THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**
Ms N O'Hare
Ms H Bharadia

BETWEEN:

Ms D Summersett **Claimant**

AND

Churchill Contract Services Limited **Respondent**

ON: **11- 14 December 2017**

Appearances:

For the Claimant: **Mr Grant, Legal Executive**

For the Respondent: **Mr Kerr, Representative**

WRITTEN REASONS FOR THE JUDGMENT ON LIABILITY PROVIDED IN RESPONSE TO A REQUEST BY THE RESPONDENT

1. Judgment in this case was delivered orally to the parties at the end of the hearing on 14 December 2017 with full reasons for the Tribunal's decision and the Respondent made an application in writing for written reasons. The unanimous judgment of the Tribunal was that:

    a. The Claimant suffered unauthorised deductions from her pay in the period between 1 October 2016 and 28 March 2017 in breach of s 13 Employment Rights Act 1996 ("ERA").
    b. The Claimant had itemised pay statements made available to her in the same period and her claim that these were not provided fails and is dismissed.
    c. The Claimant is entitled to holiday pay for 2016 amounting to the gross

sum of £540.

d. The Respondent did not comply with s10 National Minimum Wage Act 1998 (“NMWA”) when responding to the Claimant’s production notice on 16 March 2017.
e. The Respondent discriminated against the Claimant for a reason arising from disability in breach of s15 Equality Act 2010 (“Equality Act”).
f. The Respondent failed to make reasonable adjustments for the Claimant in breach of s20 Equality Act.
g. The Claimant was constructively dismissed in breach of s 95 (1)(c) ERA and s 39 (2)(c) Equality Act.
h. The Respondent did not provide the Claimant with a statement of written particulars compliant with s1 ERA or a statement of changes under s 4 ERA.

2. The Respondent requested written reasons for the Tribunal’s judgment by email to the Tribunal dated 20 December 2017. These reasons are produced in response to that request.

Relevant law

3. Section 1 ERA provides that where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment and sections 1 – 3 specify the particulars that are to be included. Section 4 provides that if there is a change in any of the matters particulars of which are required by sections 1 to 3 to be included in a statement under section 1, the employer shall provide the employee with a written statement of the change within one month.

4. Section 8 ERA provides that an employee has the right to be given by his employer, at or before the time at which a payment of wages or salary is made to him, a written itemised pay statement. The section also specifies the information that should be included in the statement.

5. The right to paid holiday of four weeks per year is set out in Regulation 13 Working Time Regulations 1998 (“WTR”). The right to an additional 1.6 weeks’ holiday is set out in Regulation 13A. Regulation 14 sets out how an employee should be compensated for untaken leave on termination of employment.

6. Section 13 ERA 1996 provides as follows:

“13 Right not to suffer unauthorised deductions.

(1)An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.”

7. Section15 Equality Act provides as follows:

"Discrimination arising from disability

(1)A person (A) discriminates against a disabled person (B) if—

(a)A treats B unfavourably because of something arising in consequence of B's disability, and

(b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2)Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

8. The duty to make reasonable adjustments arises under section 20 and Schedule 8 Equality Act. Section 20, subsections (3) to (5) imposes on the Respondent a duty comprising three requirements any of which was potentially engaged on the facts of this case:

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

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

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

9. Section 39(2)(c) Equality Act provides that an employer must not discriminate against an employee by dismissing her. S 39(7)(b) provides that "the reference to dismissing B includes a reference to the termination of B's employment…(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice."

10. Section 10 NMWA provides as follows:

"10 Worker's right of access to records.

(1)A worker may, in accordance with the following provisions of this section,—

(a)require his employer to produce any relevant records; and

(b)inspect and examine those records and copy any part of them.

(2)The rights conferred by subsection (1) above are exercisable only if the worker believes on reasonable grounds that he is or may be being, or has or may have been, remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage.

(3)The rights conferred by subsection (1) above are exercisable only for the purpose of

establishing whether or not the worker is being, or has been, remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage.

(4)The rights conferred by subsection (1) above are exercisable—

(a)by the worker alone; or

(b)by the worker accompanied by such other person as the worker may think fit.

(5)The rights conferred by subsection (1) above are exercisable only if the worker gives notice (a "production notice") to his employer requesting the production of any relevant records relating to such period as may be described in the notice.

(6)If the worker intends to exercise the right conferred by subsection (4)(b) above, the production notice must contain a statement of that intention.

(7)Where a production notice is given, the employer shall give the worker reasonable notice of the place and time at which the relevant records will be produced.

(8)The place at which the relevant records are produced must be—

(a)the worker's place of work; or

(b)any other place at which it is reasonable, in all the circumstances, for the worker to attend to inspect the relevant records; or

(c)such other place as may be agreed between the worker and the employer.

(9)The relevant records must be produced—

(a)before the end of the period of fourteen days following the date of receipt of the production notice; or

(b)at such later time as may be agreed during that period between the worker and the employer.

