# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| **Ms S McAdorey** | **v** | **Chiltern Distribution Ltd** |

**Heard at**: Watford (CVP) **On**: 1, 2, 3, 4 & 5 March 2021

**Before:** Employment Judge Alliott
Mr T Chapman
Mr P Miller

**Appearances**

**For the Claimant:** In person
**For the Respondent:** Mr John Ratledge, Counsel

**COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals**

"This has been a remote hearing not objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and no-one requested the same."

# JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim is dismissed.

# REASONS

## Introduction

1. The claimant was employed by Chiltern Cold Storage Group Ltd as a Warehouse Administrator from 20 February 2017. On 1 November 2018 she was "TUPE" transferred to the respondent. On 16 April 2019 she resigned and the effective date of termination of her contract of employment was 1 May 2019.

2. By a claim form presented on 22 May 2018, following a period of early conciliation from 9-22 May 2019, the claimant brings complaints of unfair dismissal (constructive), disability discrimination and breach of the Working Time Regulations 1998.

3. The claimant's schedule of loss claims £876,474.

**The issues**

4. The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Constructive unfair dismissal & wrongful dismissal

4.1 Was the Claimant dismissed, i.e. (a) did the respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant? (b) if so, did the Claimant affirm the contract of employment before resigning? (c) if not, did the Claimant resign in response to the Respondent's conduct (to put it another way, was it a reason for the Claimant's resignation – it need not be the reason for the resignation)? If the Claimant was dismissed, she will necessarily have been wrongfully dismissed because she resigned without notice.

4.2 The conduct the Claimant relies on as breaching the trust and confidence term is:

4.2.1 That she was bullied by Laura Parker on 4 March 2019 in the general office. She will call Molly Davis as a witness. She alleges that Ms Parker offered to make everyone a hot drink apart from the claimant, singling her out;

4.2.2 That Ms Parker repeatedly said that the claimant was not doing any work. This, she avers, was on a continuous basis and will call Molly Davis and Ben Ford to give evidence;

4.2.3 That Laura Parker spied on her, recording everything she did using a notebook which she kept for her personal use. Again the, the witnesses are Molly Davis and Ben Ford;

4.2.4 That Ms Parker unreasonably asked her to answer to the office phone on diverse dates. This was not part of the claimant's contracted duties. She will call Molly Davis, Ben Ford and Paul Sullivan;

4.2.5 That on 26 March 2019, she was "verbally attacked" by Brian Sagaseta and Julian Cooper during a grievance hearing. She will call Rachael Marshal and Peter Nepham as witnesses. Part

of the "verbal attack on her" was that the two principals claimed to be Police Officers and did not allow her to raise her grievance in an appropriate manner;

4.2.6 That she was forced to move from her contracted job with Chiltern Cold Storage Limited to Chiltern Distribution Limited at the end of November/beginning of December 2018;

4.2.7 That she was denied a pay rise promised by Andrew Withers when she started work in February 2017. He promised to pay her £24,000 for the work that she was doing and then asked her "bend over a table" for sexual reasons on a number of occasions. This has been the subject of a grievance heard by the respondent. She will call as witnesses Simone Loveridge and Ms Ieva Verasan. While of sick and having reflected on the manner in which she was treated, she gave one week's notice to terminate her contract on 30 April 2019.

4.3 If the Claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal

4.4 If the Claimant was unfairly dismissed and the remedy is compensation:

4.4.1 if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604];

4.4.2 would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

4.4.3 did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Disability

4.5 Was the Claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following condition(s):

4.5.1 fibromyalgia?

Reasonable adjustments: EQA, sections 20 & 21

4.6 Did the Respondent not know and could it not reasonably have been expected to know the Claimant was a disabled person?

4.7 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

4.7.1 The requirement to lift 20kg trays?

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

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

4.9.1 The claimant clarified that her claim relates to an alleged failure on the part of the respondent to make reasonable adjustments. Although she was taken on as the administrator of an account known as the Meadows Account, she was also required to undertake lifting work. She avers that there was a requirement to lift 20kg trays on a daily basis and the respondent had failed to make adjustments by not following a request for reduced hours, a varied shift pattern and in failing to remove the requirement to work overtime and to provide adequate and equally required rest breaks.

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

Other claims

4.11 Was there a breach of the Working Time Regulations 1998?

4.12 Did the Claimant sign an agreement opting out of the Regulations, allowing her working hours to exceed 48 hours per week?

