



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

**AND**

**Respondents**

Ms M de Morgado

Carolia Towers Ltd t/a Doubletree  
by Hilton Hotel – Tower of London

**Heard at:** London Central Employment Tribunal (by video CVP)

**On:** 14 January 2021

**Before:** Employment Judge Adkin  
Mr D Kendall  
Mr R Baber

## Representations

**For the Claimant:** Ms S Pankowski, Paralegal

**For the Respondent:** Mr D Northall, Counsel

## WRITTEN REASONS

1. These are written reasons confirming the refusal, given orally of the Respondent's application for reconsideration dated 8 December 2020.

### Background

2. The Tribunal ruled on liability in the Claimant's favour in a written judgment and reasons promulgated and sent to the parties on the 28 November 2020.
3. The application for reconsideration under rule 70 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules") was made on 8 December 2020, but unfortunately not referred to me until 7 January 2021 as a result of administrative delays. I took the view that

this was not an application that should be dealt with on the papers, and that it was appropriate for this to be dealt with on the basis of oral submissions from both parties by the full panel.

4. Today's hearing was due to be the first day of a two-day remedy hearing. In the event however the parties are not ready to deal with remedy (not least because the Claimant is not present).

#### The Application

5. The written application for reconsideration dated 8 December contains three grounds:
  - 5.1. It was never the Claimant's pleaded claim that she should have been transferred to a permanent role in reservations to alleviate her back pain.
  - 5.2. It is not clear from the judgment when the Respondent should have transferred the Claimant to a permanent role in reservations.
  - 5.3. It is not clear how the Respondent should have facilitated a transfer of the Claimant to a permanent role in reservations as a reasonable adjustment.
6. Mr Northall for the Respondent pursued the application in a slightly different basis to that in the written application. Mr Northall's assumption and starting position is that the Tribunal found that a job in the Respondent's Reservations department should have been given to the Claimant at a time other than October 2018. This he infers from the language in the written reasons, in particular paragraph 276 (set out below) which refers to "a" reservation rather than "the" reservation role.
7. Mr Northall accepts that, based on the claim as it was framed in the list of issues it was permissible finding to find that it was a reasonable adjustment and to grant a job in the reservations department in October 2018. He argues that for various factual and legal reasons, we ought not to have made that finding and invites us to reconsider.
8. Mr Northall made an oral request that an addendum to the original decision be annexed to it to clarify the reasoning. We consider that the written reasons themselves are clear. If we are wrong about that, to the extent that Mr Northall has contended that there was an ambiguity in the reasons, this ambiguity has been resolved through the oral and written reasons given in determining this application.

#### Law

9. Rule 70 provides

70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration,

the decision (“the original decision”) may be confirmed, varied or revoked. If it is revoked it may be taken again.

### The Claim

10. The Claim form presented on 29 August 2019 contained the following elements: [references are to the hearing bundle]
  - 10.1. [16] – she experiencing severe backache due to standing long hours; “she explained about her diagnose[d] medical condition and how working long hours was affecting her back;
  - 10.2. [17] – “severe backache”; “no chairs provided for her to sit during the shift resulting from claimant experiencing excruciating back pain; backache”; “ the claimant informed the assistant manager that... The claimant requested once again to have her disability looked into, to consider her symptom including... backache... and make reasonable adjustment to accommodate her”;
  - 10.3. [19] – “no chair provided which enhance her backache”;
  - 10.4. [21] – “section 20 failure to make reasonable adjustments”.
11. The actual adjustments contended for were unclear from the claim form.
12. It seems that claim became particularised at a series of case management hearings (17 February 2020, 30 April 2020, 22 May 2020, 23 July 2020) through to the creation of a list of issues by Employment Judge E Burns. That list included the following elements in the claim of failure to make reasonable adjustments:
  - 12.1. PCP: [Issue13c] Requiring staff to stand when working at reception.
  - 12.2. Substantial disadvantage: [Issue 15c] Her lower back pain was exacerbated
  - 12.3. Reasonable adjustments: [Issue 17a] A permanent transfer to a role into Reservations;
13. The proposed permanent transfer to Reservations was dealt with at paragraph 73(a) of the Amended Grounds of Resistance.
14. That was the list of issues which was the basis for the matters heard before us.

