



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

Mrs L Walker

v

CP Woburn (Operating Company)  
Limited

**Heard at:** Cambridge

**On:** 4, 5, 6 and 7 January 2021

**Before:** Employment Judge Ord

**Members:** Mr P Devonald and Mr B Smith

**Appearances For the Claimant:** In person **For the Respondent:** Mr  
Tariq Sadiq (Counsel)

## JUDGMENT

It is the unanimous decision of the Employment Tribunal, that the Claimant's complaints are not well founded and her claim is dismissed.

## REASONS

1. The Claimant was employed by the Respondent from 3 February 2014 until 21 August 2018 when her employment ended by way of resignation in circumstances in which the Claimant said amounted to a dismissal.
2. The Claimant was employed as an Assistant Housekeeping Supervisor (Linen) at the Respondent's Centre Parcs Holiday Village.
3. Following a period of Acas Early Conciliation from 21 August 2018 until 21 September 2018, the Claimant presented a claim form to the Tribunal on 28 September 2018 making allegations of disability discrimination, unfair dismissal and breach of contract (notice pay).

## The Issues

4. The issues to be determined by the Tribunal were established and set out at a Preliminary Hearing on 20 March 2019 before Employment Judge M Warren. Those issues were confirmed as those remaining to be determined by the Tribunal at this Hearing and they were as follows:
  - 4.1 Was the Claimant a disabled person in accordance with the Equality Act 2010 at all relevant times because of tendon inflammation in her right shoulder, finger strain, impinged nerves in her vertebrae and facet joints displacement in her back?
  - 4.2 Has the Respondent's subjected the Claimant to the following treatment amounting to direct discrimination in accordance with Section 13 of the Equality Act 2010:
    - 4.2.1 not inviting her to team building events in October and November 2017;
    - 4.2.2 not inviting her to a Assistant Team Supervisor meetings;
    - 4.2.3 appointing someone to take over her duties;
    - 4.2.4 subjecting her to a capability process in May 2018, without having followed its capability management procedure correctly in the first place;
    - 4.2.5 her Manager Matthew Vyse commenting to her in early March 2018, "*you could go back to doing whatever it is that you do*";
    - 4.2.6 by providing an outcome to her grievance of May 2018 that the capability procedure had been followed when it had not;
    - 4.2.7 refusing to send her copies of documents she had requested when off sick in July 2018 after a social media incident, informing her that the matter would be taken up on her return to work and indicating that a Capability Meeting would not now consider an Occupational Health report as had previously been arranged, but that instead, further steps would be taken in the capability process?
  - 4.3 If so, was that treatment "*less favourable treatment*", i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others in not materially different circumstances? The Claimant relies on hypothetical comparators.
  - 4.4 If so, was this because of the Claimant's disability?

Discrimination Arising from Disability – Equality Act 2010 (“EqA”) s.15

- 4.5 Were the Claimant’s duties changed for reasons arising from her disability?
- 4.6 If so, was she as a consequence subjected to the following unfavourable treatment:
- 4.6.1 not being invited to either Linen or Inventory Team building as she was in neither of those teams;
- 4.6.2 not being invited to Assistant Team Supervisor meetings;
- 4.6.3 someone else being appointed to take over her duties;
- 4.6.4 being subject to a capability process in May 2018; and
- 4.6.5 her Manager Matthew Vyse commenting to her in March 2018, *“you can go back to doing whatever it is that you do”* ?
- 4.7 Was the Claimant subject to a capability process as a consequence of something arising out of her disability?
- 4.8 If so, was she as a result subjected to the following unfavourable treatment:
- 4.8.1 the respondent not following its own procedure correctly; and
- 4.8.2 the Respondent incorrectly not upholding her grievance that the procedure had not been followed correctly?
- 4.9 If the capability process did arise out of the Claimant’s disability, could the grievance, which led to the alleged victimisation referred to below, which led to the Claimant being off sick, each be said also to arise out of her disability?
- 4.10 If so, was she as a consequence subjected to the following unfavourable treatment:
- 4.10.1 the Respondent refusing to send her copy documents related to the investigation into the social media incident;
- 4.10.2 informing her that matters would be taken up on her return; and
- 4.10.3 indicating that the Capability Meeting at which she was expecting to discuss a recent Occupational Health Report would now consider further steps in the capability process?
- 4.11 If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

- 4.12 Alternatively, has the Respondent shown that it did not know and could not reasonably have been expected to know, that the Claimant had the disability?

Indirect Disability Discrimination – EqA s.19

- 4.13 Did the Respondent have a provision, criterion or practice (“PCP”) in the form of a Capability Policy that made no allowance for people with a disability?
- 4.14 Did the Respondent apply the PCP to the Claimant at any relevant time?
- 4.15 Did the Respondent apply (or would the Respondent have applied) the PCP to people who are not disabled?
- 4.16 Did the PCP put disabled people at one or more particular disadvantage when compared with people who are not disabled, in that they would never, or would be less likely to be able to, satisfy the requirement to improve?
- 4.17 Did the PCP put the Claimant at that disadvantage at any relevant time?
- 4.18 If so, has the Respondent shown the PCP to be a proportionate means of achieving a legitimate aim?

Reasonable Adjustments – EqA s.20 and s.21

- 4.19 Did the Respondent know or could it reasonably have been expected to know the Claimant was a disabled person?
- 4.20 Did the Respondent have the PCP of requiring an Assistant Team Supervisor (Linen) to use a trailer to deliver clean linen and remove dirty linen?
- 4.21 Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that she was unable to use the trailer?
- 4.22 If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?

4.23 If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The burden of proof does not lie on the Claimant, however, it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows:

4.23.1 being given the role of Inventory on the same grade and doing the same hours as she had been doing as Assistant Team Supervisor (Linen);

4.23.2 being given a role in Customer Service, (presumably on the same grade and hours); or

4.23.3 being given the role of Assistant Team Supervisor (Inventory)?

4.24 If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

Victimisation – EqA s.27

4.25 Did the Claimant do a protected act and / or did the Respondent believe that the Claimant had done or might do a protected act, in that she complained of discrimination in her grievance of May 2018?

4.26 If so, was the Claimant subjected to the following alleged detriments:

4.26.1 being accused of a breach of the Respondent's Social Media Policy;

4.26.2 being subjected to a disciplinary action as a consequence;

4.26.3 being refused copies of documents requested relating to the disciplinary investigation whilst off sick in July 2018;

4.26.4 being informed that matters would be taken up on her return from sick leave; and

4.26.5 it being indicated to her that a planned meeting to discuss an Occupational Health Report would now be a further step in the capability process?

4.27 If so, was this because the Claimant did the alleged protected act and / or because the Respondent believed the claimant had done, or might do, a protected act?

Constructive Unfair Dismissal and Wrongful Dismissal

4.28 Was there a fundamental breach of the Contract of Employment. Did the Respondent breach the so called 'trust and confidence' term, i.e. did it, without reasonable and proper cause, conduct itself in a

manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant?

- 4.29 If so, did the Claimant affirm the Contract of Employment before resigning?
- 4.30 If not, did the Claimant resign in response to the Respondent's conduct; to put it another way, was it any reason for the Claimant's resignation, it need not be the reason for the resignation? If the Claimant was dismissed, she will necessarily have been wrongfully dismissed because she resigned without notice.
- 4.31 The conduct the Claimant relies on as breaching the term of trust and confidence is the alleged acts of discrimination referred to above.
- 4.32 If the Claimant was dismissed, what was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? If so, was the dismissal fair or unfair in accordance with s.98(4) ERA and in particular, did the Respondent in all respects act within the so called 'band of reasonable responses'?

