EMPLOYMENT TRIBUNALS

Claimant: Miss L Jones

Respondent: Staffordshire Leisure Group Limited

FINAL HEARING

Heard at: Birmingham **On:** 8, 9, & [tribunal deliberations in private] 10 October 2018

Before: Employment Judge Camp Members: Mr P Zealander, Mr J Sharma

Appearances
For the claimant: Mr R Ennis, solicitor
For the respondent: Mr C Kennedy, counsel

JUDGMENT

(1) By consent, all and any victimisation complaints and any complaint under section 15 of the Equality Act 2010 relying as the "*something*" on the claimant tendering her resignation because of an alleged failure to make reasonable adjustments are dismissed upon withdrawal, in accordance with rule 52.

(2) The Judgment in paragraph (1) was made and took effect on 9 October 2018.

RESERVED JUDGMENT

(3) The claimant's other complaints, being complaints of disability discrimination and of wrongful dismissal, all fail and are dismissed.

REASONS

Introduction; complaints & issues

1. These are the Reasons for the above Reserved Judgment.

2. The claimant, who is partially deaf, was employed by the respondent as the General Manager of the Lion Hotel and Staffordshire Grill in Brewood, Staffordshire ("Hotel") from 2 January 2017 until her summary dismissal on 21 July 2017. After going through early conciliation, she presented a claim form on 6 October 2017 alleging: wrongful dismissal (failure to give notice of dismissal or make payment in lieu); disability discrimination (failure to comply with the duty to make reasonable adjustments and unfavourable treatment because of something arising in consequence of disability under section 15 – "section 15" – of the Equality Act 2010 – "EQA"); victimisation under EQA section 27.

3. There was a case management preliminary hearing before Employment Judge Self on 22 February 2018. By way of background, we refer to the written record of that preliminary hearing. Within that written record, there is a list of issues (the "list of issues"), which we adopt, subject to a handful of changes that will be apparent later in these Reasons. The parties' representatives confirmed at the start of this final hearing that the list of issues was accurate and complete and no one sought to change the way in which any of the issues was worded during this hearing.

4. Also at the start of the hearing, it was agreed that the only remedy issue we would potentially deal with for the time being was the issue of whether, if a victimisation or discrimination complaint concerning dismissal was successful, any adjustment should be made to the claimant's compensation / damages to reflect the possibility that the claimant would have been dismissed anyway at some stage even without any discrimination or victimisation. Because none of the complaints succeeded, we have not, in fact, dealt with that issue.

5. As appears from the unreserved Judgment, above, the claimant's solicitor, Mr Ennis, withdrew the victimisation claim and part of the section 15 claim on her behalf during this final hearing.

6. The claimant's complaints are detailed within the list of issues. Those that remained by the end of this final hearing were (using the wording in the list of issues): wrongful dismissal; a single reasonable adjustments complaint based on an alleged "*provision, criterion or practice*" ("PCP") "*that the claimant had to be available to deal with customer emergencies at any time*"; three section 15 complaints. The section 15 complaints are: a single complaint about the imposition of a final written warning that relies on the claimant's "*inability to hear the attempts to contact her*" as the "*something*" [EQA section 15(1)(a)]; two complaints about dismissal, one of which relies on the same alleged something as the final written warning complaint and the other of which relies on the claimant "*attending a medical appointment*" as the something.

7. We have not, in relation to every complaint, dealt with every issue that potentially arose. In the main, we have only dealt with those it was reasonably

necessary for us to deal with to decide this case. Similarly, in these Reasons we do not mention all facts or even deal with all factual disputes that have been raised before us, but only those we felt we needed to in order to explain and justify our decision.

The law

8. In terms of the relevant law, our starting point in relation to the discrimination complaints is the wording of the relevant parts of the EQA: in particular sections 15(1), 20(3), and paragraph 20(1)(b) of schedule 8. We also bear in mind EQA section 136, although it has not been suggested on the claimant's behalf that that section has a significant role to play in this case.

9. We have also been particularly assisted by, and have sought to apply the law as set out in, Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265, at paragraphs 15 to 29, 41 to 47, 57 to 68, 73, and 79 to 80.

10. Our decision is based much more on factual than legal issues, with possibly one exception. The one legal issue that has been significant in terms of our decision-making is: when considering an allegation that particular unfavourable treatment was "*because of*" a particular "*something*" in accordance with EQA section 15(1)(a), is it enough that the claimant would not have been treated in this way 'but for' that something; is it enough that it would probably not have happened if the something had not arisen? In short, as we shall explain later, we don't think that is enough; we think the something has to be at least part of the reason for the treatment; we think that the distinction between what used to be known as a 'causa sine qua non' and the true, effective or activating cause of the treatment being complained about is just as valid in relation to a section 15 complaint as it is in other areas of law.

11. So far as concerns the wrongful dismissal complaint, there is no dispute that the claimant would in normal circumstances have been entitled to notice of dismissal and therefore that the only way the respondent can successfully defend the complaint is by persuading us that at the time of dismissal, she had fundamentally breached her contract of employment and that the respondent had not affirmed the contract of employment between her committing the fundamental breach of contract relied on and dismissal.

12. The respondent relies as the fundamental breach or breaches of contract on a number of alleged acts and omissions said to amount to gross misconduct. The claimant accepts, through Mr Ennis, that it does not matter whether the respondent knew about them before the decision to dismiss.

13. The question for us is whether the claimant was in fact guilty of committing a repudiatory breach of her contract of employment by what she did and failed to do. We are not concerned, as we would be in relation to an unfair dismissal complaint, with what the respondent believed, reasonably or otherwise, nor with whether the respondent acted within the so-called 'band of reasonable responses'.

14. There is no particular magic in the words "gross misconduct". The phrase is just a convenient shorthand for: something wrong the employee did and/or failed to do which was so serious it was a fundamental or repudiatory breach of the

contract of employment. A repudiatory breach is one going to the root of the contract; one (to use the language of some of the older cases) evincing an intention on the part of the contract breaker no longer to be bound by the contract's terms.

15. In the present case, as in most wrongful dismissal cases, the respondent's case is, essentially, that the claimant breached the so-called 'trust and confidence term' by what she did and didn't do, i.e. that, without reasonable and proper cause, she behaved in a way calculated or likely to destroy or seriously to damage the relationship of trust and confidence between employer and employee. Any breach of that term is a fundamental breach, which highlights what a high-threshold test it is: "*destroy or seriously damage*" is the wording used.

16. An employee's breach of the trust and confidence term can consist of number of things taken together, ending with what could be labelled a 'final straw', in much the same way that, in a constructive dismissal case, an employer's breach of that term can consist of a course of conduct. (The main difference is that, in a constructive dismissal case, the employee must show she resigned in response to the employer's breach of the trust and confidence term whereas, in a wrongful dismissal case, the employer does not have to show that its decision to dismiss was linked to the employee's breach of contract in order to have a valid defence).