(10)In this section—

"records" means records which the worker's employer is required to keep and, at the time of receipt of the production notice, preserve in accordance with section 9 above;

"relevant records" means such parts of, or such extracts from, any records as are relevant to establishing whether or not the worker has, for any pay reference period to which the records relate, been remunerated by the employer at a rate which is at least equal to the national minimum wage."

11. Section 11 NMWA sets out the right of an employee to complain to an employment tribunal if an employer has not complied with section 10. It provides that:

"Where an employment tribunal finds a complaint under this section well-founded, the tribunal shall—

(a)make a declaration to that effect; and

(b)make an award that the employer pay to the worker a sum equal to 80 times the hourly amount of the national minimum wage (as in force when the award is made)."

The issues

12. After some discussion at the commencement of the hearing it was agreed that the issues in the case were as follows:

1. **Unauthorised deductions (sections 13 and 23 ERA)**
Did the Claimant suffer an unauthorised deduction from wages between 1 October 2016 and 28 March 2017?

2. **Itemised pay statements (section 8, 11 and 12 ERA)**
2.1 Did the respondent fail to provide itemised pay statements on various dates?
2.2 Were there any unnotified deductions and if so what were they?

3. **Holiday pay (sections 13 and 23 ERA and Regulation 14 Working Time Regulations 1998)**
What holiday pay is the Claimant entitled to receive upon termination?

4. **Production notice (sections 10-11 NMWA)**
When responding to the Claimant's production notice of 15 March 2017, did the Respondent comply with Section 10 NMWA?

5. **Discrimination arising from disability (section 15 Equality Act)**
5.1 Did the Respondent treat the Claimant unfavourably by:
(a) sending her home on 30 September 2016 and refusing to allow her to work; and
(b) failing to pay the Claimant her wages at 30-37.5 hours per week?
5.2 Did the Respondent do so because of:
(a) the Claimant's inability or refusal to wear the safety boot provided by the Respondent; and
(b) the Claimant's absence and/or submission of fit notes?
5.3 Did that inability/refusal arise in consequence of disability?
5.4 Can the Respondent show that its treatment of the Claimant was a proportionate means of achieving a legitimate aim?

6. **Reasonable adjustments (sections 20-23 Equality Act)**

6.1 **Auxiliary aids**
Can the Respondent show that it has taken such steps as it was reasonable to have taken to provide the Claimant with training shoes or safety shoes?

6.2**. Provision criterion or practice**
6.2.1 Did the Respondent apply to its train cleaners at Brighton Station a PCP of requiring its cleaners to wear safety boots supplied by it?
6.2.2 Can the Respondent show that it has taken such steps as it was reasonable to have taken to avoid the disadvantage to which the Claimant was placed by that PCP? In particular by:
(a) allowing the Claimant to wear her trainers to work;
(b) providing the Claimant with safety shoes;
(c) redeploying the Claimant to a cleaner or housekeeper role at Churchill Square

Shopping Centre;
(d) redeploying the Claimant to a cleaning manager position; and
(e) redeploying the Claimant to a car park cleaner role?

8. **Constructive dismissal (section 95 ERA and section 39 Equality Act)**
8.1 Did the Respondent commit a repudiatory breach of contract, namely act in a manner that was calculated or likely to destroy or seriously damage the relationship of trust and confidence by:
(a) requiring the Claimant to wear safety boots and thereby failing to comply with section 20 Equality Act;
(b) sending the Claimant home on 30 September 2016 and thereby failing to comply with section 15 Equality Act;
(c) refusing to pay the Claimant wages that were properly payable after 30 September 2016 and thereby contravening section 15 Equality Act;
(d) failing to pay the Claimant transparently or issue payslips;
(e) failing to pursue the Claimant's interest in working in Churchill Square;
(f) failing to redeploy the Claimant contrary to section 20 Equality Act;
(g) failing to handle the Claimant's grievance in an adequate or timely manner;
(h) failing to provide effective redress to the Claimant's grievance (including failing to recognise discrimination); and
(i) by suggesting in the grievance outcome letter that payment for travel time was discretionary.
8.2 Is the Respondent able to show that there was a potentially fair reason for the Claimant's dismissal (section 98(1) ERA)?
8.3 Is the Claimant's dismissal fair or unfair by reference to section 98(4) ERA?
8.4 Did the Claimant accept the fundamental breach by her letter of 28 March 2017 and therefore tender her resignation?
8.5 Alternatively did she waive the breach?

9. **Section 38 Employment Act 2002**
9.1 Did the Respondent provide the Claimant with a statement compliant with section 1 ERA?
9.2 Did the Respondent provide the Claimant with a statement of changes after her employment transferred from Lightbridge to the Respondent as required by section 4 ERA?

10. **Wrongful dismissal**
Was the Claimant wrongfully dismissed by reference to the matters at paragraph 8 above?

Findings of fact and conclusions

13. The Respondent conceded that the Claimant was a disabled person by reason of her condition of plantar fasciitis.

14. The Claimant worked for the Respondent and its predecessor Lightbridge Support Services Limited from September 2010 until her resignation with immediate effect on 28 March 2017. She was employed as a cleaner on trains at

Brighton Station. The Respondent was responsible for providing cleaning services to Govia Thameslink Railways which runs services out of Brighton and various other stations on the south coast.

