EMPLOYMENT TRIBUNALS

Claimant: Mr F Stiuca

Respondent: Dorchester Hotel Limited

Heard at: London Central Employment Tribunal

On: 19 – 22 January 2021

Before: Employment Judge Khan
Ms J Marshall
Mr T Robinson

Representation
Claimant: In person
Respondent: Ms G Nicholls, Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the claims for disability discrimination and unfair dismissal fail, and are dismissed.

REASONS

1. By an ET1 presented on 8 January 2020 the claimant brought claims for disability discrimination and unfair dismissal. The respondent resisted these claims.

The issues

2. We were required to determine the following issues which are based on the list of issues agreed by the parties in advance of the hearing:

<u>Disability</u>

1. The claimant asserts that he is disabled by reason of lower back pain. The respondent does not accept this due to insufficient evidence and puts the claimant to proof of this fact. The respondent denies that it perceived the claimant as having a disability.

2. It is for the tribunal to determine whether the claimant's alleged condition meets the statutory definition of a disability within section 6 of the Equality Act 2010 (EQA), namely:

    a. Did the claimant have a physical impairment?
    b. Did that impairment have a substantial adverse effect on the claimant's ability to carry out normal day to day activities?
    c. Were these adverse effects (or were they likely to be) long term (i.e. did they last or were they likely to last 12 months or more)?

3. Did the respondent perceive the claimant to be disabled within the meaning given in the EQA?

4. In the event that the tribunal finds that the claimant was disabled, did the respondent:

    a. Have actual knowledge of the claimant's disability?
    b. Have constructive knowledge of the claimant's disability on the basis that they ought reasonably to have known that the claimant had such disability?

5. In the event that the tribunal had actual or constructive knowledge of the claimant's disability:

    a. When did the respondent obtain such knowledge?
    b. Who within the respondent's business had such knowledge?

<u>Direct discrimination (section 13 EQA)</u>

6. Does the claimant's dismissal amount to less favourable treatment?

7. Who does the claimant assert is a comparator? In the event that no actual comparator exists, what characteristics does the claimant assert a hypothetical comparator would have?

8. If the tribunal finds that the claimant's dismissal was less favourable treatment, was this less favourable treatment because of the claimant's disability or perceived disability?

<u>Discrimination arising from disability (section 15 EQA)</u>

9. The claimant asserts that his dismissal was an act of discrimination because of something arising from his disability.

10. Was the claimant's dismissal unfavourable treatment?

11. In the event that the claimant's dismissal was unfavourable treatment, was this because of:

    a. The claimant's inability to carry out his in-room dining waiter role;
    b. The claimant's inability to carry out a high volume of in-room dining waiter duties;

c. The respondent's belief that the claimant was unable to do his in-room waiter work.

12. In the event that the tribunal finds that the claimant's dismissal was for one of these reasons, was this a proportionate means of achieving a legitimate aim? The respondent asserts that this was a proportionate means of achieving a legitimate aim, on the grounds set out at paragraph 52 of the amended grounds of resistance i.e. for the In-Room Dining Team to be able to function at full capacity.

Failure to make reasonable adjustments (sections 20 & 21 EQA)

13. Did the respondent have knowledge of the claimant's disability so as to give rise to a duty to make reasonable adjustments?

14. Did the respondent apply the following PCPs (provisions, criteria or practices):

    a. Requiring in-room waiters to lift, carry, push, walk, undertake physical in-room waiter tasks? (PCP (a))
    b. Requiring in-room waiters to do all those things at twice the volume, for example, serving 3 rooms rather than 1, or serving a room every 10-12 minutes, rather than every 20 minutes? (PCP (b))

15. Did those PCPs put the claimant, as a disabled person, at a substantial disadvantage, in that the claimant might experience pain or exacerbation of symptoms in doing those things?

16. Who does the claimant assert is a comparator? In the event that no actual comparator exists, what characteristics does the claimant assert a hypothetical comparator would have?

17. Was it reasonable for the respondent to make the following adjustments to the PCPs:

    a. Allowing the claimant a phased return to work;
    b. Permitting the claimant to undertake lighter duties;
    c. Permitting the claimant to work at a normal, or reduced speed;
    d. Providing the claimant with alternative work, for example, office work or work as an "order taker" role
    e. The respondent identifying and providing the claimant with suitable alternative work, rather than requiring the claimant to identify and apply for alternative roles.

18. Would these adjustments have avoided the disadvantage suffered by the claimant, as a disabled person?

Unfair dismissal (section 98 Employment Rights Act (ERA))

19. Has the respondent shown that the reason or principal reason for dismissal was a potentially fair reason? The respondent relies on capability.

20. If so, did the respondent act fairly in dismissing the claimant for that reason?

21. Did the respondent follow a fair process in relation to the claimant's dismissal?

22. In addition to the facts and issues in the disability discrimination claim, which the claimant also relies on in his unfair dismissal claim, the claimant contends that, at the dismissal meeting, the respondent did not give the claimant the opportunity to prove that he was fit for work, or could carry out his waiter role; the respondent's decision was rushed and was made by a person who had no knowledge of the claimant.

The evidence and procedure

3. The hearing was a remote public hearing, conducted using the Cloud Video Platform (CVP) under rule 46. In accordance with rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. There were no technical issues.

4. The claimant gave evidence himself. The claimant was unable to call Natalia Cerniciuc to give evidence because she was unwell. We did not give any weight to her evidence because the respondent was unable to put questions to Ms Cerniciuc and we did not find that the content of her statement was relevant to the issues we were required to determine.

5. For the respondent, we heard from: Mike Gillam, Occupational Health Manager; Rachel Banks, Assistant Director of People and Culture; Richard Newell, Assistant Director of Food and Beverage; Emma Jaynes, Area Director of People and Culture.

6. There was a hearing bundle of 291 pages. We allowed into evidence, by agreement, one additional document from the respondent and two emails, and seven staff rotas from the claimant. We read the pages to which we were referred.

