EMPLOYMENT TRIBUNALS

Claimant: **Ms Sandra Brooks**

Respondent: **Leisure Employment Services Ltd**

Heard at: **Bristol (by VHS)** **On:** **8 and 9 December 2021**

Before: Employment Judge Street

Representation
Claimant: Mr B Malik, counsel
Respondent: Mr J Boyd, counsel

JUDGMENT having been sent to the parties on 10 January 2022 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. **Evidence**

1.1. The Tribunal heard from the claimant and from Ms Turnbull, who was in a role titled Sales Operations Manager at the material times. She continues in the same role with a different title.
1.2. The Tribunal read the documents referred to in the bundle provided.

2. **Issues**

2.1. It is not disputed that the Claimant was disabled by reason of her asthma and it is not disputed that the respondent had implied knowledge that the asthma was probably severe and long-standing enough to amount to a disability.

2.2. The issues are as set out in the Case Management Order of Employment Judge Midgley dated 31 March 2021, save as to the issue of disability and the Respondent's knowledge.
2.3. Those issues are set out here, adopting the original numbering.

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the Tribunal may not have jurisdiction.
1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. *Constructive unfair dismissal*

2.1 The claimant claims that the respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breach was as follows;

2.1.1 Removing the claimant from the respondent's WhatsApp Group on 24 March 2020.

2.2 The Tribunal will need to decide:

2.2.1 Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
2.2.2 Whether it had reasonable and proper cause for doing so.

2.3 Did the claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled

to treat the contract as being at an end.

2.4 Did the claimant delay before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.5 If there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

4. Direct disability discrimination (Equality Act 2010 section 13)

4.1 It is admitted that the respondent removed the claimant from the respondent's WhatsApp Group on 24 March 2020.

4.2 Was that less favourable treatment? The Tribunal will have to decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether the claimant was treated worse than someone else would have been treated. The claimant says they was treated worse than the remaining members of the sales team who were not removed from the WhatsApp group.

4.3 If so, was it because of the protected characteristic?

5. Remedy

Unfair dismissal

5.1 The claimant does not wish to be reinstated and/or re-engaged.
5.2 What basic award is payable to the claimant, if any?
5.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
5.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

5.4.1 What financial losses has the dismissal caused the claimant?
5.4.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
5.4.3 If not, for what period of loss should the claimant be compensated?
5.4.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
5.4.5 If so, should the claimant's compensation be reduced? By how much?

5.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the respondent or the claimant unreasonably fail to comply with it by failing to respond to the claimant's grievance? If so, is it just and equitable to increase or decrease any award payable to the claimant and, if so, by what proportion up to 25%?

5.4.7 Does the statutory cap of fifty-two weeks' pay or £86,444 (until April 2020) £88,519 thereafter apply?

Discrimination

5.5 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
5.6 What financial losses has the discrimination caused the claimant?
5.7 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
5.8 If not, for what period of loss should the claimant be compensated for?
5.9 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
5.10 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
5.11 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
5.12 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it by failing to respond to her grievance? If so, is it just and equitable to increase or decrease any award payable to the claimant and, if so, by what proportion up to 25%?
5.13 Should interest be awarded? How much?

3. **Findings of Fact**

Background

3.1. The claimant has been employed by the respondent from 1/01/90 to 11/05/20, most recently as Resort Holiday Sales Advisor.
3.2. The most recent contract of employment is dated 11 July 2007 and incorrectly sets out that Ms Brooks continuous period of employment runs from that date. It is not disputed that she has been in employment since 1990.
3.3. Ms Brooks was employed on a basis that she was to work flexibly in accordance with the annualised hours working scheme operated by the Company. The Call Centre operated between Monday at 08.30 to Sunday at 22.00 hours (47).

3.4. The contract does not set out salary per se. Under the heading "Remuneration", it sets out that Ms Brooks "total flex fund is £5,816.23 per annum." Once the contract was under way, that is, after the first 8 weeks, payment was monthly on the 15th of each month, in equal monthly instalments, paid two weeks in advance and two weeks in arrears by BACS transfer. Payment was in equal monthly instalments without regard to the number of annualised hours actually worked in that month.

3.5. It is agreed that her normal working hours were 30 hours per week.

3.6. The contract does not refer to any commission or bonus. However, there was more payable than set out as flex fund. The respondent states that her pay was commission based on sales and there was no contractual right to any level of commission payment. Commission is said to be based on custom and practice. Ms Brooks says that she had gross pay of £400 per week or an average per month of £1600 and I accept that was the normal level of pay she had achieved. She refers to commission as being only an element of wages (100).

3.7. Mr Pardey was the Resort Director at Butlins Bognor Regis. Mr Tipper was the Head of Sales and Guest Services. Ms Turnbull was the Team Leader for the Conferencing and Events Team. Ms Agyemang was the Team Leader for the Holiday Booking Shop and Ms Brooks' line manager under Ms Turnbull.

3.8. Ms Brooks is agreed to be a disabled person by reason of her asthma. She is on regular medication administered by inhalers, and when she gets an exacerbation of her asthma she is prescribed oral prednisolone. During exacerbations, she has wheeze and tight chest and feels very unwell in herself, unable to continue day to day activity at home or at work (GP letter, 12 June 2020, page 43).

The arrival of Covid-19

3.9. There were no concerns raised over Ms Brooks work prior to March 2020.

3.10. In early 2020, information in particular from China and Italy, pointed at the risks of the new Covid-19 to those with respiratory difficulties. Ms Brooks was aware of her vulnerability before the pandemic was formally declared.

3.11. She was very concerned about the risk of infection.

3.12. Butlins hosted a between World Party between 24 – 28 February with participants from 14 countries. Ms Brooks was deeply concerned at the lack of safety steps and at being required to work with hundreds of people from around the world. Only those from Italy were not allowed to attend. There was no official guidance issued on managing Covid-19 risks.

3.13. She raised repeated concerns during March about the risks of infection and safety measures, asking what steps were being taken.

3.14. On 3 March, Ms Brooks emailed Mr Tipper and Ms Smith,

> "Following the recent "World Party – Just Eat" conference we've had at Butlins with hundreds of international delegates, and a full capacity

> resort straight after, what is the established protocol the Company has in protecting Team (and by extension our families) and the resort Guests regarding the Covid-19 outbreak?
> I've been asked by many guests about the virus and the company's protection protocol and wondered what we should be saying to them as saying nothing does not appear to be a sensible option.
> I'm concerned equally for my family and potentially passing on the virus to them as they are in the high risk group as am I suffering as I do from asthma.
> I would be grateful for a copy of the company written protocol so I know all the ins and outs." (page 65/6)

3.15. She forwarded that email to Ms Agyemang on 6 March again asking for the written protocol on what to say to guests and team/ general protection, having had no response.

