EMPLOYMENT TRIBUNALS

Claimant: Miss A Forder
Respondent: Care UK Community Partnerships Limited

Heard at: Cambridge Employment Tribunal **On:** 28-30 September 2022 and 21-22 November 2022

Before: Employment Judge Dobbie
Sitting with: Mr K Mizon
Mr A Hayes

Representation
Claimant: Mr Forder (Claimant's brother)
Respondent: Mr H Dhorajiwala (Counsel)

RESERVED JUDGMENT

1. It is the unanimous decision of the tribunal that the following claims are upheld:
    a) Unfair dismissal;
    b) Discriminatory dismissal, contrary to sections 15 and 39 EqA;
    c) Unfavourable treatment, contrary to sections 15 and 39 EqA by issuing the Claimant with a final written warning in September 2020;
    d) Failure to make reasonable adjustments, contrary to sections 20-21 and 39 EqA.

2. The unanimous decision of the tribunal is that the claim for detriment for being asked to go home in November 2020 is not upheld and is dismissed.

REASONS

1. By a claim presented to the tribunal on 17 May 2021, following ACAS Early Conciliation from 12 to 17 May 2021, the Claimant brought claims for unfair dismissal and disability discrimination, under s.15 Equality Act 2010 ("EqA") for unfavourable treatment because of something arising in consequence of

disability and under ss.20-21 EqA, for breach of the duty to make reasonable adjustments.

2. The Claimant was employed by the Respondent (a national independent provider of care homes with over 100 homes and over 10,500 employed staff) from 16 September 2016, initially as a carer, and latterly as a part-time gardener. She worked at a home called Field Lodge and was dismissed with PILON on 23 April 2021, on grounds of capability. Her employment therefore terminated on 23 April 2021.

3. The Respondent defended all claims in an ET3 presented to the tribunal on 15 July 2021. It amended its reply subsequently.

4. There was a list of issues at pages 44-51 of the tribunal bundle, which had been drafted by or with the assistance of EJ Tuck at the Preliminary Hearing on 7 February 2022. It stated (with different paragraphs numbers):

ISSUES

5. Time limits

5.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 13 February 2021 may not have been brought in time.

5.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The tribunal will decide:

- 5.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
- 5.2.2 If not, was there conduct extending over a period?
- 5.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
- 5.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
  - 5.2.4.1 Why were the complaints not made to the Tribunal in time?
  - 5.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

6. Unfair dismissal

6.1 The Respondent accepts that it dismissed the Claimant. It relies on the potentially fair reason of capability.

6.2 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

7. Discrimination arising from disability (Equality Act 2010 section 15)

7.1 Did the respondent treat the claimant unfavourably by:

- 7.1.1 Giving her a final written warning [on 21 September 2020]
- 7.1.2 Sending her home in November 2020
- 7.1.3 Dismissing her [on 23 April 2021]

7.2 Did the following thing arise in consequence of the claimant's disability:

7.2.1 The claimant's inability to take a Covid Test (due to her extreme anxiety when she tried to do so).

7.3 Was the unfavourable treatment because of any of that thing [sic those things]?

7.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

7.4.1 Keeping residents in its care homes safe
7.4.2 Complying with government regulations.

7.5 The Tribunal will decide in particular:
7.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
7.5.2 could something less discriminatory have been done instead;
7.5.3 how should the needs of the claimant and the respondent be balanced?

7.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

8. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

8.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

8.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

8.2.1 Requiring all care home staff to undergo regular Covid Tests

8.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she was unable to take a test due to her extreme anxiety?

8.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

8.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

8.5.1 Ensuring that the Claimant, as a gardener, did not come into contact with residents, either by altering her hours or the area of garden to work in.
8.5.2 Instructing the claimant not to access the premises at all – she suggested changing in the garden outbuildings.

8.6 Was it reasonable for the respondent to have to take those steps and when?

8.7 Did the respondent fail to take those steps?

PROCEDURE

9. The case was initially listed for four days (from 27-30 September 2022 inclusive) to include liability and remedy (if needed). However, the listing was reduced to three days the week prior to the hearing due to a lack of tribunal resources. The matter was heard virtually, by video.

10. The hearing took the three days from 28, 29 and 30 September 2022 solely to hear the Respondent's evidence. Unfortunately, it was not possible to also hear from the Claimant or receive submissions within that listing and the matter had to be re-listed on 21 and 22 November 2022 (the latter being a chambers' day for the panel to reach its decision). Therefore, in total, the case took five days for liability only.

11. There were various delays during the three days, caused primarily by the Respondent's late disclosure of documents. We do not comment further on this at this stage. Suffice it to say that the Respondent's behaviour in respect of providing the bundle, changing it very shortly before the first day of the full merits hearing and providing witness statements very late would have been unacceptable even if the Claimant had been professionally represented. However, given her disability and the fact she was represented by her brother (a lay person who took time off from his business to assist her) the Respondent's conduct in this matter is ever less acceptable.

12. The tribunal heard from the following witnesses for the Respondent (between 28 and 30 September 2022):
    (a) Linda Martinez, Home Manager at Field Lodge (and dismissing officer);
    (b) Elena Bratu, Operations Support Manager for Suffolk ;
    (c) Alice Banda, Home Manager at Tall Trees home;
    (d) Bernard Mawoyo, Regional Director, Essex; and
    (e) Amanda Bell, Operations Support Manager, Essex (and appeal officer).

13. The Claimant gave evidence on 21 November 2022 and did not call any other witnesses.

14. Each witness had produced a witness statement. The Claimant had produced an earlier impact statement and a short statement for the final hearing. In discussion with Counsel for the Respondent, it was agreed that the tribunal would take both such statements as the Claimant's evidence in the case.

15. Disability (specifically anxiety and depression) had been conceded for the period 20 September to 23 April 2021, by an email dated 28 April 2022.

16. In this judgment, references in square brackets are to pages in the agreed hearing bundle unless stated otherwise.

FINDINGS OF FACT

17. The Claimant commenced working for the Respondent on 16 September 2016 as a carer at Field Lodge. The Claimant has struggled with anxiety and mental health impairments since her teenage years, and this was discussed in her initial interview with the Respondent, along with the medication she was taking at that time.

18. At some point prior to July 2017, the Claimant raised a complaint about the way Ms Martinez had spoken in derogatory terms about the then Home Manager of Field Lodge when she visited the home (at a time the Claimant was a carer). Ms Martinez confirmed in her live evidence that she was aware that the Claimant had raised a complaint which implicated her before Ms Martinez moved to Field Lodge.

19. In July 2017, the Claimant changed roles to that of Maintenance, also at Field Lodge. It was agreed by both parties that her maintenance duties were limited to gardening. She worked 15 hours a week in total, split over three days, five hours a day. The Claimant was initially told she could carry out her gardening duties when it suited her, and she originally started her shifts at 5am. She continued to start her shift at 5am until February 2018, when Linda Martinez joined Field Lodge (from another home) as Home Manager. When she joined, Ms Martinez required the Claimant to start later due to Ms Martinez's concerns about inadequate lighting for effective gardening at 5am.