17. There is a 'live' issue to do with affirmation in the present case: it is alleged that in relation to part of the claimant's alleged gross misconduct, the respondent affirmed the contract of employment by, initially, choosing to impose a final written warning instead of dismissing her. It is argued on the claimant's behalf that having affirmed the contract in this way, the respondent could not then rely on the same alleged gross misconduct to dismiss her.

18. So far as concerns how the law relating to 'final straws' and affirmation works in the context of an alleged breach of the trust and confidence term by the employer, we note Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 at paragraphs 39 to 55. We think similar principles apply to a case like the present one, concerning an alleged breach of the trust and confidence term by the employee.

19. Finally on the law, we note that the fairness of the respondent's actions is not relevant. If the claimant had the necessary two years' service with the respondent to be entitled to bring an unfair dismissal complaint and had brought one, that complaint would, we think, have been successful. But this does not affect our decision on disability discrimination or wrongful dismissal at all – and, anyway, the respondent would probably have treated the claimant differently if she had had two years' service.

The facts

20. Many of our findings of fact are not set out in this section of these Reasons; they are set out in the section headed "*Decision on the issues*".

21. The respondent is one of a number of restaurant / hotel businesses owned by Mr Leon Burton, who is the respondent's sole director and who was the

respondent's main witness in this case. The Hotel opened in July 2016. It has 11 bedrooms and a bar and grill with 80 covers. The person in charge of the Hotel is the General Manager and they report to Mr Burton. Mr Burton only came to the Hotel once a week or once a fortnight. The Hotel's General Manager before the claimant was Mr Robert Wright.

22. The claimant is profoundly deaf in her right ear and has significant hearing difficulties in her left ear. As a result, she is and was at all relevant times a disabled person under the EQA. She has extensive experience working in the hospitality sector going back at least to 2009. She was appointed to the post of General Manager in or around early December 2016, her first day of employment being 2 January 2017. During the first three weeks' or so of her employment, she overlapped with Mr Wright, to enable a handover or informal induction to take place. There is a dispute between the parties as to the extent of any handover or induction.

23. One of the things Mr Wright alleges and the claimant disputes was handed over to her was any significant information about fire safety. Mr Burton and Mr Wright had prepared a fire risk assessment in July / August 2016. Mr Wright alleges that he prepared a folder containing fire safety information, including that risk assessment and records of fire alarm tests, which he passed to the claimant in January 2017. The claimant's case is that neither this folder nor any other relevant fire safety information was passed on to her. She accepts that no fire alarm tests were conducted during her time as sole General Manager.

24. The Hotel does not have a night porter or, necessarily, anyone on site out of hours. It is common ground that there was a discussion about this between Mr Wright and the claimant during January 2017, although what exactly was said is not agreed. There is a flat over the road from the Hotel for the General Manager to live in, if they want to. Mr Wright lived in the flat until January 2017 and the claimant lived there from then until her dismissal. Guests of the Hotel are given a letter of welcome when they arrive which has, amongst other things, a telephone number on it for them to contact if there is an out-of-hours emergency. The parties agree that from at least the time Mr Wright left, in late January 2017, to 16 July 2017, the telephone number on the letter was to a telephone socket in the flat which didn't have a telephone connected to it.

25. In or around February or March 2017, there was a disagreement between the claimant and Mr Burton. The claimant was upset and Mr Burton arranged for some flowers to be delivered to her by way of an apology. The claimant alleges that at the same time and as part of the same apology, Mr Burton told her that when her family came for a meal and to stay – something that she told us had already been planned or pencilled in at this time – they could have two hotel rooms for free and could have 50 percent off their restaurant bill. This allegation is denied by Mr Burton.

26. When the claimant's family came on 20 May 2017, the claimant arranged for them to be given two rooms for free and for the meal which she had with them in the Staffordshire Grill to be discounted by 50 percent. The discount was worth £269.05 and the two rooms were worth £180 in total. The claimant made the entry in the respondent's computer system for the discount on the night herself, even though she was not on duty at the time, recording in the system

that the discount was for a "*New promotion*". The respondent also has a manual log, known as the "voids log" for recording and explaining amounts that have been deducted or written off from a customer's bill in the Staffordshire Grill. No one had recorded the 50 percent discount given to the claimant and her family on 20 May 2017. The claimant's case is that the voids log was not for that kind of discount but was instead for things like a deduction made because a customer had been given the wrong food.

27. On 9 June 2017, the claimant emailed one Nigel Dobson, the owner of another establishment called the Old School House, with a copy of the respondent's General Manager job description. Mr Dobson was apparently looking to recruit a caterer and the claimant was helping him out. Her evidence was that she was doing him a favour to pay him back for past favours the respondent accepts he had done the respondent. Her email included a suggestion that he "*pull bits out of here*" and that "*If you want help interviewing or cover give me a shout happy to help*". The respondent subsequently accused her of breaching the confidentiality of company documents and information in relation to this.

28. On 24 June 2017, an employee accidentally set a bin on fire. Although everything turned out all right, there could have been serious consequences. Mr Burton emailed the claimant the following day asking her to do a full risk assessment and on 3 July 2017, she emailed members of staff stating that, "*Any further incidents of this nature will result in disciplinary action*".

29. The respondent alleges and the claimant denies that on 14 July 2017, Mr Burton met with the claimant and discussed fire safety and that, upon discovering that no fire alarm tests had been carried out at the Hotel during her time in sole charge, he asked her to ensure that fire alarm tests were carried out weekly from then onwards.

30. In the small hours of 16 July 2017, a guest's electronic key failed and he and his family were unable to access their room. He telephoned the emergency number given in the welcome letter but, as we have already explained, that number did not belong to a connected telephone. He was able to find some members of staff who were off duty and they helped him. One of the things they tried to do was to rouse the claimant but she could not hear them banging on the window of her flat. The incident was potentially very bad for the respondent from a public relations point of view, and Mr Burton financially compensated the guest. The incident also revealed the fact that a letter was being handed out to guests with an invalid emergency contact number on it. There was an email 'conversation' between Mr Burton and the claimant about it on 16 July 2017, to which we refer. A face-to-face meeting on 21 July 2017 between the two of them was arranged.

31. The meeting on 21 July 2017 took place around 12 noon. During the meeting, the claimant was told she was being given a final written warning in relation to – broadly – two things: failure to ensure fire alarm tests were carried out; the incident on 16 July 2017 and guests being given an invalid emergency contact number. The claimant alleges this was the first time fire alarm testing had been raised with her and that the meeting consisted, essentially, of her being read (but not given) the final written warning. The respondent's case is that there was an 'investigation' part of the meeting followed by the 'disciplinary' part of it. Both

sides agree that the claimant did not see the final written warning document until a while later. At the end of the meeting, Mr Burton gave the claimant a mobile phone the number of which was to be used as the Hotel's emergency contact number. This had been discussed in the emails of 16 July 2017. The phone that was provided was specifically designed for the hard of hearing, although the claimant may not have known this at the time.