4.13 Did she work more than 48 hours per week over a 17 week reference period?

4.14 Was the Claimant not allowed the legal rest breaks under the Regulations?

**The evidence**

5. We were provided with a trial bundle running to 232 pages. In addition we had witness statements and heard oral evidence from the following:

The claimant;
Ms Ieva Versanka: a co-worker at Chiltern Cold Storage Ltd;
Ms Molly Davis: a co-worker at the respondent;
Mr Paul Sullivan: a co-worker at the respondent;
Ms Rachel Marshall: a friend of the claimant;
Mr Peter Mepham: a friend of the claimant;
Mr Paul Jackson: owner and director of the respondent;
Mr Paul Jephcott: consultant to the respondent at the relevant time;
Mr Brian Sageseta: operations director of the respondent;
Ms Laura Parker: transport administrator of the respondent, working alongside the claimant.

**The law**

6. Disability

6.1 S.6 of the Equality Act 2010 provides:-

> "6. Disability
> (1) 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."

6.2 In addition we have Schedule 1 to the Equality Act and the Guidance on the Definition of Disability (2011) which we have taken into account where appropriate. In particular:-

> D3. "In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern."

6.3 In addition the Statutory Code of Practice on Employment (2011) deals with the employer's knowledge as follows:-

> "6.19 For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.
>
> 6.20 The act does not prevent a disabled person keeping a disability confidential from an employer. But keeping a disability confidential is likely to mean that unless the employer could reasonably be expected to know about it anyway, the employer will not be under a duty to make a reasonable adjustment. If a disabled person expects an employer to make a reasonable adjustment, they will need to provide the employer – or someone acting on their behalf – with sufficient information to carry out that adjustment."

7. Failure to make reasonable adjustments

7.1 As per the list of issues

8. Unfair dismissal (constructive)

8.1 In order to claim constructive dismissal, the employee must establish that:

- There was a fundamental breach of contract on the part of the employer
- The employer's breach had caused the employee to resign
- The employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

8.2 A constructive dismissal is not necessarily an unfair one.

8.3 There may be a single breach of contract or a series of breaches of contract, the last of which cumulatively is sufficient to justify a claimant in resigning.

8.4 In this case the contractual term relied upon is the implied term of mutual trust and confidence.

8.5 Of particular relevance to this case, in our judgment, is the grievance procedure. Obviously enough there is the ACAS Code of Practice on Grievance Procedures and the claimant's contract of employment had, by reference to the employee handbook, a grievance procedure. We have not seen that grievance procedure. By reference to the IDS Employment Law Handbook "Contracts of Employment" at paragraph 3.100 – "Grievance Procedures" the case of WA Goold (Pearmark) Ltd

v McConnell and another [1995] IRLR 516 EAT is cited and the following set out: -

> "The EAT upheld an employment tribunal's decision that there was an implied term in a contract of employment that the employer would 'reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance they may have'.
>
> The EAT agreed with the tribunal that, when Parliament introduced the requirement that details of a grievance procedure must be given to employees in their written statement of terms and conditions, Parliament must have considered that the proper handling of grievances was a necessary part of good industrial relations."

8.6 In our judgment the proper handling and conduct of grievances does form part of the claimant's contract of employment.

9. Working Time Regulations

9.1 As regards work, there is no freestanding jurisdiction of the tribunal to deal with an alleged breach of the 48 hour week save for compensating with pay. The claimant at all times has accepted that she was paid for all hours worked.

9.2 It is a matter of fact for us to determine whether the claimant has established that her right to uninterrupted breaks has been infringed.

**The facts**

10. Disability

10.1 The claimant relies on the disability of fibromyalgia.

10.2 The case management orders of 13 February 2020 required her to disclose relevant medical notes and other documents and serve an "impact" statement dealing with her disability and the effect of it on her ability to carry out normal day-to-day activities by 26 March 2020.

10.3 The claimant has disclosed GP notes covering the period 1 September 2018 to 18 February 2020. We also have a letter dated 5 December 2018 from a consultant rheumatologist following an examination on 19 November 2018. The claimant has disclosed a DWP decision letter dated 3 September 2018 giving the result of her application for a Personal Independence Payment (PIP). This was based on a questionnaire filled in by the claimant which we do not have. It was also based on a physical assessment.

10.4 The claimant failed to comply with the direction for an impact statement. Further, the claimant has not dealt with the issue of any impact on her day to day activities in her main witness statement. Despite this we have gone on to examine such evidence as we have

to determine whether we can make a decision as to the impact of her physical impairment on her day-to-day activities.