> "When are we going to be advised on how to treat/respond to our guests' questions and concerns adequately please as well as being told how we are going to be protected ourselves and generally onsite during this unprecedented international epidemic outbreak?" (page 65)

3.16. On 12 March 2020, she wrote to Mr Pardey complaining that the questions she had raised remained unanswered. She asks again for the written health and safety protocol for dealing with the Covid-19 health emergency. She explains that she is concerned for her own safety, that of colleagues and family and asks very detailed questions about the protocol for dealing with emergencies arising from someone at work suffering symptoms. (67/8)

3.17. On 13 March 2020, she suffered symptoms like those of Covid-19 and decided to isolate at home.

3.18. On 16 March, she was invited to attend to meet Mr Pardey by his assistant (67). She responded to say that she had Covid-like symptoms. She proposed to isolate and taking into account government guidance gave her projected return to work date as 19 June 2020, based on 14 days self-isolation and a further 12 weeks applying government advice. She volunteered to work from home. She proposed that the meeting take place by telephone (70).

3.19. On 17 March, Ms Brooks spoke to Ms Turnbull and was told to stay at home, as someone who was high risk (page 74). She was told that the pay while she was at home would be statutory sick pay, unless she took holiday, although the whole picture was not yet clear. This was before the government job retention scheme was announced.

3.20. Ms Brook expressed gratitude to know that there were no outbreaks at resorts and that Ms Turnbull had contacted her, since she was the only person who had, given that there had been no response to her emailed

questions. Ms Turnbull apologised for the absence of a formal response from the hierarchy.

3.21. Ms Brooks reiterated her willingness to work from home or do anything to help or support the company, to which Ms Turnbull says,

> "I think just over the next couple of days we're obviously just looking at options and plans and putting procedures in place and really understanding what does that look like… (86)

3.22. It is clear that at that point and over recent weeks, managers had been very uncertain about the position and what arrangements would be put in place in the face of the pandemic. That was in part the reason for the lack of response to Ms Brooks' emails; they didn't have the answers to her questions.

3.23. On 18 March, there was an email to staff confirming resort closures (92) – all three resorts were to close until 17 April, the end of the Easter holidays. Provided they were available for work, the team would be paid their contractual hours; it remains unclear what this meant for sales staff.

3.24. On 20/03/21, Ms Brooks emailed Mr Pardey

3.25. She confirmed that she did not have Covid, but asthma. Showing no symptoms of Covid-19, she now understood that it was her decision whether or not to return to work for the next twelve weeks. She cited the government guidance. There was a need for staff to man the phones which could not be done from home and she was willing and ready to work.

3.26. She raised the question of discrimination –she had been sent home indefinitely due to her asthma but others with the same condition were being allowed to work if they chose to. She also raised pay,

> "In our conversation, you suggested that I will only receive statutory sick pay for the next twelve weeks if I remained at home." (*90)*

3.27. The recent communication Mr Pardey had sent out seemed to contradict that –

> "Our team will continue to be paid their contracted hours throughout this period" after deciding to close the resort.

3.28. Ms Brooks asked for confirmation that she will be paid her normal earnings and commission.

> "The position in the HBS is very low paid job, and Butlins custom and practice has always been that part of the payment mix for the staff working in HBS is to always include a commission element on sales which is what makes the job tenable financially. I have never had any period during my time with the company where I have not earned

> commission on a monthly basis as part of the money I receive each month….
> Can you clarify please how you are dealing with the expected commission element of my earnings in the "full pay" I will receive from today (91).

3.29. She suggests using her previous 12 months' commission earnings as a basis to arrive at a fair monthly figure.

3.30. On 23 March 2020, the national lockdown was imposed and the Coronavirus Job Retention Scheme was launched.

3.31. On 23 March 2020, Ms Brook received a WhatsApp message from Ms Agyemang saying that she must stay off work – more information to come:

> "Until we hear more can I ask for you to stay off work. It will be on full pay as per Jeremy's direction. As soon as I hear more. I can call you tomorrow… Apologies for the late notice however as I am sure you are aware information and direction changes rapidly and so last minute xx" (96)

3.32. Ms Turnbull was charged with putting together a list of 20 people willing and able to work from home to deal with customer issues, on 24 March 2021. She had to do that very quickly. They wanted the staff to be able to work within 24 hours. There were some 33 staff in the holiday booking shop, some 50 sales staff altogether and perhaps 90 including the guest teams. They wanted the best and most skilled staff on the new, home-working team.

3.33. An email was sent to the Sales staff who were eligible and she also rang people. Staff needed to have an internet connection and a desk close enough to the router; Butlins would provided the cable and computer required.

3.34. Ms Turnbull rang the claimant. She was satisfied that the claimant was an excellent candidate and during that phone call, it was confirmed that she had the technology to work from home.

3.35. Ms Turnbull wanted those willing and able to work from home to work full-time. Ms Brooks confirmed she would be willing to increase her hours.

3.36. She was put on the initial list on 24 March 2021 at 13.05, on the basis that she would increase her working hours by an additional 7.5 hours per week (97).

3.37. Ms Turnbull saw Ms Brooks as an ideal candidate, even though she was not working full-time, and she put her on the initial list even though they had intended to prioritise full-time staff.

3.38. A WhatsApp group - BG Team-Home Support – was created of those willing and able to be on the team, including those from Guest Services and Sales. Ms Brooks was on that list, with her addition 7.5 hours noted (others also increased their hours to get the offer of work). That list was sent by email on 24 March 2020 (98).

3.39. Ms Turnbull saw the WhatsApp group as to provide support to those working from home. She says it was not intended to be the main source of communication with the Sales Team but in fact the rest of the team were furloughed, so this was the only team for whom there was work.

3.40. Ms Brooks sent a WhatsApp to Ms Turnbull at 14.55 on 24 March,

> "Hi Cat,
> Many thanks for your call.
> As Butlins decided to close itself (before any government defective (sic)) and you have offered me the opportunity to work from home, I am happy of course to help wherever I can." (100)

3.41. She confirmed that she has the broadband and facility to work from home. She raised questions about pay and expenses,

> "As we are being fully paid until 17th April, there is no incentive to work at all before the 18th April.
> So I assume that the Company will be paying us double time from now until 18th April for the work from home?
> I also wonder what the Company are doing regarding cost of electricity and phone bills or any other expenses we will incur at home as a result of the opportunity to work from home as you don't say?"