32. The final written warning document is dated 21 July 2017 and speaks for itself.

33. At around 1.30 pm (on 21 July 2017), after Mr Burton had left the Hotel and was in his car on the motorway, the claimant telephoned him to say she was resigning and wanting to discuss her notice period, her contractual notice period being 3 months. Mr Burton ended the call, saying they could discuss it at a more appropriate time.

34. At about 1.45 pm, in the presence of Darren Buckley, the Head Chef at the Hotel, the claimant gave Mr Maguire, Group Chief Executive, her written note of resignation together with the mobile phone and then left the Hotel, without explaining where she was going or when she would be back. It is alleged that she did this in a rude and unprofessional way. It is also alleged that immediately after she left, the duty Supervisor, Mike Chapman, told Mr Maguire (who then telephoned Mr Burton to pass this information on) that the claimant had told him she wouldn't be back. The resignation letter simply states: "*After being issued with a final warning for gross negligence & my current health problems I hereby give you my notice. If you could provide me with a release date that would be great.*"

35. At just after 2 pm, Mr Burton had a telephone conversation with the claimant. He and she give differing account of the conversation, but agree that: he told her to return to the Hotel for the start of her shift at 3pm; she told him she was going to a doctor's appointment. The main point of difference about the call is that Mr Burton alleges the claimant told him that she would not be returning to work that day whereas the claimant alleges she told him she would be returning at 6 pm.

36. At around 2.37 pm, the claimant emailed Mr Burton stating she would be returning to work at 6 pm. Unfortunately, we do not have a copy of that email, nor of any separate email she may have sent to members of staff. At about 3 pm, Mr Burton called her to tell her she was summarily dismissed. His evidence to the tribunal was that he had made up his mind to dismiss her before receiving her email. He prepared a letter confirming dismissal, dated 21 July 2017. For one reason or another, she did not receive that letter for several days.

37. The claimant appealed against dismissal by letters of 24 and 31 July 2017. Prior to holding an appeal meeting, Mr Burton replied to those letters with one of his own, dated 31 August 2017. Subsequently, on 8 September 2017, there was an appeal meeting, chaired by Mr Burton, which we have seen a full transcript of. Mr Burton's decision rejecting the appeal is contained in a letter dated 15 September 2017.

Decision on the issues; disability discrimination

38. We will now go through each of the claimant's claims in turn, making the additional findings we need to make and giving and explaining our decision in relation to the relevant issues.

39. Subject to one or two things, which we shall explain when we come to them, we take the issues to be as set out in the written record of the preliminary hearing that took place on the 22 February 2018 before Employment Judge Self. We refer to the issues by the numbers Employment Judge Self gave to them.

40. We start with the reasonable adjustments claim and with issue 3: did the respondent have a provision, criterion or practice that the claimant had to be available to deal with customer emergencies at any time?

41. If we take the PCP to be strictly as defined here, i.e. that the claimant herself had to be available (and not just that Mr Burton thought or expected it would be her who was available as a matter of fact, but that it could be somebody else), then this was not, we find, a PCP that the respondent had at any relevant time. As a matter of fact, and the reasonable adjustments complaint fails for that reason.

42. If we take a less strict view as to what the PCP was, and if we were to define it as the respondent, in the form of Mr Burton, expecting that it would be the claimant who was available to deal with customer emergencies as a matter of fact generally (although she could in principle delegate this responsibility), then we accept, for present purposes, that that was a PCP that the respondent had and so move on to the next issue.

43. The next issue is: did this PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled? The answer to that question is clearly: yes. Everyone accepts that the claimant is and was at all relevant times partially deaf. This meant it was more difficult to wake her up than it would be someone who was not partially deaf. An expectation that it would be her who would respond to emergencies, because those emergencies might well happen and at night time when she was asleep, would indeed put her at a substantial disadvantage compared with others. We also know that in practice it did put her at that disadvantage in the early morning of 16 July 2018, in that she could not be woken up when people tried to rouse her.

44. The next issue in the case is not actually listed in Employment Judge Self's list of issues and it is this: in accordance with paragraph 20(1)(b) of schedule 9 to the EQA, did the respondent not know, and could it not reasonably have been expected to know that the claimant was likely to be placed at that disadvantage? The respondent was clearly aware – or at the very least ought reasonably to have been aware – of the substantial disadvantage we have just identified from 16 July 2017. It is almost explicitly mentioned by the claimant during her email exchange with Mr Burton on that date. However, there was, we find, no good reason for the respondent to be aware of any particular problem in relation to this before then.

45. We split what Employment Judge Self’s next issue – number 5 – into two parts.

46. The first part is: were there steps that could have been taken that would have avoided that disadvantage (i.e. could well have alleviated it)? We find that there were. On the evidence, we have identified five steps. The first would be the provision of a night porter or similar. The second would be providing the claimant with some kind of device that, through vibration or some other means, would have woken her up, if a telephone call came through when she was asleep.

47. The third would be providing her with a phone that was sufficiently loud to ensure that it woke her up. We looked carefully at the claimant's written evidence and our notes or her oral evidence during our deliberations. We realised the claimant had never actually said in terms that the phone that was provided for her by the respondent after the incident on 16 July 2017 was not suitable for her. It appears to us that she never actually tried it out; she merely feared that it would not wake her up. We are satisfied that that phone could well have alleviated the disadvantage, i.e. have made it significantly less likely that she would sleep through a telephone call.

48. The fourth thing the respondent could have done – and like the third thing, this was something the respondent actually did – was to empower the claimant herself to take whatever steps she felt were appropriate. The fact that the duty to make reasonable adjustments is on the employer does not mean that the employer in the form of more senior management than the claimant herself has to organise the buying of whatever equipment is, or has to take whatever steps are, necessary. There is nothing wrong in principle with an employer saying to their disabled employee, in effect, 'We are complying with the duty to make reasonable adjustments by giving you a free hand to do whatever you think will be most helpful in terms of avoiding the substantial disadvantage.' In many cases, this will actually be the best thing that an employer can do, because often the disabled employee is the person in the best position to know what practicable steps would be most helpful to them in practice.

49. The fifth step that would have avoided the disadvantage, at least temporarily, was another step the respondent took: offering to have someone else as the emergency contact. Mr Burton offered himself as the emergency contact in one of his emails of 16 July 2017.

50. The next issue – the other part of issue 5 – is: in relation to any of the steps identified when addressing the previous issue that were not taken, would it have been reasonable for the respondent to have to take those steps at any relevant time?