15. The Claimant's evidence was that she was not given a written contract of employment and as neither party was able to produce one, we find as a fact that that was the case. The Respondent was therefore in breach of its duty under s1 ERA to provide the Claimant with written particulars of the terms on which she was employed. It was common ground that she was entitled to 28 days' holiday per year.

16. We find that the Claimant's duties were as described in paragraph 2 of her witness statement, namely that she was responsible for walking through the trains to collect litter into bags that she then needed to take to the dustbins on platform 8. She also cleaned toilets, tables and under the tables and seats. We find that her work pattern was as described in paragraph 5, which set out her shift pattern which resulted in her working 37.5 hours three weeks of the month and 30 hours in the remaining week. Her work involved being on her feet for much of the time and she generally worked alone. We also find that from time to time the Claimant had undertaken additional duties and worked longer hours by travelling to other stations. However there was no longer an issue between the parties as to whether the Claimant had been properly paid for that additional work.

17. The Claimant's payslips were electronic and accessible via the Respondent's intranet. The Claimant was not sent copies of then whilst she was absent from the office. We were not satisfied that she was unable to access them during her absence as her recollection was unclear.

18. The Respondent maintained that all of its employees were required by the terms of its contract with GTR to wear certain personal protective equipment ("PPE") including what was referred to in the hearing as "safety boots". The Respondent did not however establish what the precise terms of its contractual obligation was as the relevant documents were not made available to the Tribunal. Nevertheless the Respondent had carried out risk assessments of the various activities carried out by the Claimant during the course of her work. These were at pages 62 – 108. Some of the relevant pages referred to safety footwear (eg page 82), some to safety shoes (eg page 68), some to sensible shoes (eg page 77) and some to safety boots with ankle support (eg page 76) although those references were only applicable to employees boarding and alighting from trains in sidings, which would not have included the Claimant at any time. It was the Respondent's case that the contractual obligation they were under required all staff to wear laced up safety boots with a steel toe cap which meets European specification EN ISO 20345:2004. The Respondent relied on the email chain at pages 140-143 to confirm the position taken on footwear by GTR and in particular the email from Stuart Cooper, National Operations Director – Rail, at page 140 and the email from Karl Watson, Contracts Manager at page 142. The Tribunal was not however at any stage shown any photographic or documentary evidence of what exactly GTR required.

19. The Lightbridge staff handbook at page 41 stated that "all protective clothing and

safety equipment must be used…You are required to wear the correct Personal Protection Equipment as recommended at all times". At page 110 there was a copy of a signed application form which appeared to confirm that that Claimant had had a copy of the staff handbook. However in cross examination she denied that that was the case. Regardless of that, we were satisfied from her other answers in cross examination that the Claimant understood that there was a requirement to wear PPE and the reasons for it. Furthermore in her own witness statement she described wearing steel capped boots whilst working for Lightbridge and having to replace them herself when they became worn because Lightbridge was slow to do so. We therefore find as a fact that for a period of her employment the Claimant did in fact wear boots at work.

20. The Claimant began to suffer with plantar fasciitis in January 2015. The symptoms lasted until mid-2015 and then subsided. In early January 2016 the symptoms returned. The Claimant describes the treatment she received and the difficulties the condition presented her with in her impact statement at page 212 – 217. She nevertheless continued to attend work despite real problems with walking and being on her feet all day. Her condition did however mean that she had to take a considerable amount of time off work between January and March 2016. The condition was very painful and the Claimant's doctor prescribed painkillers and told her that she needed cushioned shoes, so she bought a pair of Nike Air trainers, which she found made a noticeable difference.

21. On 24 February 2016 the Respondent sent the Claimant the letter at page 114 inviting her to a disciplinary investigation meeting on 1 March to discuss her levels of sickness absence. The Tribunal was concerned by the tone of this letter and in particular the passage that read,

> **"Not complying with conditions of employment, as laid down by the Company, constitutes misconduct under the Company's disciplinary procedure. However such is the seriousness of some of these allegations that they may constitute gross misconduct and could result in your summary dismissal".**

This seemed to the Tribunal an entirely inappropriate passage to include in a letter concerning the investigation of sickness absence and appeared to conflate genuine sickness absence with potential gross misconduct.

22. The Claimant was understandably upset by the invitation as the absences related to her plantar fasciitis. On 29 February she visited her GP who provided a Fit Note (page 116) which indicated that she could work provided that she wore training shoes and not boots. The Claimant returned to work the same day.

23. At some point prior to her return Mr Eastwood had provided her with an alternative pair of boots, which she tried for a short period, but which she found made the pain worse. There was no evidence that Mr Eastwood made any attempt to confer with or consult the Claimant, or the Respondent's HR or health and safety departments about what sort of footwear might be suitable for the Claimant's needs or what range of alternatives might be available. The Claimant tried to explain to Mr Eastwood both within and outside the disciplinary proceedings that the alternatives he had provided were unsuitable, but he was

not receptive. At the investigation meeting Mr Eastwood asked whether the new boots were helping but when the Claimant said no, moved on to the subject of her painkillers and whether it was safe for her to be working whilst taking them. Nothing further was said about managing her foot problem.