3.42. She set out her understanding that pay from 18th April will be 80% from the government and asks if Butlins will make up the balance.

3.43. She says too that,

> "I have sadly still not even had the courtesy of a response about that issue from Jeremy or about the payment of the commission element of wages always paid for the past 30 years as custom and practice and I would still be grateful for clarification of those issues as it influences my thinking." (100)

3.44. When Ms Turnbull next messaged the group, at 16.30, Ms Brooks had been removed from it (101).

3.45. That message answered a number of questions people had raised, but not those relating to pay and expenses from Ms Brooks. Ms Turnbull had passed the enquiry on but could not get an answer. She agreed the removal of two team members from the original list with Mr Tipper and Mr Pardey.

3.46. No explanation was given to Ms Brooks at the time or for some time later. Ms Turnbull called her and had no reply. Ms Brooks did not return the call.

3.47. Ms Turnbull had been working under pressure at the time. She worked until 11 pm putting together the list of those selected to work from home, and spent the following day personally delivering the equipment they would require.

3.48. One other person had been removed from the list. She had wished to join the group but to take holiday first and so was not available until 17 April.

3.49. On 26 March**,** Ms Brooks removed herself from the Holiday Booking Shop and Sales Team WhatsApp groups. She had heard nothing further since 24 March 2021, was upset and embarrassed. "I despaired with the whole situation" is her comment from her grievance of 15 April 2020.

3.50. On 31 March, Ms Brooks was expressly notified by Ms Turnbull of a meeting with Mr Pardey, on dial in basis, for everyone, and was encouraged to dial in to the call – "its important that if you can dial in to the call that would be much appreciated". She did not (103).

3.51. There was a WhatsApp exchange between Ms Brooks and Ms Turnbull, (103)

> "Hi Cat, you are aware I am not a member of the sales group and you have also removed only me from the sales home group (working from home) apart from Michaela now back in the group I understand. I had already said to you that I was happy to work from home and asked you questions which you avoided answering by removing me from the group so you would not have to answer I assume.
> The entire chain of command has similarly failed to answer a single email I have sent with questions over the past weeks to similarly avoid answering my questions, a normal person could not form any other opinion.
> As you also know, I do not use Facebook and I have been ostracized from all of my peers by you specifically without reason, justification nor explanation, I am unsure why you are now messaging me or asking me to participate in a conversation you have all made me too embarrassed and upset to join." (105)

3.52. Ms Turnbull replied,

> "Thank you for your message, sorry I did try to call you on the back of your last message and was unsuccessful of the call being answered to discuss the matter further. If you are ok to talk, I am more than happy to give you a call to discuss this further.
> Many thanks,
> Cat

3.53. Ms Brooks preferred not to speak to Ms Turnbull, and Ms Turnbull agreed to respond in writing, asking for time to enable her to get the answers required, but promising an update within 48 hours (109).

3.54. The full reply came on 2 April, after Ms Turnbull had consulted colleagues (118). It was an apologetic email, acknowledging communication failures,

> "Firstly, I would like to say sorry if my actions have made you feel upset, embarrassed or left out. It was never my intent to do any of those things and I am sorry to hear that you are feeling like this." (118)

3.55. In essence, the explanation given for the removal from of Ms Brooks' name from the list was that after the initial list had been put together, they found that they had more names than they were allowed to recruit. They were under a deadline to produce a list quickly of those able to start work within 24 hours. There were others besides Ms Brooks who had raised questions which could not be answered immediately. It wasn't clear that those individuals were definite that they wanted to participate. A business decision had been made to select only those who were clearly committed to taking part (118, ws 38).

3.56. Ms Turnbull said she had called Ms Brooks immediately to explain the decision but had no reply, and Ms Brooks had not called her back.

3.57. Ms Turnbull invited Ms Brooks to rejoin the WhatsApp groups and mentioned the activities being used by her colleagues in those groups – drawing competitions, dance challenges, etc, - to maintain morale.

3.58. In relation to the queries Ms Brooks had had about pay, Ms Turnbull summarised the guidance that Mr Pardey had given, recognising that Ms Brooks had not felt able to join the conference call:

> "All team will remain being paid 100% of their wages from Butlins up until 17th April. From the 18th April team will be furloughed, which means they will receive 80% of their pay for approximately a 12 week period."

3.59. She also provided a link so that Ms Brooks could listen to the call.

The Grievance

3.60. On 15 April 2019, Ms Brooks sent in a formal grievance. She alleged discrimination, breach of contract and loss of trust and confidence. She opens by saying,

> "The issue which has led me to lodging this grievance concerns discrimination and began on 3 March 2020, having to work at the Butlins Bognor resort Just Eat "World Party". (120)

3.61. She refers to her series of emails and questions about the health emergency and associated issues involving pay and conditions. As a method of avoiding those questions, she says,

> "The company has extraordinarily actively discriminated against me, by removing me from online work groups, isolating me from team and in particular without reason or explanation, maliciously prevented my

> working from home and denying me all opportunity to earn money, despite my volunteering to do so immediately when asked to, my having the precise technical requirements at home to enable me so to do, and further confirmation from Cat Turnbull at Bognor that I would be offered at least full time work."

3.62. The reference to discrimination is in the context of her health concerns being ignored and her removal from online working groups and being isolated and prevented from working from home.

3.63. She asked for a copy of the company's dated written protocol for dealing with a health emergency, in this instance the Covid-19 pandemic.
In an annex to the grievance, she sets out the full history of her emails and contacts with the company, starting with the World Party and then her emails concerning safety arrangements of 3 March, to Ms Smith and Mr Tipper, of 6 March, to those individuals and Ms Agyemang and of 12, 17 and 20 March to Mr Pardey. She points out the failure to respond to her emails.

3.64. In relation to the guidance offered by Mr Pardey and relayed by Ms Turnbull in her email of 2 April, namely,

> "All team will remain being paid 100% of their wages from Butlins up until 17th April. From the 18th April team will be furloughed, which means they will receive 80% of their pay for approximately a 12 week period" (125)

she said, "That answers one of my questions about pay and conditions" but the company is not topping up the 20% shortfall, on what is already very low pay.

3.65. In relation to the commission element of pay,

> "Even now though, even you avoid answering my question in regard to the commission element of my pay, which has always been paid by custom and practice on a monthly basis to HBS staff. That is because the job would be financially unviable without it, which is why it has always been paid. My financial security may not be important to you but it is to me." (126 – from her summary with the grievance, 125)

3.66. She concludes that the Company has discriminated against her and undermined her position and credibility within the business as a method of forcing her out of the company for whom she has loyally worked for upwards of 30 years.