10.5 It is for the claimant to establish that she is disabled within the meaning of the Equality Act 2010.

10.6 Although we do not have the GP notes going back further than 1 September 2018, the consultant rheumatologist letter states as follows:

> "I understand she was diagnosed with polymyalgia rheumatica in October last year (2017) when she presented with sudden pain involving the neck and shoulders and she told me that at that time she had a swelling (puffiness) of hands and feet, and she has been having severe pain since."

10.7 We take from that evidence that as from October 2017 the claimant had a physical impairment. At that time it was characterised as polymyalgia rheumatica (PMR) a diagnosis subsequently doubted by the rheumatologist when he made a diagnosis of fibromyalgia syndrome in November 2019. Further, the events that we are dealing with cover November 2018-May 2019. Consequently, we find that the claimant's physical impairment had lasted in excess of twelve months and consequently was long term.

10.8 In the circumstances we have focused on whether the claimant's physical impairment had a substantial adverse effect on her ability to undertake day-to-day activities. The claimant places reliance on the PIP decision letter.

10.9 The referral letter to the rheumatologist is summarised by him and includes:

> "She told me that every time she tried to reduce her Prednisolone below 5mg daily, she would have severe pain. The pain would be typically involving the four quadrants of the body, both joint and muscles. She has not had any recent episode of any joint swelling. Her pain is typically mechanical in nature. She does not seem to have any inflammatory symptoms…"

10.10 The rheumatologist's report sets out the examination findings as follows:-

> "On examination, her shoulder abduction is limited to around 120 degrees, passive movement allowed to around 180 degrees with symptoms of impingement. Hand examination was unremarkable, no evidence of any synovitis. No skin rashes noted today. On examination of the hip, she has full range of movement of the hip with no pain on internal or external rotation of the hip but leg raising is limited to around 30 degrees bilaterally mainly because of pain localised to the lateral aspect of the hip and she is very tender over the trochanteric bursa bilaterally consistent with trochanteric bursitis. She is tender in around 15/18 tender triggering points."

10.11 The rheumatologist's report provides evidence that the claimant experiences pain in her neck, shoulders/limbs and that she has some limitation in her shoulder abduction and leg raising. It provides limited assistance in assessing the extent to which this affects her day-to-day activities.

10.12 We have examined the fit notes that have been placed before us. There are 10 of them.

- On 18 September 2017 the claimant was signed off work for seven days for "joint pains? infection".
- On 10 October 2017 the claimant was signed off work for two weeks for "debility".
- On 23 October 2017 the claimant was signed off work for a further four weeks for "joint pains, under investigations".
- On 18 November 2017 the claimant was signed fit for work with a phased return to work on light duties, altered hours to 30 hours per week and a recommendation that she need not wear safety boots. The condition was "polymyalgia rheumatica and planter fasciitis".
- On 27 March 2018 the claimant had a fit note recording "polymyalgia rheumatica" and stated the claimant was fit for work reduced to 30 hours per week.
- On 6 August 2018 a fit note for 35 hours per week on the grounds of "suspected polymyalgia, joint symptoms, waiting rheumatology opinion".
- On 5 November 2018 for "suspected polymyalgia, joint symptoms, awaiting rheumatology opinion" the claimant was signed fit for work at 35 hours per week.
- On 2 February 2019 for "fibromyalgia syndrome" the claimant was fit for work at 35 hours per week.
- On 5 March 2019 for "fibromyalgia" the claimant was not fit for work for two weeks.
- On 14 March 2019 for "fibromyalgia" the claimant was not fit for work for a further two weeks.

10.13 Save for the period of six weeks when the claimant was not fit for work in 2017, the fit notes are solely concerned with the claimant working reduced hours of 30 or 35 hours per week. They do not provide any assistance to us in evaluating what adverse effect, if any, the claimant's physical impairment had on her day-to-day activities. On the face of it she was fully fit for work.

10.14 The GP notes provide little or no assistance concerning the claimant's day-to-day activities.

10.15 We have considered carefully the Personal Independent Payment assessment document. As already recorded, we do not have the questionnaire filled in by the claimant or the extra information she provided on assessment. Dealing with daily living there are 10 activities assessed. On six of them the claimant scored zero. On the

other four she scored two, giving her a total score of 8/84. The minimum score to receive a standard payment is 8. The claimant was therefore assessed at the very lowest level of qualifying for a PIP.