24. The investigation meeting was followed by a disciplinary meeting on 22 March conducted by Mr Castle. His approach was also to express concern about the Claimant’s pain medication and to inform her that it was up to her to do everything she could to get on top of her foot condition because her absence levels were unacceptable. Neither Mr Eastwood nor Mr Castle appeared to address their minds to the possibility that the Claimant might have a disability. The Claimant was issued with a final written warning (pages 138-9). She opted not to appeal as she did not think she would get anywhere if she did. The Tribunal was surprised to find that despite the existence of a capability procedure in its staff handbook (a copy of which was not supplied to the tribunal but which appeared in the handbook index) the Respondent thought it appropriate to use a disciplinary procedure for the management of certified absence from work of an employee whose condition potentially amounted to a disability.

25. We find as a fact that following this meeting the Claimant prioritised attendance at work and in order to do so continued to wear her Nike trainers. The Respondent maintained that it did not tolerate this state of affairs. However there is no evidence that any formal discussions took place with her indicating that her continuing wearing them was a problem. The Claimant’s case, which we accept, was that the wearing of alternative footwear and trainers was widely tolerated during this period. The Respondent provided no evidence to support its contention that it regularly challenged employees who were not wearing the correct footwear and we find that it did not do so until later in the year. In forming this view of the facts we took into account Mr Leone’s evidence that if had to have more than one conversation with the employees he supervised about any matter of concern he would record it on a record of discussion form. No such form was included in the bundle concerning the wearing of inappropriate footwear in relation to any member of staff.

26. The next meeting between the Claimant and her managers was on 30 September 2016. The background to this meeting was that on the morning of 30 September Mr Leone, who had just been made the Claimant’s manager, learned that there would be a visit to Brighton station by a manager from GTR. He received a phone call from Karl Watson, the contract manager, to this effect and Mr Watson said that he wanted to meet Mr Leone at Brighton. Mr Leone then telephoned the on duty supervisor at Brighton to make sure that everything was in order for a visit from the contract manager. The supervisor informed him that the Claimant was wearing trainers. Mr Leone told the supervisor to tell the Claimant that she must wear safety boots, but the supervisor informed him that the Claimant was refusing to do so. Mr Leone called Mr Eastwood for guidance and Mr Eastwood asked him not to raise the issue with HR because the Claimant was still on a final warning for sickness absence and he did not want to lose her. When he arrived in Brighton Mr Leone had a conversation with the Claimant who said that she was unable to wear the safety boots and that her doctor had advised her to this effect. Mr Leone told the Claimant that in the circumstances he had no option but to

send her home if she would not wear the boots. The Claimant left the office that day and never returned to work.

27. A few days prior to this incident there had been an exchange of emails amongst the managers, including Mr Eastwood (pages 140 – 143). The gist of the exchange was that Mr Watson was unhappy about "Engineering's strict policy on ankle support" being ignored and was insisting that the problem was addressed. The Respondent's HR manager, Debbie Wakes, was included in the exchange and she said (page 141) "if there are specific issues with individuals then they may need to be offered the opportunity to review different types of footwear still compliant with safety requirements". Anthony Hall, HSEQ Accident and Claims Advisor, responded by advising that the supplier should be contacted if there appeared to be a need for an alternative type of footwear. Stuart Cooper, National Operations Director ended the conversation with the following email:

> **"As discussed a few days back the specification legislated derived from GT engineering and all staff must be in ankle high safety boots not shoes of any description, there are many different departments within GTR and all function very differently so therefore will come with a multitude of opinions however regardless of local belief we must comply with engineering regardless of pushback.**
>
> **Irrelevant of whether they have seen a foot specialist or just a GP the fact remains that they must wear ankle high safety boots supplied by Churchill, by all means speak to Avica/JP for an alternative and I'm happy to go slightly higher on cost, that said we must remain sensible as essentially most of the time this is nothing more than an excuse not to wear safety boots although agreed we do have the exceptions which I'm happy to accommodate than as Anthony quite rightly pointed out if we cannot reach a sensible resolution with each individual on a case by case basis then we go down the HR route.**
>
> **This situation has been historic across the contract for many years hence the resistance from certain individuals however the fact remains we are directed by engineering so should they not wish to comply we follow as above with HR involvement as these situations carry on for far too long so from now let's have a robust approach and if people turn up for shift without the correct footwear you send them home without pay until HR close off.**
>
> **Simple process here yet people seem to want to cloud the approach and resolve which then goes to debate for days and weeks with not positive outcome so please let us not have many more emails of this nature just follow due diligence and company process. We work for GTR engineering."**

28. Two things emerge from this conversation. Firstly none of it was reported to Mr Leone by Mr Eastwood, even though the email exchange had taken place just a few days before Mr Leone' meeting with the Claimant at which he sent her home.