### Evidence

15. The Respondent called evidence on why working in Reservation might not have been suitable for the Claimant, which appeared to directly engage issue 17a, in particular the evidence of Fiona Green which is referred to below.

16. It was clarified on the third day of the hearing, when a discussion came up between the Tribunal and the advocates about the timing of the reasonable adjustments contended for, that the Claimant's case was that the permanent transfer should have taken place on October 2018. The clear significance of that date is that the claimant attended an interview for a position in the Reservation department on 10 October 2018.
17. Mr Northall made submissions on the transfer to reservations following the interview on 10 October 2018 at paragraph 57-59 of his written submissions. He did not make the submission that this was not the pleaded claim. Rather he dealt with it based on the evidence on this point.

The Tribunal's written reasons

18. Our findings of fact contain the following:

Reservation role

47. In September 2018 the Claimant applied for the position of Reservations Agent at the Hotel.

48. On 10 October 2018 the Claimant attended an interview for this role. The Manager of the Reservations Department Sadie Scolah wrote to Caroline Shaw saying although there was a stronger candidate for this recruitment exercise, her comment about the Claimant was that she was "actually rather impressed with her". Ms Scolah described the Claimant as "very self-aware" and having provided answers which were "detailed and pretty polished", she is described as eager to learn and very interested in a reservations apprenticeship. Ms Scolah positively recommended an apprenticeship to gain experience at reservations and says that she would recommend her, especially for another property (presumably another hotel).

49. The Claimant's contention is that she should have been given a permanent transfer to a role in Reservations at this time as a reasonable adjustment. There is no evidence that the Claimant suggested at the time that this would have been an appropriate adjustment.

50. Following on from this interview in the days after the Claimant and Ms Shaw had an email exchange about the possibility of the Claimant taking up a reservations "apprenticeship". The Claimant was thankful of Ms Shaw's support, and also enquired about a possible apprenticeship for conference and events. It must have been clear to Ms Shaw based on this and the earlier conversation, that the Claimant was keen to leave the Front of House team.

...

274. (Issue 17) The Claimant contends that the Respondent should have taken the following steps:

275. (17a) A permanent transfer to a role in Reservations; –

275. The Claimant was found to be a sufficiently good candidate to mean that she was considered suitable for a Reservations role, albeit that she was beaten by a better candidate in October 2018. In our assessment it would have been a reasonable adjustment to allow her to be moved to a Reservation role. This may have required giving her preferential treatment over a non-disabled colleague (per *Archibald v Fife Council* [2004] UKHL 32, [2004] IRLR 651, [2004] ICR 954).

...

281. Did the Respondent fail to take those steps?

282. It cannot be in dispute that the Respondent failed to transfer the Claimant to a role in Reservations.

283. Were they reasonable?

284. The Respondent makes the point that the Claimant did not ask for role as a reasonable adjustment. It is clear from authority that this in itself is not a bar. We do not accept the argument that there was no information within the Respondent's knowledge causing it to think that offering the role could amount to an adjustment. All of the elements which caused the disadvantage were within the Respondent's knowledge. She had difficulty standing for reception roles. She was being pulled from the adjusted sitting down duty on Careline back onto front desk reception. This caused a further absence on 27-28 September, following absences which had been caused by standing before. A purely sedentary role such as Reservations would have been the solution to this.

285. It is argued that there is nothing to suggest a move to Reservations would have provided a material benefit that was not provided by Careline, nor that a reservations role would be more sedentary. Had the Claimant been left to work on Careline as Ms Branley envisaged, this submission would hold. Our finding, based on the evidence is that the Claimant was being either rostered onto Front of House or pulled away from the Careline work onto Front of House work.

286. We do not accept the evidence of Fiona Green that the Reservations role would have been positively detrimental given the greater pace of working life and demands of client, for three reasons. First, Ms Green admitted during her oral evidence that she had very little practical experience of the Front of House roles. We felt that the comparison she made with Reservations was therefore of limited value to us. Second, it was quite clear

that the Front of House roles were at times extremely busy. Third, she had been identified as a good candidate for Reservation work by Ms Scora the Reservations Manager.