### **The Hearing**

5. The Claimant gave evidence and called two additional witnesses; namely Celia Lai and Wendy Wain.
6. On behalf of the Respondent evidence was given by Matthew Vyse and Diane Packer. A signed statement from Hannah Delahunt was submitted to the Tribunal, but Ms Delahunt did not attend the Hearing and was not cross examined on her statement and therefore we give that evidence an appropriately lower level of weight.
7. Reference was made to a substantial bundle of documents.

### **The Facts**

Based on the evidence before us we have made the following findings of fact:

8. The claimant began work with the Respondent on 3 February 2014 and at an early stage in her employment she attended an Induction Training Course.
9. Ms Packer told us that as part of employee induction, employees are informed about the Respondent's Intranet to which all employees have

access and through which they can access such items as reduced rate holidays, day visits and through which they access the Respondent's Human Resources policy documents. We accept that evidence which was not challenged, save that the Claimant pointed out that there was no proof that she had been so advised.

10. The Claimant's Contract of Employment to which she directed us states that access to the Company's range of policies and procedures can be obtained "*through your HR department or by accessing the Intranet*".
11. On the balance of probabilities we are satisfied that the existence of the Intranet and how to access it, was brought to the Claimant's attention.
12. The Claimant worked 10.5 hours per week, working on Monday and Friday.
13. The Claimant's employment proceeded without incident, including her receiving an excellent appraisal in March 2017, until she began a period of sickness absence of 30 June 2017 as a result of low back pain.
14. The Claimant returned to work on 25 August 2017 on light duties which according to the Return to Work Interview Record signed by the Claimant on 28 August 2017, were to last until the Claimant's Doctor's appointment on 5 September 2017.
15. The Claimant had recovered from her lower back pain sufficiently well to enable her to complete the Great North Run half marathon on 10 September 2017. She was seen by the Respondent's Consultant Occupational Physician Dr Edwards on 28 September 2017. This appointment had been arranged as a result of the Claimant's earlier absence and Dr Edwards' reported that the Claimant had a history of low back pain which had receded and was not causing difficulty either inside or outside work. He reported that the Claimant had a different type of low back discomfort following physiotherapy which was being further investigated.
16. Dr Edwards reported that the Claimant had developed right shoulder pain and pain over a joint in the right index finger; the shoulder pain being present after the Claimant returned from what Dr Edwards described as "*a summer absence*". Dr Edwards had noted that the Claimant was of small stature and had to stretch above shoulder height to lift heavy piles of linen.
17. The Doctor's opinion was that as a result of stretching above shoulder height to lift piles of linen, the Claimant had provoked a tendon inflammation and strain within the right shoulder and a strain of the joint within the right index finger. He said it would be in the Claimant's best interests to be redeployed to a different role as continuing her current activities would aggravate matters further.

18. He did not, however, give any opinion on the likely prognosis, whether the shoulder injury was likely to persist or recover with the change of duties and did not consider whether the Claimant might be disabled within the meaning of the Equality Act 2010.
19. The Claimant was thereafter placed on light duties and was not working in her contractual role. The Claimant described being given a set of various undefined duties without any clear role at the start of each shift. She said it was quite common for staff in the Linen Department to have health issues and they would be moved to the Inventory Department.
20. On 27 October 2017, the Claimant attended a review meeting, details of which are recorded in a typed note taken by Ms Mullan. According to that note the Claimant accepted that she was unable to work in her previous role because of her shoulder injury, whilst carrying out inventory and office work, was still able to do lifting and moving and had been doing light duties since the Occupational Health appointment. The Claimant had applied for a Team Member position in Inventory and had been offered the role but had turned it down because the pay was lower than in her previous role (£7.56 per hour rather than £8.00). During the course of the Hearing it became apparent that the role also was for one hour per week less than the Claimant's previous job.
21. Whilst carrying out her light duties, the Claimant was protected both as to hours and pay.
22. Under the Respondent's Light Duties Policy, when employees are unable to carry out the full remit of their role a temporary adjustment to duties can be made. But it is said that it is unlikely that the Company could sustain supporting an employee covered by the above on light duties for a period longer than 12 consecutive weeks. It was said that if further medical advice indicated an employee had no prospect of returning to full capacity in their contractual role, discussions would begin to review the options available which may include discussion about termination of employment on the ground of capability. Any formal meeting would take place within the framework of the Company Capability Policy.
23. The Company's Capability Policy has three stages. Level 1 is informal counselling which can lead to a verbal warning (against which an employee can appeal); Level 2 is a formal review stage; and Level 3, described as "*final action*" involves transfer, demotion to a more suitable position, or dismissal.
24. Under the Capability Policy, at any stage of the procedure, if it becomes evident that performance difficulties are likely to be due to a disability covered by the Equality Act 2010, steps must follow in accordance with the Company Management of Disability Policy.



25. Under the Management of Disability Policy, the duty to make reasonable adjustments is set out with the aim of the Policy being to provide guidelines to provide protection to existing and potential employees against discrimination on the ground of disability.
26. On 28 October 2017, the Claimant emailed Ms Mullan and requested, as she had done at the meeting the day before, to move to the Inventory role on a preserved salary (and presumably the hours).
27. On 20 November 2017, a Light Duty Monitoring meeting took place. The Claimant was said to still be unable to complete a linen run in relation to both delivery and collection, which is the main part of the role and that she was at that time staying back at the base to assist Stores and Inventory. The agreed actions were to continue to monitor the Claimant's injury, to consider redeployment of the Claimant and for her to update the Respondent on any roles for which she applied.
28. The Claimant says she was not invited to Team Building events and Assistant Supervisor Meetings on 10 November 2017. At that time she was not working as an Assistant Supervisor. The Claimant was not clear about the Team Building event in question, but Mr Vyse advised us that a sign up sheet was placed on a notice board which anyone could sign if they wished to participate in either Laser Clay Target Shooting and Laser Combat. The Claimant denied seeing any such list, but we accept Mr Vyse's evidence which was otherwise unchallenged.
29. In relation to the Supervisor Meeting, Mr Vyse referred to an occasion when everyone who was working on a particular day was gathered together in a room, it was noticed that the Claimant was not present, therefore someone went out to her to bring her into the meeting. That evidence was also unchallenged.
30. As the Claimant was carrying out different duties to those of her contractual role, another employee, Michelle Ellaway, was allocated some (on the Respondent's case) or all (on the Claimant's case) of the Claimant's previous duties. As the Claimant was unable to carry out these duties, we find as a fact that such reallocation was both inevitable and necessary to ensure the continued smooth operation of the Respondent's business.
31. On 1 December 2017, the Claimant received a copy of the Respondent's Social Media Re-brief document.
32. On 4 December 2017, the Claimant attended a Light Duties Monitoring Meeting where there was no reported change in her condition and where she advised she was waiting for a referral for physiotherapy from her treating hospital.

33. A further Light Duties Monitoring Meeting was held on 5 January 2018. The Claimant reported that her shoulder and back condition had improved but was not fully repaired and that the improvement was due to resting and not carrying out the delivery or collection duties which caused her difficulties.
34. The Claimant said she was lifting and moving items whilst adhering to manual handling guidelines and that she had not seen anything within the Respondent's job vacancies which met her particular requirements (hours of work and rate of pay) and therefore had not applied for any alternative roles, but she would like to take on more responsibilities in other areas of the department, including the Office, Lost Property and Inventory.
35. The next Light Duties Monitoring Meeting was held on 19 January 2018. Again there was no change recorded in the Claimant's condition, she had not applied for any roles, had helped in the Lost Property Department that day and had spent previous weeks supporting inventory. It is noted that there were no roles available at the rate of pay the Claimant received in her contractual role and which she was continuing to receive during the period of alternative or light duties.
36. The Claimant alleged that some time in March 2018, on a date which she could not recall, Mr Vyse said to her that,

*"you can go back to doing whatever it is you do".*

Mr Vyse does not recall this conversation which the Claimant says took place after the distribution of appropriate inventory to the Inventory Checkers who were out on site (something which she described as being part of work on a specific project which had been ongoing over the course of the last few weeks or months). She says that at the end of the project, she drove Mr Vyse and the rest of the team back to the yard in a minibus and as they were walking away he said to the rest of the team,

*"you can all go back to work".*

And to the Claimant,

*"and you can go back to whatever it is you do"*

Which the Claimant said she found offensive, demeaning and hurtful.