10.16 Dealing with mobility, the claimant scored 8 for moving around. Again, 8 is the minimum required to receive the standard rate for mobility needs.

10.17 The PIP assessment was undertaken between April and September 2018, when the claimant was working for Chiltern Cold Storage. The car park at Chiltern Cold Storage was 200 metres or so away from the office block. The claimant would park there and walk to the office. The PIP assessment states as follows:

> "You said you have difficulty moving around. You report being able to walk 20 metres and then repeating this after a short rest. You said you walk for 5 minutes from the car park at work to get to your desk with 2 stops …..
>
> Taking into account reliability I consider it reasonable to decide you can stand and then move unaided more than 20 metres but no more than 50 metres. This is consistent with your medical history, your description of a typical day, informal observations at your face to face consultation, how you engage with the assessor, the information you provided about how your disability affects you and your musculoskeletal examination results."

10.18 The respondent's witnesses told us and we accept that the claimant regularly walked the 200 metres or so to the office without apparent difficulty. Whilst not specifically observing her for obvious reasons, she had been seen doing so on a regular basis. Further, none of the respondent's witnesses recalled the claimant having any mobility issues whilst at work. That is of course inconsistent with what the claimant was telling the DWP. We find that the claimant's self-reported limitation on mobility to 50 metres to be unreliable and exaggerated. In our judgment, if the assessor had been told that she regularly walked 200 metres from a car park to her work then she would not have achieved the score of 8.

10.19 Our finding on mobility has resulted in us looking at her other alleged restrictions carefully. In early 2019 the claimant was complaining about having to move trays weighing 20kg. Whilst that activity may have caused her pain, she could clearly do it. She claimed in the PIP assessment that for "preparing food" she needed an aid or an appliance to be able to prepare or cook a simple meal. Again we find that assessment to be exaggerated and unlikely. The claimant could obviously boil a kettle at work. In our judgment, if she could carry a heavy tray she could prepare a simple meal. The best the claimant could say was that her daughter gave her a hand.

10.20 "Managing toilet needs" was also assessed at 2. The claimant said that on occasions she needed assistance from her daughter.

However, throughout 2018 the claimant was working at Chiltern Cold Storage eight hours a day and six days a week sometimes. It is inconceivable that she did not go to the toilet whilst at work and there were no reports of her having any difficulties doing so. Again we find her self-reported limitations to be exaggerated.

10.21 As regards "washing and bathing", the claimant said it related to washing her hair. We do accept that she may have had some difficulty raising her arms to her head to wash her hair. Similarly, in terms of "dressing and undressing" we accept that she may have had difficulties raising her arms to place clothing over her head. This is because of the reduced abduction reported in the rheumatologist's report.

10.22 Washing her hair and some dressing are examples of day-to-day activities within the guidance. We assess the impact of her conditions as relatively minor Nevertheless, assessing the evidence placed before us by the claimant, we do not find that she has established that her physical impairment had a substantial adverse effect on her ability to undertake day to day activities.

10.23 Consequently, we find that the claimant has not proved that she was disabled within the meaning of the Equality Act 2010 at all relevant times in early 2019.

10.24 Having made our determination on disability, that is an end of the disability discrimination claim but we record in summary the further findings we would have gone on to make.

11. The respondent's knowledge

11.1 We find that the respondent did not know that the claimant was disabled at any relevant time. Further, we find that the respondent could not reasonably have been expected to have known that the claimant was disabled. From the respondent's perspective the claimant's fit notes after the period of sickness absence in October 2017 merely indicated a reduction in hours. They did not suggest that the claimant was or was likely to be disabled. Further, the claimant at no time until after her resignation complained to the respondent about difficulties caused by her physical impairment or requested adjustments other than those recommended in the fit notes. The documents we have been referred to indicate that the GP recommendations were acted upon by the respondent in reducing her hours until it was agreed that they could go up again, and removing the need to wear safety boots.

11.2 The impression we got concerning the hours of work is that the respondent was a new company and that everyone was working long hours to make a success of it. We find that the claimant was responsible for drawing up the rotas which included a weekly

breakdown of her hours. We accept that there probably was some pressure on the claimant to work long hours and that she agreed to do so. There are no contemporary emails of her complaining about her hours.

11.3 The respondent accepts that it knew that the claimant thought she had Lymes disease. However, from the respondent's point of view the claimant was discharging her function at work well and was not making complaints that she had any problems caused by her physical impairment.

