every case of disability that it arises.

126. Thus, the Tribunal must **first** identify whether there was a provision, criteria or practice ('a PCP') that applied in general at work.

127. The Tribunal must not take too narrow a view of whether the PCP has been applied if it is something that is to happen if the Claimant returns to work, see Rider v Leeds City Council EAT 0243/11. The Claimant in that case was instructed to return to work but she was concerned that if she did so her asthma would be exacerbated.

128. Where a Claimant pleads a practice by being 'required' to do something, the Court of Appeal has directed Tribunals to take a broad view of what 'required' means. If the Claimant is expected to do something that can amount to a practice, see United First Utilities v Carreras 2018 EWCA Civ 323.

129. **Second**, it must ask whether the PCP put the Claimant to a comparative substantial disadvantage. There may be some cases in which the PCP disadvantages all employees, but the Tribunal must go on to ask whether the disabled employee was comparatively disadvantaged by a more than minor or trivial degree.

130. **Third**, it must ask whether the Respondent knew or reasonably ought to have known of the comparative substantial disadvantage.

131. The Claimant is not required to suggest to the employer adjustments, but a failure to do so could be relevant to the question of the employer's knowledge of the disadvantage.

132. **Fourth,** it must consider how the proposed adjustment would have addressed the substantial disadvantage in question. This is an objective question, the focus being on the practical result. It does not require a definitive answer. What must be shown is 'a' prospect or a 'real prospect'. A mere opportunity to avoid the disadvantage is insufficient.

133. **Fifth,** it must consider whether the proposed adjustment was reasonable. We have had regard to the Equality and Human Rights Commission Code of Practice on Employment 2011 ('the Code'). According to section 15(4) of the Equality Act 2006, a court or tribunal must take this into account in any case where it appears to be relevant. The Tribunal considers a wide variety of factors in deciding reasonableness: the size and resources of the employer; what proposed adjustments might cost; the availability of finance or other help in making the adjustment; the logistics of making the adjustment; the nature of the role; the effect of the adjustment on the workload of other staff; the other impacts of the adjustment; the extent it is practical to make (see 7.29 of the Code).

134. Failure to consult about adjustments does not itself constitute a breach of the EQA, although obviously it is good practice to do so. We also note that just because the employer has already made adjustments does not mean in theory that there are others that might have to be made.

Application of facts and law to issues

135. We shall deal with the disability discrimination claim first.

Issue 12.1.5 Knowledge of Disability

136. It is conceded that the Claimant was a disabled person by reason of her interstitial cystitis and her emotional unstable personality disorder. But it is useful to remind ourselves here what our findings have been as to the symptoms experienced.

137. In relation to IC: the pain was lessened post-operatively and usually managed by medication, but the Claimant needed to use the toilet more frequently than a non-disabled person and she experienced stress-related urgency. She wore pads every day to deal with this matter. While the pads stopped most leakages, they did not relieve the unpleasantness of this condition.

138. In relation to EUPD, again the medication she took managed her symptoms, but the Claimant was vulnerable to stress. At times of stress and pressure the Claimant was likely to be more emotional in relation to matters that caused her concern. Mrs Cepparulo observed this. At times of stress, she was more likely to experience panic attacks and anxiety.

Interstitial Cystitis

139. The Respondent found out that the Claimant had IC when she told Mr Bristow in about 2015. In our view, the Respondent ought reasonably to have asked then more about the condition so that it could understand in what ways the Claimant might be affected at work. This is because the Claimant had had an operation, and had had some treatment thereafter, which Mr Bristow had known about and changed the rota to accommodate. If it had done so, the Respondent would have found out what we have found now as to the frequency and stress-related urgency. It is also likely that the Respondent would have discovered the condition was likely to last more than 12 months.

140. If we are wrong about that, once Mrs Cepparulo discovered that the Claimant had a condition called IC (in one of their conversations post June 2016/2017), given she was an experienced HR professional, she reasonably ought to have asked more questions of her then. This would have revealed the Claimant's IC and that it had lasted 12 months.