3.67. Mr Hutton was given the role of investigating the grievance, "to intermediate and work in collating the details behind your grievance at this time". He was the resort operations manager.

3.68. He wrote to Ms Brooks on 4 May to explain his role. The need for an intermediate role is explained as being that most staff were working from home, so the grievance process could not be managed in the usual way and

with the usual deadlines. He proposed to learn from Ms Brooks how her grievance came about and what resolution she wanted. The information he gathered would then be passed on to a senior leader who would carry out the formal grievance procedure when the business reopened.

3.69. Mr Hutton proposed a meeting with Ms Brooks. She objected to the proposed delay in the handling of the grievance by a senior officer (155). She declined to meet Mr Hutton until she had seen the documents she had requested, and repeated the request for health and safety policies including for dealing with health emergencies, all contracts and staff handbooks in relation to her employment throughout and certificates of accreditation for any policies.

3.70. Mr Hutton then proposed to review her grievance based on written submissions, continuing to submit questions to her. He had asked for the documents she had requested but the health and safety team were largely furloughed. The formal grievance procedure would be conducted by the senior officer, Ms Lloyd, conducted to handle the grievance. Given the pandemic, delay was inevitable. That interim response was provided on 11 May 2020 (159).

3.71. Mr Hutton interviewed Ms Turnbull on 26 May. She explained that Ms Brooks had been included in the initial list of home-working employees, “So far as I was concerned, she was a yes.”

3.72. They wanted the most skilled and competent team. Ms Brooks was, “the go-to person when it comes to competency.”

3.73. She then says this,

> “12.44 pm I sent a message confirming Sandra was on the list of 20 team. 13.05 I sent a confirmed list over to Nick Tipper. At 14.55, I received a WhatsApp message from Sandra asking to confirm we would be paying double time, how the commission works, but I could not answer these questions. At this point I sent the question to Jeremy and Tanya but got a reply saying they could not answer….
> AT 16.30, I call Nick and Nigel confirming the list … I hold my hands up as I tried to call her as I could not get the answers she wanted and I had another team member trying to delay their start date but I needed to get the team all set up ready to work in 24 hours. … Jenny was pushing me now it was 16.30 pm and I had to get IT configuring completed. I could not get the answers so wasn’t sure if they still wanted to do it. ..”
> “Sandra insinuated that if she did not get double pay, she would not do it?”
> “No more she assumed she would get double pay (Cat reads Sandra’s message from 14.55 pm)”
> “You made the decision as you could not answer their questions to remove the two team members?”
> “Yes I agreed this with Nick and Jeremy to take them out, we needed to get the team set up the next day to work from home.”

3.74. On 28 May 2020, Ms Turnbull offered Ms Brooks (amongst others) the opportunity to apply to join the COVID home working team, vacancies having arisen. It was offered at short notice. Ms Brooks did not reply (175). At some stage, Mr Tipper also contacted Ms Brooks about a vacancy but received no reply. The other staff member who had been initially taken off the list was added back to the team.

3.75. Ms Brooks responded to Mr Hutton on 31 May, requesting additional documentation, including amongst other things electronic reports of her professional activity as a Premier Host, item by item for dates between 2011 and 2020, details of other activities and of other employees if any, copies of Seaware Team Training sessions since 2010, and payslips from 2010.

3.76. On 25 June 2020, Ms Brooks resigned by email with immediate effect. She relied on fundamental breach by the company of the relationship of trust and confidence. She relied on her grievance and subsequent correspondence (180).

3.77. She followed that up with a further letter of 29 June with questions directed at establishing the proper identification of her employer.

3.78. The Respondent continued to investigate the grievance. Mr Barron, resport director, Skegness, was appointed to consider it. The grievance was dismissed on 10 August 2020 (227 to 229).

4. **Law**

Constructive Dismissal

4.1. A termination of the contract by the employee will constitute a dismissal within section 95(1)(c) of the Employment Rights Act 1996 (“ERA 1996”) if he or she is entitled to so terminate it because of the employer's conduct. That is a constructive dismissal.

4.2. For the employee to be able to claim constructive dismissal, the employee must establish that the following four conditions are met:

i) There must be a breach of contract by the employer.

ii) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving.

iii) The employee must leave in response to the breach and not for some other, unconnected reason.

iv) The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he or she may be deemed to have waived the breach and agreed to the variation of the contract or affirmed it.

4.3. A repudiatory breach of contract is a significant breach, going to the root of the contract *(Western Excavating (ECC) Ltd v Sharp [1978] ICR 221).* It is to

be decided objectively by considering its impact on the contractual relationship of the parties *(Millbrook Furnishing Industries Ltd v McIntosh (1981) IRLR 309).* What might amount to repudiatory conduct was described in general terms as any conduct which is "so intolerable that it amounts to a repudiation of the contract" (*British Aircract Corporation v Austin [1978] IRLR 332.)* The fact that the employer may genuinely believe that the breach is not repudiatory is irrelevant.

4.4. It also follows that there will be no breach simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach, then the employee's claim will fail *(see Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] IRLR 35).*

4.5. Employment contracts contain an implied term of mutual trust and confidence. The parties to the contract will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust which should exist between employer and employee *(Malik v BBCI SA (in liq) [1998] AC 20; Baldwin v Brighton and Hove City Council [2008 ICR 680*).

4.6. It is not simply about unreasonableness or unfairness. The question is whether the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence.

4.7. It is not necessary in each case to show a subjective intention on the part of the employee to destroy or damage the relationship, a point reaffirmed by the EAT in *Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT*. As Judge Burke put it:

> "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

4.8. The Court of Appeal in *Lewis v Motorworld Garages Ltd [1986] ICR 157* held that a course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a "last straw" incident, even though that incident by itself does not amount to a breach of contract. In *Omilaju (*above) it was stated that the last straw does not have to be of the same character as the earlier acts in the series, but it must contribute something to the breach of trust and confidence.

4.9. An employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts, notwithstanding a prior affirmation *(Kaur v Leeds Teaching Hospitals NHS Trust, [2019] ICR 1, CA) ("Kaur").* In that case guidance is given on the approach for Tribunals:

i) What is the most recent act (or omission) triggering resignation?
ii) Has he or she affirmed the contract since that date?
iii) If not, was that act or omission itself a repudiatory breach of contract?
iv) If not, was it part of a course of conduct which viewed cumulatively amounts to a repudiatory breach of trust and confidence?
v) Did the employee resign in response – or partly so – to that breach?