51. One aspect of the duty to make reasonable adjustments which is often missed, is that there is a 'time' element to it. An employer is only in breach of the duty to make reasonable adjustments if it fails to implement the relevant adjustments within a reasonable time of the point at which they would reasonably have been identified. The duty arose here on 16 July 2017 at the earliest: the respondent lacked knowledge of substantial disadvantage before that date; the claimant was not put to any substantial disadvantage before that date, in that the expectation that she would be the emergency point of contact did not impinge on her at all until 16 July 2017. On 21 July 2017, the claimant was dismissed. Accordingly, the period during which the respondent might have been in breach

of the duty to make reasonable adjustments in any relevant respect was very short: just five days.

52. Our decision on this issue is that the duty to make reasonable adjustments was not breached in relation to the claimant between 16 and 21 July 2017, and therefore not breached at all. On 16 July 2017, the respondent did three things that were reasonable adjustments: offering to provide her with the phone, empowering her to take whatever steps she felt were necessary, offering Mr Burton as, temporarily, the emergency point of contact. We don't think it was reasonable for the respondent to have to take any further steps before 21 July 2017.

53. We note that in Mr Burton's final email in the series of messages between him and the claimant on 16 July 2017, he mentions the fact that the matter is to be discussed on the 21st. We don't think that what the claimant stated in her final email in that series, namely expressing a concern that the mobile phone might not solve the problem, triggered any obligation on the respondent to have to do more in terms of reasonable adjustments before the 21st; it was reasonable, for 5 days, to leave things as they had been left on the 16th.

54. In addition, we note that on the 21st itself, the final written warning given to the claimant did not say that she had to be the person who answered the mobile phone that was provided to her. There was no breach in the few hours between the claimant being given the final written warning and the phone and her being dismissed.

55. None of this means it was necessarily reasonable for the respondent to impose a final written warning on the claimant in relation to this issue on the 21st. But the respondent having potentially behaved unreasonably in this respect does not make it any more reasonable for the respondent to have to make further reasonable adjustments before the 21st. The reasonable adjustments claim is not about the imposition of the final written warning.

56. It is quite possible that if the claimant's employment had continued, there would come a point when either additional steps would have been taken to avoid the disadvantage or the respondent would have found itself in breach of the duty to make reasonable adjustments. But the claimant's employment ended before the respondent was in breach.

57. In summary, the reasonable adjustments complaint fails because: the respondent did not have the PCP relied on by the claimant; even if we adopt a relaxed approach to the wording of the PCP (and there is no good reason why we should; the claimant, through her solicitor, firmly pinned her colours to the mask in this respect) it was not reasonable for the respondents to have to take particular steps that it failed to take at any relevant time.

58. We shall now turn to the section 15 complaints.

59. The first section 15 complaint concerns the final written warning. We note that in order for the claimant to succeed on this complaint, the "something" arising only has to be part of the reason for the final written warning.

60. The alleged “something” is the claimant’s inability to hear the attempts to contact her overnight on 15 to 16 July 2017, i.e. to hear a couple of members of staff from the Hotel knocking on the window of her flat. They may also – the evidence is not entirely clear – have attempted to telephone her on her personal mobile phone.

61. We note that this is not the same issue as the claimant’s failure to connect a phone to the phone socket in her room with the number that was given to guests as the emergency contact number. That failure on the part of the claimant, whether it was blameworthy or not, is nothing to do with her disability.

62. The first question is: was the final written warning imposed because of her inability to hear the attempts to contact her?

63. In submissions, we were invited by Mr Ennis to find that ‘but for’ the claimant's inability to hear the attempts to contact her, a final written warning would not have been imposed. On balance, we are prepared to make that finding. There are many unknowns and it is quite possible that the claimant would still have ended up with a final written warning even if the attempts to contact her to wake her up had been successful. However, on balance, although we are sure that Mr Burton would still have been annoyed with the claimant and would still have imposed some kind of disciplinary sanction on her, we think she would probably not have ended up with a final written warning. This is because the consequences of there being no valid emergency contact number for six or seven months would, in this scenario, have been less serious in terms of what happened to the guests and therefore this failure would have been viewed as less serious. Although it is not particularly logical, most people partly judge the seriousness of something that has gone wrong by its consequences. For example, if two drivers have separate accidents through failing to look properly when pulling out of a junction, and the first accident results in serious personal injury whereas the second results in nothing worse than car damage, the driver in the first accident will be thought of as having done something more blameworthy than the driver in the second, even though he may not have been any more careless.

64. The next question or issue is: is ‘but for’ causation enough? We don't think it is, as a matter of law. We think we have to ask ourselves: why was the final written warning imposed; what was the reason for its imposition? The law draws a distinction between the background circumstances without which (or 'but for' which) something would not have occurred at its true, effective or activating cause. To give an example, which we discussed in submissions: someone's alarm clock stops working overnight; they oversleep as a result; they then have a car accident because they drive too fast trying to make up time. In this example, the true cause of the accident is them driving too fast. It isn’t the alarm clock breaking, even though the accident would not have happened ‘but for’ the clock not working properly. We think the claimant’s inability to hear the attempts to wake her up is the equivalent of the broken alarm clock in the example.

65. We move on, then, to what the true reason for the final written warning being imposed was, and whether it was, to any significant extent, the claimant's inability to hear the attempts to contact her.

66. The respondent's case is that the reason the final written warning was imposed was two things. The first – an issue to do with fire alarms – we can disregard for present purposes because no one is suggesting that (whatever the rights and wrongs) the alleged issue to do with fire alarms had anything to do with disability. The claimant herself accepts this – her acceptance of it is implicit in her allegation that the fire alarms issue was only raised to make it look as though she was not being disciplined because of something to do with her disability.

67. On the face of the final written warning, and in accordance with the respondent's evidence, the second reason for its imposition was nothing to do with the difficulty in contacting and rousing her. Instead, it was because of the fact that no valid out-of-hours emergency contact number had been given out to guests for a period of many months. The question is, then: were Mr Burton's true reasons for imposing the final written warning not the reasons he gave and was a significant part of the real reason he imposed the final written warning that the claimant had been unable to hear the attempts to contact her?

68. We unanimously accept that Mr Burton genuinely had the concerns about the lack of an emergency contact number that he expressed in the final written warning letter dated 21 July 2017. We note that although the final written warning is obviously a document prepared after considerable thought and possibly with the assistance of some legal advice, the emails that he sent on 16 July 2017 appear to have been sent spontaneously. Potentially, they give a better insight into what was really going on in his head than the final written warning does. However, examining those emails, they are entirely consistent with the reasoning in the final written warning: Mr Burton's concern is, once again, about the unconnected emergency phone number; they culminate in an email from Mr Burton suggesting he was irritated or annoyed with the claimant because of her suggestion that there should be no emergency number rather than because claimant had been un-wakeable.

69. Accordingly, we think that the operative reason for the imposition of the final written warning that had some loose connection with the incident on 15/16 July 2017 was the reason Mr Burton gave: that that incident revealed that the claimant had for seven month been General Manager of a hotel which was handing out an unconnected emergency contact telephone number.