29. Secondly, with the possible exception of the comments by HR, none of the participants in the exchange appeared to be taking into account the possibility that they might be subject to the duty to make reasonable adjustments in the case of certain individuals. Mr Cooper's email was indicative of the Respondent's attitude to the problem of whether or not staff were wearing safety boots, namely that it was essentially one of contract compliance. Other considerations, and in particular the requirements of the Equality Act, were not addressed.

30. On 1 October the Claimant sent Mr Leone a text asking whether she was going to be paid. He replied on 6 October saying that he needed a doctor's letter from her and he would then get HR involved (page 145A). The Claimant also called Mr Eastwood but he told her that if she was not working he would not be paying her. On 8 October the Claimant submitted a handwritten letter setting out her concerns about her treatment. She delivered it to the Respondent by hand on 10 October and left it on Mr Leone's chair. Mr Leone found it on 14 October and asked Mr Eastwood what to do. Mr Eastwood relied that he had given the Claimant alternative boots to wear and that she could return to work if she wore those, as boots were not optional. Mr Leone replied telling Mr Eastwood that the Claimant had already told him that she could not wear the alternative boots and was obtaining a doctor's letter. She had asked again about payment and he had confirmed that she would not be paid.

31. The Claimant's doctor provided the fit note at page 152 confirming that the Claimant would be signed off for two months, but would be able to attend work if she did not have to wear steel toe capped boots, which we understood to have been a reference to the specific boots issued by the Respondent. At this point no steps were taken by either manager to contact HR or to seek advice about whether further information should be obtained about the Claimant's condition. In cross examination Mr Leone confirmed that he did not know what an occupational health report was.

32. The Claimant raised a formal grievance by typed letter dated 21 October (page 153). The letter was not acknowledged until Mr Eastwood's letter of 21 November. That letter invited her to a grievance meeting on 25 November, but the meeting was rescheduled to 6 December. In the meantime, there was an internal exchange of emails (pages 160-162) between Mr Eastwood, Mr Cooper and HR which again showed no indication that the Respondent had taken into account the possibility that it might owe the Claimant duties under the Equality Act, save for brief mention of the possibility of alternative roles at Churchill Square. However there was no evidence that alternative roles were ever put to or discussed with the Claimant. The Respondent's evidence as to the question of alternative roles was scant and consisted of a number of job descriptions at pages 218 to 224 and hearsay evidence regarding the efforts made by Alex Rouse to identify suitable roles at Churchill Square. There was no direct evidence from Mr Rouse himself or from any HR representative of the Respondent. The impression given is of a search that was no more than perfunctory.

33. The Claimant had instructed solicitors by this stage and they wrote to the Respondent on 23 November (page 165) and telephoned the Respondent's HR department. The solicitors set out the issues clearly and raised the issue of the Claimant's condition and the fact that it amounted to a disability as well as raising various issues about the Claimant's pay. ACAS had also been contacted by this stage.

34. The grievance meeting took place on 6 December and was conducted by Mr Eastwood. We consider that to have been inappropriate as Mr Eastwood was the one of the subjects of her grievance. The notes were at pages 172 -178. The Claimant had been promised various documents concerning her complaint about her pay but these were not forthcoming at the meeting. The solicitors wrote again on 14 December making this point.

35. In the earlier part of November Mr Eastwood had suggested to the Claimant that there might be an alternative job at Churchill Square and the Claimant sent a text to confirm her interest (page 159). However she heard nothing further. There is then very little evidence of further contact between the parties, save for a text message dated 5 February from the Claimant to Mr Eastwood updating him about her condition, until she received the grievance outcome from Mr Eastwood on 4 March (page 181), almost three months after the grievance meeting had taken place. Her grievance was not upheld.

36. There were four headings in the letter. The Respondent denied wrongly sending the Claimant home from work on the basis that the decision had been justified by her inability to wear the prescribed footwear. It denied that she was entitled to pay whilst absent, on the basis that if she was not able to wear the safety boots she was absent for sickness related reasons and would therefore only be entitled to SSP. As regards the Claimant's grievance about payment for additional hours of travel during the working day, although an offer of recompense was made, the letter also states that the payment was non-contractual and subject to being stopped or amended at any time. Finally the letter dealt with the question of discrimination by saying simply "Since this matter was reported to me I have done several random checks at Brighton and NEVER found anyone to be wearing non-compliant safety boots". Mr Eastwood therefore failed to address the detailed points made by the Claimant in her grievance letter to the effect that she had been subjected to discrimination arising from disability and that the duty to make reasonable adjustments had not been complied with. The Tribunal was surprised at the absence of any evidence that Mr Eastwood had received support from HR in dealing with what was in fact a complex grievance raising important equality issues.

37. The Claimant appealed against this outcome on 13 March by letter at page 183. The letter was acknowledged on 17 March. It invited her to an appeal meeting at Victoria station on 30 March before Mr Cooper. In the meantime the Claimant also submitted a NMW Production Notice (page 185) which was also sent in soft copy by her solicitor and which was responded to at page 186 on 16 March by a spreadsheet from the Respondent showing the payments made to her and the total hours she had worked.