4.10. The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract, the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end, but the election to affirm is not required within any specific period.

4.11. In *Colomar Mari v Reuters Ltd [2015] 1W:UK 712,* the summary of His Honour Judge Jeffrey Burke QC summarised the position with regard to affirmation as follows, describing this as a summary built upon Cox Toner and other case law and noting that the doctrine of affirmation is applied more liberally in the case of an employee who is the victim of a fundamental breach than it would be in the case of most other (commercial) contracts.

"The essential principles are that:

(i) The employee must make up his [her] mind whether or not to resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed *(Western Excavating, above, as modified by WE Cox Toner, above, and Cantor Fitzgerald International v Bird [20020 EWHC 2736 (QB) [2002])*
(ii) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay *(Cox Toner, above)*
(iii) If the employee call on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation *(Fereday v Staffs NHS Primary Care Trust UKEAT/0513/ZT [2011] paras 45/46)*
(iv) There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive *(Fereday para 44).*

4.12. Delaying too long or, by conduct, indicating acceptance of the change, can point to affirmation. It is not simply a matter of time, in isolation. In *WE Cox Toner (International) Ltd v Crook, [1981] IRLR 443*, it is established that mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. Simply continued working and the receipt of wages points towards affirmation. Nevertheless, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation.

4.13. The limitations on that are addressed in *Bournemouth University Higher Education Corp v Buckland [2010], CA, IRLR 445 para 44,*

"That does not mean, however, that tribunals of fact cannot take a reasonably robust approach to affirmation: a wronged party, particularly if it fails to make ts position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amends."

Direct Discrimination - section 13

4.14. Direct discrimination is provided for under the Equality Act 2010 ("EA 2010") by section 13(1):

> "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.'

4.15. By section 39(2) of the EA 2010,

> 'An employer (A) must not discriminate against an employee of A's (B)
> (a) as to B's terms of employment;
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> (c) by subjecting B to any other detriment.'

4.16. There are two elements in direct discrimination, as explained in *Glasgow City Council v Zafar [1998] IRLR 36, by Lord Browne-Wilkinson,* the less favourable treatment and the reason for that treatment.

4.17. The words “because of” mean that the protected characteristic must be a cause of the less favourable treatment, but it does not need to be the only or even the main cause. For it to be a significant influence or an effective cause is enough. Motive or intention is not required.

4.18. Treatment is “because of a protected characteristic” if either

- it is inherently discriminatory *(James v. Eastleigh Borough Council [1990] ICR 554)* or
- if the characteristic in question influenced the "mental processes" of the alleged discriminator whether consciously or unconsciously, to any significant extent *(Nagarajan v London Regional Transport [2000] 1 AC 501)*.

4.19. It is where a decision is alleged to fall into the second category that it will be necessary to identify the person who made the decision.

4.20. Detriment does not require a physical or economic consequence; it is sufficient that a reasonable person might take the view that they have been disadvantaged:

> “Detriment exists if a reasonable worker would, or might, take the view that the treatment accorded to her had in all the circumstances been to her detriment. It is not necessary to demonstrate some physical or economic consequence.” *(Shamoon v Chief Constable of RUC [2003] IRLR 285 HL)*

4.21. As the Equality Act Statutory Code of Practice on Employment (the “Code of Practice”), explains, at paragraph 3.5:

> ‘It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.’

The comparator

4.22. Essential to the consideration of less favourable treatment is the question of comparison.

4.23. By section 23 of the EA 2010,

> “On a comparison of cases for the purposes of sections 13, 14 and 19, there must be no material difference between the circumstances relating to each case.”

4.24. This is dealt with by the Code of Practice at paragraphs 3.22 onwards.

4.25. The other approach is to say but for the relevant protected characteristic, would the claimant have been treated in this way? That may be helpful in identifying a hypothetical comparator (Code of Practice, 3.27).

Burden of proof

4.26. By section 136(2) and (3) of the EA 2010, the test in respect of the burden of proof is set out:

"(2) If there are facts from which 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."
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.'

4.27. The switching of the burden of proof is simply set out in the Code at para 15.34:

> "If a claimant has proved facts from which a tribunal could conclude that there has been an unlawful act, then the burden of proof shifts to the respondent. To successfully defend a claim, the respondent will have to prove, on balance of probability, that they did not act unlawfully. If the respondent's explanation is inadequate or unsatisfactory, the tribunal must find that the act was unlawful."

4.28. For the burden of proof to shift, the claimant must show facts sufficient – without the explanation referred to – to enable the tribunal to find discrimination. The Barton guidelines as amended in the Igen case *(Igen v Wong, 2005 IRLR 258 CA),* remain the basis for applying the law notwithstanding the re-enactment of discrimination legislation in the 2010 Act. It is those guidelines that establish the two-stage test,

> "The first stage requires the complainant to prove facts from which the Employment Tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld *(Peter Gibson LJ, para 17, Igen)*

4.29. The Tribunal is required to make an assumption at the first stage which may be contrary to reality.

4.30. In *Hewage v Grampian Health Board [2012] UKSC 37,* the application of the Barton/Igen guidelines to cases under the EA 2010 is approved at the highest level. At paragraph 33, Lord Hope, on the burden of proof provisions, says,

> "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence…"

4.31. In *Laing and Manchester City Council and others, 2006 IRLR 748,* the correct approach in relation to the two-stage test is discussed,

> "No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case…. (para 73)
> The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race (*or other)* discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, 'there is a nice question as to whether the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race'.

4.32. The nub of the question remains why the claimant was treated as he or she was:

> "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination." *(Madarassy v Nomura International plc) 2007 IRLR 246).*

4.33. In that case, in a judgment later approved by the Supreme Court in Hewage, above, Mummery LJ pointed out that the employer should be able to adduce at stage one evidence to show "that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant."

4.34. The "something more" that may lead a Tribunal to move beyond the difference in status and treatment need not be substantial – it may be derived from the factual context including inconsistent or dishonest

explanations (see Base Childrenswear Ltd v Otshudi 2019 EWCA Civ 1648 CA; Veolia Environmental Services UK v Gumbs EAT 0487/12.

4.35. The presence of discrimination is almost always a matter of inference rather than direct proof – even after the change in the burden of proof, it is still for a claimant to establish matters from which the presence of discrimination could be inferred, before any burden passes to his or her employer.