70. The section 15 complaint about the final written warning therefore fails, as the warning was not imposed because of the claimant's inability to hear the attempts to contact and rouse her.

71. If we are wrong about this and simple 'but for' causation is enough, we are anyway satisfied that imposing a final written warning was a proportionate means of achieving the legitimate aim of ensuring health and safely. For the reasons given below in relation to the wrongful dismissal complaint, it would arguably have been legitimate to dismiss the claimant for this issue to do with the emergency contact number alone; certainly, imposing a final written warning was not disproportionate.

72. The other section 15 complaint that remains concerns dismissal. The claimant relies on two "*something*"s: again, her inability to hear the attempts to contact

her, i.e. the fact that she couldn't be woken up; "*her attending a medical appointment*".

73. Once again, we think we have to ask ourselves: what was the 'reason for the treatment'?; why did Mr Burton dismiss the claimant?; what was in his mind and was it, to any significant extent, either the claimant's inability to hear the attempts to contact her or her attending a medical appointment?

74. We start with what Mr Burton's given reasons were at the time. In the dismissal letter dated 21 July 2017, three reasons are given: "*your failure to comply with fire safety management responsibilities*"; "*your subsequent reaction to this finding, unauthorised absence and resignation without warning on a shift where you were responsible for health and safety*"; "*and then your refusal to come back to work when I gave you a direct request to return to work*".

75. In Mr Burton's witness statement, the matter is put slightly differently. He refers to fire safety. There seems to be to us no material difference between what he says in the statement about this and what was in the dismissal letter. He also refers to the claimant's "*irrational behaviour*". From where and how that phrase appears in the witness statement, we think this covers both of the other two things referred to in the dismissal letter.

76. What is potentially different in the witness statement from what is in the dismissal letter is the reference in the statement to "*lack of an emergency contact or procedure for guests*". Possibly, this is covered by the phrase in the dismissal letter "*this finding*", but that is not clearly the case.

77. The witness statement also refers to Mr Burton as having, "*lost all trust in her as the accountable person for the hotel, and for the safety of our guests and employees*". We don't see that as a material difference between the dismissal letter and the statement – we take that as no more and no less than a description of why the three things mentioned in the dismissal letter and the possibly additional thing mentioned in the witness statement led to the decision to dismiss.

78. We have asked ourselves whether the failure in the dismissal letter explicitly to mention the "*lack of an emergency contact or procedure for guests*" is significant and is something from which, for example, we should be drawing adverse inferences. We have concluded that it isn't. The thing that is present in the witness statement which was absent from the dismissal letter is something that potentially connects the dismissal to the events of 15/16 July 2017. If it was the other way around – if it wasn't mentioned in the statement but was unambiguously present in the dismissal letter – we would, perhaps, have grounds for suspicion. As it is, what we effectively have here is a concession by Mr Burton that, whatever the dismissal letter may have said, an issue to do with the emergency contact number (and therefore, peripherally, with 15/16 July 2017) <u>was</u> in his mind at the time.

79. As to whether the claimant's inability to hear the attempts to contact her was an operative cause of the claimant's dismissal, we repeat the findings we have already made in relation to the section 15 complaint about the final written warning. In summary, the dismissal was no more to do with the claimant's

inability to hear the attempts to contact her than the final written warning was; all that was part of the reason for the treatment was the fact that the claimant, as General Manager, had not, over the months when she was in post, ensured that a valid emergency contact number was being handed out to guests.

80. The claimant's case is again that 'but for' causation is enough. Again, we don't think it is, for reasons we have already given. But in case we are wrong about this, we ask ourselves whether 'but for' her inability to hear the attempts to contact her, she would still have ended up being dismissed.

81. There are so many things that could have happened differently between 16 and 21 July 2017 had the claimant been successfully woken up in the small hours of 16 July 2017 that we are reluctant to express a view on this. However, if we were forced to come down on one side or the other, we think, on balance, she probably would still have been dismissed.

82. We have already decided the claimant would probably not have got a final written warning, but she would still have been disciplined to some extent. Had she been disciplined to any extent, we think she would still have felt that this was unjust because, in her mind, she was being disciplined because of her deafness and/or because of something to do with her deafness. This wasn't why she was being disciplined, but she thought that it was and the fact that that was what was going on in her mind at the time was not challenged in cross-examination. She would, then, probably have reacted in a similar way to any form of disciplinary action to the way in which she reacted to the final written warning, namely by resigning; and there is no particular reason to think that had she resigned in response to disciplinary action short of a final written warning, anything else would have changed.

83. The section 15 complaint concerning dismissal which relies on the claimant's inability to hear the attempts to contact her as the "*something*" therefore fails.

84. The final section 15 complaint that is still before us relates to dismissal and relies on the claimant attending a medical appointment as the something arising in consequence of disability.

85. The first question is: are we satisfied that the claimant was "*attending a medical appointment*" [quotation from the list of issues] that arose in consequence of her disability?

86. The answer to this question, as posed, is: no. On the claimant's own case, she did not attend a medical appointment. The gist of her evidence in this respect was that she was too upset by being dismissed to do so.

87. We could just stop there. However, we could, arguably generously to the claimant, re-frame this complaint so that the something arising is the claimant intending to attend a medical appointment. If we did so, we would have to ask ourselves whether we are satisfied that the claimant was intending to attend a medical appointment that arose in consequence of her disability.

88. The claimant's case is that she had a GP appointment at 3 pm on 21 July 2017 for ear drops connected with a forthcoming operation relating to her disability. She has, however, provided no evidence other than what she told us herself

that there ever was a medical appointment for her to attend that day, let alone one that was something to do with her disability. Around the time of her appeal, she was encouraged to produce that evidence. In Mr Burton's letter of 31 August 2017, he stated, "*If you can provide a copy of your appointment letter for this date/time, I am more than happy to review this evidence as part of your appeal*." She did not produce any such evidence. She also did not produce anything in this respect as part of disclosure in these proceedings, nor in any of her other evidence that was put before us.

89. The claimant has been professionally represented throughout these proceedings. She and her representative must have known this was an issue, from what Mr Burton wrote in his letter of 31 August 2017, even if for no other reason. If it is the case (and we shall come on to this in a moment) that the claimant did not have written notification of the particular alleged appointment at 3 pm – because it was arranged on the day, for example – it would surely nevertheless be possible for her to obtain some corroborative evidence of some kind from her GP.

90. The claimant was cross-examined about this. She gave various answers to explain why she had not produced this evidence. At first, she said something to the effect that she didn't realise she had to produce it. She was then taken to the part of the letter of 31 August 2017 we quoted from above. She then said something like, "*I had shown the letter about my CT scan. I didn't think I needed to provide evidence of going to get ear drops. I had moved up to Yorkshire. I had limited time to get access to that information*". During cross-examination, she did not suggest that such evidence did not exist; what she seemed to be stating was that she was unable and/or had failed to obtain it.