141. In any event, if we are wrong about constructive knowledge at those earlier dates, by March 2018, when discussing the staff deployment and the prospect of lone working, the Claimant informed Mr Gold about cystitis and some of its effects and how it would make lone working more difficult. The Respondent, through the knowledge of the condition from 2015, added to this knowledge by then knew that the Claimant had been experiencing IC for some years. Given that the Claimant was raising a health-related concern that affected how effective the staff deployment in the store might be, Mr Gold ought reasonably to have asked more

of the Claimant. Had he done so he would have found out about the stress-related urgency as well as frequency. Thus, in the alternative, by March 2018 at the latest, the Respondent knew or had constructive knowledge of this disability.

Mental Health Condition

142. At the point of the Claimant's nervous breakdown, the Respondent, through Mrs Cepparulo, knew the Claimant had experienced a significant mental health event and that she was taking on-going medication for anxiety. The only doubt from the Return to Work form was whether it was likely to recur. Mrs Cepparulo, knew enough for it to have been reasonable to ask more questions of the Claimant, which she did in their subsequent conversations. From these she concluded that the Claimant was vulnerable to anxiety, emotional outbursts and had serious mental health issues. She accepts in hindsight she should have obtained information from the Claimant's GP. We agree that she ought reasonably to have found out more, from the Claimant, from her GP or an occupational health adviser, as the policy allowed. Had she done so she would have found out the formal diagnosis and found out that the condition was likely to last 12 months.

143. Furthermore, we have found it likely that the Claimant told Mrs Cepparulo of the diagnosis, and this equally ought reasonably to have led her to ask more questions of experts about the condition. In addition, had anyone at the Respondent read the personnel file in full they would have read the abbreviated diagnosis on the discharge sheet and that ought reasonably to have prompted more questions.

144. In any event, by June 2017, Mrs Cepparulo knew that the Claimant continued to have mental health difficulties, including that she had been absent with anxiety and was on a phased return. This was sufficient knowledge to know the condition had lasted 12 months.

145. Once Mrs Cepparulo knew, then the Respondent knew. The Respondent failed to have an effective system whereby, with the Claimant's consent, future managers could be informed of the Claimant's condition and her needs. In such a large employer this was, as Ms Harkness put it, an important systemic failure.

146. While it is not relevant to our finding as to when the Respondent knew, we also find that Mr Gold had found out enough after the mediation to know that the Claimant was vulnerable to stress-related anxiety. And Miss Ellwood discovered the same in the welfare call.

Adjustments

Issue 9.6 and 12.1.1 Did the Respondent apply the following PCPs to the Claimant?

147. We have separated out, in our analysis, the first question, whether there was a PCP applied, from the second question, whether it put the Claimant to a comparative substantial disadvantage, albeit that these are combined in the statement of the issues.

148. 9.6.1: *Requiring the Claimant to carry out the duties of a Store Manager at the Colchester store*. It is undisputed that this was a condition that applied to the

Claimant, as it would apply to any other person who was employed as a store manager there.

149. 9.6.2: *Advising the Claimant that she would be losing more assistant hours in store which would mean that she was likely to be trading in store alone.* In our judgment this was a PCP. We apply the approach in Rider v Leeds City Council. Had the Claimant returned to work, she faced the risk of having to lone trade. This risk was real because Mr Gold identified that lone trading was likely at the beginning and end of the day. The only other key holder (an employee who could open and close the shop), Ms Fairclough, worked part-time and it was not going to be possible to delegate her to open/close and lone trade early and late every day.

150. 9.6.3. *The likelihood of having to deal with deliveries alone*. We apply the same reasoning as at issue 9.6.2. This was a PCP because there was a real risk of the store staff having to do deliveries alone in the near future. This is because of the proposed reduction in staff hours.

151. 9.6.4 *The Respondent wanted her to continue trading before the matter was cleaned up…. They also took away her stock and failed to replace it. This would have made it difficult for her to achieve stock bonus.* In our judgment the Claimant has not established that the contended-for PCP was applied to her. Our findings of fact show that the Claimant was not instructed to continue to trade. The What's App discussion shows Mr Gold was asking questions and suggesting what would happen *'if'* the leak could be contained. This was not an instruction to remain open. Nor did he require the Claimant to clean-up sewage. Similarly, we have not accepted as a fact that the Respondent failed to replace stock or put the Claimant's bonus in jeopardy, because the stock was treated as a fridge/freezer loss, which did not affect the store's KPIs.