7. We also considered written and oral closing submissions.

The facts

8. Having considered all the evidence, we make the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

9. The respondent is a business operating The Dorchester (the Hotel), a 5-star luxury hotel, situated on Park Lane, central London. It is part of a group or portfolio of nine hotels known as the Dorchester Collection which is owned by the Brunei Investment Agency, the sovereign wealth fund of the Sultan of Brunei.

10. The claimant was employed by the respondent for seven years, from 29 October 2012 until his dismissal on 13 November 2019. For most of this time he was employed in the role of Food and Beverage (F&B) Assistant until his job title was changed to In-Room Dining Waiter (IRDW) in August 2019. It is agreed that the claimant undertook the same duties in both roles, the main elements of which were to: prepare trolleys, deliver and serve orders to guests in their rooms, deal with any special requests for food and beverage, and keep his trolley clean and tidy. This was physically demanding work which involved lifting, pushing and pulling heavy trolleys. It also required standing for long periods and bending. As the job description for this role emphasised, it required high levels of energy.

11. The claimant worked as part of the In-Room Dining (IRD) department alongside colleagues who were responsible for restocking amenities and the mis-en-place on trolleys, who dealt with the Mini Bar, and who took guest orders over the telephone. The team worked across a 24-hour period divided into morning, evening and night shifts. We accepted the claimant's unchallenged evidence that he had carried out each of the different designated roles in the department and across all shifts, as and when required, as well as transporting items to nearby business addresses associated with the Dorchester Collection.

12. The IRD department was situated in and around the main kitchen, in the basement of the Hotel, close to the hot pass, main stores, hot wash and other washing areas. This was a centre of activity where many staff worked and passed through. Orders were taken in a small office which was adjacent to the kitchen in which there were two desks each with its own computer. The basement was accessed via several flights of stairs and corridors.

    <u>The claimant's lower back pain</u>

13. The claimant has lower back pain. The respondent has not conceded that this is a physical impairment which amounts to a disability for the purposes of the EQA.

14. The claimant injured his back in a motorcycle accident in late October 2014. He was on sick leave for around six weeks, which included around five days in hospital, when we find that it is likely that the claimant was incapacitated to the extent which substantially and adversely impacted on his mobility. We take account of the claimant's GP records which noted that he was using crutches to walk on 4 and 13 November 2014 and was able to walk slowly without crutches on 3 December 2014.

15. Following an assessment with Mike Gillam, Occupational Health (OH) Manager, on 8 December 2014, the claimant commenced a phased return to work the following week. Although no record of this assessment was provided we accepted Mr Gillam's unchallenged evidence that he reviewed the claimant's Med 3 statements (fit notes) and assessed the claimant's gait, posture, flexibility and mobility.

16. The claimant was taken to hospital with severe back pain on 2 January 2015. He returned to work on 6 January 2015 and was reviewed by Mr

Gillam the following week. The claimant was deployed to lighter and office-based duties, for around one month.

17. The claimant was absent from work because of lower back pain for four weeks from 7 May 2015 and a further week in July 2015.

18. In his disability impact statement, the claimant said that his back condition resolved, although not entirely, from around this time, and he was to able to carry out his daily and working activities until the spring 2019. He was able to manage his pain with exercises and painkillers and was generally able to continue to work unimpeded by his back pain. Over the next three and a half years the claimant had a couple of short episodes of sickness absence of no more than two days because of back pain. He then aggravated his back condition when he fell at home in June 2018 and March 2019. He did not report either fall to his supervisors or managers. We accepted the claimant's unchallenged evidence that there were some occasions between these two dates when his back pain meant he was slower at work and when his supervisors noticed this he explained that he had aggravated his back.

19. Save for just over two weeks between 18 February and 5 April 2019 the claimant was certified as being unfit for work because of lower back pain and he remained on sick leave until his dismissal on 13 November 2019.

20. The claimant has explained the way that his back pain has affected his daily activities in his disability impact statement, which was not challenged by the respondent, from the date of his second fall in March 2019: it has affected his sleep and therefore ability to rest; he has required assistance to get down from bed in the morning because he has difficulty bending; he has needed help to put on his socks, shoes and trousers for the same reason; he has had difficulty stepping in and out of the bath and using the stairs; he has been unable to cook because he cannot stand for long periods; he is unable to carry heavy shopping; he is less confident about walking along and crossing busy streets; he has been unable run with his child and play sport.

21. We find that the recurrence of the claimant's lower back pain has had a substantial and adverse impact on his daily activities since late February 2019. This is because we find that looking at the pattern of the claimant's sickness absences, it is likely that his ability to carry out some of the daily activities set out above was already substantially impaired by late February 2019 when the claimant's back pain had already rendered him unfit to work.

Absence Management Policy (AMP)

22. The respondent's revised AMP, dated June 2016, provided for an examination to be carried out by a GP or the company doctor and for the affected employee to give their consent to disclose the resulting report to OH and Human Resources (HR).

23. The AMP also provided guidance in relation to long-term sickness absence, defined as one of four weeks or more duration. This included regular contact by the line manager and involvement of the OH team and for the following steps:

(1) Establish the reasons for the absence and its likely duration.
(2) Consider a phased return to work with OH and in the case of disability, agree on reasonable adjustments.
(3) Request permission to contact the employee's GP to establish: the likely duration of absence; the long-term effect on capability (i.e. their job performance and attendance) and / or request that the employee is assessed by the company doctor for a medical report.

24. Where such medical investigation established that the employee's health condition impacted on their capability, the AMP set out the following options: making reasonable adjustments (in the case of disability), dismissal on the grounds of ill health or retirement on medical grounds.

The respondent's application of the AMP to the claimant

25. We find that the respondent took reasonable steps to manage the claimant's long-term sickness absence in accordance with the AMP but these efforts were obstructed and undermined by the claimant's unwillingness to engage with his managers, and his refusal to cooperate with their attempts to investigate his back condition. As will be seen:

(1) The claimant's managers and OH had difficulty contacting him.
(2) He failed to provide fit notes in time and had to be chased for them.
(3) He refused to give consent for the respondent to contact his GP or to access his GP records on at least four occasions. Nor did he provide any records in relation to the specialist treatment he had in Ireland and Romania or elsewhere.
(4) He failed to attend scheduled appointments with the Company Doctor, Dr Northridge, in July, August and September 2019.