91. The final question the claimant was asked during her oral evidence, which was in re-examination, was whether her GP provided written notifications of appointments. That was a perfectly proper question and was not, technically, a leading question. Nevertheless, it was a question that gave the claimant an obvious 'lifeline' that she had evidently been unable to come up with for herself during cross-examination. She answered that her GP didn't provide them. We are afraid we do not accept that part of her evidence. If this is why we don't have evidence of this doctor's appointment and evidence of it being connected with her disability, why didn't she just say this during cross-examination – why did she given every answer to the questions that were being asked of her about this except the most obvious one?

92. We are also concerned by an apparent inconsistency to do with the timing of the appointment. According to the claimant, it was at 3pm and she did not attend because she was upset about being dismissed. But she also accepted in cross-examination that she was dismissed shortly after 3pm. She did not suggest that she had been sitting in the doctor's surgery when she received Mr Burton's telephone call by which he dismissed her, or anything like that. This apparent inconsistency in the chronological account of what happened on 21 July 2017 was unexplained.

93. In the absence of evidence corroborating the claimant's case that she had a GP appointment which arose in consequence of her disability, and in light of these inconsistencies in her evidence, and bearing in mind that the burden of proof in

relation to this issue of fact is on the claimant, we are not satisfied that she was intending to attend a GP appointment that arose in consequence of her disability.

94. If we are wrong about this, we are anyway of the view that the reason for dismissal was not her attending or intending to attend a medical appointment. There are a number of reasons for dismissal. If and in so far as any of them was something to do with this alleged medical appointment, they concern the fact that the claimant had not told Mr Burton about it beforehand, rather than the appointment itself.

95. This last section 15 complaint therefore fails because we are not satisfied: of the existence of a relevant something arising in consequence of disability; that the claimant was dismissed because of that alleged something.

Wrongful dismissal

96. The claimant was dismissed without notice. It is for the respondent to show that at the time of dismissal the claimant had committed one or more fundamental breaches of contract that the respondent had not affirmed. The things relied on by the respondent as one or more fundamental breaches of contract are set out in paragraph 115 of Mr Burton's witness statement. We take them in a slightly different order from Mr Burton and begin with the fire alarms issue.

97. What we mean by the fire alarms issue is, broadly, the claimant's failure to arrange for the fire alarms in the Hotel to be tested during the 6 to 7 month period during which she was sole General Manager. There are three strands to this. The first is how we view that failure in and of itself, irrespective of what was handed over to her and regardless of whether anything was said to her about the fire alarms on 14 July 2017 by Mr Burton. The second is whether we accept Mr Wright's evidence to the effect that he did a proper handover of the fire alarms and whether, if we do, this makes any misconduct by the claimant more serious. The third aspect to this is whether we accept Mr Burton's account of what he said to the claimant on 14 July 2017 and, if we do, whether this makes any misconduct by the claimant more serious. We shall take these in order.

98. We are very surprised indeed that the claimant should, apparently, have given no thought at all to the need regularly to test fire alarms in the Hotel for which she was primarily responsible for a period of at least six months. This is particularly so given that issues to do with fire safety did crop up. For example: on 3 May 2017, she sent an email containing a supervisor training record which included issues to do with fire safety; on 21 June 2017, she emailed the respondent's fire safety consultant asking them to carry out some work; on 24 June 2017, there was a fire in a bin and the following day she was asked by Mr Burton to ensure that a full risk assessment was done.

99. The claimant was not asked this question in cross-examination, but we have asked ourselves who she thought was responsible for fire safety, if not her? We also think about what the consequences would have been for the respondent – and possibly for the claimant herself, as the General Manager – had there been a fire during a night in, say, May 2017 that had gone undetected due to a faulty fire alarm, the fault in which had not, in turn, been picked up because of the lack

of testing. We could echo Mr Burton's words in the final written warning letter: "*an unimaginable incident in the future*".

100. For us, this is a very serious matter in and of itself, and that is even if we accept the claimant's case that Mr Wright said next-to-nothing to her about fire alarms, or about fire safety of any relevance, during the handover period.

101. We next turn to the question of whether we accept Mr Wright's evidence – or, rather, whether we prefer his evidence to that of the claimant about what was handed over to her.

102. We start with the inherent probabilities of the situation. The handover period was about three weeks. The claimant's evidence is rather unclear on this point, but the impression she seemed to be trying to give to us was that there was, in fact, almost no handover actually done during this three-week period. That seems implausible to us.

103. Mr Wright told us in his evidence that his background was in amusement parks where there was a very particular emphasis on health and safety, including fire safety. There is clear documentary evidence supporting the notion that he and the respondent generally were conscious of fire safety issues and had taken positive steps to address those issues. In particular, there is a Hotel Fire Marshall Training Presentation document and a Fire Risk Assessment document that Mr Wright and Mr Burton completed together. There is also the fact that the respondent retained a company called Fire Safety Services specifically to help deal with fire safety issues (something the claimant was aware of). We ask ourselves whether it is likely that, given all this, Mr Wright would have said nothing of relevance to the claimant about fire safety during the handover period. We don't think it is at all likely.

104. Mr Wright's evidence was clear and consistent. He gave us evidence on points of detail that made it improbable that what he was saying was, as the claimant would apparently have it, pure invention. For example, he told us that the fire safety folder he says he prepared and gave to the claimant was stored in the General Manager's flat rather than in the Hotel itself because of the lack of a fire-proof safe in the Hotel. He did not seem to us to have any particular 'axe to grind' against the claimant. His only possible motivation for lying in his evidence, given that he is no longer employed by the respondent, would be a desire to help Mr Burton out. It was not put to him in cross-examination that that was his motivation; indeed, no particular motivation for not telling the truth about this was put.

105. What was put to Mr Wright in cross-examination was to the effect that his memory might have been playing tricks with him, given that he was first asked about this by the respondent in or around August 2017. Although human memory is pliable and fallible, we find it hard to accept that he could be mistaken about this part of his evidence; he could, plausibly, only be deliberately not telling us the truth.

106. To put it another way, we think the probability of the claimant being mistaken – having forgotten – about Mr Wright having covered fire safety and testing as

part of her induction is considerably greater than the possibility of Mr Wright having innocently misremembered having done it when he hadn't done it.

107. In addition, we have already highlighted some difficulties we have with parts of the claimant's evidence and we highlight others below.

108. In the above circumstances, considering the inherent probabilities of the situation, and all the evidence, and weighing the claimant's evidence against that of Mr Wright, we think his account of events is more likely to be accurate than hers.

109. Undoubtedly, the fact that Mr Wright did, as we accept, cover fire safety issues as part of his handover to the claimant makes the claimant's failure to think about those issues to any significant extent, and in particular to ensure that fire alarm testing was done, an even more serious matter than it would otherwise be.