4.36. In drawing inferences, an uncritical belief in credibility is insufficient' as Sedley LJ pointed out in Anya v University of Oxford 2001 IRLR 377 CA (paragraph 25) it may be very difficult to say whether a witness is telling the truth or not. Where there is a conflict of evidence, reference to the objective facts and documents, to the likely motives of a witness and the overall probabilities can give a court very great assistance in ascertaining the truth.

4.37. In *Talbot v Costain Oil, Gas and Process Ltd and ors 2017 ICR D11, EAT*, His Honour Judge Shanks — having looked at the relevant authorities — summarised the following principles for employment tribunals to consider when deciding what inferences of discrimination may be drawn:

- it is very unusual to find direct evidence of discrimination
- normally an employment tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question
- it is essential that the tribunal makes findings about any 'primary facts' that are in issue so that it can take them into account as part of the relevant circumstances
- the tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference
- assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also of reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities
- where there are a number of allegations of discrimination involving one person, conclusions about that person are obviously going to be relevant in relation to all the allegations
- the tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors that point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment

- if it is necessary to resort to the burden of proof in this context, S.136 EA 2010 provides, in effect, that where it would be proper to draw an inference of discrimination in the absence of 'any other explanation', the burden lies on the alleged discriminator to prove there was no discrimination.

4.38. Unreasonable conduct or poor management does not of itself point to discrimination. There must be indications from the evidence that point to the unreasonable conduct relating to the prohibited ground *(Laing v Manchester City Council and anor 2006 ICR 1519, EAT).*

4.39. In Glasgow *City Council v Zafar 1998 ICR 120, HL*, Lord Browne-Wilkinson considered that 'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".' His Lordship also approved the words of Lord Morison, who delivered the judgment of the Court of Session, that 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'.

4.40. Equally, it cannot be simply inferred that the fact that an employer has acted unreasonably towards one employee means it would have acted the same way towards others. A failure to explain unreasonable conduct by the employer can support an inference of discrimination. If an employer acts in a wholly unreasonable way, it may be inferred that the explanation offered is not the true or full explanation *(Rice v McEvoy 2011 NICA 9 NICA).* In all cases, the drawing of inferences involves careful consideration of the surrounding facts:.

> "Facts will frequently explain, at least in part, why someone has acted as they have" (Elias P in Laing (above).

4.41. However,

> 'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.' Simler P, *Chief Constable of Kent Constabulary v Bowler EAT 0214/16*

4.42. As stated by the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*, an unjustified sense of grievance does not point to less favourable treatment.

4.43. Where a case consists of several allegations, the Tribunal must consider each separately to determine whether less favourable treatment occurred by comparison with others, so as to shift the burden of proof, rather than taking a broad-brush approach in respect of all the allegations *(Essex County Council v Jarrett EAT 0045/15).*

Time Limits – Equality Act

4.44. Section 123 of the EA 2010 sets out the period within which proceedings are to be brought.

4.45. Proceedings on a complaint within section 120 may not be brought after the end of:

(a) the period of 3 months starting with the date of the act to which the complaint relates or

b) such other period as the employment tribunal thinks just and equitable.

4.46. That means that a claim must be presented before the end of the three-month period beginning when the act complained of was done. The date of the act is included in the calculation of the time allowed. That means the period of three months beginning with 10 March ends on 9 June.

4.47. By section 123(3),

" For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

4.48. By section 123(4)

"In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

4.49. In *Hendricks v Metropolitan Police Commissioner [2002) EWCA Civ 1686,* in particular paragraphs 51 and 52, continuing acts are explored, concluding simply,

> "The question is whether there is an act extending over a period as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed."

4.50. The question is whether the employer is responsible for "an ongoing situation or continuing state of affairs" in which the members of the defined group are treated less favourably. It is wrong to pay close attention to words such as 'policy', 'rule', 'practice', 'scheme' or 'regime', as these are but examples of when an act extends over a period.

4.51. In Hale v Brighton and Sussex University Hospitals NHS Trust *(EAT 0342/16),* it was held that a decision to commence a disciplinary investigation was not to be treated as a one off act where it led to disciplinary procedures and ultimately dismissal. A relevant but not conclusive factor is whether the same or different individuals were involved in the incidents.

4.52. However, citing Hendricks, Choudhary P in South Western Ambulance NHS Foundation Trust v King *[2020] IRLR 168* warned '… that reliance cannot be placed on some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time. The claimant must still establish constituent acts of discrimination or instances of less favourable treatment that evidence that discriminatory state of affairs.' (at [36])

4.53. The time limits for bringing claims are extended by section 140B of the Equality Act to facilitate conciliation before the institution of proceedings.

5. **Reasons and Analysis**

Background

5.1. The parties agreed to the case being heard by an Employment Judge sitting alone.

5.2. These Reasons are issued very late, the request having come in on 20 December and again on 22 January. Unfortunately, the request was not passed on to me until 29 March. Given the lapse of time, they then inevitably required more care and re-reading than if the request had been received promptly. I very much regret the delay in their issue.

Disability

5.3. Disability is agreed in this case. Ms Brooks has asthma. That is a long-standing condition, managed by medication with exacerbations, rendering her vulnerable given the increasing level of Covid infection.

5.4. The asthma is plainly the background to the emails that she sent in March about the company's arrangements for addressing the rising concerns about disease and infection. She was sent home before others and before the full closure of the resorts because of her asthma.
5.5. Her enquiries in March 2020 related to the asthma and reflected the personal risk she saw for herself and the family as well as concerns about the safety of the resort for staff and guests.
5.6. It is pursued in the grievance, reiterating the requests for information earlier made and complaining of a failure to respond.

Direct Discrimination

5.7. The concerns that Ms Brooks raised in relation to discrimination does not relate to the March 2020 emails. The treatment Ms Brooks relies on is her removal from the WhatsApp group on 24 March 2020.
5.8. That has to be seen in the wider context: that group was the group selected to start work from home immediately, and in a position to carry on working and earning when others were furloughed.
5.9. It has been contended that the issue relates only to her removal from the WhatsApp group and not from the list of those to be working from home. I am not in any doubt that the WhatsApp group was seen as co-extensive with the list of those to be working from home and her removal reflected her removal from the list of those working. I find the distinction made to be artificial. She was removed from the WhatsApp group because she was not going to be working and so she did not need to be included in the source of advice, information and support provided for working. It was that group whose names were given to managers as the working team.
5.10. It is clear from the way that Ms Turnbull discussed her removal from the group that it was a business decision that related to the membership of the home working team and not simply a decision relating to access to that group.
5.11. It was also a public forum, in that those on the group saw who else was in it and who was added or removed.
5.12. Being in that team was important to Ms Brooks. She needed to work. There remained serious issues which the company had failed to address as to what the income would be for those excluded from work while the resort was closed, both before the Job Retention scheme was announced and once it was clear that staff could be furloughed. That is because the pay is not recorded in the contract and the commission that Ms Brooks relied on for a substantial proportion of her earned income was dependent on sales. Absent any sales, there would be no commission. Membership of the working team offered her some security financially.
5.13. It is quite clear that Ms Brooks was regarded by Ms Turnbull as a highly experienced and competent member of staff. She was well equipped to fulfil the role of home worker, and Ms Turnbull was willing to extend her hours in order to include her in the team – as she did for others.