By restricting access to his GP and to his medical records the claimant prevented the respondent from obtaining medical input which was needed to establish the likely duration of his absence, the longer-term effect on his capability or the suitability of any adjusted duties or alternative roles.

26. The claimant's line manager, Yogesh Kapoor, IRD Manager, emailed him on 29 April and 12 May 2019 to request an outstanding fit note. From around the same date as this first email, Mr Gillam, also attempted to make contact with the claimant without success.

27. The claimant replied to Mr Kapoor on 15 May 2019 when he told him that he had sustained a "serious injury" to his back for which he was in hospital receiving treatment where he expected to remain a further two weeks. No more detail was given. Nor did the claimant explain that he was in Bucharest.

28. Having heard nothing more from the claimant, Florentina Serban, HR Manager, emailed him a week later. Noting that his last fit note had expired more than one month earlier, on 16 April 2019, Ms Serban reminded the claimant of his obligations to maintain contact and to provide timely fit notes, and she attached a copy of the AMP. She requested a note from his hospital. She asked the claimant to contact Mr Kapoor to confirm a return to work date so that a meeting with OH could be arranged. Alternatively, if

there was no immediate prospect of a return to work, Ms Serban requested the claimant's permission to contact his GP so that the respondent could understand his condition and how it might impact on his work. This was a clear explanation of the basis on which this information was necessary. Ms Serban also noted that Mr Gillam had tried several times to contact the claimant without success.

29. The claimant replied the next day, on 22 May 2019, in which he reported that he remained unfit for work: he had "strong back pain", his movements were limited and he was walking using two crutches. He confirmed that he was in Bucharest receiving treatment, having physiotherapy and exercising. He did not refer to the request for consent to contact his GP. When Ms Serban repeated this request, the claimant refused "due to privacy and confidentiality" but did not explain what this meant.

30. In her reply, Ms Serban asked the claimant to provide a hospital report by 5 June 2019 confirming the date of his admission, the duration of his hospital stay and when he would be fit to return to work. She now insisted on the claimant's consent to contact his GP because this was necessary to establish the nature of his condition and to consider any adjustments when he was able to return to work, and it had not been possible to organise an OH assessment because the claimant had not taken Mr Gillam's calls. The claimant was warned that unless he cooperated with the respondent formal action would be taken regarding his future employment. The claimant was being uncooperative and obstructive. He did not provide the respondent with a hospital note.

31. Two appointments were made for the claimant to attend OH in June 2019. When the claimant attended the first of these two appointments, with Mr Gillam and Ms Serban, he was given a consent form to sign authorising the respondent to access his medical records. The claimant refused to sign this form and it was agreed that he could take it home to review it and reconsider. This form included a summary of the claimant's rights in relation to the processing of his medical records. He did not subsequently query this summary or seek further clarification in relation to it.

32. The second appointment, an assessment with Dr Northridge on 19 June 2019, was cancelled by Mr Kapoor after the claimant submitted a fit note dated 17 June 2019 in which he was signed off work with low back pain until 15 July 2019. Dr Northridge came into the hotel for one day each month. We accept Mr Gillam's evidence that he rearranged for the claimant to be assessed by Dr Northridge on his next visit in July 2019. The claimant did not attend this appointment. We find that this was one of the two appointments made with Dr Northridge which on the claimant's evidence he asked to be postponed. This appointment was rescheduled for a second time, on 14 August 2019.

33. The claimant submitted a further fit note to Mr Kapoor on 15 July 2019 in which he was certified as unfit because of low back pain for another month. In correspondence with another manager a week later, the claimant explained that he needed crutches to walk. He submitted a further fit note for another four weeks on 14 August 2019 when he also met with Mr Gillam. The claimant was three hours late for this appointment because of a

physiotherapy session which meant that he missed his slot with Dr Northridge. Mr Gillam was surprised to see that the claimant required crutches to walk. He did not conduct an assessment of the claimant himself. When he asked the claimant for consent to contact his GP to obtain more information in relation to his back condition, the claimant refused. Mr Gilliam referred to this in an email he sent to the claimant on 11 September 2019 when he confirmed that he had rescheduled the appointment with Dr Northridge, for a third time, on 18 September 2019.

34. The claimant replied on the same date to request that this appointment was postponed until the results of medical tests he was due to have in Romania on 14 September 2019 were known. He also confirmed that he was due to see a specialist in Dublin the next day, on 12 September 2019.

35. The claimant was signed off work by his GP for another four weeks on 11 September 2019 with low back pain. He was now approaching his sixth consecutive month of continuous sickness absence. With the claimant's entitlement to SSP due to end in October 2019 a decision was taken to escalate the management of his sickness absence. Rachel Banks, Assistant Director of People and Culture, and Richard Newell, Assistant Director F&B, took over the management of it. Mr Gillam made no further attempt to arrange an appointment with Dr Northridge. This decision was therefore taken without any input from the company doctor or the claimant's GP because the claimant had thwarted the respondent's efforts to gain a better understanding of his back condition: he had repeatedly refused consent for his managers or OH to contact his GP or to access his medical records; nor had he provided the respondent with any documents in relation to his specialist treatment in Romania and Ireland, including the tests he was due to have in mid-September 2019.

36. Ms Banks wrote to the claimant on 25 September 2019 to invite him to attend a sickness review meeting on 3 October 2019. The claimant was told that his job could not be kept open for another month: he had been on sick leave for six months and it was unclear when it was likely that he would be able to return to work or whether there were any adjustments that could be made to facilitate this. Ms Banks explained that a decision would have to be made in relation to the claimant's ongoing employment on the limited information available. He was invited to provide any medical updates without delay.