11.4 As regards the PCP, we find there was no formal requirement on the claimant to lift trays weighing 20kgs. She was the office based warehouse administrator. Nevertheless, we accept that on occasions the claimant would go to the warehouse in order to ensure that goods went out. We accept that if one of the warehouse staff was not immediately available, the claimant would, in a 'hands on' way, take it upon herself to move trays weighing 20kg from pallet to pallet. We find that the claimant had not been instructed to do so but did so in order to get the job done. As such we are prepared to find that it was a practice that the claimant would do this.

11.5 The claimant told us that it caused her pain to do so. We accept that lifting such trays put the claimant at a particular disadvantage compared with those who were not disabled in that she suffered pain.

11.6 The reasonable adjustments contended for in terms of a varied shift pattern, no overtime and adequate breaks do not in any way correlate to the requirement to lift the tray. The only reasonable adjustment to remove the disadvantage would be to remove the requirement for the claimant to lift the tray. In actual fact, the claimant accepted that she could avoid lifting the trays by going to find a member of the warehouse staff to lift it for her. Accordingly, even if the claimant had established disability, her claim for failure to make reasonable adjustments would have failed.

12. Constructive Unfair Dismissal

12.1 Seven allegations of breach of contract are made. We deal with each in chronological order.

12.2 That the claimant was denied a pay rise. This relates to an incident in February 2017. It is alleged that Andrew Withers, the claimant's line manager, promised to pay her £24,000 for the work she was doing and then asked her to bend over a table for sexual reasons on a number of occasions. We find that this cannot have been construed as a serious contractual offer to increase the claimant's pay. Mr Withers was not authorised to offer pay rises, although we accept that as her line manager she might have thought he had ostensible authority to do so. However, the link to a disgraceful

comment makes clear in our view that this was not a serious or contractually binding offer of a pay rise. This was clear from the circumstances. Mr Withers was investigated and dismissed for other inappropriate behaviour. We find that not giving the claimant a pay rise to £24,000 then or later was not a breach of the claimant's contract of employment. The claimant did receive the annual pay rises that everyone else got.

12.3 The claimant claims that she was forced to move from Chiltern Cold Storage to the respondent, effective on 1 November 2018. In an email dated 4 October 2018 the claimant expressed a lot of concerns with the move and stated that she was not sure she would be coming.

12.4 We have a document dated 5 October 2018 which records a meeting between the claimant and Mr Sageseta and Ashleigh McQueen. This has handwritten on it "Happy to relocate". Whilst the claimant disputed this, we find that the claimant did agree to "TUPE" transfer to the respondent. Consequently, we do not find that this alleged breach of contract has been made out.

12.5 Even if we are wrong concerning the two breaches of contract dealt with above, the claimant signed a new contract of employment with the respondent in December 2018. In our judgment that represents an unequivocal affirmation of the contract of employment with the respondent and the alleged breaches of contract could not have justified her subsequent resignation.

12.6 The next four alleged breaches of contract concern allegations against Laura Parker. Ms Parker had joined the respondent in December 2018 and was hence new to the company. Laura Parker was at the same level as the claimant. All the allegations against Laura Parker were only made by the claimant following the claimant being informed on 5 March 2019 that Laura Parker was going to be promoted and would become her line manager. We deal with this further below. It would appear and we find that there was a personality clash between Ms Parker and other members of staff, including the claimant. Molly Davis referred to her being nasty. The main allegation against Laura Parker was that she did not offer the claimant a coffee on 4 March 2019 when she offered to get everyone else in the office a drink. Ms Parker accepted that she did not offer to get the claimant a drink but said it was because the claimant had made clear that she had her own supplies and made her own drinks. The allegations of spying on people and keeping comments in a notebook were based on an assumption by the claimant that this was happening. Ms Parker accepted that she kept a notebook in which she recorded aspects of her job and how to do it. She denied keeping detrimental information on other employees. We had a one page extract which was said to be the only part dealing with the claimant. Laura Parker accepted asking the claimant to answer the

phone. The claimant accepted in principle that being asked to answer the phone was not unreasonable and said it was the way that she was asked that she complained about. Ms Parker denied saying to the claimant or Ms Davis that they weren't doing any work.

12.7 We do not consider any of these four allegations, even if made out, constituted fundamental breaches of the claimant's contract of employment. In our judgment these were low level personality clashes between members of staff and we would have expected them to have been dealt with initially on an informal basis and later, if necessary, on a more formal basis. It was only after learning of Laura Parker's promotion that these allegations came out.