5.14. While Ms Turnbull says the inclusion in the original list was provisional, I accept that Ms Brooks did not understand that to be the case. She thought she was in the team.

5.15. Between 13.05 on 24 March and 16.30, Ms Brooks was removed from the team.

5.16. She compares herself to others in the WhatsApp group, that is, the team who became the home working team.

5.17. That was undoubtedly less favourable treatment than those kept in the group received.

5.18. The real issue is why that happened. Was it to any degree because of Ms Brooks known disability of asthma?

5.19. Ms Brooks' asthma and vulnerability was well known to Ms Turnbull – they had spoken about it on 17 March. She was known to have asthma when she was originally considered for and put into the group.

5.20. Ms Turnbull specifically rang her to discuss home working. She had also sent out a message but she rang Ms Brooks personally – as she did other candidates - to make sure she didn't miss it.

5.21. The role being considered was consistent with safety measures to protect Ms Brooks from exposure to infection.

5.22. Ms Turnbull had rung her to explore whether she could and would be willing to do the home working. She knew of Ms Brooks' asthma and vulnerability when ringing her. She included her in the initial list, knowing of her asthma and vulnerability to infection.

5.23. It is unlikely that later the same day, the fact of her having asthma was the reason or a contributory reason for removing her from the group.

5.24. It is hard to see any link between the fact that Ms Brooks has asthma and her removal from the WhatsApp and home working group.

5.25. The link Ms Brooks makes in her witness statement is that,

> "It seemed to me that my removal was a reaction to the questions I had asked Butlins about Covid-19 or because I had asthma and that had somehow created an issue, or that the questions I had asked about homeworking generally and furthermore pay, had not "gone down well". Whichever way I thought about it, it seemed clear to me that I was perceived by Butlins as some sort of "troublemaker" or nuisance and had therefore been side lined."

5.26. Ms Turnbull denies having knowledge at the time of the full history of emails concerning health and safety. She did however consult Mr Tipper and Mr Pardey and HR before excluding Ms Brooks and another member of staff from the list. Mr Pardey and Mr Tipper did have knowledge of the correspondence. Ms Brooks sees that as the trigger – because she raised her concerns about her health, that influenced the way she was seen and treated; what Ms Brooks feels was a nuisance factor.

5.27. I cannot reason simply from the fact that Mr Tipper and Mr Pardey were aware of the full history of the concerns Ms Brooks had been raising to

conclude that she was removed from the home working team because of those concerns, the way she raised them or her asthma. She was the best or one of the best candidates. The business priority was to create the best team to take on the very difficult role of handling customers when the resorts had been suddenly closed.

5.28. Ms Brooks says she had no response to any of her emails, but Mr Pardey had tried to meet with her, and he did then speak to her by telephone. She was not ignored. The tenor of the response, although unsatisfactory to her, was not unsympathetic or dismissive. This was a crisis in the history of the company that was unprecedented, but Mr Pardey was willing to find time to engage with her concerns.

5.29. There is nothing to link Mr Pardey's or Mr Tipper's knowledge of her health and disability with the agreement to remove her from the list of home workers.

5.30. The trigger for her removal is given as the message that she sent at 14.55 on 24 March 2020 asking about pay and conditions. I accept that that was the reason.

5.31. She was perfectly entitled to raise those enquiries. The managers should have been in a position to clarify the basis of pay both for those furloughed and those working from home. They couldn't. None of the managers were able to clarify the basis of pay at the time.

5.32. Working at speed, under pressure, without adequate information but trying to meet the requirement to get the team up and working the next day, the reason given by Ms Turnbull rings wholly true.

5.33. What she says is that given the terms of the message of 14.55, she could not be sure that she had Ms Brooks' commitment to joining. There were more than enough staff interested and a substitute was found.

5.34. That is consistent with the intense pressure at the time to get the home working team up and running immediately.

5.35. I have not found any basis to say that the decision was in any way influenced by the fact that Ms Brooks was disabled. If I had, it would be somewhat contradicted by the evidence that Ms Turnbull then offered Ms Brooks the opportunity to apply to rejoin the team two months later, on 28 March and again Mr Tipper offered another opportunity. Ms Brooks points out that it was not an offer to join the team, only an opportunity to reapply, but it does not sit well with a suggestion that she had been excluded because of her disability.

5.36. The reason for her removal was that her response to being invited to join the team appeared to be equivocal. She cannot be criticised for wanting to be clear about the terms on offer, but it meant that there wasn't the immediate, unequivocal commitment needed.

5.37. I accept too that Ms Turnbull tried to speak to her but had no answer, and that Ms Brooks did not call her back.

5.38. Applying the law to the facts found, I find that the claimant was less favourably treated in being taken off the list of home workers than the others on the initial list. I do not find that that treatment was because of her

disability. In my judgment there is not a prima facie case of disability discrimination, but if the burden of proof has passed to the respondent, I accept the reason relied on by the respondent and that it was untainted by discrimination on the protected ground of disability. It was that they needed a team who were willing to commit themselves immediately and they saw in her questions that she was not. In no sense whatsoever was it because Ms Brooks was disabled by asthma.

5.39. The disability discrimination claim is dismissed.

Constructive unfair dismissal.

5.40. The breach of contract is said to be the decision to remove her from the WhatsApp and home-working group on 24 March 2020.

5.41. She was a good candidate, one of, or the best. She was on the initial list put forward. She was removed after asking about pay.

5.42. Oddly, pay is not fully explained in the contract produced. The contract reserves only a flexi-fund, which at the level in 2007, and apparently still, provides for pay below the minimum wage. The real level of pay is based on commission, for which no documentation has been provided and which is described as based on custom and practice.

5.43. The effect of that was that when the pandemic forced closure of the resort, those individuals relying on commission were in a particularly invidious position. They didn't know what their income would be based on – if it was the flexi-fund in the contract, then it would be a very minimal level.