20. The Claimant was obliged to attend to various areas for gardening. In her live evidence to the tribunal, which was unchallenged and which we accept, the Claimant stated: "There's a front garden, 2 side gardens and a back garden. Down the side there's 10 rooms long the garden is and they're not normal length rooms, there's the café room, cinema rooms and I could work in that part of the garden. There is no pathway for residents.". The tribunal had photographs of the rear garden which is sizeable. In terms of the front garden, Ms Martinez accepted in oral evidence that it had a "substantial amount to be done and foliage to be maintained".

21. Due to covid-19, on 19 March 2020, the Respondent banned visitors from entering into the care homes so as to protect the vulnerable residents. This was not long before this measure was introduced nationally for care homes, on 2 April 2020.

22. Also in April 2020, the Respondent started requiring all staff to test their temperature before starting each shift and residents' temperatures were tested twice daily. It should be recalled that at this early stage of the pandemic, there were no other testing methods readily available.

23. On 29 April 2020, the Respondent announced its Whole Home testing guide, stating that the government would be offering testing for staff from 6 June 2020. From 1 May 2020, staff were required to wear masks.

24. On 19 May 2020, the Claimant undertook a PCR test at work. This was a one-off PCR test. The Claimant reacted badly to the test, which unexpectedly triggered her anxiety. She stated in her live evidence (which the tribunal accepted) that: "I did it myself in a bathroom, I was in a very bad state and I did what I could but I know I could not do it properly and she [Ms Martinez] said "I can see you have done it right by your face" and walked away."

25. From 10 July 2020, as lockdown restrictions eased nationally, the Respondent's pandemic plan document stated that visitors were allowed to meet residents in the garden subject only to temperature checks [362] and [376].

26. On 14 August 2020, Ms Martinez wrote to staff informing them that the Respondent then had ample stocks of testing kits and would commence once-weekly testing of staff.

27. On 17 August 2020, the Claimant was asked to do a swab test. She declined. At this time, she believed that it was something she was entitled to refuse and she was not aware that it was regarded as mandatory or that it could lead to disciplinary proceedings if she refused. The policy documents specifying that testing was mandatory were displayed inside the home and the Claimant had not seen them (given that she worked outside) nor had she been given a copy of them or had her attention drawn to them.

28. On 24 August 2020, the Respondent commenced once-weekly testing of all staff. On that date, the Claimant again refused to test (again believing she had a right to decline without consequence).

Disciplinary investigation meeting 26 August 2020

29. On 26 August 2020, the Respondent commenced a disciplinary investigation into the Claimant's refusals to test. The investigator, Jo Hancock, interviewed the Claimant that day. In the notes of that meeting, signed by the Claimant, she agreed she had refused to take the tests and is recorded as having stated "I am the gardener so don't come into contact with residents. If any of them are in the garden I keep a safe distance." [107]. In the notes, the Claimant is further recorded as having understood why testing is important but she stated that she did not feel she fell under the remit of the testing regime (because she worked outside) and because the tests are only valid on the days they are taken she felt it was futile testing once a week. She stated if she were to be tested on each of her three days a week "she would have it willingly"[108]. The Claimant explained in her live evidence (and this was accepted by the tribunal) that she was actually refusing due to the aversion she had to testing due to her anxiety. However, she was deeply embarrassed about her condition, which she stated she perceives as a weakness and she did not want to inform others of this, so she advanced excuses to avoid the risk of being judged as weak or vulnerable.

30. On an unknown date, the Claimant was invited to a disciplinary hearing in respect of her refusal to test.

Disciplinary hearing, 14 September 2020

31. On 14 September 2020, the Claimant attended a disciplinary hearing chaired by Ms Martinez. In the interview, Ms Martinez asked the Claimant "Do you understand that all colleagues working in Care UK who work in care homes are requested to have this test unless there is a valid reason not to have this test?" [109]. The Claimant stated she was aware. She also accepted she had consistently refused to test and when asked if there was a medical reason for her refusal, she said "no" [110]. The Claimant asked to postpone the meeting because she wanted to obtain a companion. She had chosen Jo Hancock to attend as her companion, but this had been refused by Ms Martinez on the day on the basis that Ms Hancock would be an inappropriate companion given her involvement as investigator. Ms Martinez refused to adjourn the meeting. The tone of the meeting deteriorated into an argument between Ms Martinez and the Claimant. The Claimant had prepared a statement which Ms Martinez refused to accept and the Claimant therefore wrote "I have a statement" on the notes when she signed them [111].

32. On 16 September 2020, the Claimant wrote to Sharon Maiden (in the Respondent's HR team) explaining what had happened at the disciplinary hearing and attaching her statement. In the statement, the Claimant stated she believed it to be unnecessary for her to test (given that she worked outside and did not enter the home for any purpose). She stated she was adhering to mask wearing and social distancing but did not agree to being tested. She did not state that there was any medical reason, nor did she allude to anxiety. The email clearly raised complaints about Ms Martinez's conduct of the disciplinary and that she was "sick with worry" about attending work due to Ms Martinez. This email was thus plainly a grievance. Sharon Maiden stated she would forward the Claimant's email to Amanda Bell who "will be in contact with you in due course" [114].

33. The Claimant was signed off sick with stress from 16 September to 16 October 2020.

Final written warning, 21 September 2020

34. On 21 September 2020, Ms Martinez wrote to the Claimant with the disciplinary outcome, issuing the Claimant with a final written warning to remain live for 12 months. The letter warned that any further breach of company standards could result in dismissal and that the Claimant was expected to start weekly testing.

35. On 23 September 2020, the Claimant appealed against the final written warning. By a letter dated 21 October 2020, Ms Bratu invited the Claimant to attend an appeal hearing on 23 October 2020. Also on 23 September 2020, the Claimant received a letter informing her of weekly covid antigen testing, which referred to three times a week testing (two lateral flow tests and one PCR test a week) on three fixed days each week (irrespective of what days each staff member worked). Staff on holiday were not obliged to attend a testing day to test. However, those not on holiday who were not at work on a testing day (because it was not one of their working days) were expected to attend the home to test.

36. On 6 October 2020, the Department of Health and Social Care update to care homes stated that it was critical for homes to test staff once a week and that a failure to do so is "against national policy" [421].

37. The Claimant's sick leave ceased on 16 October 2020 and she returned to work. She continued to refuse to test and was not suspended and was permitted to attend work. She worked exclusively outside during these times.

38. On 23 October 2020, the Claimant attended the appeal hearing in respect of the final written warning, which was convened in a meeting room inside the care home. The Claimant was invited to attend the meeting inside despite the Respondent knowing she had refused to test for Covid-19 to that date or on that day.