12.8 In our judgment, the allegation concerning being verbally attacked during the grievance hearing on 26 March 2019 is potentially a fundamental breach of the claimant's contract of employment.

12.9 There was a clear conflict of evidence between the two accounts of the grievance hearing on 26 March 2019. Mr Sageseta said that it was calm and conducted in accordance with the three page meeting notes that we have. It was accepted that the claimant walked out upset at the end but he suggested that was because she had found his response frustrating. The claimant, supported by two witnesses who claimed that they had accidentally watched the meeting via a Facetime link, suggested the claimant was shouted at and intimidated by Mr Sageseta and Mr Cooper standing up, pointing fingers at her and claiming to be police officers.

12.10 We found aspects of both sides' evidence to be troubling and find that neither side's account was entirely accurate. We find it improbable that the two witnesses to the Facetime call completely invented the fact that the call took place. We are not entirely sure how a Facetime link can be made accidentally and that the recipients, who admit shouting at the claimant, could not be heard at the claimant's end. Further, we find it improbable that the claimant was holding her phone to her chest to provide the view that the two witnesses said they had. That would have been obvious to Mr Sageseta and Mr Cooper who would have taken action. There is an email that refers to the claimant using her mobile to refer to notes. The evidence of Mr Sageseta is that the claimant was holding her mobile or it was in her lap and that he thought towards the end of the meeting that she might have been communicating with a third party. The two witnesses' evidence has precise timings of 11:07-11:36. However, they said they met on a lunch break. They were inconsistent as to the location where they met near Peterborough. The claimant consistently claimed after the event that she had recorded the meeting when she knew that she had not.

12.11 On the other hand, we do not accept that the meeting was perfectly calm. We accept that the witnesses heard something and that was

raised voices. We find that the meeting was not calm and that the claimant felt intimidated by having two individuals shouting at her. The reference to Mr Sageseta and Mr Cooper claiming to be police officers is curious. In actual fact, both of them had had a police background, albeit Mr Sageseta had been a special constable and Mr Cooper had been a police officer in the RAF. We find it is improbable that they would have claimed to be current serving police officers. The grievance hearing notes do have a reference to Mr Cooper having been a policeman towards the end. We find that it is more probable than not that one or both of those individuals referred to themselves having been police officers in the context of knowing what the law was in relation to bullying and potentially recording the meeting. We find that this was probably said in a forceful manner and that the claimant misinterpreted it. What is clear is that, in the aftermath of that grievance hearing, the claimant consistently referred to being verbally attacked. We find that the grievance hearing did cover most of the issues in the notes but that the tone of it was not as calm as Mr Sageseta suggests.

12.12 We note that the ACAS Code Guide on Grievances specifically makes the point that in smaller organisations grievances can sometimes be taken as personal criticism and employers should be careful to hear any grievance in a calm and objective manner.

12.13 We have not been assisted in determining this issue by the fact that the respondent has, for whatever reason, not called Mr Julian Cooper.

12.14 We find that in being verbally aggressive to the claimant the respondent failed to conduct the grievance hearing appropriately or properly and that that conduct amounted to a fundamental breach of the claimant's contract of employment in that it undermined the mutual trust and confidence between the claimant and the respondent.

12.15 Having made that finding, we go on to consider whether between then and 16 April the claimant affirmed the contract and, more importantly, whether the claimant resigned in response to that breach of contract.

13. 5 March 2019

13.1 On 5 March 2019, a memo e-mail was sent at 11.09 to all staff. This announced that Laura Parker was to be promoted to Operations Manager as of 11 March 2019.

13.2 Ms Parker gave evidence that when the e-mail was sent, she saw the claimant take a photo of her computer screen. The claimant then left the office with her phone and, when she returned, stated

that her daughter had had an asthma attack and that she needed to leave immediately.

13.3 Mr Sagaseta recorded what happened in a minutes of meeting document made later that day. The minutes record:

> "I was in the main transport office and within a couple of minutes of her reading the announcement, she hesitated to answer and then said that she had a family emergency, I then asked if everything is ok, what's happened, she advised 'yes it's her daughter' and then left…….
>
> I received a phone call from Sue at 16.18 advising me that she wanted to have a meeting with myself and Paul either that day after 17.00 hrs or Wednesday. I asked if everything was ok with the family emergency, she advised yes, it was her daughter had an asthma attack and an ambulance was called but that she was ok now. I said to her that myself and Paul would be able to see her that day after 17.00 hours.
>
> Sue arrived at the depot at approximately 17.15 hours where Paul, Sue and myself had a meeting on the restroom.
>
> We sat down and Sue advised that she wasn't happy. She said that she wanted to speak to the both of us as she felt like she had been slapped in the face.
>
> We asked what she was referring to and she advised the announcement. She went on to say that no way was she working for her. When we asked Sue what do you mean she said I do not want to work here if Laura is her manager. Sue said that her and Paul Sullivan had put in a lot of hours and went onto say that if it wasn't for them we would have never got by. Sue said that how could she work for someone that didn't understand her warehouse, her boys and her contract. Sue again went on to say that she would not work if Laura was her manager."