152. 9.6.5 *The Claimant needed to use the lift to get to the toilet … Following her being stuck in the lift … the Respondent then informed her that it should have been designated as a goods only lift. If she had remained in store this would have meant that she could not use the lift to go to the toilet upstairs.* In our judgment the PCP revealed by this allegation is that the Claimant was required to use the stairs to go to the toilet rather than the lift. This was plainly a PCP applying to all staff at the store.

153. 9.6.6 It seems to us the PCP that was identified by the final allegation is that the Claimant was managed by an ASM, namely Mr Gold.

Issue 9.6, 12.1.2 Did the PCP put the Claimant to a substantial disadvantage in comparison with non-disabled persons?

154. Of those PCPs we have found did they place the Claimant at a comparative substantial disadvantage?

9.6.1 The duties of store manager.

155. In our judgment, by the time she resigned, it had become too stressful for the Claimant to undertake the duties of store manager. She admitted as much herself in her welfare interview with Miss Ellwood and in her evidence to us and in her wish to work in an alternative role in Head Office. It seems to us that a number of

factors had contributed to this stress: the Store's poor performance, the prospective reduction in staff hours; the leak, lift and cage accidents and her perception that Mr Gold was critical. These are all features of being the store manager at Culver.

156. One of the symptoms of her disability was stress-related anxiety. The stresses of being the store manager at Culver therefore put her at a substantial disadvantage because she was less able to cope with them because of her disability. She was at a greater disadvantage than a non-disabled store manager. This is because, while non-disabled store managers are likely to have experienced these factors as stressful too, in our judgment they would have been less vulnerable to it and coped with it as part and parcel of the job of store manager in a larger store.

9.6.2 the prospective risk of lone trading

157. Again, the Claimant experienced a comparative substantial disadvantage in this respect because of the symptoms of her IC. Any employee lone trading might have had to go to the toilet and have to close the store. But the Claimant was more likely to have to do so, give the frequency she experienced and the stress-related urgency. The practical process she would have had to go through to close the store: looking for customers; asking customers to leave, closing up and then going up a floor to use the toilet was more than a trivial or minor disadvantage in our view. It was a time consuming process that someone who needed to use the toilet urgently or more frequently would have been much discomfited by.

9.6.4 Deliveries Alone

158. We reach a different conclusion in relation to deliveries. On balance we consider, the Claimant would have been able to delegate this task to other staff. We have not heard any evidence that deliveries were likely to coincide with the short periods of lone working the Claimant was at risk of. Otherwise she had staff to delegate this task to. This means that she was not comparatively disadvantaged by this PCP. As a store manager, it lay within her control not to be. (If we are wrong about this, then the delegation we have described above, would have been a reasonable adjustment the Claimant herself could have taken to avoid any disadvantage.)

9.6.5 Having to use the stairs to access the toilet rather than the lift

159. The Claimant argues she was put to a comparative disadvantage because the stairs were slower than the lift. However, on balance we are not persuaded that this disadvantage was more than a minor or trivial. The Claimant's case is based on speed. She does not say there was any impediment to her using the stairs. We are not persuaded that using the stairs to go up one floor was slower than using the lift. The stairs required her to input a code at the door. But the lift required to be called and sometimes waited for. If using the stairs to go up one floor was slower, in our estimation on the evidence we have heard, this would only be to a minor or trivial degree.

160. In any event, if we are wrong about this, we would not have been persuaded that allowing the Claimant to use the lift was a reasonable adjustment. The Claimant

had become stuck in the lift and we cannot second-guess, on the evidence we have heard, the Respondent's decision to make the lift goods-only. A cautious approach to its use was probably reasonable in the circumstances, especially given the Claimant's vulnerability to stress-induced urgency and stress-related anxiety.

9.6.6 Management

161. We should be clear that we do not accept the Claimant's case that Mr Gold did not respond to her requests for practical help: he plainly did so.