39. At the hearing, the Claimant was asked why she had refused to test. She initially said "Had it once, did not like it, I work in the garden 3 days a week, it is only valid for that day and think it is a waste of time" [118]. The pages of the notes of the hearing were not in their correct sequence and it was not possible to decipher the correct sequence. However, it is apparent that the

Claimant must have given some indication that the test caused her distress because at page [122] the following dialogue is recorded:

> Elena Bratu "why will you not allow to just have it up the nose?"
> Claimant: "I don't know, I did myself last time, I did not know I only had to do in the nose."
> Elena Bratu: "If it reduces the anxiety and stress, will you try it?"
> Claimant: "It puts people under pressure, stressful, I had 3 weeks off for stress.."
> Elena Bratu: "Sorry to hear about anxiety".

40. The Claimant is also later recorded as having said: "the thought of taking it causes me stress and anxiety" [129]. She asked "can I go to the doctor's and get a letter saying it is not consuvive [sic, conducive / compulsory?] for me to have the test?". This clearly indicates that the Claimant was linking her anxiety to a medical reason. It was agreed that Ms Bratu would wait a week for the Claimant to visit her doctor before delivering the appeal outcome letter [123].

41. Also during the meeting, the Claimant reported to Ms Bratu that visitors were attending the care home at this time, entering the premises without being tested [125] and that visitors were allowed in the garden without a test [129]. Ms Bratu did not dispute this or say it was against the Respondent's policy. In her live evidence, Ms Martinez stated that visitors attending the garden had to be tested but she could not recall what date this commenced.

42. At the appeal hearing, the Claimant asked whether she had to do the test until she had a letter from her doctor and Ms Bratu informed her she could continue attending work without testing until then [130].

43. On 3 November 2020, before the Claimant provided anything from her doctor, Ms Bratu issued her written appeal outcome dismissing the Claimant's appeal and advising her to prepare to start covid-19 testing on her next shift. Ms Bratu sent a copy to Bernard Mawoyo and Ms Martinez. Mr Mawoyo commented "The letter is fair and reflective of Care UK processes." [132].

44. On 4 November 2020, the Claimant spoke to Ms Martinez about her mental health. Ms Martinez referred the Claimant to the Respondent's Employee Assistance Programme ("EAP") on 5 November 2020 [134]. Paragraphs 13 and 14 of the amended grounds of resistance state that the Claimant informed Ms Martinez that the prospect of testing was giving her anxiety and affecting her mental health and this is what prompted details of the Respondent's EAP being given to her [54].

45. Also on 5 November 2020, the Claimant obtained and provided to the Respondent a copy of a letter from her doctor which stated that the requirement to test: "had caused her a great deal of undue stress and anxiety, which is not uncommon in this viral pandemic. Please note that this could be down to an individual's personality and resilience and this note does not preclude her from the test." [135]. In response to this letter, Ms Martinez wrote to the Claimant that "I do appreciate that you find the testing difficult and are very anxious about it… there are no exceptions to the rules of testing." [137]. The second national lockdown was announced on this day.

46. On 11 November 2020, during a period of annual leave, the Claimant attended Field Lodge on a testing day to take a test. She was observed by Ms Martinez and another manager attempting to take the test and breaking down into what the Claimant described as a panic attack. Ms Martinez herself accepted in her live evidence that "she came across as very distressed... she left very upset. She was crying". The Claimant was asked to leave and had to sit in her car for something in the region of 20 minutes to compose herself because she was so distraught. She was signed off sick with "stress" for four weeks on that day. She did not return to work at any time before she was dismissed, she was signed off sick throughout, not because she was too unwell to undertake gardening duties, but because she was unable to test.

47. On 25 November 2020, the Claimant wrote to Ms Martinez by email referencing an earlier discussion in which she requested furlough which Ms Martinez had refused. The Claimant then suggested two alternative ways forwards in her email: (1) a saliva test; and (2) that she change her working hours to three hours a day five days a week working 7am to 10am and preventing residents from entering the garden before 10am [142]. Ms Martinez replied on 26 November 2022 stating she would look into saliva testing. It is apparent from the evidence given by Ms Martinez and from the documentary evidence that she did not in fact look seriously into alternative methods of testing until some five months later, on 21 April 2021, which was just two days prior to the letter of dismissal (and after the final capability meeting, described below).

48. In respect of altering the Claimant's hours, Ms Martinez stated in her letter: "Option 2 is not reasonable, I cannot deny residents access to the garden, this is unfair and could be detrimental on our residents welfare" [141]. Neither in her written statement nor in her live evidence did Ms Martinez state that she had investigated which residents tended to use the garden in the mornings or at what times. She dismissed the suggestion of altered hours without any discussion or investigation. Hence her belief that the Claimant's altered hours would impede the normal enjoyment of the garden that residents were accustomed to was an assumption. She was not fully aware when they tended to do so and cannot therefore have known what impact the altered hours would have on residents.

49. The Claimant gave evidence in internal proceedings and to the tribunal that was consistent on this matter. She stated that there were two male residents that regularly came out into the garden in the mornings and that they did so after breakfast. There was another female resident that used the garden regularly too. She stated that the garden doors are locked until that time, namely around 8am. Accordingly, it was some time after 8am when these regular residents did their morning walk. She stated other residents might come out on an ad hoc basis at other times, but that no residents came out before 8am. Residents suffering dementia or similar impairments would be accompanied by a carer when they went into the garden. Other residents would be entitled to access the garden alone unless they were vulnerable in some way. The Claimant noted that those without a mental impairment who were allowed to access the garden alone were sufficiently astute to understand the need to socially distance and that this is what had happened. She stated that those who were not sufficiently astute were always accompanied by a carer who was, such that the carer could ensure social distancing was observed.

50. Ms Martinez disputed there was a breakfast time at all and said residents were allowed to ask to go into the garden at any time, albeit she did not deny that the garden doors were locked in the night and into the morning. She stated they were unlocked by 7am if not requested prior. We considered the Claimant's evidence on this to be more reliable because she was the one working in the garden and would be better placed to note when residents routinely came outside and when the doors were unlocked. Ms Martinez, as Home Manager is less likely to have been as aware of these operational details and resident habits. Her evidence also suggested there was no routine whatsoever to resident breakfast times and that there was no conventional designated breakfast time. This was implausible and/or demonstrated that Ms Martinez was perhaps unsure of the home routine.

51. In January 2021, vaccinations were made available for care home residents and staff. The Claimant was vaccinated at some point after this. Also in January 2021, the government issued updated care home testing guidance which required three times a week testing of staff. As with the earlier such guidance, it stated that "testing should be done for the whole home" including "all care home staff (including agency workers)" [469].