13.4 Later in the memo, the following is recorded

> "We both explained again that we were not expecting Laura to do her job as that what they are there for, but she would be managing the people within the departments.
>
> Sue said if that's the case then I am not working for her and then pulled out a sick note from her doctors which was issued on 05/03/2019 signing her off work for two weeks because of a condition called 'fibromyalgia'…..
>
> As soon as Sue had shown me the sick note, I said that we could discuss the situation when she was ready to come back to work. Sue went on to say that she will be looking for another job and wont come back if Laura is in charge of her, that she wouldn't work for her and for us to make contact if the situation changed."

13.5 The claimant denied taking a photo of her computer screen with the announcement of Ms Parker's promotion but said that she had received a text or an e-mail concerning her daughter and that is why she lifted up her phone.

13.6 We have no independent evidence that the claimant's daughter sustained an asthma attack and had to attend hospital. We make no specific finding on that issue. However, we do find that the claimant reacted very badly to the news that Ms Parker had been promoted.

13.7 The claimant's GP notes show that on 5 March 2019 at 15.28 hours the claimant attended her GP surgery. The following is recorded:

> "req med 3 as had been off for a wk now. r/v 2 WKS"

13.8 This is an odd entry as the claimant had not been off work for a week. The claimant says that she does not recall saying that to the GP, but we find she must have done for it to be recorded.

13.9 The claimant accepted that she called Mr Sagaseta at around 16.00 hours to request a meeting.

13.10 Whether or not the claimant's daughter actually had an asthma attack or it was used an pretext for her to leave work following the announcement of Ms Parker's promotion, the fact is that the claimant attended her GP at 15.28 hours in order to obtain a fit note, signing off work for two weeks on the false basis that she had already had one week off work and requested a meeting later that day with Mr Sagaseta. Those actions reinforced us in our conclusion that the claimant had an adverse reaction to the news that Ms Parker had been promoted. We accept Mr Sagaseta's account of the meeting later on 5 March and that the claimant was clearly trying to get them to change their mind to promote Ms Parker. She only handed in the sick note when it became clear that they were not going to change their mind.

13.11 It was only after 5 March 2019 that the claimant started raising the issues that she relies upon in support of her constructive dismissal claim (excluding, obviously, the grievance hearing which had not occurred at that time).

13.12 On 12 March 2019, the claimant sent an e-mail complaining about bullying and being pushed out of her job. However, the claimant set out clearly that:

> "I have made my feelings very clear that I will not work for Laura as she is becoming my manager because of this".

13.14 On 20 March 2019, the claimant sent an e-mail stating as follows:

> "I must inform you that I will not be returning to work till the bullying case has been investigated and I am happy to return".

13.15 It is against that background that the grievance hearing on 26 March took place. Mr Cooper's notes of the grievance hearing record as follows:

> "She then proceeded to say that she did not want to return to work whilst Laura was her manager ……"

13.16 We find that it is probable that that was said by the claimant during the course of the grievance.

13.17 After her grievance had been rejected, the claimant exchanged quite a few emails with Mr Sageseta. In those emails she raised a number of questions relating to sick pay, pay review, rest time between shifts and her allegations against Laura Parker.

13.18 It is fair to say that, amongst the issues pointed out by the claimant following the grievance hearing, the verbal aggression at the grievance hearing was alluded to. It was included in the grievance appeal document. However, it was only one amongst many issues that the claimant was raising.

13.19 We find that all matters of complaint being raised by the claimant, both in the grievance and concerning the conduct of the grievance hearing, were being raised by the claimant due to her annoyance at Ms Parker's promotion and in order to try and get management to change their minds. We find that the claimant repeatedly made it clear that she would not return to work for as long as Ms Parker was promoted and had become her line manager.