37. We are not satisfied on the balance of probabilities that this comment was made. The events around the making of the comment which the Claimant attributes to Mr Vyse appeared for the first time in the Claimant's witness statement. There was no contemporaneous complaint and the first time the Claimant raised this issue at all was when she lodged a formal grievance on 17 May 2018. The context of a *"specific project"* and the comments

allegedly made to the other members of the team in contrast to that alleged to have been made to the Claimant were not mentioned at all in the grievance letter of 17 May 2018. In that letter the Claimant did not say she found the comment offensive, demeaning or hurtful, but in fact said she ignored it and continued to work in what she described as a professional and conscientious manner.

38. Weighing all these matters in the balance, the Claimant has not satisfied us on the balance of probabilities that the alleged comment to “*go back to whatever it is that you do*” was made.
39. On 2 April 2018, there was a further Light Duties Monitoring Meeting. Again there was no change in the Claimant’s condition and she had not applied for any roles. There were roles available in the Guest Services on different days and hours to those which the Claimant worked. The Claimant said she would be interested in working in Guest Services, but only on the same shifts as she was currently working. Janet Filler, the Manager conducting the meeting, said she would enquire to see whether there was any flexibility in those roles.
40. On 11 April 2018, the Claimant was invited to a Welfare Meeting to discuss her then current condition to see whether she could be supported to return to her full duties. That meeting was held on 16 April 2018.
41. Typed notes of that meeting are in the Bundle, having been prepared by Ms Delahunt. The Claimant criticises these meeting notes and others as being inaccurate. It is correct that they were not sent to her contemporaneously for checking. However, at no stage has the Claimant condescended to particularise where she says the notes are inaccurate.
42. According to those notes, the Claimant was told that the meeting was an informal one to discuss her current medical condition and treatment and see whether her condition was permanent or temporary. The Claimant said she had been looking at “*Job Spot*” – the Respondent’s internal vacancy list – but had not found a role that suited her hours or her rate of pay.
43. When the Claimant was asked what her General Practitioner had advised and whether the Claimant had been given any, and if so what, exercises to assist with her recovery, she said that she had not seen her General Practitioner about this matter, but that the Occupational Health Doctor had diagnosed Repetitive Strain Injury (RSI) which was permanent.
44. In fact at this stage, the only Report from Occupational Health was that dated 28 September 2017. In that Report Dr Edwards did not indicate whether the Claimant’s condition was temporary or permanent and there was no diagnosis of Repetitive Strain Injury.

45. The Claimant was asked whether she would consider other roles on the Village and she said that she would like to remain in Housekeeping (Linen) as an Assistant Supervisor for Inventory. Ms Delahunt understood the Claimant's frustration and said there would be a further update the following week.
46. According to the Claimant's witness statement, she did not consider herself to be on light duties, rather that she was doing alternative duties. She continued to carry out those various duties. On 27 April 2018 Ms Delahunt told the Claimant that a meeting would take place *"in the next couple of weeks"* to look at next steps.
47. On the same day Ms Delahunt sought to arrange a meeting with Mr Vyse and Ms Filler and on 1 May 2018 they indicated that they would be available for a meeting on 4 May 2018. No notes for any such meeting have been produced.
48. On 7 May 2018, Ms Delahunt drafted a letter for checking by Ms Packer inviting the Claimant to a formal meeting which was a Long Term Absence Review Meeting. Ms Delahunt asked for guidance from Ms Packer because she had mistakenly considered the Claimant to still have a long term absence (i.e. absence from her contractual role). Subsequently that letter was redrafted and on 14 May 2018 the Claimant was invited to a Capability Meeting to be held that Friday. The meeting was said to be held under the Company's Formal Capability Procedure, the purpose being to discuss the Claimant's ability to complete tasks within her then current role, reasonable adjustments to the role, relocation or transfer to an alternative suitable role and to consider GP / Occupational Health recommendations. The invitation confirmed that during the meeting the Respondent would review actions already taken and any suggestions or options to enable the Claimant to continue in employment at Centre Parcs. She was advised of her right to be accompanied and was advised that if she was unable to work in her contractual role and there was no alternative suitable employment available, or possible modifications to be made to enable her to work in her current role, then there may have to be discussions regarding possible termination of employment. The meeting was to be Chaired by Mr Vyse.
49. On the same day, the Claimant provided details of her Trade Union Representative who would be accompanying her at the meeting. The Respondent asked for that Union Representative's number so that credentials could be checked with the relevant Union. The Representative was unable to supply a copy of the relevant certification. The Claimant was sent, at her request, a copy of the Disability Policy. The Claimant replied on 18 May 2018 saying that because of Data Protection the Trade Union would only confirm the service credentials over the telephone whilst Ms Herbert was present.

50. At 11:55pm on 17 May 2018, the Claimant submitted, by email, a Grievance against Mr Vyse. At 08:50am on 18 May 2018, Ms Delahunt emailed the Claimant to say that as the Grievance had been raised against Mr Vyse that day's meeting would be rescheduled to be held at a later date with a different Manager.
51. Notwithstanding the fact that the Claimant had asked for the matter to be heard by a different Manager when she raised her Grievance, the Claimant did not apparently check her emails on the morning of 18 May 2018 because she attended the Respondent's premises for the Capability Meeting. Although it was not necessary for her to do so to gain access to the Village, or to attend the meeting, she sought to register her presence through a swipe card (as she is a registered provider of First Aid whilst at work). The card did not function when she presented it and the record of the card usage reads, "*warning card has not been completely updated*". This record is provided by an external technology provider.
52. In her submissions, the Claimant said she took this to be evidence that the Respondent had already determined to dismiss her at the meeting on 18 May 2018. We reject that submission. The Respondent had already written to the Claimant, by email, postponing the meeting and the allegation was not put to the Respondent's witnesses.
53. The Claimant attended a Grievance Hearing on 25 May 2018. The Grievance against Mr Vyse was Chaired by the Deputy of Leisure Manager Mr Adam McDonnell who was assisted by Ms Diane Packer as a note taker. The Claimant was represented by a fellow Team member Ms Lai.
54. The Claimant makes no complaint that the Grievance Meeting or the Grievance Investigation was in any way inappropriate or inadequate, but complains about the Grievance outcome.
55. The outcome was sent to the Claimant by first class post / recorded delivery and email on 8 June 2018. The Grievance was not upheld. There were five parts to the Grievance.
56. First, the Claimant raised a complaint about the Inventory job saying that had she accepted it she would have been demoted and had a deduction in wages and hours through no fault of her own. She says she rejected the offer because of its,

*"unsuitable terms and conditions for my personal circumstances"*.

Mr McDonnell was satisfied that the Company's Light Duties Policy had been correctly followed; the Policy stating that,

*“when on restricted duties pay in the first instance remains the same. However, should the period of time that the employee continues to require support exceed that which is deemed reasonable given the nature of incapacity, the Company reserves the right to review and if necessary reduce pay in cases where there is a substantial difference in duties being carried out”.*

57. Mr McDonnell said that he had also reviewed information given about other employees and confirmed that a consistent approach had been taken.