Grievance, 26 January 2021

52. On 26 January 2021, the Claimant raised a written grievance about the fact she was required to test and had to be signed off sick. She also stated "I suffer with mental health problems and have a very bad setback with regards to the covid test. This unfortunately causes me to have panic attacks so severe I could not talk or remember where I lived…". She then detailed the adjustments she had previously suggested (saliva testing and changing her hours to 7-10am five days a week) and suggested further that she could go and work in the front garden if a resident accessed the back gardens during her working time (to reduce the risk of transmission).

53. On 29 January 2021, the Claimant was invited to a virtual grievance hearing on 2 February 2021.

54. On 2 February 2021, the grievance hearing was held, chaired by Alice Banda (Home Manager for another home). It lasted 30 minutes. In the notes, which the Claimant signed, she is recorded as having said: "I suffer with anxiety and stress and am on antidepressants, I get panic attacks when I have to have the covid test" [167]. It is notable that the Claimant stated at the outset of the hearing that she wanted a companion and was unable to get one because she did not know how to add them to a virtual hearing and she was "not allowed to contact them" [157]. Despite this, Ms Banda did not adjourn the hearing or make any attempt to enable the Claimant to be accompanied.

55. Also on 2 February 2021, the Respondent received the Occupational Health report from its provider (the Claimant having consented to be assessed) which stated that the Claimant had long-term mental health issues which had been controlled for many years with the use of prescription medication. However, attempting to take the covid-19 test triggered a "strong anxiety reaction". It went on to state that she is "fit to undertake the full remit of her role and testing for covid-19 in a workplace is a managerial decision" [156]

56. On 5 February 2021, Ms Banda wrote to the Claimant rejecting her grievance stating that "it is mandatory that all Care Home colleagues test and we cannot make exceptions to that." [168]

57. The Claimant appealed the grievance outcome to Bernard Mawoyo (Regional Director, Essex) on 8 February 2021. She stated the test "causes me great anxiety and panic attacks which can be verified by Linda and Donna who were both present when I tried and ended in total breakdown where I was sent home. Because of the mental health of the situation, I wrote to Andrew Knight… am struggling so much with the test the Dr has signed me off since October with stress. I want to work I have offered so many solutions which have all been rejected… it is such a huge mental health matter for me" [173-4].

58. Mr Mawoyo sent the email to Sharnna Coates (ER). She replied to him on 10 February 2021 stating "Her concern raised to Andrew Knight was about anxiety and testing, unfortunately, as you already know, there are no exceptions therefore, not much to look into… I am concerned about the lack of understanding so let me know what you think about next steps. I'm even considering if capability might be necessary now." [172]. This suggests that ER pre-judged the matter and advised Mr Mawoyo accordingly, orientating the process towards a capability dismissal instead of investigating alternatives.

59. On 12 February 2021, Sharnna Coates wrote further to Ms Martinez and Mr Mawoyo advising them on how to "move things forward". This was 10 days prior to the grievance appeal hearing which Mr Mawoyo was scheduled to chair. She stated, amongst other things: "This will be a medical capability, not a performance capability and will be in line with the long-term sick process… You can repeat point that have already been offered such as a career break, accompaniment to testing, self-administering, or choosing someone to do it for her in a quiet room etc etc. But also sensitively explain why we couldn't accommodate her requests of different testing and not allowing residents into the garden before a certain time. The next stage will be stage 5 which is where you could make a decision on her employment" [178].

60. At paragraph 26 of her witness statement, Ms Martinez stated that: "Sharnna echoed my empathy in relation to Miss Forder, stating "it may simply be a case that she can't do it...and that is not her fault, but it is also not our fault.". We find it somewhat disingenuous to suggest that this was an expression of empathy. Ms Martinez did not appear to demonstrate empathy towards the Claimant. The mere fact that Ms Coates expressed that it "may" not be the Claimant's fault that she cannot test (when they had just read and reviewed the OH report which explained the reason for her refusing to test) merely reinforces the fact that there was scepticism as to the reason why she was refusing to test. Ms Martinez certainly indicated that she disbelieved the Claimant at times, as set out below.

61. It is also notable that the only evidence of the Respondent having looked into alternative testing was an email chain at page [204] and this occurred in April 2021. It would seem therefore that the Claimant's suggestion for alternative tests was not seriously considered at this earlier time, yet the Respondent appears to have dismissed it as a possibility despite having not researched it. Whilst we fully accept that from March 2020, the Respondent would have

been taking emergency measures in respect of the risks posed by the pandemic, and this was likely to have been the focus, this does not negate the fact that no attempt appears to have been made to look into alternative methods of testing which could have enabled the Claimant to work.

62. On 22 February 2021, Mr Mawoyo convened the grievance appeal hearing. During the meeting, Mr Mawoyo stated that the Claimant cannot simply avoid residents if they come into the garden when she is working, because she is obliged to do activities with them. She explained that this had never happened during her years as gardener and that residents would always be assisted by a member of the activities team. In his statement at paragraph 13, he stated: "I did not agree or understand this, as our staff are there to operate as one and all of them should be interacting with the residents. Particularly where residents are in the garden, this would be on Miss Forder to interact and not actively avoid them which is what she was proposing as an alternative to testing." However, there is no evidence to suggest he ever checked what her duties were or the level of interaction she was required to have with residents, particularly in the context of the pandemic where people were accustomed to and obliged to socially distance where possible.

63. When she suggested alternative (blood) testing, he stated "I am not aware of other testing procedures" and when the Claimant suggested a blood test he stated "we don't offer blood tests, we have weekly PCR and lateral flow testing." When the Claimant asked about saliva tests, he responded "We don't have any information on the accuracy of that. That isn't what is available to us." From this, it is evident that he had not looked into alternative testing, yet was willing to dismiss the prospect of it.

64. At paragraph 18 of his witness statement he stated: "I spoke to Linda I believe on the phone, regarding this and I was satisfied that it was not possible for us to offer alternative forms of testing on top of the LFD or PCR tests" but he did not give any basis for this belief nor what Ms Martinez had said to him. Given that Ms Martinez herself did not make enquiries about alternative forms of testing until 21 April 2021, it appears that both she and Mr Mawoyo dismissed the idea without enquiry at these earlier times.

65. At paragraph 18 of his statement, Mr Mawoyo stated that after the meeting, he contacted "Field Lodge care home, where Miss Forder was employed, to look at how many residents used the garden; there was no specific number however we did have a large number of residents residing on the ground floor that <u>would</u> want to use the garden." [emphasis added]. This reinforced the tribunal's conclusion that the Claimant was better placed than the Respondent's witnesses to know how regularly the garden was used, when and by whom. Further, that Mr Mawoyo was making assumptions as to the extent of any impact the Claimant's proposed change in hours would have on residents, precisely because he did not know when residents tended to use the garden.

66. Mr Mawoyo sent the outcome letter that day, rejecting the appeal. In his (very short) letter he stated "if a resident wishes to go into the garden when you are working then they should be able to do so. I have explored other means of covid testing and I can confirm that unfortunately the only tests available for care home residents and workers are PCR and LFD tests."