162. Nevertheless, from September 2017 any ASM would have sought to improve Culver's performance against its KPIs, which were all in the red after nearly a a year of trading. This would have involved speaking to the Store Manager about how to improve them. Mr Gold did this on his full-store visits. The Claimant was stressed by this approach. This put her to a comparative substantial disadvantage because she was vulnerable to stress. A store manager who did not have stress-induced anxiety would have coped with this management approach. The disadvantage was more than minor or trivial: although the Claimant coped for several months, eventually, it contributed to her becoming stressed and anxious, as illustrated by her panic attacks and the occasion in March 2018 when she shouted at Mr Gold.

Issue 12.1.4 Did the Respondent know (or ought it reasonably to have known) of the substantial comparative disadvantage we have found.

163. *9.6.1 Store Manager:* In our judgment, once the Respondent knew or ought to have known that the Claimant experienced stress-induced anxiety, then it was likely to know or reasonably ought to have known that the duties of managing a larger store were likely to put her to a comparative substantial disadvantage. This is because this was a step-up for the Claimant. The store had a larger staff and a £1million pound turnover. Each responsibility of the store manager was heavier than she had successfully managed in the past: more staff to manage; more stock to manage and process; more training to undertake. Certainly by the point at which it knew or reasonably ought to have known the Claimant had a long-term mental health condition that meant she experienced stress-induced anxiety and it also knew that the Culver store was not reaching its KPIs, then the two together should have led the Respondent to conclude that the Claimant was likely to be placed at a comparative substantial disadvantage in the role of Store Manager of Culver.

164. *9.6.3 Prospect of Lone* Trading. The Respondent knew that lone trading presented a problem for the Claimant because of her IC: she had told Mr Gold and Miss Ellwood about his. They knew that she was comparatively substantially disadvantaged or they knew enough for it to make it reasonable for them to ask more questions about the problem and understand this.

165. *9.6.6. Managed by an ASM/Gold* By the time of the mediation the Respondent knew that the Claimant had a disability one of the symptoms of which was stress-induced anxiety. There was such a poor start to the relationship, one requiring mediation, that this should also should have rung alarm bells that the Claimant was not coping with being managed and that it placed her at a substantial

comparative disadvantage.

Issue 12.2 Effectiveness and Reasonableness of Proposed Adjustments

Issue 12.2.1 *Transferring the Claimant to fill an existing vacancy, at head office, including the possibility that the Claimant should be placed at the same, lower, or higher grade without any competitive interview that is reasonable under the circumstances?*

Issue 12.2.2. Was there an existing vacancy at the time? The Claimant relies on the vacancy of Management Development Trainer. Issue 12.2.3 *Was there also a vacancy for store support which the Claimant had done before which she was willing to do on this occasion?*

Issue 12.2.4 Would it have been reasonable in the circumstances to transfer the Claimant to the office to work without application?

166. We are willing to accept that, within the large store network there may well have been vacancies the Claimant could have done, as Miss Ellwood had suggested. But the Claimant rejected the idea of doing a lesser role in stores. It was reasonable, therefore, for the Respondent not to progress this possible adjustment any further.

167. In our judgment, in addition to sending the list vacancies to her, the Respondent ought to have looked itself at whether there were suitable vacancies that it could transfer the Claimant to in the light of her stated difficulty in staying in her store manager role and the comparative substantial disadvantage that put her to because of her mental health condition. This is because the duty is on the employer to make the adjustment.

168. The difficulty for the Claimant is that she narrowed down her alternative job search to Head Office. The evidence is that all Head Office vacancies were on its 'career page' (the link she had been sent by Miss Ellwood). The Claimant accepts that none were suitable for her save possibly the job she applied for. But we have accepted the unchallenged evidence of Mr Pearce that the Claimant did not have the essential experience for that job. It would not, therefore, have been a reasonable adjustment to transfer her to that position. This is not the kind of case where a Claimant fits an alternative role if she received some training, see the example in the Code para 6.33. It would not have been reasonable to move the Claimant to the post of Management Development Trainer with no essential experience.

169. Thus, even if the Respondent had acted proactively and searched for a suitable alternative role (as it should have done), it would not have found one that it could have reasonably transferred the Claimant into. There was no failure therefore to make a reasonable adjustment because the search would not have had any prospect of removing the disadvantage the Claimant was experiencing.