58. Secondly, the Claimant complained that she had been treated with apathy and disdain by Mr Vyse from 2017 onwards, which she describes as a number of small incidents. She felt that Mr Vyse’s tone was dismissive and referred to the alleged comment that the Claimant should

*“go back to whatever it is [she] did”.*

59. Mr McDonnell noted that the matter had not been reported to the Management or Human Resources and there were no witnesses to any of the events. He said that the alleged specific comment having been made many weeks ago could not be investigated fairly due to the passage of time. The Claimant was advised by Mr McDonnell that if she was treated unfairly or required support, she should refer to him or the Human Resources Team immediately.

60. Thirdly, the Claimant raised a complaint about the Assistant Supervisor Meetings and the fact that she was not invited to them and was only made aware of them at the last minute. Mr McDonnell said that on investigation it was normal practice for the Linen Supervisors to inform Assistant Supervisors on a Friday change over that a meeting was to be held the following Monday and that having spoken to Mr Vyse, he could confirm that any future meetings would be communicated to the Claimant and she would be welcome to attend.

61. Fourthly, the Claimant had raised complaints that an email sent to Ms Mullan in December 2017 had not been replied to. Mr McDonnell reported that that person had left the business in October 2017 which was why no response had been received, but had spoken to the HR Team who apologised that the email was not picked up by another member of the Team.

62. Fifthly, the Claimant complained that the capability process had not been followed and she had received unfair treatment. In particular, she said there was no investigation prior to the formal Capability Meeting and the letter calling the meeting refers to,

*“our recent discussions on your performance of your duties”*

But there had been no meeting with Mr Vyse to discuss this. Mr McDonnell referred the Claimant to the informal meetings and reviews on 27 October 2017 and 16 April 2018 as well as the Light Duty Meetings on 20 November 2017 and 4 December 2017 and again on 5 and 19 January 2018.

63. The Claimant also complained that the invitation to the first formal Capability Meeting was intimidating, directly bullying and upsetting. Mr McDonnell confirmed that the letter was a template letter, not written to cause any distress and the agenda of current medical condition, review of the current role, discussion of reasonable adjustments and consideration of suitable roles within the Company was a reasonable one.
64. The Claimant alleged there had been no offer to redeploy her and no clear communication. She said that a reasonable adjustment would have been to move her to another role on the same terms and conditions as that of the Assistant Supervisor. Mr McDonnell noted that the offer in September 2017 of a move to an Inventory Tracker role which the Claimant had declined as a demotion, came with a reduced hours and a reduced hourly rate of pay, Mr McDonnell considered the Housekeeping Team had already made reasonable adjustments by removing her from the Assistant Supervisor Role as recommended by Dr Edwards on 28 September 2017, although she had not been found a specific role.
65. Mr McDonnell noted that in each of the Light Duty Meetings, redeployment had been discussed.
66. On 20 November 2017, the Claimant was to update the Respondent on roles applied for, on 4 December 2017 no roles had been applied for, on 5 January 2018 there was said to have been nothing on the jobs page which fulfilled the Claimant's requirements and on 19 June 2018 there were no jobs advertised at the rate of pay which the Claimant was already receiving. Mr McDonnell said that given the Claimant's injury, the Respondent had accommodated her by giving her light duties since September 2017 and that the Light Duty Meetings were intended to see if there was progress in the Claimant's condition and whether the Claimant could return to full duties or be supported in any job application.
67. The final element of the Claimant's Grievance was to request that Mr Vyse no longer dealt with the capability process. Mr McDonnell confirmed that Sarah Vine, Deputy Accommodation Services and Housekeeping Manager, would be at any future capability meetings. The Claimant's Grievance was not upheld and she was advised of the right to appeal.
68. On 29 May 2018 Ms Delahunt, referring to discussions on the previous day, advised that the Respondent wished to obtain a further report from Occupational Health as the last report was dated September 2017. As the Doctor was currently on holiday, Ms Delahunt said she would advise the Claimant once she had a further date for an appointment.

69. On 6 June 2018, Ms Delahunt confirmed the date of the next appointment at the Occupational Health Clinic as being on Thursday 21 May 2018. The 21 May had already passed and was not a Thursday. This was clearly a typographical error for 21 June 2018 which Ms Delahunt repeated in her email of 11 June 2018 confirming the time of the appointment at 9am, but again referring to 21 May instead of 21 June.
70. In her reply of 13 June 2018, the Claimant said she assumed the appointment was 21 June 2018 and not May, but also questioned why the Respondent wanted a further Occupational Health Report. Sarah Vine replied on 15 June 2018 saying that the request for an Occupational Health report was in the absence of any medical advice from the Claimant's own GP and, given the length of time since the last report, the Respondent wished to understand the Claimant's current condition, *"to ensure that we are supporting [her]"*. The Claimant was advised that she had the option to review the outcome letter from the Occupational Health Doctor before it was submitted to the Company.
71. The Claimant then appealed against the Grievance Outcome by a letter dated 14 June 2018 and began by referring to the fact that whilst the notes would not be verbatim, she had not been sent a copy as requested to check over and verify before they were finalised. She said several matters discussed had not been addressed and that she would list them as part of her Appeal.
72. The Grievance Appeal was conducted by Wayne Hawkins, the Leisure Services Manager. The Claimant attended with another member of the Linen Team, Sharon Scott. Employee Relations Advisor Yvonne Noble attended as note taker. Again, no complaint is made about the conduct of the meeting, the Claimant objects to the outcome. The Hearing on 25 June 2018 was adjourned, part heard, to enable Mr Hawkins to make further enquiries or conduct investigations and on 9 June 2018 he wrote to the Claimant seeking to have the Hearing re-start on 16 July 2018.
73. The Housekeeping Team within the Respondent operates a closed Facebook page called *"Purple is the new white"*. On July 2018, the Claimant made a post on that page stating,
- "if anyone is interested Chris and Kem are currently in 110. Their Instagram story is very funny."*
74. The two individuals referred to are celebrity individuals due to the appearance of one or both of them on the television series 'Love Island'.
75. This post was reported by Matt Fletcher, another member of the Housekeeping Team. He had commented on the Claimant's Facebook status saying that she should not post where individuals were staying as



that broke the Privacy Code. He said that Monique Ranger, another colleague agreed with him and he informed his Supervisor Kelly Suckling about the post.

76. On the basis of the investigation into this matter we have seen, Kelly Suckling approached Fiona O'Leary (Assistant Head of Department at Woodlands), showed the Facebook post to her and at Ms O'Leary's request provided a screenshot of the post. Ms O'Leary then contacted Carol Thompson an administrator of the Facebook page and asked her to remove the post which she did. According to Ms O'Leary, the post had been on the page for approximately 50 minutes before it was removed. She then reported the matter which led to an investigation conducted by Ms Picariello. Kelly Suckling confirmed those events, as did Ms Thompson who confirmed that she had deleted the post but could not recall its contents. The Claimant apparently later asked why it had been removed and was told probably because she had put the lodge number in the post and whilst the Claimant said that guests had put the lodge number on their Instagram account, we have seen no evidence of this.
77. The Claimant was interviewed about this matter on 20 July 2018. She said the individuals had posted an Instagram video about their stay at Centre Parcs so that it was in the public domain. She thought the staff may be interested in the video so she posted it on a closed Housekeeping Group for anyone to take a look at. She could not remember what specifically she had posted, but would not have posted anything the individuals had not posted themselves. She said she had not seen comments from the two members of staff saying that there was a breach of Company rules, did not take the post down, did not who had taken it down and could not remember the re-brief on Social Media Policy in November 2017. She asked for a hard copy of the Policy and a signed sheet to confirm her attendance at the re-brief which was given to her. The Claimant was told by Ms Picariello that the Centre Parc rules do not allow the posting of personal information about a guest regardless of their status and for that reason she recommended that the Claimant should be referred for disciplinary action.
78. Whilst this investigation was continuing, the Claimant received notification that her Grievance Appeal had been dismissed (letter of 17 July 2018). Mr Hawkins said that the reason why the Grievance Appeal was rejected were that first there had been at least seven meetings between 28 August 2017 and 16 April 2018 discussing the Claimant's capability to carry out her contracted role. Further, that whilst a meeting, or meetings, might have been labelled as informal capability meetings, all of them were to discuss the Claimant's capability for carrying out her role and that at six of those meetings alternative job roles and the use of 'Job Spot' was discussed. Further, at the meeting on 16 April 2018, the Claimant had said she could not carry out her contracted role and was advised that the next steps would be considered. Mr Hawkins confirmed that the next step was to progress the issues under the formal capability process and that he was satisfied that

the correct procedure had been followed. The letter sent to her by Mr Vyse on 14 May 2018 was a standard template letter. The Claimant was advised of her right of further appeal which, it was said, must be based on new evidence on different grounds to the first Appeal.