Formal process leading to dismissal

67. On 1 March 2021, the Respondent invited the Claimant to attend a meeting "re Occupational Health Report – Meeting to Discuss Outputs". The letter references the Sick Absence Policy (but did not attach it). It did not inform the Claimant it was a stage 4 meeting under that policy nor the implications of the stage the process was at [187].

68. On 12 March 2021, Care UK Pandemic Plan (the Plan) was issued stating that the government hopes to revoke all social distancing after 21 June 2021 [225]. The Home also introduced cohorting, whereby a colleague was designated to specific residents in bubbles to reduce intermingling [243]. If all staff and residents were cohorting, it is not possible that they would all be allowed to use the garden individually at will. Therefore, the home did appear to tolerate some fetters being placed on residents' enjoyment of the garden. The Plan says that colleagues must be tested weekly (one PCR and two LFT per week) [252]. It also requires a temperature check before each shift [252].

69. It is evident therefore that there would be some staff working full time but only being tested on three of their working days. Accordingly, the Respondent tolerated full-time carers entering into the premises about two days a week, being in close contact with residents without having had a test on those two days. This tends to suggest that whilst regular testing was a valuable control mechanism (along with an arsenal of other measures, including temperature checks, PPE, social distancing, hand-washing and masks) it was not regarded as an absolute requirement for entry into the home. It was merely one measure (amongst a suite of measures) that helped to reduce (though not nullify) the risk of transmission of covid-19.

70. In respect of ad hoc agency staff, the home had a checklist for approving their use and provided they could show that they had had a negative PCR test within the last seven days, and complied with other screening requirements (a health questionnaire, temperature check and declarations) the home could approve them to work without a LFT or PCR test on the day in question [268].

71. Under the Plan, the home allowed essential caregiver visitors for those residents in need of close contact personal care from a loved one. Such carers were subject to the same testing regime as staff. In theory therefore, an essential carer could be attending every day (7 days a week) but only being tested three times a week. They were allowed to enter the home and could come into contact with other residents (as well and transmitting any infection to their resident relative) [296].

72. Under the Plan, garden visits were banned but the home allowed visits through a closed window without the need for the visitor to do any test or wear any PPE [299].Accordingly, by 12 March 2021, the Respondent was content to manage the risks posed by those entering the home with three times weekly testing (even if the carer attended seven days a week) and it was content to have visitors in the garden and the external perimeter of the home speaking to residents through closed windows. This is a sensible and pragmatic approach to the risk, taking steps to seek to minimise the risk of transmission but not seeing a LFT / PCR test before every single shift as necessary.

73. Given that face to face visits in the garden were not permitted at all by this time, the garden was less vital as a visitation tool at this time. It is therefore likely to have been less heavily used than at an earlier stage in the pandemic when it was the only method of visiting that was permitted (in July 2020 onwards, per page [362]).

74. On 22 March 2021, the Claimant attended the sickness absence review meeting with Ms Martinez. It is recorded to have lasted just 11 minutes. In that meeting, Ms Martinez clearly articulates that she understands from the OH report that Covid-19 testing triggers a panic attack in the Claimant. However, Ms Martinez's follow-up questions indicate she is not convinced by the medical opinion, asking "You had a covid test in May 2020 with no concerns or anxiety?". She also referenced this part of the meeting at paragraph 29 of her witness statement, demonstrating that even at the time of the final hearing, she continued to doubt the Claimant's anxiety in relation to testing. Ms Martinez further reiterated in the meeting that the need to test was mandatory. [188-189]

75. Ms Martinez spoke to Sharnna Coates again after the meeting. At paragraph 31 of her statement she stated: "Following the meeting I had a discussion with Sharnna Coates (ER Advisor) regarding the possible alternatives to testing. The other forms of testing were not an option". Ms Martinez failed to give any explanation as to why this was not an option and did not suggest she had done any research into the matter other than to raise it with Ms Coates. It is known what Ms Coates' view of the situation was by this time, since she had already informed Mr Mawoyo that there was no much to look into and she had proposed to Mr Mawoyo and Ms Martinez that the matter be progressed the capability process (as above).

76. On 25 March 2021, Ms Martinez offered the Claimant a career break for three months (unpaid and with no benefits accruing). The rationale was that testing might have ceased by then and the situation could be reviewed. The Claimant stated she was unable to accept that offer because she needed some pay, and that it would be preferable to remain signed off sick receiving sick pay.

77. In her live evidence, Ms Martinez noted that the "maintenance man" had been able to cover a lot of the Claimant's duties during her absence and they had not been required to engage another person as an employee or contractor to do so.

78. By April 2021, the Field Lodge Journey records that residents were allowed to go out again, including for rides in a minibus and with named visitors taking residents out in public. Further, that nominated visitor numbers had increased [540].

79. On 7 April 2021, the Claimant was signed off sick with "situational anxiety" for one month due to her inability to test.

80. On 8 April 2021, the Respondent invited the Claimant to a meeting "Re Long Term Sickness Absence – Review Meeting" by WhatsApp video, scheduled for 14 April 2021 in respect of periods of absence from 16 September to 16 October 2020 and 4 November 2020 to that date (8 April 2021). This time, the letter did enclose a copy of the correct policy. The letter warned the Claimant that she might be dismissed on notice at the meeting for capability.

Presumably this was a stage 5 meeting under the policy [85-87], but it does not specify this in the letter. The letter reads as though it is based on the periods of absence to date triggering the policy.

Meeting leading to dismissal, 14 April 2021

81. On 14 April 2021, the Claimant attended the hearing chaired by Ms Martinez. It lasted 25 minutes. In the meeting, Ms Martinez's questions demonstrate she continued to be sceptical about the reasons for the Claimant's refusal to test. For example, she asked "do you still feel that you are unable to have the PCR test due to mental health issues?". She also raised the adjustments previously discussed by the Claimant but stated "however the residents should have access to the gardens at all times.". When the Claimant suggested alternative methods of testing, Ms Martinez stated "Unfortunately we do not have access to these tests". The Claimant then suggested that if a resident comes into the back garden when she is working, she could move to the front garden and tend to it (which residents are not allowed to enter). Ms Martinez did not even comment on this and instead moved the conversation to needing to discuss the Claimant's future employment. The Claimant then stated she was confused as to the purpose of the meeting and Ms Martinez simply stated they were following the process and then stated "I am now ending the meeting."

82. In her live evidence, when asked questions by the panel, the Claimant stated that whilst she had suggested working 7-10am, this was just a suggestion. She accepted she had not actually suggested working 5am to 8am, but she stated: "but I did say I worked at 5am before; I could start at that time.". She stated she had said this to Ms Martinez in one the discussions about her hours, but she could not recall which. We accepted that evidence (which was unchallenged). We find that she said this most likely at the April 2021 hearing meeting with Ms Martinez, if not at the prior absence review meeting.