37. The claimant replied two days later to confirm that he remained unfit for work and was in Romania for physiotherapy treatment, and he therefore requested that this meeting was postponed. He referred to a GP letter which he said would soon be sent to the respondent. Ms Banks agreed to postpone this meeting to 13 October 2019. She then wrote to the claimant on 3 October 2019, to chase up his GP's letter which remained outstanding and which she underlined was a priority. The claimant then requested a second postponement on the basis that he was having more medical tests on 14 October 2019 when he wrote "i have good news from my doctors and it's a huge probability to come back to work at the end of this month." He provided no medical records then or later to substantiate this assertion.

38. Ms Banks agreed to reschedule this meeting a second time on 18 October 2019. In writing to confirm this, on 14 October 2019, she emphasised that the respondent could not keep the claimant's role open indefinitely and a meeting was needed to better understand his ongoing sickness absence. She repeated the point that the claimant's refusal to cooperate meant that there was a lack of medical evidence including in relation to a likely return to work date. The claimant's GP's letter had not materialised and she invited the claimant to provide any such medical information.

    First sickness review meeting on 18 October 2019

39. This sickness review meeting took place on 18 October 2019 when the claimant met Mr Gillam, Ms Banks and Mr Newell.

40. The claimant was using two crutches to walk. It was evident to his managers that he was in pain. It is therefore likely that they were surprised when the claimant told them he would be able to return to work in two weeks. He provided no medical evidence to support this. He said that he had been referred to a neurosurgeon for treatment which involved injections to his back although the duration and likely effect of this treatment were unclear. He estimated that he was able to work for one hour and fifteen minutes before he would need to stop. The respondent took this as an indication that he was not fit to work for any longer. His shifts lasted eight hours. Observing that the claimant required crutches and reported being tired after an hour of activity, Mr Newell queried whether the claimant was fit to return to his IRDW duties which he knew were physical and meant standing for long periods.

41. Mr Gillam told the claimant that a GP report was required before he was able to return to work. He noted that the claimant had prevented the respondent from contacting his GP directly to request a report. When Mr Gillam again asked the claimant for consent to contact his GP, he refused. The claimant said that he had been advised by his solicitor against providing this consent. He gave no other reason for this refusal. The claimant was asked if he had brought any medical records with him. He had not. He said that his GP's letter should have arrived. It had not. Ms Banks told that the claimant that this was now a critical point when the respondent needed this information because his job could not be kept open for much longer. She also noted that the claimant's ongoing absence was putting strain on the business and the team, and the busiest time of the year was approaching. She asked the claimant to provide his GP's letter within 48 hours. Ms Banks told the claimant that the respondent would need to make a decision on whether it was able to keep his job open much longer and this would be based on business priorities and an assessment of his likely return to work.

42. A boycott in relation to the owner of the business which had begun earlier in the year continued to affect occupancy levels in the Hotel, and these numbers remained lower in September and October 2019 than in the previous year, however, there was an expectation that the business would be significantly busier by late November 2019 and into the Christmas period. This was a genuine consideration which together with the ongoing recruitment freeze, implemented because of the impact of the boycott on revenue, meant that the respondent needed all its IRD team members to be working at full capacity. The IRD department had also recently incorporated

the butler service which meant an increase in the volume of its work. Taking all these elements into account, we find it likely that there was an expectation of a greater work intensity but we do not find that this meant that the respondent required its IRDWs to work at twice their normal volume or speed. There was no evidence to suggest this.

43. Mr Gillam, who confirmed to us that he had extensive professional experience of back pain, noted that the claimant was in pain and discomfort during this hearing and his mobility, posture and gait were impaired, and that it was likely that these effects of the claimant's back condition would not resolve in the near future by which we find meant at least several months.

44. Later that day, the claimant forwarded a fit note dated 18 October 2019 in which he was certified as remaining unfit for work for another five weeks, backdated from 10 October 2019. This contradicted the claimant's own assessment that he would be able to return to work within two weeks. The claimant also provided a copy of a receipt dated 18 October 2019 for payment of a letter from his GP, Dr Hussain. The claimant sent this letter which was dated 22 October 2019 to the respondent on 25 October 2019. Despite the claimant's repeated assertions to the contrary, we find that he did not request this GP letter before 18 October 2019.

45. In his letter, Dr Hussain confirmed:

> "Mr Stiuca suffers with chronic low back pain and unfortunately had recurrence this year after a fall and due work activities. MRI scan done recently showed multilevel degenerative changes in the lumber spine. He is currently under the Musculoskeletal Clinic and is having regular physiotherapy. He requires regular analgesia (see below) [Co-codamol] and uses walking sticks to mobilise. Mr Stiuca has admitted that work related activities such as heavy lifting and pushing/pulling objects exacerbate his pain. He finds that his symptoms tend to improve with rest. As a result he trying to pursue office based work. I do feel this will help."

46. Other than his fit notes, this was the only medical document which was provided by the claimant. Dr Hussain's letter was limited. It did not explain the likely duration of the claimant's absence, his prognosis for recovery to full or greater functionality or what other work the claimant was safely able to do and of what duration.

47. In his evidence, Mr Gillam confirmed he understood that by "recurrence" Dr Hussain was referring to the pain resulting from the claimant's back injury in 2014. Although this letter was not detailed enough to assess whether and when it was likely that the claimant would be able to return to his IRDW role or his fitness to work with adjustments in any other capacity, Mr Gillam concluded that the claimant was not fit to return to his substantive role because it would exacerbate his chronic back pain. He emailed Ms Banks on 25 October 2019 to confirm this and to recommend that a meeting was now arranged to consider alternative options. This meant looking at an alternative role which did not require heavy physical work.

48. Ms Banks emailed the claimant on 1 November 2019 to confirm Mr Gillam's assessment which meant that it was now necessary to explore options for redeployment into an office-based role. She attached a list of current vacancies and included a link to the careers website for the Dorchester Collection which encompassed all nine sites and its corporate office in Berkley Square. The claimant was told that if he was unable to identify a potentially suitable role within a week i.e. by 8 November 2019 the respondent would need to review his "status" as an IRDW, based on Dr Hussain's letter. The claimant replied on 7 November 2019. He had reviewed the vacancy list and website and had not seen "much available office job positions". He did not identify a potentially suitable vacancy. He said that he wanted to remain in the IRD department working on lighter duties, including as an Order Taker, until an office job became available.