79. On 20 July 2018, following the Claimant's interview regarding the social media posting, she began a period of sickness absence from work. The fit note she submitted after a period of self-certification said she was unfit for four weeks from 26 July 2018 to 22 August 2018 due to stress at work.
80. On 23 July 2018, the Claimant submitted a second Appeal against the findings of the Grievance. That was acknowledged on 24 July 2018. In her second Appeal she said that the whole situation was making her *"thoroughly ill and anxious"*. She said she did not wish to attend the Hearing and asked that the Appeal could be investigated and concluded without further representation by her. The Deputy General Manager, acknowledged receipt of the letter on 24 July 2018 and proposed a meeting be held off site in the hope that would be less stressful for the Claimant, although it would still be held under the terms of the grievance procedure with the Claimant having the right to be accompanied. The Claimant was asked to telephone Diane Packer or Yvonne Noble to discuss whether she would like to meet, or to confirm that Mr Carpenter should start investigation, if so, it was hoped that a decision would be with her within 10 calendar days.
81. On 1 August 2018, the Respondent through Diane Packer wrote to the Claimant confirming receipt of the fit note and stating that as there were a number of processes taking place at the same time, (the second Grievance Appeal, a Capability Meeting to support the Claimant back into her role as Housekeeping Assistant Team Leader in Linen and an investigation into her social media usage), and as the Claimant was absent from work through stress, the Company would not continue with any of those processes or provide any information to her until she returned to work giving the reason for her absence. Ms Packer said that *"we do realise this is a difficult time for you and your welfare is our priority"* and gave the Claimant a direct telephone number to contact in the event of her having any questions.
82. Mr Carpenter had received no reply to his letter of 24 July 2018 and therefore wrote to the Claimant again on 15 August 2018 saying that if the Claimant did not wish to meet with him and did not confirm the position by 22 August 2018 he would commence his investigation based on the Appeal document only.
83. In the meantime, the Claimant had written to the Head Office of Centre Parcs (according to the Respondent, and not challenged, a wholly different corporate entity to the Respondent business) raising a *"Formal Grievance against the Company"* for failing to provide a safe place of work, failing to provide reasonable adjustments, the operation of the Capability Policy and Procedure, her Grievance and a failure to provide information under a

Subject Access Request. She also alleged victimisation and a breach of contract. Mr Carpenter had reminded the Claimant that the second Appeal to him was the highest level to which a grievance might be brought and that a decision at that stage was final.

84. The Claimant replied to the letter of 1 August 2018 from Diane Packer on 3 August 2018, saying that it was the lack of communication and clarity of process in the way that the Respondent acted or failed to act on its own policies that was causing her stress and therefore repeated her request for documents or policies to be given to her following the investigation with Ms Picariello and stated that a failure to send those documents added to her stress.
85. On 21 August 2018, the Claimant resigned, without notice.
86. It is against that factual background that the Claimant brings her claims.

### **The Law**

87. Under Section 94 of the Employment Rights Act 1996 (“ERA”), every employee has the right not to be unfairly dismissed.
88. Under Section 95(1)(c) ERA, an employee is dismissed by his employer if they terminate their contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer’s conduct.
89. In the event of a employee being dismissed, it is for the Respondent to show a potentially fair reason for that dismissal in accordance with Section 98(1) and (2) of the ERA.
90. If such a reason is shown, then under Section 98(4) the determination of the question of whether the dismissal is fair or unfair (having regard to the reasons shown) depends on whether in the circumstances, including the size and administrative resources of the employer’s undertaking, the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.
91. Under the Equality Act 2010 (“EqA”), Section 4, disability is a protected characteristic.

92. Under Section 6 EqA, a person has a disability if they have a physical or mental impairment and that impairment has a substantial and long term adverse effect on their ability to carry out normal day to day activities.
93. Under Section 13 EqA, a person discriminates against another if because of a protected characteristic they treat that person less favourably than they treat or would treat others.
94. Under Section 15 EqA, a person discriminates against a disabled person if they treat that person unfavourably because of something arising in consequence of the disability and it cannot be shown that that treatment is a proportionate means of achieving a legitimate aim.
95. Under Section 19 EqA, a person discriminates against another if they apply to that person a provision, criterion or practice which is discriminatory in relation to a protected characteristic of that person. Under sub-section (2), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic if a person applies, or would apply it to persons with whom the disabled person does not share the characteristic, it puts or would put persons with whom that person shares a characteristic at a particular disadvantage when compared with persons who do not share it, it puts or would put the individual at a disadvantage and it cannot be shown that the PCP is a proportionate means of achieving a legitimate aim.
96. Under Section 20 EqA, where a provision, criterion or practice of an employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage.
97. Under Section 27 of the Equality Act 2010, a person victimises another if they subject that person to a detriment because they do or it is believed that they have done or may do a protected act. Under sub-section (2) it is a protected act to bring proceedings under the Equality Act 2010, give evidence or information in connection with proceedings under the Act, do any other thing for the purposes of or in connection with the Act, or make an allegation (whether or not express) that another person has contravened the Act.
98. In the seminal case of Western Excavating (ECC) Limited v Sharp [1978] ICR 221, the Court of Appeal ruled that an employer's conduct which gives rise to a constructive dismissal must involve a repudiatory breach of contract. The employee must establish that there was a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

99. As established in Savoia v Chiltern Herb Farms Limited [1982] IRLR 166 CA, a constructive dismissal is not necessarily an unfair one.
100. A course of conduct can accumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a “*last straw*” incident even though the last straw by itself does not amount to a breach of contract (Lewis v Motorworld Garages Limited [1986] ICR 157).
101. However, the last straw may not be an entirely innocuous act on the part of the employer. It does not have to be of the same character as the earlier acts, nor must it constitute an unreasonable or blameworthy conduct, but must contribute however slightly to the breach of the implied term of trust and confidence (Omilaju v Waltham Forest London Borough Council [2005] ICR 481).

## Conclusions

102. Applying the facts found to the relevant Law, we have reached the following conclusions and set them out in relation to the issues before us, in the same sequence as they were set out as the issues in this case.

### “Was the Claimant a disabled person?”

103. The Claimant was a disabled person as a result of the injury to her right shoulder. On the basis of the evidence before us, none of the other conditions referred to have led to the Claimant being disabled within the meaning of the Act. We have heard no evidence regarding difficulties with the Claimant’s finger, or in relation to her back. There is no medical evidence to support the Claimant’s view that either of those are disabling conditions. The Occupational Health Report of 28 September 2017 described the lower back pain as having receded and not causing any difficulties either inside or outside of work, with a Report of “*a different type*” of lower back pain following physiotherapy which was further investigated. The second Report from the Occupational Health Doctor stated that the shoulder problem had persisted since Easter 2017 and was unable to predict how much longer it would continue, but that any improvements in symptoms might be temporary if the Claimant was expected to return to undertake the specific duties of her substantive post which he believed had caused the shoulder problems in the first instance. He noted no medical treatment was being given at the time. The Claimant reported, and we accept, that she had difficulty in carrying out activities which required her to

have her hand above shoulder height. In an unchallenged part of the Claimant's witness statement set out difficulties which she had in carrying out normal day to day activities as a result.