110. We move on to the alleged events of 14 July 2017.

111. The claimant's case is that there was no conversation at all between her and Mr Burton on 14 July 2017 and that he was not even present in the Hotel on that date. It must therefore be her case that, on 21 July 2017, he invented having had a conversation about fire alarms on 14 July 2017 in order to justify giving her a final written warning. (He mentions the alleged conversation on the 14th in the final written warning letter).

112. Pausing there, what is his incentive supposed to be for inventing that conversation of 14 July 2017? It can't have been to 'get rid' of the claimant, as he did not do so – and because she had less than two years' service with the respondent, he could have done so completely unfairly without adverse consequences for the respondent. The claimant's partial answer to this question that she gives in her witness statement is something we've already mentioned – her suggestion that, "*the allegation about the fire alarm was simply added to make it look as though I was not being disciplined over something which was not my fault because of my disability*". This is, we are afraid, so implausible an explanation for why Mr Burton would do this, as to be almost absurd. It would require Mr Burton to appreciate that he was doing something that was potentially discriminatory, but to be determined to do it anyway; and for him not to appreciate that if he was doing something discriminatory by his other allegation, adding the fire alarm allegation would not save him from being a discriminator; and for him, at random, to pick an allegation about the testing of fire alarms which (for some reason the evidence does not tell us) he knew the claimant would be weak on.

113. Accordingly, we can see no sensible reason for Mr Burton to have invented not just an entire conversation, but also his presence at the Hotel on the 14 July 2017. We note Mr Maguire agreed in evidence that Mr Burton was present at the Hotel on that day.

114. For these reasons, we think it is more likely than not that the claimant did indeed have a meeting with Mr Burton on 14 July 2017 during which the fire alarms issue was raised.

115. We think that if the claimant did have such a conversation – and we have just found that she did – and did not immediately or shortly afterwards (within a day or two) arrange a fire alarm test, that makes her failures in this respect significantly worse than they would otherwise be.

116. We unanimously agree that taking all the above into account, the claimant was guilty of gross misconduct on account of the fire alarms issue alone. We are, as explained above, using the phrase "gross misconduct" as a shorthand for conduct without reasonable and proper cause that is calculated or likely to destroy or seriously to damage the relationship between the claimant and the respondent. Mr Burton would have been within his rights to dismiss the claimant without notice on 21 July 2017 at the time he gave her a final written warning.

117. Mr Burton did not dismiss the claimant at that stage, though. Instead, he affirmed the contract of employment by giving her a final written warning. In order for the respondent to rely on the fire alarms issue in defence of the wrongful dismissal complaint, it must therefore point to something the claimant did between the imposition of the final written warning and dismissal that was a further fundamental breach of the contract of employment. In practice, what the respondent needs to identify is the equivalent of the final straw in a constructive dismissal case – something that, when taken accumulatively with everything that has gone before (potentially including the fire alarms issue), constituted a breach of the trust and confidence term. We shall return to this below.

118. A further thing relied on by the respondent in defence of the wrongful dismissal claim is the phones issue, i.e. the fact that the claimant, as General Manager, presided for a number of months over a hotel that was handing out to guests an invalid emergency contact number, leaving, potentially, no way for them to contact a member of staff in an out-of-hours emergency.

119. Our views in relation to this are very similar to the views we have just expressed in relation to the fire alarm issue. Even if Mr Wright had not said anything to the claimant about the emergency contact number, the claimant was significantly at fault in, seemingly, having given no thought at all in a period of six months or so to what would happen if one of the respondent's guests needed to get in touch with a member of staff out-of-hours. Again, this was not a question put to her in cross-examination, but, again, we have asked ourselves what the claimant thought would happen in this scenario. If she thought about it at all, and we don't think she did, it would surely have occurred to her to ask whose telephone number the number being given out to guests was. Indeed, the fact that she did not know before 16 July 2017 that the number being given out to guests was not a number that was connected to a phone is the main reason why we think she can't have addressed her mind to the issue before the problem on 15 to 16 July 2017 occurred.

120. We remind ourselves that this was a hotel with no member of staff on site after hours in normal circumstances. It was only a matter of time before something happened like what happened on 15 to 16 July 2017; and the potential consequences to the respondent of something like that happening could well have been significantly worse than they actually were.

121. In addition, we bear in mind the claimant's evidence that she had a conversation with Mr Wright about the lack of a night porter on site. When we bear this in mind, this failure (even on her own case) to address her mind to the issue is really rather extraordinary.

122. Taking Mr Wright's evidence about what he and the claimant discussed in this respect into account, the claimant's conduct is painted in an even worse light. We again prefer Mr Wright's evidence to the claimant's. Again, Mr Wright gave detailed evidence of the kind that lends weight and credibility to what he was telling us. For example, he described how, when he was acting as General Manager, the emergency contact number in the welcome letter was regularly changed, giving specific examples. He also described a particular occasion during the claimant's handover / induction period when he showed the claimant how to access the welcome letter on the Hotel's computer and to change the telephone number on it. As with the issue to do with the fire alarms, it is difficult for us to see how he could honestly have misremembered this, given all of the points of detail he provided us with. It is much easier for us to see how the claimant could have forgotten this aspect of her handover. In any event, there are issues with the claimant's credibility more generally that there aren't with Mr Wright's.

123. Whether or not this 'telephones issue' is gross misconduct in and of itself, it certainly is gross misconduct and/or serious negligence of a kind that breaches the trust and confidence term when taken in combination with the fire alarms issue.

124. As with the fire alarms issue, there was affirmation by the respondent when the final written warning was imposed. This is dealt with below.

125. The respondent needs to explain why the claimant was dismissed on 21 July 2017 when, only a couple of hours beforehand, it imposed a final written warning and did not dismiss her for the fire alarms issue and the emergency contact number issue. At the time of dismissal, the main thing that appears to have been relied on by Mr Burton as an explanation is the claimant leaving work and allegedly refusing to return. The way in which this is put in paragraph 115 of Mr Burton's witness statement is putting "*the phone down on me when I asked her to return for her shift at 3pm on Friday 21 July 2017*". The reality is, though, that what the respondent is accusing the claimant of having done is insubordination, namely allegedly telling Mr Burton in the telephone conversation between the two of them at around 2pm on the 21 July 2017 that she would not be returning to work at all that day.

126. The claimant has sought to make much of the fact that she emailed the respondent a little after 2.30pm to confirm that she was indeed returning to work that day, at around 6pm. It seems to us, however, that if Mr Burton is right, and she did say to him she was not coming into work to do her shift at all that day, this would be serious insubordination and the fact that she subsequently changed her mind and thought better of it and sent the email would be largely irrelevant. This is particularly so given her case is not that she changed her mind and apologised and was contrite, or anything like that.

127. Both parties' versions of events are plausible in and of themselves. There is nothing inherently improbable in the respondent's case to the effect that the claimant was angry and went off for the whole shift, but then had a change of heart. Similarly, it is perfectly possible that there was a misunderstanding between the claimant and Mr Burton in the conversation at around 2pm, and that Mr Burton thought she was proposing not to return to work when this was not the case, particularly given that Mr Burton had apparently been told that when she left the respondent's premises between 1pm and 2pm that day, she had said to Mr Chapman she was not coming back.