38. The Claimant resigned on 28 March by letter at page 190. The letter sets out the reasons for her resignation which can be summarised as:

    a. Being discriminated against by being sent home for not wearing safety boots;
    b. The failure by the Respondent to provide documentation that showed that she had been paid for all the hours she had worked (including itemised

payslips)

c. Failure by the Respondent to address the issues raised in her grievance;
d. Failure to pay her other than intermittent amounts during her absence despite her willingness to work;
e. The Respondent's decision in the grievance that payment for hours when she was sent to cover staff shortages was not contractual.

39. The Respondent nevertheless dealt with the grievance appeal in the Claimant's absence and did not uphold the appeal. The outcome letter was at page 192 – 194 and signed by James Temby, Regional Manager. Although the letter acknowledged that the Respondent had taken a long time to respond to the original grievance, no other aspect of the grievance was upheld. As regards the matter of safety boots the letter stated:

"It is a requirement on the contract to wear boots with ankle coverage. As you state in your appeal letter you were asked to cover for shortages of staff elsewhere. The very same reason is stated for the requirement of ankle covering boots to be worn. I quote: "Taking all things into consideration, such as work locations and activities carried out, not least of all the fact that staff are transferable between location ie station and depot/sidings working, the decision was made that railway standard safety footwear with ankle support should be worn by all Churchill operatives." Due to the possible dangers and requirement for safety boots with ankle coverage to be worn it would be negligent and contractually harmful to allow any employees not to wear safety boots. As stated in the original appeal hearing you were provided with a different pair of boots. I do not feel this is discrimination towards your disability….

In addition the company investigated the possibilities of redeploying you but unfortunately a suitable opportunity did not arise. I do not consider there was discrimination and take the view the company made a reasonable adjustment in providing you with an alternative boot and by seeking to redeploy you."

Conclusions

40. In relation to the claim under s 15 Equality Act, based on the Respondent's concession during the hearing that the Claimant was at all material times a disabled person and that it either knew or ought to have known of that fact, we find that the Claimant was treated unfavourably for a reason arising from disability by her being sent home on 30 September for not wearing safety boots and by the Respondent's refusal to allow her to return to work after that date until she did wear the boots. It was also unfavourable treatment not to pay her for her normal hours during that period. In both cases the treatment complained of was unfavourable and arose because the Claimant was unable to comply with the instruction to wear the boots because of the pain they caused her. The pain arose from her condition of plantar fasciitis.

41. We accept that in principle that compliance with health and safety standards whether imposed by law or by contract, and compliance with the terms of a contract to which the employer is a party are both capable of being legitimate aims. The question in this case is whether those aims were pursued proportionately. Bearing in mind the applicable test, that the discriminatory effect

of the means chosen should be no more than necessary to achieve the aim, we are not satisfied that the Respondent's approach was proportionate for the following reasons:

a. The Respondent did not explain what the precise contractual requirement was. Although it pointed to various emails issued by representatives of GTR and specifically Mr Watson, it did not provide a copy of the relevant contractual requirements.
b. It did not advance compelling evidence that the specific safety boots it issued were required by virtue of its own risk assessments, as those germane to the Claimant's work did not specify steel capped ankle boots as such but referred to other forms of safety footwear.
c. The question of whether the means of pursuing a legitimate aim is proportionate cannot be considered in isolation from the question of reasonable adjustments. The Respondent did not appear to have approached the problem raised by the Claimant as one that potentially involved a disability and triggered the reasonable adjustments duty. Consequently everyone involved in the process leading to the Claimant's resignation, with the possible exception of Debbie Wakes in HR, adopted a closed minded approach to the question of safety footwear and did not properly consider the possibility that it would have been a reasonable adjustment under s20 Equality Act to provide an alternative that was nevertheless compliant with safety standards. There were a number of examples of safety footwear complying with the relevant European standard in the bundle. Still less did the Respondent consider in light of its Equality Act duties whether there were other adjustments that it would have been reasonable to make to enable the Claimant to remain in its employment.
d. Furthermore there was no evidence that the Respondent ever seriously considered the possibility of raising the issue and discussing it with GTR. Although Ms Wakes mentions the possibility at page 141, Mr Cooper's response at page 140 indicated a mind-set which excluded from consideration any alternative to unquestioning compliance the client's requirements. Whilst we do not underestimate the commercial importance to the Respondent of being seen to understand and comply with its contractual obligations, any employer must be prepared to act in accordance with Equality Act requirements in conjunction with the contractual terms imposed by third parties. This may necessitate raising with the client an issue of the kind that arose in this case with a view to discussing how the problem could be resolved in a manner that took into account the Equality Act duties. The grievance outcome given by Mr Temby showed a greater awareness of the Respondent's responsibilities, but the emphasis of his analysis was still on what was "negligent and contractually harmful" and he appeared to consider that the duty to make reasonable adjustments had been complied with simply by the supply of a different pair of boots.