5.44. Initially the respondent proposed that those shielding should be on statutory sick pay, itself very low relative to wages. But the later offer of "full pay" was difficult to interpret without knowing how the company would resolve commission. Ms Turnbull's understanding was that it meant basic pay, not commission, but who knows what people thought at the time.

5.45. Furlough, when it came, was an unfamiliar creature. At the point when the government scheme was declared, there was maximum uncertainty for this group of employees about their income.

5.46. In the uncertainty created by the pandemic , given the proposal that employees work from home and the uncertainty created by the pay arrangements, Ms Brooks was absolutely entitled to raise the question of pay and expenses.

5.47. She did so in the WhatsApp message of 24 March. It was that which led to her being removed from the group.

5.48. If Ms Turnbull and her more senior colleagues decided to remove her from the WhatsApp group for asking about pay, when there was uncertainty about pay, that is a fundamental breach of contract.

5.49. If it was the issue of pay and the uncertainty over what pay she would qualify for that led to her resignation, she could rely on that breach of contract.

5.50. She was excluded in effect for raising a proper enquiry about terms and conditions. The speed with which Ms Turnbull was working, being

required to work, and the fact that the company had not sorted out the remuneration for the work that they were asking people to do led to an unfair selection for membership of the home working team.

5.51. That is a fundamental breach of contract. What was proposed was a change in her working terms that changed the basis of her pay, and without full disclosure of the financial terms on which she was to be working. When she asked for the terms, the opportunity was withdrawn. That was a breach of the express terms of the contract as well as a breach of trust and confidence.

5.52. It is a little more complicated than that. Neither in the WhatsApp message nor later does she say she is resigning because of the uncertainty about pay. Nor did she resign at that point. She resigned three months later.

5.53. The pleaded claim is not a breach of contract related to pay, uncertainty about pay or a change in terms and conditions. It is about being removed from the WhatsApp group. She was willing to join the home working group in spite of the uncertainties about pay. She so confirmed in her oral evidence. And, in fairness to the respondent, she was not removed for asking about pay, but for asking a question that they could not answer, so that they could not be sure of her commitment.

5.54. The anger and distress that Ms Brooks explained in her evidence was not put forward as being on the basis that she had been excluded for asking about pay. It was simply that she had been excluded and that was because she was a disabled person,

> "I felt absolutely upset and humiliated. At that point I had been working there for 30 years and at that point I felt I had been dismissed." (oral evidence)

5.55. That was on 24 March. She considered the contract to be over at that point.

5.56. It is right to say that she did raise the uncertainty about pay again in her grievance. But the pleaded claim is about not being allowed to work, in spite of the uncertainty about pay.

5.57. In her oral evidence, she confirmed that all trust and confidence had gone by 24 March.

> "I had decided that because of being taken off the WhatsApp group that there was no way that I would ever be able to be back in the company and I had had enough at that point." (oral evidence)

5.58. She was asked whether, if she had had a call from Ms Turnbull about being removed from the group, because they could not answer the questions she had raised, things would have been different,

> "Yes, because I would have been communicated with and had an explanation".

5.59. And if someone has asked her if she still wanted to work in the home working group, even if they could not answer the questions she had raised, she said she would have agreed.

5.60. She had regarded herself as no longer working for the company when she removed herself from the other WhatsApp groups.

5.61. In her ET1, in response to the question "If your employment has ended, when did it end?", she answered 11 May 2020. She was asked about that. That was the date, she explained, when Mr Hutton indicated that he would proceed to investigate the grievance without a meeting. The grievance procedure had not been followed correctly by the company. So that was the date she said on which she was finishing, though she had been dismissed before.

5.62. She had had two opportunities, she confirmed, to apply for active roles working from home after being removed from the WhatsApp group on 24 March but did not apply.

5.63. The question is whether she resigned because of a fundamental breach of contract

5.64. She did not resign because of a breach of contract related to the change in terms and conditions or the uncertainty about pay.

5.65. She decided that the role had come to an end on 24 March. That is her evidence.

5.66. The reason she gave for that was her belief that she had been removed because of her disability. I have not found that to be true or a reasonable or well-founded belief. There simply is no foundation for it. It is inconsistent with contacting her to invite her to apply for the group and including her in it in the first place, as with offering her later opportunities to join.

5.67. Her further reason was the way that it was done, without explanation or consultation.

5.68. I accept that is in itself in the context of the loss of earnings, and great uncertainty, a fundamental breach. That is the relevant breach: the withdrawal without notice or consultation of a valuable opportunity to keep on working.

5.69. Her evidence is that in her view the job had come to an end in March. Consistent with that, she removed herself from the WhatsApp groups with her peers, declined to attend the company's information sessions and did not seek to rejoin the home-working team when she could. She raised the issue of the way her removal had been handled in her grievance but she did not think it was worth waiting for the outcome of the grievance. The way it was being handled by 11 May she says, confirmed her sense that the job had gone.

5.70. On 11 May, Mr Hutton had explained that he would carry on investigating the grievance without seeing her in person. She had declined to meet him until she had seen an extensive range of documents, while protesting at the delays. The team on whom he relied for the documents she

wanted were largely furloughed. Those documents that were immediately available had been provided, including the team handbook from 2013 and Ms Brooks contracts of employment throughout her employment at Butlins Bognor Regis.

5.71. The response of 11 May was not a “last straw” incident. The company was not following the usual timetable for carrying out a grievance procedure, but in the circumstances of the pandemic and lockdown, Mr Hutton was doing his best. Ms Brooks may have felt, in the combative mood that her emails disclose, that this was a further breach of trust and confidence, but objectively, it cannot be understood as that.

5.72. So on 25 June, she resigned, having decided that the job came to an end on 24 March, and that the grievance procedure was not worth relying on by 11 May.

5.73. Her resignation was on 25 June. She had continued to be paid while at home. It is true that she was paid without having to work, but that arose from the unique circumstances of lockdown. At some point, she had to elect between termination and continuing with the contract and in my judgment, that time had certainly come by two to three months after the incident relied on, throughout which by her conduct and evidence, she knew she intended not to return.

5.74. In my judgment, the reason for her resignation was her removal from the WhatsApp group and home working team in March 2020; the breach of contract was the manner in which it happened. She had however affirmed the breach by continuing to accept payment without resigning for three months.

5.75. The claims in respect of discrimination and constructive dismissal are dismissed.

Employment Judge Street
Date 25 April 2022

REASONS SENT TO THE PARTIES ON
13 May 2022 By Mr J McCormick

FOR THE TRIBUNAL OFFICE