170. The Respondent should be aware that, in the future, it should not require disabled employees to do their own search but should be proactively looking for roles. It should also be aware that, depending on the circumstances, it may well be a reasonable adjustment to transfer an employee into a suitable role as the Code

suggests. On the fact here, this is not that case.

Lone Trading

171. Although there is no proposed adjustment set out in the issues, it is not for the Claimant to identify adjustments. We have considered what adjustment if any was appropriate to make for the PCP we have identified.

172. First the Claimant could not avoid the prospect of lone trading by delegating these shifts to others. This is because of the key-holder problem we identified above. Ms Fairclough was part-time.

173. Second, it was not enough to allow the Claimant to close the store: that process itself created the comparative disadvantage: it was time consuming and awkward in times of an urgent need to go to the toilet.

174. Third, we have considered whether the Claimant's coping mechanism (that she used for deliveries) might have been a sufficient adjustment. She could go to the toilet before opening and again once another member of staff arrived at the end of lone trading. We considered this would work for some of the time but not all because of the difficulty of anticipating the stress-related urgency that she was, by then, more likely to be experiencing.

175. Fourth, we do not consider Ms Harkness' suggestion of letting the Claimant use the lift as an exception was a reasonable adjustment. Mostly because there was not much difference if any between using the lift and the stairs. And, in any event, it was reasonable of the employer to be cautious about staff using the lift after the incident.

176. We have concluded that the appropriate reasonable adjustment was to adjust the staffing hours available to avoid the part of the week when the Claimant was lone working give her the hours. This would have been effective to avoid the disadvantage. It would also have been reasonable in our view, despite the aim to reduce staff hours across the board. First the hours were few: no more than about 3.5 per week. It was likely she could delegate half the week to Ms Fairclough, leaving 3.5 days of 1 hour a day that she was at risk. We have taken into account the size of the Respondent, the turnover of the store and the small amount of extra hours this cost would represent. Even though the Respondent was seeking to reduce hours, this, in our judgment does not outweigh those other factors given the positive obligations to adjust that the Act requires.

177. In the alternative, the Respondent could have allocated another key-holder in the Culver store and identified, in that way, another member of staff as well as Ms Fairclough who could have done the remaining early shifts.

178. Mr Gold ought to have indicated that these were the adjustments that could be made at his meeting in March 2018 and/or Miss Ellwood should have taken steps to explore with Mr Gold the options after she heard of the Claimant's concern at the welfare meeting in May 2018. There was still a reasonable amount of time prior to the Claimant's resignation to suggest these two alternatives to her.

179. Thus, the Respondent failed to make a reasonable adjustment to prevent the risk

of the Claimant having to lone trade.

Issue 12.2.5 Extra Support

180. By the time of the mediation, we have found that the Respondent ought to have known that being managed put the Claimant to a substantial comparative disadvantage.

181. The mediation was a first appropriate attempt to make a reasonable adjustment in this regard (even if the Respondent did not identify it as such at the time). In that meeting with the help of Mrs Cepparulo, the Claimant and Mr Gold discussed what had happened, their perceptions of each other, discussed a better way to communicate in the future and talked frankly about mental health. Thereafter their relationship improved; Mr Gold ensured to keep the Claimant included in his decisions; tried to identify good practice for her. In our view, he gave her the support an ASM would be expected to give. He appropriately set her targets through the 'performance drive'. And his informal management of the stores' and the Claimant's performance through his monthly full store visits, was appropriate to the level of his concerns about them. Thus the mediation appears to have worked until the stressors on the Claimant became greater and she lost the support of Mrs Cepparulo.

182. Until January 2018, the Claimant had the support of Mrs Cepparulo who acted as a mentor: offering the Claimant guidance, support, a sounding board outside the line of management. Again, this was a reasonable adjustment even though she did not identify it as such at the time.

183. It is no coincidence, in our view, that the Claimant's resilience deteriorated after Mrs Cepparulo was promoted and was no longer available to the Claimant in this informal mentoring role. We therefore consider the reasonable adjustment that the Respondent failed to make in respect of the PCP of management is that it should have ensured the Claimant continued to receive mentoring support.