e. The Respondent made no real effort to inform itself of the nature of the Claimant's problem and what might have been appropriate to obviate the difficulties. This was a case in which an occupational health referral was obviously called for and never undertaken. Mr Leone gave evidence that he did not know what an occupational health report was. It was clear to us that inexperienced and insufficiently trained managers had been left to deal with a complex and sensitive issue without the necessary understanding on their part or appropriate support from HR.

f. The failure to pay the Claimant during her absence was not proportionate for the same reasons. The Claimant was deprived of her normal income because the Respondent adopted what we consider to have been the disproportionate response of closing its mind to the possibility that alternative footwear might be found that would have met the requirements of the client whilst ensuring that it complied with its duty under s20 Equality Act. This state of affairs was compounded by the Respondent's failure to inform itself properly of the effects of the Claimant's condition on her ability to carry out normal day to day activities despite clear indications from her GP that her ability to carry out her duties was affected by the footwear she was wearing. The Claimant was therefore deprived of the ability to earn her normal income as a direct consequence of the Respondent's failures to comply with its duties towards her.

g. The alternative way in which the financial impact on the Claimant might have been reduced and the reasonable adjustments duty complied with was by finding her alternative employment. None was offered or even discussed with the Claimant. Again Mr Temby made reference to this in his appeal outcome letter, but in a manner that was perfunctory. He appeared to consider that the duty was discharged by the Respondent "seeking to redeploy you", without his exploring in any detail why none of the alternatives the Respondent says it considered was in fact unsuitable. We have found on the basis of the evidence presented to us that the Respondent's search for alternative employment was indeed perfunctory and insufficient and as such could not have been a proportionate means of achieving the aim of complying with its health and safety and contractual responsibilities.

h. We find that this was clearly not a case in which the Claimant's refusal to wear the boots issued by the Respondent was obdurate or insubordinate. The refusal was related to her disability and the Respondent's failure to recognise that fact undermines its argument that its response in sending her home, requiring her to stay at home until she wore the issued boots and not paying her until she was prepared to do so, was a proportionate means of achieving a legitimate aim.

42. On the question of reasonable adjustments we find that the Respondent applied the PCP of requiring the train cleaners at Brighton to wear the approved safety boots it supplied. The Respondent conceded that the PCP placed the Claimant at a substantial disadvantage compared to non-disabled cleaners in relation to standing and walking and that it knew that this was the case or ought to have done so. The Respondent did not in our view comply with the reasonable adjustments duty by adjusting the PCP, or providing the Claimant with a suitable auxiliary aid. The only alternative boots offered were those suggested by Mr

Eastwood. He did this without informing himself of what the Claimant needed by means of an occupational health report or otherwise and without discussion with her. Furthermore these alternative boots were provided in March 2016 and the Respondent offered nothing further to the Claimant by way of aids or adjustments after that date.

43. Furthermore, the Respondent did not allow the Claimant to wear her trainers to work but even if that had not been a reasonable step for safety reasons, for the reasons cited in the previous paragraph the steps it took to identify a suitable alternative were not in our judgment adequate or compliant with the reasonable adjustments duty. We were particularly struck by the fact that at no stage did the Respondent take any steps to inform itself about the Claimant's condition by obtaining a report from her GP, by taking occupational health advice or otherwise.

44. As regards redeployment as a potential adjustment, for the reasons stated above we were not satisfied that the Respondent took such steps as were reasonable to avoid the disadvantage to the Claimant. The Respondent did not provide satisfactory evidence of how it identified suitable roles, how it evaluated the suitability of the Claimant for those roles and how, if at all, it considered how any of those roles might have been adjusted to make them more suitable for the Claimant taking into account her disability. The hearsay evidence in Mr Eastwood’s witness statement was not compelling. The account of the lack of alternative cleaning jobs in paragraphs 143 and 144 of Mr Eastwood’s witness statement were wholly unsupported by documentary evidence. The only role for which the Claimant was offered an interview was one for which she applied independently of the Respondent.

45. Turning to the Claimant’s constructive dismissal claim, the Claimant resigned for the reasons set out at page 190. To recap we found these to have been:

    a. Being discriminated against by being sent home for not wearing safety boots;
    b. The failure by the Respondent to provide documentation that showed that she had been paid for all the hours she had worked (including itemised payslips);
    c. Failure by the Respondent to address the issues raised in her grievance;
    d. Failure to pay her other than intermittent amounts during her absence despite her willingness to work;
    e. The Respondent’s decision in the grievance that payment for hours when she was sent to cover staff shortages was not contractual.

46. We have found as a fact that the Claimant was discriminated against under sections 15 and 20 Equality Act by the Respondent’s treatment of her in sending her home for not wearing safety boots and refusing to pay her or allow her to return to work until she wore them. We also find that the Respondent did not provide the Claimant with the rotas she needed to establish whether or not she had been properly paid, despite the specific request in her solicitors’ letter of 23 November at page 165 -166. We have also found that the Respondent did not deal with the Claimant’s complaints of discrimination in responding to her

grievance and that it only paid her intermittent amounts during her absence from work. Finally, whatever Mr Eastwood may have meant, the Claimant reasonably construed the grievance outcome letter as indicating that he did not regard himself as contractually bound to pay her for travelling to other locations whilst on shift.