104. We are satisfied on the basis of the evidence that by 21 June 2018, the Claimant satisfied the definition of disability within Section 6 of the Equality Act 2010 and by that date the Respondent had actual, or imputed, knowledge of that disability.
105. The minority view of Tribunal is that the Respondent had imputed knowledge of disability from receipt of the initial Occupational Health Report on 20 September 2017, on the basis of the view that it would be in the Claimant's best interest to be redeployed to a different role; continuing her then current activity would aggravate her shoulder injury further. The minority view was that that should have alerted the Respondent to the likelihood of the Claimant being disabled within the meaning of Section 6 of the Equality Act 2010. The recommendation did not say it was a temporary redeployment and it was not suggested that the Claimant's condition would recover.
106. The majority view of the Tribunal, however, is that it was not until the Claimant had been on light duties for a period of time and when the Respondent obtained a further Occupational Health Report on 21 June 2018, that they could reasonably be on notice that the Claimant's condition was likely to persist and to last for more than 12 months. On the majority basis we find that it was on receipt of that second Occupational Health Report that it became apparent for the first time that the Claimant's condition would not improve and was likely to persist for 12 months or more. Accordingly, the majority view of the Tribunal is that the Claimant is disabled and the Respondent had actual or imputed knowledge of the disability from 21 June 2018 onwards.
107. In the light of our other findings, however, the difference between the majority and minority view of the Tribunal on this point is of academic concern only.

Direct Discrimination because of Disability – Equality Act 2010, Section 13

108. Under Section 13 of the Equality Act 2010:
  - 108.1 Not inviting the Claimant to Team building events in October and November 2017; and
  - 108.2 Not inviting the Claimant to Assistant Team Supervisor meetings -

We deal with these two matters together. The Claimant did not raise any complaint about these issues until her Grievance on 17 May 2018, which was raised after she had been invited to the Capability Meeting. Based on the evidence before us, we conclude that the Team Building meetings were organised by people placing their names on a sheet if they wished to attend and that the Claimant did not do so. The Claimant accepted that Assistant Team Supervisor Meetings were held ad hoc and she did not identify any single meeting by date, or approximate date, that she was not invited to. In any event, she was not at the time working in the role of Assistant Team Supervisor. There is no evidence that the hypothetical comparator who failed to put their name on the sign up sheet, or a hypothetical comparator who was no longer working in the role of Assistant Team Supervisor would have been treated differently to the way that the Claimant was treated and therefore these two complaints fail on their facts. No one was "*invited*" to Team Building events, they put their names forward for attendance and no one who was not working as an Assistant Team Supervisor would have been invited to those meetings.

108.3 Appointing someone to take over the Claimant's duties -

As the Claimant was not carrying out those duties, it was inevitable that another person would be required to undertake them. There was no complaint made by the

Claimant about this at the relevant time and as the Claimant could not carry out the work, the work had to be done. The Claimant was not treated less favourably than a non-disabled person in her position would have been treated. Had a nondisabled person ceased to carry out the duties of an Assistant Team Supervisor, another person would have been appointed to carry out those duties.

108.4 Subjecting the Claimant to a capability process in May 2018 without having followed the Capability Management Procedure correctly in the first place -

This claim is not made out on its facts. The Claimant has looked only at the capability process and has failed to take into account the terms of the Light Duties Policy. Under that policy when employees are unable to carry out the full remit of their role due to health reasons and have requested a temporary adjustment to their duties, the Light Duties Policy and procedure takes effect. At the time, the Claimant began light duties it was anticipated by the Respondent that this would be a temporary measure. The anticipated length of time in which someone will be dealt with

under the Light Duties Policy is not more than 12 weeks, but the Policy envisages the longer period to support an employee covered by the Equality Act 2010 and the number of weeks can vary depending on the individual circumstances and the role being carried out.

Under the Policy there are to be regular reviews and the Claimant had reviews on 20 November 2017, 4 December 2017, 5 January 2018 and 2 April 2018.

Further, the Policy states that if the employee has no prospect of returning to full capacity in their contracted role, then formal discussions would begin to review the options available to the employee at the time, which might include redeployment to other areas, but also may include discussions about termination of employment on the grounds of capability. Those formal meetings were to take place within the framework of the Company's Capability Policy.

Under the Capability Policy, a formal review takes place at Capability Level 2 and it was at this stage that the Claimant was brought in to the Capability Policy. The Respondent followed the process correctly by first using the Light Duties Policy and then moving to the formal stage of the Capability Policy. A non-disabled employee who had exhausted the period of light duties envisaged under the Policy, or who was unable to return to their full contractual role, would have been treated in exactly the same way. The premise of the Claimant's complaint, that the procedure had not been followed correctly, is false.

108.5 The Claimant's Manager Matthew Vyse commenting to her in early March 2018 that, "*you can go back to whatever it is you do*" -

We have found that on the balance of probabilities this statement was not made.

108.6 In an outcome to the Claimant's Grievance in May 2018 that the capability procedure had been followed when it had not -

We have already found that the capability procedure (in team with the Light Duties Policy) had been properly followed. In so far as there is any difference between this allegation and the allegation at 108.4 above, the Claimant has not established that the Respondent had failed to follow the appropriate procedures and has failed to establish that any hypothetical comparator would have been treated differently.



108.7 Refusing to send the Claimant copies of documents she had requested whilst off sick in July 2018 after the social media incident, informing her that the matter would be taken up upon her return to work and indicating that the Capability Meeting would not now consider an Occupational Health Report as had previously been arranged but instead further steps would be taken in the capability process –

A number of documents were sent to the Claimant at her request, including Policies and Procedures before she was absent from work through stress. On 17 May 2017, the Capability Policy and Disability Policy were sent. On 23 May 2017, she was sent the Equality and Diversity Policy and another copy of the Disability Policy, as well as the Light Duties Policy (in reply to a request for a copy of a 'Redeployment Policy' which did not exist). The Claimant had access to all Policies and other relevant documents through the Respondent's Intranet. We have found that the Claimant was aware of the Intranet, but in any event the Claimant had a copy of the Contract of Employment and she took us to a number of clauses which indicated that copies of documents could be obtained from the Human Resources Department. That clause also referred to them being available on the Intranet. She made no enquiries about that if there was any confusion or lack of awareness on her part.

In July 2018, however, the reason why no further documents were sent was, as we were told in evidence and was cited in the contemporaneous correspondence, because first of all the procedures had been paused whilst the Claimant was absent from work through stress and second because Ms Packer took the view – and we find reasonably took the view – that whilst the Claimant was absent from work through stress it would be inappropriate to send further documents which were likely to lead (as others had done) to further enquiries and questions from the Claimant and analysis of documents when the Claimant should have been taking time to recover from the stress which was giving her difficulty.

In any event, the reason for the Respondent not sending the documents related to the Claimant's condition of stress which she has not sought to rely upon as a disabling condition. The refusal to send did not relate to the Claimant's disability and cannot be an act of direct discrimination.

109. For the reasons set out above, the Claimant has not suffered less favourable treatment. In so far as the treatment identified took place, a hypothetical non-disabled comparator in the same situation as the Claimant would have

been treated in exactly the same way and in relation to item 108.7 above, the refusal to send documents, this did not relate to the Claimant's disability but to her then condition of stress.