83. On 21 April 2021, Ms Martinez made enquiries about alternative forms of testing to the local Clinical Commissioning Group ("CCG"). Emily Smith of the CCG informed Ms Martinez that LAMP tests (saliva tests) were not available and that blood tests can only test whether a person has antibodies (i.e. that they have had Covid-19 in the past, not whether they have it at the time of the test). The nearest venue for LAMP testing was said to be at least an hour away [203-4].

Dismissal, 23 April 2021

84. On 23 April 2021, Ms Martinez wrote to the Claimant dismissing her on one months' notice for capability (ill health). The letter proceeded to explain why alternative testing was not available and that the Claimant's suggestion of altering her hours could not be accepted because "it is not acceptable to not allow residents to use the garden when they so wish." [198-199].

85. Ms Martinez's written statement to the tribunal echoed her apparent scepticism of the Claimant's refusal to test being caused by her disability. It is notable that this was written after the Respondent had formally conceded disability in the legal proceedings and after the OH report (above) which clearly stated that her refusal to test was for this reason. At paragraph 6 of her statement, Ms Martinez stated: "Miss Forder was the only staff member to refuse to take a test and the only residents we had in the home that we were not able to test at the time they were meant to be were those

with Dementia and even then, we were able to return the following day and test them successfully". Paragraph 9 of her statement stated: "Interestingly Miss Forder said that she was also refusing because the test was only valid for the day it was carried out and that did not make sense as she worked three days a week. She went on to say, and also reiterate, that if she was tested on each of the three days she worked then she would be tested "willingly". This contradicts the position that Miss Forder later took."

Appeal against dismissal, 26 April 2021

86. On 26 April 2021, the Claimant appealed the decision to dismiss her. Amanda Bell was appointed chair for the appeal stage and she invited the Claimant to a virtual meeting scheduled for 30 April 2021.

87. The appeal hearing lasted 30 minutes. The Claimant explained to Ms Bell all the proposals she had made to date (including working five days a week and she suggested 6-9am) and she explained which residents used the gardens and why the Claimant believed she could socially distance from them safely if they entered the gardens during her working hours.

88. On 10 May 2021, Ms Bell wrote to the Claimant dismissing the appeal against dismissal on the basis that "The Covid test is required by all staff regardless of role. This being in accordance with Government guidelines." She further stated, rejecting the Claimant's proposal to alter her hours (and socially distance if a resident came into the garden when she was working) stating: "As gardener you would be required to communicate with residents, if the situation arose and not avoid those residents when they come out into the garden. All staff are expected to socially interact with residents if approached."

89. Also in May 2021, the Field Lodge Journey records that residents were permitted to have five nominated visitors each and were allowed to go out in public with them.

90. On 23 May 2021, the Claimant's employment terminated. This is thus the effective date of termination for the purposes of the unfair dismissal claim.

RELEVANT LEGAL PRINCIPLES

Unfair Dismissal

91. Section 98 ERA 1996, states:

98.— General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, ...

(3) In subsection (2)(a)—
(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, ...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

92. In **East Lindsey District Council v Daubney** [1977] ICR 566 (EAT), 571-572 (a key authority on ill-health dismissals) it was stated that:

> "Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done."

93. In **O'Brien v Bolton St Catherine's Academy** [2017] EWCA Civ 145, [2017] ICR 737, at paragraph 37, Underhill LJ stated:

> "More generally, the proposition that it was unfair of an employer to decide, after a senior employee had already been absent for over 12 months and where there was no certainty as to when she would be able to return, that the time had come when the employment had to be terminated, seems to me to require very careful scrutiny. The argument "give me a little more time and I am sure I will recover" is easy to advance, but a time comes when an employer is entitled to some finality."

94. In **DB Schenker Rail (UK) Ltd v Doolan** UKEATS/0053/09/BI, the EAT held that the *Burchell* analysis for conduct dismissals is applicable to ill-health capability dismissals.

> "Although this was a capability dismissal rather than a conduct dismissal, the Burchell analysis is, nonetheless, relevant because there was an issue as to the sufficiency of the reason for dismissal – a potentially fair reason relating to capability — in this case. Accordingly the Tribunal is required to address three questions, namely whether the Respondent genuinely believed in their stated reason, whether it was a reason reached after a reasonable investigation and whether they had reasonable grounds on which to conclude as they did."

95. Where the facts of a case fall squarely within one of the section 98(2) ERA reasons, there cannot simultaneously be an SOSR reason, because by

definition, SOSR is some other substantial reason. In some cases, the reason may appear to fall within one of the section 98(2) ERA reasons, but in fact does not. In **Wilson v Post Office** [2000] IRLR 834, an employee with a poor absence record (due to genuine ill-health) was dismissed for failure to satisfy the employer's attendance policy. A tribunal found that the reason for dismissal was capability, but the Court of Appeal held that the reason was the employee's failure to meet the requirements of the policy, which was SOSR.

96. In **Ridge v HM Land Registry** [2014] UKEAT/0485/12, the tribunal found that the dismissal had been for "some other substantial reason", not "capability" as had been asserted by the respondent. The EAT held that the re-labelling of the reason for dismissal had caused no procedural unfairness or practical difficulty for the parties. The EAT developed the point made in **Wilson*,*** and emphasised that the correct characterisation of the reason for dismissal will depend on what was at the forefront of the employer's mind. If it was the employee's "skill, aptitude, health or any other physical or mental quality", then the reason for dismissal will be capability under section 98(2)(a) ERA. But where the recurring absences themselves are the reason for dismissal (which is not unusual) and an attendance policy has been triggered, the better characterisation may be SOSR.

97. Section 15 EqA states:

> **15 Discrimination arising from disability**
> (1) A person (A) discriminates against a disabled person (B) if—
>
> > (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

98. In **Pnaiser v NHS England and anor** [2016] IRLR 170, the EAT set out the correct approach to s.15 claims, at paragraph 31, stating that the tribunal first has to identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment; focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

99. As to the justification defence, the treatment will be objectively justified if: 1) there is a legitimate aim which is legal and non-discriminatory, and one that represents a real, objective consideration; and 2) if the aim is legitimate, whether the means of achieving that aim is proportionate (i.e. appropriate and necessary in all the circumstances). Proportionality will involve an objective balance between the discriminatory effect of the condition, and the reasonable needs of the party who applies the condition.