47. Do these matters amount to a repudiatory breach of the Claimant's contract? I our view they do. The Respondent had conducted itself in a manner incompatible with its Equality Act duties towards the Claimant and the implied term of trust and confidence. It therefore did not act with reasonable and proper cause and there was no potentially fair reason for dismissal. On the strength of the breaches of the .Equality Act duties alone, the Claimant was therefore entitled to resign with immediate effect and regard herself as constructively unfairly dismissed. The other matters on which she relies simply reinforce her argument that the Respondent's conduct towards her, culminating in the extremely delayed outcome to her grievance and failure to address the Equality Act aspects of it, was intolerable. As a result of the fundamental nature of the Respondent's breaches of the express and implied terms of the employment contract, she also wrongfully dismissed.

48. We do not accept the Respondent's submission that by appealing against the grievance outcome the Claimant was indicating that she waived all the breaches that had occurred to that date. A Claimant faced with a difficult decision such as whether or not to resign from a job she had held for some years, is entitled to vacillate somewhat and consider alternatives such as exhausting the Respondent's internal procedures, without this amounting to a waiver of all the preceding breaches of contract.

49. Nor do we accept the Respondent's submission that the fact that her decision to resign was influenced by the fact that, as she accepted in cross examination, she had been offered another job, meant that the alternative was the real reason for her resignation. The Claimant was clear that she took that job because she desperately needed the money. We do not lose sight of the fact that the Claimant was unpaid by the Respondent except for statutory sick pay for a period of almost six months preceding her resignation. In those circumstances her decision to take paid work elsewhere was a response to the Respondent's treatment of her rather than a separate and extraneous reason for leaving her employment.

50. If we are wrong about our conclusion that the Claimant did not waive the previous breaches of contract by appealing against her dismissal, we would accept Mr Grant's alternative submission that the Respondent's incomplete response to the NMW production notice represented a final straw that revived the previous breaches, entitling her to resign after that point in reliance on them. Whether the Claimant delayed for 12 days or 28 days, she did not in our view delay for so long that this amounted to a waiver in and of itself. As already stated, employees facing this difficult decision are entitled to some time to reflect before making the final decision to resign.

51. It follows from our conclusions on the matter of disability discrimination that the Respondent made unauthorised deductions from the Claimant's wages by

declining to pay her in the period 1 October 2016 to 28 March 2017 when she was ready and willing to work and would have done so but for the Respondent's discriminatory conduct towards her. In the alternative the Claimant suffered loss of earnings in this period as a result of the Respondent's discriminatory conduct and is entitled to compensation accordingly.

52. As regards holiday pay, it was accepted by both parties that the Claimant had in fact taken and been paid for ten days of leave in the relevant holiday period. The Respondent conceded that the Claimant was entitled to be paid in lieu of ten days' carried over holiday arising under Regulation 13 Working Time Regulations 1998. We accepted the Respondent's submission that the Claimant was not entitled to payment in lieu of the additional holiday arising under Regulation 13A as her right to that element of her holiday pay did not derive from European law.

53. The Respondent did not provide the Claimant with a statement of particulars of her employment as required by s1 ERA and no statement of changes under section 4 of that Act. The Claimant is accordingly entitled to compensation of four weeks' pay under s 38 Employment Act 2002.

54. The Respondent's response to the Claimant's production notice on 16 March 2017 did not comply with s10 National Minimum Wage Act 1998.We accepted the Claimant's submissions that the documents provided failed to comply with s 10 (7)-(9) in that the Claimant was not give notice of the place and time at which the records would be produced and was simply sent a spreadsheet by email. Furthermore the spreadsheet did not amount to "records which [the Respondent] is required to keep and, at the time of the production notice, preserve in accordance with s9." Accordingly the Claimant is entitled to be compensated in accordance with s11 NMWA.

55. The Claimant's claim that she was not provided with itemised pay statements is not well founded on the facts of the case.

Remedy

56. The parties asked the tribunal to give an indication of four matters in relation to remedy which would enable the parties to endeavour to reach agreement about the compensation payable to the Claimant without the need for a separate remedy hearing. The Tribunal considered this approach to be in accordance with the overriding objective and indicated that it would be likely to award the Claimant compensation according to the following principles:

    a. An uplift to compensation of 15 per cent under s 207A Trade union and Labour Relations (Consolidation) Act 1992 in consequence of the Respondent's failure to follow the provisions of the ACAS Code in dealing with the Claimant's grievance and in particular the egregious delay in sending her the outcome of the grievance;
    b. An award for injury to feelings of £8500;
    c. An award for future loss of earnings for a period of 12 months from the date of termination of employment.

d. Our satisfaction that the Claimant took reasonable steps to mitigate her losses.

57. Should the parties be unable to resolve the matter of remedy between them a further hearing will be listed in due course.

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Employment Judge Morton

Date: 9 February 2018