13.20 On 16 April 2019 the claimant resigned. In her resignation email she states as follows:

> "I wish to inform you that I will not be returning to the business once my sick line runs out.
> …
> I will not be returning on the grounds that I am not getting any response from my emails.
>
> I will be taking further bullying in the workplace, too many hours worked – you choose to ignore doctor's request, not legal rest in between shifts, broken confidentiality, a promised pay review that I did not receive and verbally attacked when asked to attend a meeting.
> …
>
> You and Brian have now made me feel that I can not return because of this."

13.21 We find that the reason the claimant resigned was that she did not like the fact that Laura Parker had been promoted to line manager over her and that she would not return to work if that situation prevailed. We find that all the issues raised by the claimant were

against the background where she did not want to return to work if Laura Parker was her line manager. Put another way, we have no doubt that, if Laura Parker had been told that she was not to be promoted or had left the respondent, then the claimant would not have resigned in response to any of the other issues.

13.22 We have further considered whether the treatment of the claimant in the grievance hearing was a reason for her resignation even if it was not the principal reason. We find that it was not a reason for her resignation. It was just one of the range of issues that the claimant was threatening to 'take further' as she was resigning. It was not a cause of her resignation even to some minor degree.

13.23 Consequently, the claimant's claim for constructive unfair dismissal fails.

14. Working Time Regulations

14.1. We have not been shown any document whereby the claimant agreed in writing to opt out. Consequently we find that she did not sign such an agreement. We do not find there was a breach of the Working Time Regulations 1998. We have not calculated whether she worked in excess of 48 hours per week over a 17 week reference period but, given that her only recompense would be to claim pay for any hours worked in excess and that she accepts she did get paid, so no claim arises.

15. Rest breaks

15.1. The claimant was a supervisor. The claimant was responsible for managing the warehouse staff and their breaks. We find that the claimant was permitted to manage her own time and did not have a fixed time for breaks. We have been shown an e-mail dated 17 January 2019 from Mr Sagaseta to other managers, copying in the claimant, referring to recurring break issues and putting in place set breaks for the warehouse operatives. There may have been times when pressure of work meant that taking a break was difficult. However, we find that the claimant was responsible for rostering the hours worked by the workforce and was in a position to take breaks as and when appropriate on her own initiative. Consequently, we find that there has been no breach of the Working Time Regulations as regards rest breaks.

16. Costs

16.1. At the conclusion of this case, the respondent made an application for costs. We have been provided with a cost schedule running to £36,586.20.

16.2. The respondent referred to a cost warning letter sent to the claimant on 2 December 2020. The letter refers to the lack of evidence relating to the claimant's alleged disability and the failure of the claimant to submit a disability impact statement. It is suggested that the claimant was behaving unreasonably and vexatiously in continuing to pursue her claim.

16.3. Mr Routledge pointed to the schedule of loss wherein the claimant values the claim in the region of £900,000 and makes the point that 95% of that claim rides on the back of the disability discrimination claim.

16.4. He makes the point that this is not a claim that the respondent invited and has caused the respondent considerable expense.

16.5. Rule 75 of the Employment Tribunal's (Constitution & Rules of Procedure) Regulations 2013 provides as follows:

> "76 When a costs order or a preparation time order may or shall be made:
> (1) The tribunal may make costs order or a preparation time order, and shall consider whether to do so, where it considers that:
> (a) A party ….. has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
> (b) Any claim or response had no reasonable prospects of success;"

16.6. We have a discretion as to whether or not to make a costs order and must consider whether to do so in the event that we find that the party has acted unreasonably and/or the claim had not reasonable prospects of success.

16.7. Reasonableness is a matter of fact for the tribunal.

16.8. We take as our starting point that as a matter of public policy, costs are not usually awarded to the successful party against the unsuccessful party in this jurisdiction.

16.9. The mere fact that the claimant has been unsuccessful does not mean that she has acted unreasonably in bringing the claim or that it had no reasonable prospect of success. In our judgment, the claimant's claim in relation to unfair dismissal and/or disability was arguable and it was not unreasonable for her to bring these claims. We do not conclude that there was no reasonable prospect of success. As regards to the disability issue the claimant decided to rely on the DWP PIP assessment. The claimant has put some evidence before us on the issue of disability and so this is not a case where she has made a simple assertion of disability without any supporting documentation. Further, we have found that she had some justification in her complaints concerning her treatment during the grievance hearing.

17. Accordingly, we have decided not to make a costs order in this case.

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**Employment Judge Alliott**

Date: 21 May 21

Sent to the parties on: 15 June 21

For the Tribunal Office