100. As to the proportionality of a legitimate aim, particular assistance is provided in *O'Brien*. That case concerned a claim of unfair dismissal as well as a s.15 EqA claim, in the context of substantial ill-health absence. In those circumstances, Underhill LJ provided helpful insight as to the correct analysis, stating:

> "However the basic point being made by the tribunal was that its finding that the dismissal of the claimant was disproportionate for the purpose of section 15 meant also that it was not reasonable for the purpose of section 98(4). In the circumstances of this case I regard that as entirely legitimate. I accept that the language in which the two tests is expressed is different and that in the public law context a "reasonableness review" may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately I see no reason why that should be so. On the one hand, it is well established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship. On the other, I repeat—what is sometimes insufficiently appreciated—that the need to recognise that there may sometimes be circumstances where both dismissal and "non-dismissal" are reasonable responses does not reduce the task of the tribunal under section 98(4) to one of "quasi-*Wednesbury*" review (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223): see the cases referred to in para 11 above. Thus in this context I very much doubt whether the two tests should lead to different results."

101. Sections 20 and 21 EqA state:

"**20 Duty to make adjustments**

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage ...

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person ..."

102. A two-stage approach to the burden of proof applies in discrimination claims by reason of s.136 EqA (albeit it had been established in case law prior): Stage 1: can the claimant show a prima facie case? If not, the claim fails. If so, the burden shifts to the respondent. Stage 2: is the respondent's explanation sufficient to show that it did not discriminate?

103. In a claim for failure to make reasonable adjustments, the burden does not pass to the employer until:

(a) **The tribunal is satisfied that on the balance of probabilities the claimant was substantially disadvantaged**: For a disadvantage to be 'substantial', it must be "more than minor or trivial" (s.212(1) EqA). In **Griffiths v Secretary of State for Work and Pensions** [2017] ICR 160, at paragraph 58 the court stated:
"[t]he nature of the comparison exercise in the former case is clear: one must simply ask whether the PCP puts the disabled person at a substantial disadvantage compared with a non-disabled person".

(b) **The claimant or tribunal has suggested an adjustment that it is alleged the employer should have made, in sufficient detail to enable the employer to deal with it:** It is good practice to consult with a disabled employee over what adjustments might be suitable, but ultimately the duty to make reasonable adjustments is on the employer. The fact that the employee and any legal or medical advisers cannot propose a potential adjustment will not, without more, discharge the employer's duty. In **Cosgrove v Caesar and Howie** 2001 IRLR 653, EAT, the claimant had been dismissed following a year off work suffering from depression and it was not known when she would be able to return. The tribunal held that she had not been discriminated against, placing great emphasis on the fact that neither the employee nor her GP could think of any reasonable adjustments. On appeal to the EAT, it was emphasised that the duty to make adjustments is on the employer: there would be cases where the claimant's evidence alone would establish a total unavailability of reasonable and effective adjustments, but it did not follow that just because the claimant and her GP were unable to come up with any useful adjustments the duty could be taken, without more, to have been complied with. If the employer had turned its mind to adjustments, there were possibilities, such as a transfer to another office or a change in working hours, that might have facilitated a return. However, a failure by a claimant to identify potential adjustments is something that can be taken into consideration by a tribunal (**Dominique v Toll Global Forwarding Ltd** EAT 0308/13).

(c) There is evidence that is at least capable of leading a tribunal to conclude that the proposed adjustment would be reasonable and would eliminate or reduce the disadvantage.

104. If the burden shifts, the employer then has the opportunity to demonstrate that the proposed adjustment was not reasonable (**Project Management Institute v Latif** UKEAT/0028/07).

105. When determining if an adjustment is reasonable, the EHRC Employment Code sets out some relevant considerations, such as: the practicability of a step; the type and size of the employer; the financial and other costs of

making the adjustment and the extent of any disruption caused; and the extent of the employer's financial or other resources.

106. However, the duty is subject to an employer's knowledge defence, namely that the employer will not be subject to the duty if they did not know, and could not reasonably have been expected to know *inter alia* that an interested disabled person has a disability and is likely to be placed at the relevant disadvantage in s.20 EqA 2010 (sch 8 para 20 EqA 2010).

107. The EHRC Code states (at paragraph 5.21) that if an employer has failed to make a reasonable adjustment which would have prevented or minimised an employee's disadvantage, it will be very difficult for it to show that the treatment was objectively justified for the purposes of a discrimination arising from disability claim under s.15 EqA. In **Dominique**, the EAT held that where there is a link between the reasonable adjustments said to be required and the disadvantages or detriments being considered in the context of indirect discrimination (and discrimination arising from disability), it is important to put in the balance any failure to comply with the reasonable adjustments duty, when considering justification.

108. Section 123 EqA 2010 states:

123 Time limits

(1) [Subject to [section 140B] 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.

...

(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) 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."

109. Section 140B EqA 2010 extends the ordinary three-month time limit to facilitate ACAS early conciliation.

110. As to whether an act is a continuing act, the Court of Appeal in **Commissioner of Police of the Metropolis v Hendricks** [2003] ICR 530, at paragraph 48 stated:

> "the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period."

111. It also explained that a distinction was to be drawn between an act extending over a period, or a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.

CONCLUSIONS

Reasonable adjustments claims

112. In its amended grounds of resistance, the Respondent accepts that it applied a PCP of requiring regular testing (para 57 page 62). However, it disputes that such PCP placed the Claimant at a substantial disadvantage in comparison with those not suffering her disability (para 58 page 62). This seemed to conflict with its pleaded case at paragraph 54.3 page 61 which states (in the context of the s.15 EqA claim): "The Respondent accepts that the requirement to test resulted in increased anxiety for the Claimant". This quote seemingly concedes that the Claimant suffered anxiety when trying to test, hence the Respondent's defence on this appears to rest on whether such anxiety was "more than minor or trivial" and/or whether people without her condition would be placed at the same disadvantage.

113. The tribunal recalls that "more than minor or trivial" is a relatively low threshold. We accepted the Claimant's evidence as to the reactions she had when she attempted to test or did test in May 2020 and November 2020. Indeed, Ms Martinez did not dispute that she had witnessed the Claimant have an adverse stress reaction when she attempted to test in November 2020. The Claimant had come into work specifically to attempt to test during a period of annual leave, which suggests that she was consciously trying to abide by the requirement, but on attempting to test she simply could not bring herself to do it and broke down. The Claimant describes that she had to sit in her car for 20 minutes or so to compose herself afterwards. We also noted Ms Martinez's evidence that no other member of staff refused to test and even residents with dementia were able to test (even if it took a few attempts).

114. We also note that the disadvantage faced by the Claimant was not only the immediate stress reaction, but further the subsequent requirement to be signed off sick from work (which had a psychological and financial detriment to the Claimant) and she was ultimately dismissed for not testing. Accordingly, we therefore find that the PCP did place the Claimant at a substantial disadvantage in comparison to those not suffering her disability (who could undertake the test even if they felt it was unpleasant or invasive).

115. The next issue then is whether there were adjustments which could or would have been effective which might have enabled the Claimant to avoid the disadvantages she faced and which would have been reasonable for the employer to accommodate. Whilst the Claimant may have advanced various suggestions in internal proceedings, the only adjustments she pleaded were: (1) ensuring that she did not come into contact with residents either by altering her hours or the area of garden to work in; and (2) instructing the claimant not to access the premises at all.