49. Ms Banks therefore wrote to the claimant on 8 November 2019 to invite him to a meeting on 13 November 2019 to discuss his sickness absence and ongoing employment. The claimant was told that if it was not possible to facilitate his return to work then a potential outcome of this meeting was dismissal. He was invited to provide any further medical updates and was reminded of his right to bring a companion to the meeting.

50. The claimant emailed Ms Banks two days later to confirm that he had reviewed the vacancy list and had applied for the role of Suite Specialist. This was based at the corporate office. He also confirmed that he would attend the meeting on 13 November 2019 accompanied by a trade union representative. Ms Banks replied to say that she had made contact with the HR team dealing with this vacancy and they would contact the claimant separately.

51. By this date the dedicated Night Order Taker had resigned following a period of long-term sickness absence and her employment had ended on 5 November 2019. We accept the respondent's evidence that because of the recruitment freeze this was not treated as a vacancy. The respondent instead continued with the interim arrangement it had implemented to cover this role by using the remaining Night Order Taker and the Night Supervisor. This illustrated the way in which the respondent has had to reshuffle its existing cohort of staff because of the recruitment freeze.

Second sickness review meeting on 13 November 2019

52. The claimant met with Ms Banks and Mr Newell on 13 November 2019. They were supported by a note taker. When the claimant attended without a companion he was given the opportunity to rearrange the meeting and confirmed his agreement to proceed.

53. Although the claimant was not using crutches to walk he was in pain and struggling to walk. Ms Banks and Mr Newell also noted that the claimant was uncomfortable standing and sitting. Despite being visibly unfit to resume his physical duties, the claimant said that he was fit to return to work. He told his managers that he had been given this all-clear at a physiotherapy session earlier that day. He said that he could do almost everything apart from pushing and lifting trolleys, and was able to work a full shift of eight hours on his feet. Mr Newell who was not only familiar with the

demands of the claimant's job but also the physical environment of the Hotel, questioned this because the claimant's back would be bent for much of his shift and some of the floors were uneven. The claimant was reminded of what Dr Hussain had written three weeks earlier and was asked if his GP had provided an updated report which corresponded with what he was now saying. The claimant said that his GP would agree with what the physiotherapist had told him. However, he provided no evidence from either his physiotherapist or his GP which confirmed that he was fit to work. The claimant was clearly determined to get back to work. However, we find that Ms Banks and Ms Newell had a genuine and reasonable belief that the claimant was unfit to return to his IRDW duties then or within a reasonably foreseeable period. This was not based on assumptions nor on any perception that the claimant was an 'inconvenience' as he contends but rather on the medical evidence they had. It was also based on their observation that the claimant was in pain and discomfort on sitting, standing, and walking which demonstrated that he remained unfit for his duties and weighed against his opinion to the contrary, in the absence of any further medical evidence.

54. Following an adjournment, the claimant was told that he would be dismissed with immediate effect and would receive a payment in lieu of notice. Mr Newell and Ms Banks explained that based on the medical evidence they had the claimant was unfit to return to his IRDW role which required heavy lifting and standing for long periods across an eight-hour shift. The IRDW role could not be adjusted safely for the claimant because most of the duties involved manual handling, standing for long periods and bending. Nor was the claimant able to do lighter work such as restocking amenities onto the trolley as this also required bending. With the business approaching its busiest period and the recent merger of the butler service with the IRD team there was no capacity to accommodate reduced hours or a phased return to work, even had the claimant been fit to return to his duties. For the same reason the claimant's job could not be kept open any longer. In relation to redeployment to another role in the Hotel, there were no suitable office vacancies and this was unlikely to change because of the recruitment freeze. Nor were there any other vacancies in the IRD team, including the Order Taker role. It was also noted that there where the IRD team was based there was no space where the claimant could sit down and rest his back.

55. We accept the respondent's evidence that alternatives were considered. Mr Newell considered and discounted the Order Taker role. Not only was this situated in a small office in which the claimant would be required to sit for long periods, it was adjacent to a busy kitchen with a slippery floor and accessible through several small flights of stairs. He ruled out any other operational roles in F&B because they involved manual handling. He concluded based on the GP letter and the claimant's evident discomfort, pain and impaired mobility he was unfit to return to work as an IRDW or to any potentially available role at the Hotel, and doing so would be hazardous for the claimant and risked exacerbating his back pain.

56. As we have already found, the respondent had only limited medical information which was due to the claimant's refusal to provide his consent despite being told why this information was necessary and the

consequences of not having it. There was a lack of any medical evidence which established that the claimant was fit for adjusted duties or office work.

57. The claimant was told that if he was successful in his application for the Suite Specialist then he would transfer to this role. He was also told that if he was fully fit to return to his IRDW role within the next six months then he could reapply and if successful his continuity of service would be restored.

58. Ms Banks wrote to the claimant the next day to confirm that he had been dismissed "on medical grounds and capability". His length of service would be preserved if he was appointed into the Suite Specialist role. He was told that he had five working days in which to submit an appeal.

59. On the same date i.e. 14 November 2019, the claimant was contacted by a member of the HR team responsible for the Suite Specialist vacancy and told that this role had already been filled. Another role of Reservation Specialist was suggested because the claimant's CV stated that he spoke French and Italian. The claimant did not apply for this role because he felt he lacked the requisite level of fluency in these languages.

60. One week after his dismissal, on 20 November 2019, the claimant was assessed by his GP as remaining unfit to work with "low back pain [and] stress" until 4 December 2019. As with all the fit notes which the claimant provided it did not suggest that he might be fit to return to work on the basis of a phased return, adjusted duties or hours of work, or workplace adaptations.

Appeal

61. The claimant lodged an appeal against his dismissal on 19 November 2019 in which he set out two grounds of appeal: the ACAS Code of Practice did not provide for dismissal via a capability and performance procedure; and there had been no acknowledgement of a reference which he would need to secure new employment.