128. We look at what evidence there is to support both side's versions of events.

129. To support the claimant, there is not really anything beyond her own witness evidence.

130. Supporting the respondent's version of events, there is:

130.1 Mr Burton's witness evidence;

130.2 Mr Maguire's evidence (hearsay evidence, but evidence nonetheless) as to what Mr Chapman had told him on 21 July 2017, just after the claimant had left the respondent's premises, about her saying something to the effect that she was not coming back;

130.3 the fact that, as explained above, we have already decided we are not satisfied of the accuracy of the claimant's evidence about a GP appointment on 21 July 2017 relating to her disability;

130.4 the fact that the claimant was insistent, when the Employment Judge asked her about this, that there was no ambiguity in what she told Mr Burton. If this were right, it would leave largely unexplained her decision to send the email that she sent just after 2.30pm on 21 July 2017 confirming that she was coming back. The Employment Judge gave the claimant every opportunity to explain away the differences between her and Mr Burton's evidence about the contents of the telephone call at around 2pm as a misunderstanding. She did not take that opportunity.

131. There is, then, significantly more on the respondent's side of the scales on this issue than there is on the claimant's side. We therefore prefer Mr Burton's version of events and find that the claimant did indeed tell Mr Burton in the conversation between the two of them that took place around 2pm on 21 July 2017 that she would not be returning to work at all that day and would not be doing any part of her shift.

132. For the respondent to defend the wrongful dismissal complaint successfully, what we have found the claimant said to Mr Burton in his telephone conversation does not necessarily have to be gross misconduct / a breach of the trust and confidence term in and of itself. In our view, it probably is – it amounts to insubordination. But all it has to be, for the respondent's defence to be made out, is the equivalent of a final straw in a constructive dismissal case. In other words, as explained above, it needs to be something that contributes something to a breach of the trust and confidence term and to be something that when taken in combination with everything that has gone before constitutes

the end of a course of conduct for which there is no reasonable and proper cause and which is calculated or likely to destroy or seriously damage the relationship of trust and confidence. This act of insubordination, which the claimant did not apologise for, is certainly, we think, enough to breach the trust and confidence term when taken in combination with the fire alarms issue and the emergency contact number issue. In a way, the fact that the claimant had been given a final written warning only hours before being dismissed makes her position worse than it would otherwise be, in that instead of reacting to being given a final written warning by being contrite, she reacted by being insubordinate.

133. The respondent is, accordingly, able to overcome what would otherwise be a barrier to a successful defence to the wrongful dismissal complaint, namely affirmation by the imposition of the final written warning.

134. Even without considering the other alleged incidences of gross misconduct, the claimant's wrongful dismissal complaint therefore fails because at the time of dismissal, she was in fundamental breach of her contract of employment and that fundamental breach had not been affirmed by the respondent.

135. For the sake of completeness, we shall nevertheless consider the three main things that remain as allegations of gross misconduct.

136. The allegation that the claimant had committed an act of gross misconduct by allegedly throwing the emergency mobile phone across the table at Mr Maguire – see paragraph 115 d) of Mr Burton's witness statement – is not made out. Mr Burton refers in his statement to "*swearing and/or rudeness to customers*", but it was confirmed in oral evidence that no customers were present at any relevant time and that there was no swearing by the claimant. On the evidence, the claimant did not even direct anger at Mr Maguire (or at Mr Buckley who was also present). Moreover, this is not an allegation that was made in the respondent's response form.

137. The allegation of "*breach of confidentiality*" is also not made out as gross misconduct. The respondent has rather over-egged the pudding here. There were no trade secrets in what the claimant disclosed. There may have been some information that was commercially sensitive to a very limited extent, but no more than this. Mr Burton appears not even to have known how far away the Old School House was from the respondent's premises and to be almost completely ignorant of the nature of the Old School House's business and of the extent to which that business and the respondent actually competed in practice. The claimant did what she did genuinely believing that she was acting in the best interests of the Hotel, cementing the cooperative relationship the two businesses enjoyed. The potential issue with what the claimant did, so far as we are concerned, is that the job description she provided was a piece of intellectual property belonging to the respondent that the claimant was giving away for free to somebody else. But that is not something that the respondent has raised as a problem from its point of view. In any event, this issue – this alleged act of gross misconduct – is of very little significance in comparison with the other matters that we have already dealt with.

138. The final thing relied on by the respondent as gross misconduct, and the potentially most serious thing, is the claimant, without authorisation, allegedly giving members of her family free rooms and a discount on food worth, in total, over £400.

139. This is purely a factual issue. It is very finely balanced. There is strong evidence against the claimant: the fact that a £400+ apology is an unusually generous one; the fact that the claimant accounted for the discount on the respondent's system as a "*new promotion*" when it was no such thing; the failure of anyone to record it in the voids list, which clearly is a document on which this kind of thing is recorded, despite the claimant's evidence to the contrary (this is clear on the face of the list); the rumours that were apparently circulating around the time of dismissal about the claimant giving her family 'freebies'; the fact that it seems unlikely Mr Burton would have forgotten completely about authorising this very generous gesture of apology, and, if he had not forgotten, that it was improbable he would have raised it as an allegation of gross misconduct during and in relation to the claimant's appeal, to her face, in the way that he did; the fact that the claimant did not put forward any defence to the allegation during her appeal – indeed, so far as we are aware, the first time she provided any details of her defence was in her witness statement (the ET1 deals with this matter generally, without specifics).

140. However, it is possible Mr Burton could have forgotten about agreeing to give these free rooms and discount. He allegedly agreed to them in February or March 2017, several months before the issue was raised in connection with the claimant's appeal against dismissal. He has a number of businesses to concern himself with other than the Hotel. The claimant did not, so far as we can tell, seek to hide what she had done.

141. If we weigh up, on the one hand, the chances of Mr Burton having forgotten and, on the other, of the claimant, a woman of good character so far as we are aware, having done something criminal that potentially jeopardised her whole future career for the sake of a few hundred pounds, the respondent has failed to satisfy us that the claimant was guilty of doing anything that amounted to gross misconduct in this respect.

142. Nevertheless, for reasons we have already given, the respondent's defence to the wrongful dismissal complaint is unsuccessful, because the claimant was guilty of other things that did, cumulatively, breach the trust and confidence term at the time she was dismissed.

Summary

143. The respondent did not breach the duty to make reasonable adjustments in relation to the claimant.

144. The respondent did not treat the claimant unfavourably because of something arising in consequence of disability.

145. The claimant was not dismissed in breach of contract.

146. The claimant's victimisation claim has been withdrawn.

147. Accordingly, all of the claimant's claims are dismissed.

Employment Judge Camp

23 October 2018