184. Mrs Cepparulo ought to have ensured that the Claimant was provided with mentoring support. The mentor could have acted, as she had done, as a sounding board, helping to put the Claimant's perceptions into perspective, giving her guidance about the matters that caused her stress and support. Mrs Cepparulo did not keep this support in place when she handed over to Miss Ellwood. Nor did she involve the Claimant in identifying who such a mentor might be. This extra support would have had a prospect of avoiding the disadvantage that the Claimant was under becoming more stressed by the management that she inevitably had to face in order to improve her store's performance; and by the stressful incidents that had occurred. (How large a prospect is a question for the remedy hearing.)

185. Issues numbered 10 and 11 have already been dealt with under 12.2.4.

186. In conclusion the Respondent discriminated against the Claimant by failing to make the following reasonable adjustments:

186.1. Either finding about 3.5 extra hours per week of staffing time at the Culver store or allocating an existing staff member to be a new key-holder to cover those hours to avoid the risk of the Claimant having to lone trade;

186.2. In January 2018 providing the Claimant with mentoring support, upon Mrs Cepparulo's promotion.

Unfair Dismissal

Issue 9.1.1 Did the Respondent instruct the Claimant to continue trading after the sewage leak?

187. We did not find this allegation to be proved as a matter of fact.

Issue 9.1.2 Did the Respondent remove all her stock, when the sewage leak was eventually cleaned up?

188. We did not find this allegation to be proved as a matter of fact. The stock was dealt with as freezer loss and would have had no impact on her bonus.

Issue 9.1.3 Did the Respondent inform the Claimant that the lift that had been previously designated as staff lift only, was now a goods lift only after the Claimant had got stuck in it?

189. As a matter of fact the allegation at 9.1.3 is proved.

Issue 9.1.4 Did the Respondent fail to replace the stock that had been removed so that she was likely to lose out on stock bonuses?

190. This allegation has not been proved, see above.

Issue 9.1.5 Did the Respondent take away the Claimant's staff and hours so that she was going to be trading alone and informing her that she would be a lone trader, knowing that the condition of interstitial cystitis requires her to have regular access to the toilet and that in order to do so she would have to close the store which would affect trading?

191. We have found this allegation to be proved for part of the week. This is because the Claimant could have delegated some lone trading shifts to her deputy for part of the week. We have estimated this as about half the week. The Claimant therefore understood that if she returned to work she would have to lone trade for about 30 minutes at the beginning and end of the day for about half the week.

Issue 9.1.6 Did the Respondent inform the Claimant that she could not be transferred to head office according to her request but that she would have to apply for a job and go through the normal recruitment process in order to be able to move from her store?

192. It was clear to the Respondent that the Claimant wished to work in Head Office. It informed her that she should consider available vacancies online and apply for any she thought suitable.

Issue 9.1.7 Did the Respondent refuse to transfer the Claimant to head office to any job

even with a pay cut, to enable her to get away from the situation at the store?

193. This allegation is not made out because there were no suitable vacancies at head office to which to transfer the Claimant.

Issue 9.1.8 Did the Respondent require *the Claimant to work in a store which where the nearest toilet was two floors up and the only way to access the toilet quickly was in a lift which had initially been designated as staff lift and had been used by members of management or when they attended the store and was lately designated as a goods lift only, after the Claimant got stuck in it?*

194. After the incident in the lift, the Respondent stopped staff members from using it. The Claimant had to use the stairs to use the toilet: one floor up, two flights of stairs. We have found, however, that it was not significantly slower to use the stairs.

Issue 9.1.9 Did the Respondent inform the Claimant in a meeting with her area manager that she would have to deal with deliveries on her own which could amount to as much as 18 cages on any one day?

195. Mr Gold informed the Claimant in the staff deployment meeting that deliveries may have to be taken alone but the Claimant knew she could delegate this function and therefore did not have to do this task alone.

Issue 9.1.10 Did the Respondent require the Clamant to work with cages that were sometimes broken and without being flagged as being so, so that she cut her hand on one of those cages?

196. We have not found this allegation to be proven. The Claimant was not 'required' to work with broken cages. The Claimant hurt her hand on a broken cage, which was an accident**.** The cage was thereafter red flagged as broken.