62. An appeal hearing took place, chaired by Emma Jayne, Area Director of People and Culture, on 28 November 2019. The claimant was not accompanied by his trade union representative and agreed to proceed without one. The claimant was evidently struggling with back pain. We accept Ms Jayne's unchallenged evidence that at the start of the hearing the claimant explained that he had jarred his back when crossing the road and narrowly avoided a passing taxi. She was surprised at the extent to which this had impacted on the claimant. This reinforced her belief that the claimant was and remained unfit for work. The claimant did not bring any medical evidence with him to this hearing. Ms Jayne made no record of this hearing which she said took no longer than 20 minutes. She wrote the claimant on 2 December 2019 to confirm that she had not upheld his appeal.

63. The claimant's IRDW role has not been replaced because of the recruitment freeze.

The law

Disability

64. Section 6 EQA provides that a person (P) has a disability if (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

65. Section 212(1) EQA defines 'substantial' as more than minor or trivial.

66. Schedule 1, Part 1 EQA defines 'long-term effect' as one which has lasted or is likely to last for at least 12 months, or which is likely to last for the remainder of the life of the affected person.

67. There is statutory Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011).

Direct discrimination

68. Section 13(1) EQA provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

69. The protected characteristic need not be the only reason for the treatment but it must have been a substantial or "effective cause". The basic question is "What, out of the whole complex of facts before the tribunal, is the 'effective and predominant cause' or the 'real or efficient cause' of the act complained of?" (see O'Neill v Governors of St Thomas More RC Voluntarily Aided Upper School and anor [1997] ICR 33, EAT).

70. The decision-maker responsible for the impugned treatment must be aware of the protective characteristic relied on. In relation to a disability discrimination claim, the claimant must show that the employer had actual or constructive knowledge of the disability i.e. all three elements of the statutory definition: (a) a physical or mental impairment which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day activities (see Gallop v Newport City Council [2014] IRLR 211).

71. Alternatively, where the less favourable treatment is because the decision-maker perceived that the claimant had a particular protected characteristic this will also amount to direct discrimination. In the case of disability, this requires the decision-maker to perceive that the elements required to meet the statutory definition of disability (as set out above) applied to the claimant (see Chief Constable of Norfolk v Coffey [2019] EWCA Civ 1061, CA).

Discrimination arising from disability

72. Under section 15(1) EQA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

73. The unfavourable treatment must be shown by the claimant to be "because of something arising in consequence of his [or her] disability". The tribunal must ask what the reason for or cause for this alleged treatment was. If this is not obvious then the tribunal must enquire about mental processes – conscious or subconscious – of the alleged discriminator (see R (on the application of E) v Governing Body of JFS and The Admissions Appeal Panel of JFS and Ors 2010 IRLR, 136, SC). It must then determine whether the reason or cause is something arising in consequence of B's disability.

74. The employer will escape liability if it is able to objectively justify the unfavourable treatment that has been found to arise in consequence of the disability. The aim pursued by the employer must be legal, it should not be discriminatory in itself and must represent a real, and objective consideration. As to proportionality, the EHRC Code on Employment notes that the measure adopted by the employer does not have to be the only way of achieving the aim being relied on but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective.

Failure to make adjustments

75. The duty to make reasonable adjustments is set out in sections 20 and 21 EQA. Where a provision, criterion or practice of the 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 is required to take such steps as it is reasonable to have to take to avoid the disadvantage.

76. Under Schedule 8, paragraph 20(1) EQA, an employer has a defence to a claim for breach of the statutory duty if it does not know and could not reasonably be expected to know that the disabled person is disabled *and* is likely to be placed at a substantial disadvantage by the PCP, physical feature or, as the case may be, lack of auxiliary aid. A tribunal can find that the employer had constructive (as opposed to actual) knowledge both of the disability and of the likelihood that the disabled employee would be placed at a disadvantage. In this case, the question is what objectively the employer could reasonably have known following reasonable enquiry.

77. In Environment Agency v Rowan [2008] IRLR 20 the EAT said that in considering a claim for a failure to make adjustments the tribunal must identify the following matters without which it cannot go on to assess whether any proposed adjustments are reasonable:

    (1) the PCP applied by / on behalf of the employer, or
    (2) the physical feature of the premises occupied by the employer, or
    (3) the identity of non-disabled comparators where appropriate, and
    (4) the nature and extent of the substantial disadvantage suffered by the claimant

78. The onus is on the claimant to show that the duty arises i.e. that a PCP has been applied which operates to their substantial disadvantage when compared to persons who are not disabled. The burden then shifts to the

employer to show that the disadvantage would not have been eliminated or alleviated by the adjustment identified, or that it would not have been reasonably practicable to have made this adjustment.

79. The test for whether the employer has complied with its duty to make adjustments is an objective one, (see Tarbuck v Sainsbury's Supermarkets [2006] IRLR 664). Ultimately, the tribunal must consider what is reasonable (see Smith v Churchills Stairlifts Plc [2006] ICR 524). The focus is the reasonableness of the adjustment not the process by which the employer reached its decision about the proposed adjustment.

Burden of proof

80. Section 136 EQA provides that if there are facts from the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

81. Section 136 accordingly envisages a two-stage approach. Where this approach is adopted a claimant must first establish a prima facie case at the first stage. This requires the claimant to prove facts from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination and something more than a mere difference in status and treatment (see Madarassy v Nomura International plc [2007] ICR 867, CA).

82. The two-stage approach envisaged by section 136 is not obligatory and in many cases it will be appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatsoever in the adverse treatment, the complaint fails (see Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16/RN). Accordingly, the burden of proof provisions have no role to play where a tribunal is able to make positive findings of fact (see Hewage v Grampian Health Board [2012] IRLR 870).

Unfair dismissal

83. Under section 98(1) ERA, it is for the employer to show:

> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

84. Capability (ill-health) is one of the potentially fair reasons for dismissal under section 98(2) ERA.

85. If the employer does establish a potentially fair reason for dismissal then the tribunal must go on to decide whether this dismissal was fair or unfair, applying section 98(4) ERA which provides that:

> the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) 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 a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

86. The correct approach for a tribunal is to consider whether the employer's actions, including its decision to dismiss the claimant fell within the 'band of reasonable responses' which a reasonable employer could have made in the circumstances (see Iceland Frozen Foods v Jones [1983] ICR 17). The tribunal must not substitute its own view for that of the employer but must instead recognise that different employers may act reasonably in different ways in response to a particular situation. The band of reasonable responses also applies to the procedure which the employer has followed (see Sainsbury's Supermarkets v Hitt [2003] ICR 111).