Discrimination Arising from Disability – Equality Act 2010, Section 15

110. Were the Claimant's duties changed for a reason arising from the Claimant's disability?
- 110.1 The Claimant's duties were changed because of her disability, and the thing arising from her disability being her inability to work with her hand above shoulder height.
111. If so, was she as a consequence subject to the following unfavourable treatment:
- 111.1 Not being invited to Linen or Inventory Team Building as she was in neither of those Teams –
- As recorded above, the Claimant was not invited to Team Building Meetings as she did not put her name down on the sheet to attend them. The Claimant could have put her name down to attend those events had she wished to do so.
- 111.2 Not being invited to Assistant Team Supervisor Meetings –
- As recorded above, these were ad hoc meetings and at the time the Claimant was not working as an Assistant Team Supervisor. She has not explained how this caused her any detriment, or how it amounted to unfavourable treatment. There was no contemporaneous complaint and had one been made, there is no evidence to suggest that she would not have been welcome to attend such meetings.
- 111.3 Someone else being appointed to take over her duties –
- This cannot amount to unfavourable treatment. The duties needed to be done and the Claimant could not do them. If it was an act of unfavourable treatment then the Respondent exercised a proportionate means of achieving a legitimate aim of having all the work that was required done, to be done. The Claimant has not suggested there was any other way to have the work done.
- 111.4 Being subjected to a capability process in May 2018 –

The purpose of the capability process, as set out in the invitation letter, was to consider the Claimant's ability to complete tasks within her current role, reasonable adjustments to the role relocation / transfer to an alternative suitable role and the GP / Occupational Health recommendations. The extent to which the Claimant was "*subjected to*" that process amounted to the invitation letter as the matter did not proceed beyond that. The invitation to the capability process arose from the fact that the Claimant could not carry out her contractual duties, as a consequence of her disability. However, to formalise the position and to endeavour to discuss reasonable adjustments and alternative duties within the Respondent's capability process does not amount, in the circumstances, to unfavourable treatment. The purpose of the process is to establish whether any permanent adjustments to the role could be made to accommodate the Claimant's condition, whether an alternative role existed which the Claimant could carry out with or without further adjustment and to support the Claimant. It was not an act of unfavourable treatment to invite the Claimant to a meeting to discuss those matters.

111.5 The Claimant's Manager Matthew Vyse commenting to her in March 2018 that, "*you can go back to whatever it is that you do*" –

This complaint fails because on the balance of probabilities the statement was not made.

111.6 Was the Claimant subjected to a capability process as a consequence of something arising out of the disability –

This has already been answered by reference to 111.4 above.

112. If so, was the Claimant as a result subjected to unfavourable treatment as follows:

112.1 The Respondent not following its own procedure correctly; and

112.2 The Respondent incorrectly not upholding a grievance that the procedure had not been correctly followed –

We have already found that the procedure was followed correctly, by reference to the Light Duties Policy and how it interacts with the Capability Policy. However, in any event, there was no evidence put before us to suggest that the outcome of the Grievance heard by Mr McDonnell, Deputy Leisure Manager, or the Grievance Appeal heard by Wayne Hawkins, Leisure Services Manager, or the steps taken in relation to the second

Appeal by Mr Carpenter, Deputy General Manager, were in any way tainted by discrimination. Or that the findings they made were as a consequence of anything arising from the Claimant's disability. Those individuals were not involved in the other processes about which the Claimant complains and it has not been suggested that they were influenced in any way by the Claimant's disability.

113. If the capability process did arise out of the Claimant's disability, could the Grievance, which led to the alleged victimisation referred to below, which led to the Claimant being off sick, also be said to arise out of her disability?

113.1 The Grievance was a protected act. It cannot be an act of unfavourable treatment by the Respondent for the Claimant to raise a grievance. The capability process was instigated because the Claimant had exhausted the Light Duties Policy and the Respondent, quite reasonably, needed to formalise the position and endeavour to find the Claimant an alternative role, seek to make adjustments to her position to enable her to return to work, or consider the other steps identified.

114. If so, was the Claimant as a consequence subject to the following unfavourable treatment?

114.1 The Respondent refusing to send her copy documents related to the Investigation into the social media incident;

114.2 Informing the Claimant that matters would be taken up on her return;

114.3 Indicating that a Capability Meeting at which she was expecting to discuss a recent Occupational Health Report would now consider further steps in the capability process; and

115. If so, has the Respondent shown that that unfavourable treatment was proportionate and further that in any event any actions by the Respondent were a proportionate means of achieving the legitimate aim, and further that the Grievance raised by the Claimant was not an act of unfavourable treatment by the Respondent in consequence of something arising from the Claimant's disability?

These questions do not fall for consideration.

116. Alternatively, has the Respondent shown that it did not know and could not reasonably have been expected to know that the Claimant had a disability?

We have found on a majority basis that the Claimant did not have a disability within the definition of the Equality Act 2010 and the Respondent did not know and could not reasonably have been expected to know that the Claimant was a disabled person before receipt of the second Occupational Health Report on 21 June 2018. Accordingly, those matters which the Claimant complains about which occurred before that date, could not in any event relate to the question of disability, although as we have said that each of them fails on their merits in any event.

Indirect Discrimination – Equality Act 2010, Section 19

117. In relation to indirect discrimination,

117.1 did the Respondent have a PCP in the form of a Capability Policy, but made no allowance for people with a disability?

The Respondent's Policy does make allowance for people with disability. It states that,

*“If... at any stage of this procedure it becomes evident that performance difficulties are likely to be due to disability which are covered by the Equality Act 2010, further actions must be followed in accordance with the Company's Management of Disability Policy”.*

117.2 Did the Respondent apply, the PCP to the Claimant at any relevant time?

117.3 Did the Respondent apply, or would the Respondent have applied the PCP to people who are not disabled?

117.4 Did a PCP put disabled people at one or more particular disadvantage when compared to people who are not disabled in that they would never, or would be less likely to, be able to satisfy the requirement to improve?

117.5 Did the PCP put the Claimant at that disadvantage at any relevant time?

117.6 If so, has the Respondent shown the PCP to be a proportionate means of achieving a legitimate aim?

None of these matters fall for consideration because the Respondent did not have a PCP as alleged. The Capability Policy specifically makes allowance for disability and evokes a separate procedure when required. The Claimant only received an

invitation to a Capability Meeting and no other step in the Policy was taken.

Failure to make Reasonable Adjustments – Equality Act 2010, Sections 20 & 21.

118. In relation to this complaint –

118.1 Did the Respondent know and / or could the Respondent have reasonably been expected to know that the Claimant was a disabled person?

We have found by a majority that the date by which the Respondent had actual or imputed knowledge of the Claimant's disability was 21 June 2018. Before that date she did not satisfy the definition of disability in any event because it was not known or could not reasonably have been known that her condition was likely to last for 12 months or more.

118.2 Did the Respondent have a PCP of requiring an Assistant Team Supervisor (Linen) to use a trailer to deliver clean linen and remove dirty linen?

The Respondent did have this PCP.

118.3 Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that she was unable to use the trailer?

By the time the Respondent became aware, or ought to have been aware, that the Claimant was a disabled person, she had not been carrying out those duties for some time. The PCP did put the Claimant at a disadvantage because she could not work above shoulder height.

118.4 If so, did the Respondent know or could they have reasonably been expected to know, that the Claimant was likely to be placed at any such disadvantage?

Yes. They were aware of this on receipt of the first Occupational Health Report.

118.5 If so, were there steps that were not taken that could have been taken by the Respondent to avoid such disadvantage?