Issue 9.1 Breach of the implied term

197. First, of the allegations that we have found as a matter of fact occurred, did any of them happen with reasonable and proper cause?

198. In relation to the lift, we find that the Respondent had reasonable and proper cause to change its instructions regarding its use. We have taken the view that it was appropriate to be cautious about staff using the lift once two of them had become stuck in it.

199. In relation to Head Office vacancies, we think it appropriate that the Respondent directed the Claimant to the list of vacancies online and invited her to apply for any of them. It was reasonable, in the context of the contractual term, to expect a member of staff to be assessed against the criteria for the job.

200. In relation to the prospect of lone trading, we do not consider that there was reasonable and proper cause for this prospect. This is because the Respondent did not explore with the Claimant alternative ways of trading to avoid this prospect once she had informed them that it would present her with difficulties.

201. In our judgment the prospect that the Claimant would have to lone trade at Culver was a breach of the implied term in the particular circumstances of this case. Mr Gold knew of the Claimant's cystitis. She told him that lone trading would be difficult because of it. Yet, at their meeting he did not discuss ways around the problem or look for alternatives. Telling the Claimant that she could close the store was insufficient because this was a large store, she would have to look around for customers, close up, go to the toilet and reopen. This was time consuming and stressful. Similarly, Miss Ellwood did not take steps to explore with Mr Gold whether there was a way to avoid lone trading, once the Claimant had identified her concerns to her.

202. The comfort of employees at work is important, especially when it comes to their toileting needs. When faced with an employee who was explaining that her particular need to urinate frequently and sometimes urgently meant that a change to hours was going to be difficult, the maintenance of trust and confidence demanded that the employer actively sought a solution with the employee and took her concerns seriously. Neither Mr Gold nor Miss Ellwood did so here. In our judgment their approach to the problem was likely to seriously damage trust and confidence and was therefore a breach of the implied term.

203. We note that the tests as to what is a failure to make a reasonable adjustment and what is a breach of the implied term are different. The law does not require us to reach the same conclusion as to each. But in this case we have applied the contractual test and concluded that presenting the prospect of lone trading without exploring the alternatives with the Claimant was also a breach of the implied term.

Issue 9.2.1 If so, did the Claimant resign in response to the breach [at least in part].

204. It is plain from our findings of fact that one of the reasons for the Claimant's resignation was the prospect of lone working. It was not the sole reason, but it is enough that she resigned partly in response to the breach.

Issue 9.2.2 *If so, did she waive the breach and/or affirm the contract?*

205. The prospect of lone working was raised in March 2018. By 9 April the Claimant took a sickness absence. She attempted to discuss her concerns about lone working during the welfare meeting on 18 May 2019 but there was no attempt to resolve them. On 27 June she resigned. We do not consider the 'delay', if there was one, was sufficient to amount to an affirmation of the contract. The Claimant raised her concerns in May and had not received an answer to them by the time she resigned. This is classically the territory of WT Cox Toner. The Claimant had not, by her actions, waived the breach.

206. Therefore the Claimant was unfairly constructively dismissed.

Remarks of the 'Industrial Jury'

207. We are conscious that in a disability case as factually complex as this we have had the benefit of hindsight. But it is our clear view that the Respondent's failures in this case could have been avoided if its managers and HR staff had been better informed of the obligations towards disabled employees the Equality Act 2010

demands. It is crucial that HR and managers understand that they might have positive obligations towards disabled employees to adjust the normal state of affairs at work. By 2018 there was no excuse for such a large employer to be in such a state of ignorance about the Equality Act provisions. There was a lack of any effective training in disability or mental health matters.

208. What was also missing here was any coherent system of informing managers about employees' health conditions. If managers and HR had been better informed, then they would have asked questions and obtained the relevant information at a much earlier stage. They would have sought the medical information they needed far sooner and, ideally, obtained occupational health advice. They would then have had a much better chance at identifying adjustments needed and maintaining those adjustments when managers and key HR staff moved on. We are not saying those adjustments would necessarily have enabled the Claimant to stay in work – that is an issue for the remedy hearing - but they would have given her a prospect of doing so.

Employment Judge Moor

20 November 2019