87. Where an employee has had a long-term absence because of illness or injury, a tribunal must consider whether the employer could have been expected to wait longer for the employee to return. This will involve balancing the "unsatisfactory situation of having an employee on very lengthy sick leave" against other factors which may include: the nature of the employee's illness; the likely length of his or her absence; the cost of continuing to employ the employee; the size of the employer (see Spencer v Paragon Wallpapers Ltd [1977] ICR 301, EAT; S v Dundee City Council [2014] IRLR 131, Ct Sess (Inner House)).

88. A tribunal must also consider whether there has been a fair procedure. This requires, in particular:

    (1) consultation with the employee;
    (2) medical investigation i.e. such steps as are sensible to the circumstances (see East Lindsey District Council v Daubney [1977] ICR 566, EAT; S v Dundee City Council); if an employee refuses to cooperate in providing medical evidence the employer is entitled to make its decision on the relevant facts available, including its own observations.
    (3) consideration of other options, including redeployment.

Conclusions

The disability discrimination claim

Disability

89. We find that the claimant was disabled from February 2019, at the latest: his lower back pain amounted a physical impairment which had had a substantial and adverse impact on his day-to-day activities and which had lasted for at least 12 months by this date. We have found that it is likely that the claimant's mobility was substantially and adversely impaired because of

his back pain following his motorcycle accident in late October 2014 and this impairment recurred in February 2019.

Knowledge of disability

90. We find that the respondent, through Mr Gillam, Ms Banks and Mr Newell, had constructive knowledge of the claimant's disability by 25 October 2019, at the latest. This is the date when they received the GP letter which confirmed that the claimant's lower back pain was a recurrence of an earlier condition which Mr Gillam understood to be the claimant's back injury in 2014. Although the respondent did not know the extent to which this back pain had impacted on the claimant's daily activities, it was aware that the claimant's his injury in 2014 had caused him to be absent from work with lower back pain for six weeks in late 2014, for another five weeks in the summer of 2015 and much of February, and March 2019, and continuously since April 2019. The respondent also knew that the claimant required crutches to mobilise in May, July, August and October 2019 and that he was struggling to walk in November 2019. We find that had the respondent made reasonable enquiries based on these known facts, including a physical examination of the claimant, which Mr Gillam was well-placed to perform, it would have understood that the claimant was disabled.

91. We do not find that the respondent had actual knowledge of the claimant's disability nor that it perceived the claimant to be disabled. This is because we have found that the claimant's managers and OH lacked sufficient knowledge of the extent to which the claimant's injury in 2014 had impacted on his daily activities, it assumed that this issue had resolved by the second half of 2015, and although the respondent understood that the claimant's lower back pain in 2019 was a recurrence of the pain caused by his original injury it had no information in relation to the claimant's prognosis.

Direct discrimination

92. This complaint fails because we find that the claimant was dismissed because the respondent had a genuine belief that he was incapable of carrying out his IRDW work duties safely, these duties could not be adjusted and there was no suitable alternative role into which he could be redeployed. We do not therefore find that the claimant was dismissed because he was disabled (nor would we have concluded that the reason for this dismissal was that the respondent perceived him to be disabled, had we found that the respondent had this perception).

Discrimination arising from disability

93. We find that the claimant was treated unfavourably because of something arising in consequence of his disability:

    (1) The claimant was dismissed. This amounted self-evidently to unfavourable treatment.
    (2) One of the factors which the respondent relied on to dismiss the claimant was its genuine belief, based on Dr Hussain's letter, that he was unable safely to carry out his IRDW work (at any volume). This factor arose in consequence of the claimant's disability.

94. However, this complaint fails because we find that the respondent is able to justify the claimant's dismissal as being a proportionate means of achieving its stated aim which we also find to be a legitimate one.

    (1) We find that the aim relied on by the respondent was legitimate because we accepted the respondent's evidence that it required its IRDW team to be at full capacity. There was a recruitment freeze which meant that there was no spare capacity. The impending festive period meant that it needed all its waiters to be at full capacity to meet the anticipated increase in occupancy levels in the Hotel.
    (2) We also find that the decision to dismiss the claimant was a proportionate means of achieving this aim because there was no less detrimental step by which it could have met this aim.
        a. The claimant had been absent from work with lower back pain for more than seven months and there was no medical evidence that he was fit to return to his IRDW role within a reasonably foreseeable period.
        b. This meant that the claimant was not deemed to be fit to commence a phased return to the IRDW role nor to undertake these duties on reduced hours.
        c. The IRDW role was a physical role which required manual handling. It could not be adjusted to light duties. Nor would this adjustment have achieved the respondent's aim because it required its waiters to be working at their full capacity carrying out the full range of their duties.
        d. There were no suitable alternative roles into which the claimant could have been redeployed.

Failure to make adjustments

95. We remind ourselves that the burden is on the claimant to show that a PCP was applied to him. We find that PCP (a) would have been applied to the claimant had he returned to work because the respondent would have required him to resume his normal work duties which included lifting, carrying, pushing and walking. We do not find that PCP (b) would have been applied to the claimant. Whilst we have found it likely that the volume of work for waiters increased at busier times of the year, the claimant has not discharged the burden of showing that he would have been required to carry out these duties at twice the normal volume.

96. We find that had PCP (a) been applied to the claimant it would have put him at a substantial disadvantage because, as Dr Hussain confirmed, the IRDW duties were likely to exacerbate his back pain. We also find that a hypothetical comparator who did not have the same disability as the claimant would not have been placed at such a disadvantage. This was self-evidently a substantial disadvantage because of the pain which the claimant was likely to experience if this PCP was applied to him.