19. Our finding at paragraph 275 relates specifically to the Claimant's claim that she should have received a permanent transfer to a role in Reservations in October 2018, which is when she attended an interview. The reference to giving preferential treatment over a non-disabled colleague (and the reference to the authority of Archibald v Fife) related to a possible need to give the Claimant priority over the 'better' candidate referred to within the same paragraph. This was the candidate who was successful on 10 October 2018.
20. It follows that the Tribunal found for the Claimant in the terms of the claim identified in the list of issues, which Mr Northall acknowledges was a permissible finding.
21. As to 'when' the transfer should happen, the answer is October 2018.
22. As to 'how' the transfer should happen, the answer is if necessary by giving preference over another candidate.

#### Transfer to Reservation in October 2018 the wrong conclusion

23. Mr Northall's contention is that that, if our finding is for a transfer to Reservations in October 2018, this is the wrong conclusion for a variety of different arguments which are set out below.

#### Stars didn't align

24. Mr Northall's first argument, is "the stars didn't align". What Mr Northall argued was that within the reservations team Ms Sadie Scorer who carried out the recruitment interview was not aware that the Claimant was disabled. Further, Caroline Shaw, the member of the human resources team the Claimant had been dealing with who knew she was disabled and did not know that she was applying for a role in the Reservations Department. Mr Northall's argument is that in essence that the two things did not connect up, or in his words the stars did not align, which is why this situation occurred in the way that it did. His submission is that this situation should not be found to be a failure to make reasonable adjustments.
25. The Tribunal does not accept this submission for two reasons.
26. First, on the facts, in the witness statement of Caroline Shaw at paragraph 8 she says this,

"before Maria's interview for the Reservations job referred to above. I helped Maria by taking the time to explain the interview process to her and give her guidance on the type of questioning technique the interviewer would use."

27. The Respondent's own evidence is that Caroline Shaw in the HR team was aware that the Claimant was applying for this job and further she was an positively assisting her with it.
28. Secondly, we considered this matter at the level of knowledge on the part of the Respondent corporately. We found that the management team was or should have been aware of the substantial disadvantage. This was caused by the standing role.
29. It is clear from our findings that adjustments were made in response to the difficulties caused by the standing role. This was the reason why the Claimant was an given the 'Careline' role, which was a seated and telephone role rather than a standing front desk reception role. What unfortunately happened is that there was an increasing expectation and in particular from September and October 2018 onward that the Claimant should leave her Careline role and come to the front desk back to the standing role that was causing her difficulty. We made findings at paragraph 43 of the judgment. The Claimant was allocated to work back on reception Monday to Thursday, starting 24 September 2018. While she was on reception there were two other colleagues who were allocated to Careline. In those circumstances is not surprising that on 28 September 2018 the Claimant went off on sick leave. This triggered an attendance management process. The management team were aware of a disadvantage and nevertheless she was placed back in that role. She went sick and that triggered the attendance management process.
30. The management team was aware of the disadvantage, nevertheless the Claimant was being asked to work on the on the front desk.
31. Ultimately the Respondent had knowledge of the disability, knowledge of the substantial disadvantage, knowledge that the Claimant was applying for the Reservation role and yet failed to make reasonable adjustment identified.

#### Evidence of vacancies

32. The next argument is there was no vacancy or at least we've not heard evidence that there was a vacancy and are finding is that there was a vacancy in the Reservations team.
33. There was vacancy for which the interview was being carried out on 10 October 2018. The Tribunal had heard evidence that there was at least one role that the Claimant could have gone into that stage. This was the role that the "better" candidate won.

#### Creation of a role

34. Mr Northall argues that it was not for the Respondent to create a role, there was no legal obligation on to create a role. He referred to the ACAS code of practice in support of this submission.

35. Given that there was a vacancy, there was no need to create a role. It was not the finding of the Tribunal that the Respondent needed to create a role.

CONCLUSION

36. The Tribunal refuses the Respondent's application and confirms the original decision.

T. ADKIN

Employment Judge

Date 28.1.21

SENT TO THE PARTIES ON

29/1/21.

FOR THE TRIBUNAL OFFICE

Notes

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