Whilst the burden of proof does not fall on the Claimant, she suggested that there were three possibilities:

- (i) Being given the role of Inventory, on the same grade and doing the same hours as she had been doing as Assistant Team Supervisor (Linen) –

The Claimant applied for this role and accepted it, but then asked for the rate of pay to be adjusted upwards to meet her previous hourly rate (the shortfall was 44p) and to increase the hours of the role by one hour so the Claimant did not suffer any financial shortfall. The Claimant requested this adjustment at an informal Review on 27 October 2017.

On the face of it this claim is therefore substantially out of time because a reasonable time within which to make that adjustment would have been, we find, within two months of the Claimant's request which would have taken the matter to 27 December 2017. The period in which any claim in that regard should be brought would expire on 26 March 2018. The Claimant did not begin Acas Early Conciliation until 21 August 2018, almost four months out of time. In any event, we do not think that that would have been a reasonable adjustment for the Respondent to make. The Claimant has referred us to the case of G4S Cash Solutions (UK) Limited v Powell. The facts of that case were very materially different to the circumstances of the Claimant as Mr Powell had been employed in a new role on protected pay for some time and had been led to believe that this was a long term arrangement. When that role was initially to be discontinued, but was then reinstated, it was reinstated at a lower rate of pay which Mr Powell did not accept. The Employment Appeal Tribunal held that there was no reason why maintaining a higher rate of pay could not be a reasonable adjustment under s.20 and 21 of the Equality Act 2010, and that in the circumstances of that case it was a reasonable adjustment.

In this case, however, we conclude that it would not have been a reasonable adjustment to employ the Claimant in an alternative role at a protected rate of pay and increase the number of hours worked. The Claimant had been on a period of protected pay for approximately 9 months after she was redeployed from her contractual

role in the hope that alternative employment could be found, or a return to her contractual role was possible. Although the financial amounts are small, we do not consider that in the circumstances of this case, it would have been a reasonable adjustment to protect the Claimant's pay in a different role because it involved not only the rate of payment, but also to pay the Claimant for a period of work not done.

- (ii) Being given a role in Customer Service (presumably on the same grade and hours) -

There was no requirement within the Respondent's undertaking for a Customer Service employee working the hours the Claimant worked and to create a role which was not needed by the Respondent would not have been a reasonable adjustment.

- (iii) Being given the role of Assistant Team Supervisor (Inventory) –

There was no such role available within the Respondent's undertaking and it would not have been a reasonable adjustment to create such a role for the Claimant.

118.6 Would it have been reasonable for the Respondent to have to take any of those steps at the relevant time?

For the reasons stated above, it would not, and we have not been directed towards nor have we identified any other adjustment which could have been made at the relevant time which would have avoided the disadvantage suffered by the claimant. The Respondent had altered the Claimant's duties for a lengthy period whilst they assisted her in a search for alternative work, but there was nothing available which the Claimant considered suitable.

Victimisation – Equality Act 2010, Section 27

119. In relation to the claim for victimisation:

- 119.1 Did the Claimant carry out a protected act and / or did the Respondent believe that the Claimant had done or might do a protected act?



The Grievance of May 2018 was a protected act as the Respondent admitted.

119.2 If so, was the Claimant subject to the following alleged detriments:

- (i) Being accused of a breach of the Respondent's Social Media Policy -

No. The Claimant was accused of a breach of the Social Media Policy because she had made a post on an internal Facebook page which identified the lodge in which two celebrities were staying.

- (ii) Being subjected to disciplinary action as a consequence -

Following an investigation into the Claimant's Facebook post, the Investigating Officer concluded that the Claimant had a disciplinary case to answer, but the matter did not proceed beyond that point. The reason that the matter was taken forward was because of the Claimant making a post on the Facebook page and not for any reason to do with her protected act.

- (iii) Being refused copies of documents requested relating to the Disciplinary Investigation whilst off sick in July 2018 –

We have found as a fact that these were not given to the Claimant because all processes involving the Claimant were “*on pause*” whilst she was absent from work through stress.

- (iv) Being informed that matters would be taken up on her return from sick leave –

There were three ongoing processes, her second Appeal against the Grievance Outcome, the Capability process and the Disciplinary process. They could not proceed in the period in which the Claimant was absent from work through stress, but would obviously continue on her return to work. The Respondent cannot be criticised for advising the Claimant of this and in any event, they do not relate to the Claimant's protected act (other than to confirm that her second Grievance Appeal would be pursued).

- (v) The Claimant being told that a planned meeting to discuss an Occupational Health Report would now be a further step in the capability process –

The Respondent correctly invoked the formal capability process at a time when the Light Duties Policy had been exhausted in accordance with the Light Duties Policy. It was unconnected with the Claimant's protected act.

- 119.3 If so, was this because the Claimant did the alleged protected act and / or because the Respondent believed the Claimant had or might do a protected act –

No. The steps were taken by the Respondent for the reasons set out above.

Constructive Unfair Dismissal –Employment Rights Act 1996, s.94/95(1)(c)

120. In relation to the claims for constructive unfair dismissal and wrongful dismissal:

120.1 Was there a fundamental breach of the Contract of Employment?

120.2 If so, did the Claimant affirm the Contract of Employment before resigning?

120.3 If not, did the Claimant resign in response to the Respondent's conduct?

120.4 The Claimant relies on the alleged acts of discrimination referred to above as conduct breaching the implied term of trust and confidence; and

120.5 If the Claimant was dismissed, what was the principal reason for dismissal and was it a potentially fair one?

We deal with these five matters together.

121. There has been no fundamental breach of contract in this case. The Respondent has conducted itself in accordance with the Contract of Employment at all times and has properly followed its policies on Light Duties, Capability, Disciplinary and Grievance.

122. One aspect of this case is that at the time of the Preliminary Hearing in March 2019, the Claimant said that she relied upon the acts of discrimination referred to in the issues as being the conduct amounting to a fundamental breach. On that basis, the last straw (the last matter in time) was the Respondent not sending the Claimant documents whilst she was absent from work through stress. When asked to confirm that that remained the position during her closing submissions, the Claimant says the last straw was that,

*“the next thing I would have to do would be to go into work which I thought was unsafe. I didn’t trust anybody and the refusal to provide documents nobody was communicating with me”.*

123. It was not suggested at any time during the evidence in this case that the Claimant’s workplace was unsafe. There had been a lengthy period of time during which the Claimant was on alternative or light duties.

124. The decision by the Respondent not to send documents to the Claimant was taken because of the nature of the Claimant’s then absence (work related stress). That is not pursued as a disability in this case, but equally we found that it is an innocuous act and cannot constitute a last straw. It was taken for understandable welfare reasons relating to the Claimant’s then absence and the fact that it was done for those reasons was explained to the Claimant. Her reply that she wanted the documents anyway did not alter Ms Packer’s view who felt that poring over such documents while absent from work through work related stress would not assist the Claimant’s recovery.

125. At the time the Claimant resigned, she had been invited to a Capability Meeting and she knew that she would face disciplinary action in relation to her Facebook post. Rather than any blameworthy action of the Respondent, we conclude that it was because as the Claimant said in evidence, that she felt she would be dismissed either at the Capability Meeting which would follow her return to work, or at the Disciplinary Hearing which prompted her to resign. There was no blameworthy conduct on the part of the Respondent which contributed to the Claimant’s resignation. The criticisms of the conduct of the Respondent are misplaced.

126. We accept the Claimant firmly and sincerely believes that the Respondent has acted unfairly towards her, but it has become clear from her evidence that this is because she blames the Respondent for her shoulder injury and not in fact because of any action by the Respondent which would constitute to a breach of the implied term of trust and confidence.

127. Accordingly, the Claimant was not dismissed.

128. For the Reasons set out above, the Claimant was not the victim of discrimination as alleged and was not dismissed. Her complaints therefore fail and the claim is dismissed.

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Employment Judge Ord

Date: 26 February 2021

Sent to the parties on: .....

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For the Tribunal Office