97. However, this complaint fails because we find that the adjustments which the claimant identified were not likely to have alleviated or avoided this disadvantage and / or they were not practicable for the respondent to have applied:

(1) We find that neither a phased return to work nor permitting the claimant to return to his role as an IRDW at a reduced speed would have alleviated or avoided the incidence of further back pain to the claimant. As Dr Hussain confirmed, any heavy lifting, pushing and pulling was likely to exacerbate the claimant's back pain. On the claimant's own evidence, as set out in his disability impact statement, he was unable to lift, and carry heavier objects, and to bend or stand for long periods without difficulty. At the date of his dismissal, he was evidently in pain, struggled to walk, and both sitting and standing caused him discomfort. It is also notable that one week after his dismissal, the claimant continued to be certified as being unfit to work by his GP.

(2) The main duties of the IRDW role were physical and it was not practicable for the respondent to have restricted him to light duties because of its requirement for its waiters to work at full capacity. Even had such an adjustment been practicable for the respondent to make, we would have found that it would not have avoided an exacerbation of the claimant's back pain because this work would have required the claimant to bend and stand for long periods.

(3) We find that the adjustment of redeployment into an alternative role was not practicable. This is because there were no potentially suitable alternative vacancies. The recruitment freeze meant that there were very limited vacancies. Neither the claimant nor the respondent identified any office-based vacancies which were available in the Hotel and any operational vacancies were unsuitable because of the requirement for manual handling which would have exacerbated the claimant's back pain. We find that even had the role of Order Taker role been available, it would not have avoided an exacerbation of the claimant's back pain because it would have required the claimant to sit for long periods and to work in a confined office nor do we find that it was a suitable location for the claimant because of its proximity to the busy kitchen and the hazards which this environment presented.

(4) As there were no potentially suitable alternative roles into which the claimant could have been redeployed we find that there were no roles which the respondent could have identified and provided to the claimant.

The unfair dismissal claim

98. This claim fails because we find that the claimant was dismissed by reason of capability and that the respondent's decision to dismiss the claimant was within the band of reasonable responses.

99. As we have found, the reason for the claimant's dismissal was capability. The claimant had been on long-term sickness absence and the respondent had a genuine belief that he was incapable of carrying out his IRDW work duties safely. These duties could not be adjusted and there was no suitable alternative role into which he could be redeployed.

100. We do not find that the respondent could have been expected to have waited any longer for the claimant to return to work. The claimant had been absent from work continuously for more than seven months and there was

no medical evidence to show that he was able to return to his IRDW role within a reasonably foreseeable period.

101. We find that the process the respondent adopted which culminated in the claimant's dismissal was within the band of reasonable responses:

(1) We have found that the respondent took reasonable steps to manage the claimant's sickness absence under the AMP. His managers and OH took reasonable steps to consult with the claimant and to understand the true medical position from late April 2019.

(2) We find that the medical investigation conducted by the respondent was reasonable in the circumstances. The claimant was given every reasonable opportunity to provide medical evidence. He was advised by his managers and OH from May 2019 that further medical evidence was needed to understand the cause of his sickness absence, its likely duration and for consideration to be given to any adjustments necessary to support his return to work. As we have found, the reason that the respondent lacked this information was because the claimant was uncooperative and obstructive. He repeatedly refused to provide consent to access his medical records or for contact to made directly to his GP. He missed three appointments with Dr Northridge. He was told at the October 2019 meeting that a medical report was required. He was also warned that the consequence of failing to provide more medical evidence was that the respondent would have to rely on the limited information it had when considering his ongoing employment.

(3) He was invited to an initial review meeting in October 2019 which was rearranged twice at the claimant's request. He was invited to a final review meeting in November 2019 when he was warned of the potential outcome of dismissal. In relation to both meetings, he was reminded of his right to bring a companion and the start of each agreed to proceed in the absence of one.

(4) We find that the respondent considered alternatives to dismissal. Ms Banks and Mr Newell considered a phased return to work and lighter duties, and concluded that neither option was suitable for the reasons we have found. They also considered whether there were any alternative roles into which the claimant could be redeployed. There were no suitable roles available in the IRDW nor any others which were identified within the Hotel. The only potentially suitable role which the claimant identified was the Suite Specialist post which he applied for but was no longer available.

(5) We do not find that the decision to dismiss the claimant was rushed nor that it was rendered unfair because Ms Banks nor Mr Newell were unfamiliar with the claimant. As we have found, Mr Newell was familiar with the claimant's role and his working environment.

(6) The claimant was able to exercise his right of appeal. Although the appeal process conducted by Ms Jayne was somewhat perfunctory we find that this was a genuine opportunity for the claimant to challenge his dismissal and we have noted that the claimant failed to provide any new medical evidence to support his appeal.

106. We also find that the decision to dismiss the claimant was within the band of reasonable responses:

    (1) On the basis of the information it had, the respondent had a genuine and reasonable belief that the claimant was unfit to return to his IRDW duties. This was based principally on Dr Hussain's letter dated 22 October 2019, which confirmed that a resumption of the main duties of this role were likely to exacerbate the claimant's back pain. The respondent also took account of its own observations on 13 November 2019 which were consistent with this medical evidence and which weighed against the claimant's personal opinion. The claimant had by this date been on sickness absence for more than seven months. None of the fit notes which the claimant provided stated that he was fit to return to work on the basis of a phased return or adjusted hours or duties. There was no evidence to show that there was any likelihood of the claimant being able to return to this role within a reasonably foreseeable period.
    (2) As we have found, there were no adjustments which could be made to facilitate the claimant's safe return to the IRDW role because of its requirement for heavy physical work, bending and standing for long periods. The impending festive period also meant that the respondent needed to ensure that the IRDW team were at full capacity.
    (3) The recruitment freeze meant that there were very limited opportunities for redeployment. There were no suitable alternative roles available into which the claimant could have been redeployed.
    (4) We have found that the process adopted by the respondent was fair in that it was within the band of reasonable responses.

105. For these reasons, the claims fail and are dismissed.

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Employment Judge Khan
4 February 2021

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RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

Date 15 Feb. 21

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FOR EMPLOYMENT TRIBUNALS