116. There was no claim in respect of alternative methods of testing, but if there had been, we would have rejected it on the basis that the blood test did not achieve the aim of testing for live viruses (i.e. current infection) and the LAMP testing would have required the Claimant to travel a two-hour round trip three

times a week and would no doubt have entailed additional costs. We considered such an adjustment would not be reasonable.

117. As to the change in hours, we noted that the Claimant did not specifically plead what those hours could be. Her pleading is thus broad in this sense. In the internal proceedings, she had suggested 7-10am, 6-9am, or starting work at 5am, five days a week. By the date of the final hearing, she very much focused her efforts on the argument that she could have worked 5-8am, five days a week. However, even if she had not articulated these specific timings in the internal process, we recall that there is no strict duty for a claimant to identify specific adjustments. In any event, by the time of the final hearing, she was articulating these hours and the Respondent's witnesses had every opportunity to answer to that suggestion.

118. The reasons given by the Respondent's witnesses as to why a change in hours would not have been reasonable was that it would be unfair to residents to impede their peaceful enjoyment of the garden, especially during the pandemic, when they were not permitted to venture out or have normal visitation. A subsidiary point raised was that the Claimant would not be able to do her job effectively if it was dark when she was working. No concerns were raised that there would be a risk to the health of residents if the Claimant was working outside the premises, in the garden, when residents were not allowed to enter the garden. Nor was there any concern raised that there would be any penalty or compliance concerns raised with the home for failing to ensure whole home testing if the Claimant instead altered her hours to avoid the need to test.

119. It is important to note that the requirement to test was in fact a government guide, not a legal requirement imposed on care homes. Hence the cases in respect of refusing vaccines are not on point. The Respondent could (and for a time did) allow the Claimant to work even when whole-home testing was part of the guidance and it did not face any compliance issues or sanctions as a result. That does not mean that the tribunal consider it was unreasonable for the Respondent to require all staff to test. We consider it was noble and prudent of the Respondent to seek to ensure full compliance with the guidance even though it had no legal force or risk of sanction. We simply make the point that the basis for refusing an adjustment to the Claimant's hours was not based in any way on a concern about compliance with legal obligations.

120. The Respondent's objection to the proposed adjusted hours presupposes that working 5-8am in the garden would actually have affected the residents' enjoyment of the garden. Of course, if access to the garden was available on demand, there was a hypothetical risk that a resident could ask to use the gardens before 8am on any given day and that if the Claimant was working then, and the Respondent did not want her to move around to another part of its estate, the resident might have to wait. However in reality, we found that the risk of this happening was extremely slight. The Claimant's evidence as to when residents were served breakfast, when the garden doors were unlocked and when they tended to access the garden was accepted by the tribunal as found above. We also considered that in colder months, residents would be less likely to want to access the garden before 8am anyway, due to light levels and colder temperatures.

121. Therefore, in reality, the impediment to peaceful enjoyment of the garden by allowing the Claimant to work 5-8am five days a week was very slight and unlikely to arise frequently, if at all. In the event that it did, we considered it would have been perfectly reasonable to allow the Claimant to move to the front or side gardens for a time to carry out her duties there (which were not open to residents anyway) and then she could return to the rear garden as and when the resident went back inside. Alternatively, the resident could have been asked to wait. Whilst this may have been less desirable, in the context of the pandemic where restrictions were placed on social contact, cohorting (bubbles) was/were implemented and visitors restricted, we do not think it unreasonable, in order to facilitate the retention of a disabled employee's employment, to explain to residents that they may have to wait until 8am to access the garden on the rare occasion a resident may have sought access to the garden prior to that time.

122. The change in hours would not have cost the Respondent any money, would not have placed the Claimant's colleagues at any disadvantage and would have avoided the health and safety risk to residents caused by her not testing. Further, the change in hours would not have impaired the quality of the work carried out by the Claimant. We did not accept that she would be unable to garden from 5am (which the Respondent had concerns about due to light levels) because the Claimant stated (and we accepted) that the pathways were lit and that she had successfully worked from 5am for a period from July 2017 to February 2018 before, even during winter months. There was no evidence to suggest that her work was inadequate at that time. It is notable that at the time the Claimant was facing dismissal, it was late April in any event. Accordingly, had she been permitted to commence work at 5am, it would not have been pitch black then anyway (even if there had been no garden lighting).

123. The second pleaded adjustment (not accessing the main building at all, instead changing in the garden outbuildings) is more of a subsidiary point to support the feasibility of the first adjustment. There was no evidence to suggest that this adjustment would have been unreasonable / unworkable and it appeared that the Claimant had in fact been avoiding entering the home itself for some time by changing in outbuildings. In and of itself, this adjustment (without the first adjustment) would not have ameliorated the disadvantage faced by the Claimant, nor resolved the Respondent's legitimate and genuine concern about resident health if the Claimant refused to test and was in the garden at the same time as a resident. However, as part of the suite of adjustments, combined with altered hours and the Claimant moving to other parts of the garden if a resident entered before 8am, the adjustment is feasible and reasonable.

124. Turning then to knowledge, we remind ourselves that under a s.20-21 EqA, there must be knowledge of both the disability and the substantial disadvantage before liability can be found against the Respondent.

125. The Respondent conceded knowledge of disability from 2 February 2021 (the date of the grievance hearing with Alice Banda) or in the alternative, if the tribunal was not with counsel, no earlier than 11 November 2020. Based on the findings above, we find that the Respondent knew of the Claimant's disability from the outset of her employment, namely it knew at that time that she had struggled with mental health issues since her teens and needed

medication to manage it even into 2016, when she started employment. If we are wrong in that, we would have found that the Respondent certainly knew or ought to have known of her disability by no later than 4 November 2020, following: the same comments in her recruitment interview; the Claimant's comments in the appeal hearing on 23 October 2020 in respect of the final written warning (in which she discussed her anxiety around testing with Ms Bratu); the fact that she was signed off sick with stress from 16 September to 16 October 2020; and her comments in discussion with Ms Martinez on 4 November 2020, which prompted a referral to the Respondent's EAP.

126. As to knowledge of the substantial disadvantage, we find that the Respondent knew or ought to have known this also by 23 October 2020 by reason of the Claimant's comments in the hearing with Ms Bratu. If we are wrong on that, we would have found that the Respondent was certainly aware by 4 November 2020, following the discussion with Ms Martinez that day, which Ms Martinez alluded to in her letter of 5 November 2020 stating "I do appreciate that you find the testing difficult and are very anxious about it" [137].

127. In light of all of the above, we therefore find that the Claimant's claim for breach of the duty to make reasonable adjustments is well-founded and is upheld as a combination of both pleaded adjustments and that such breach occurred from approximately 23 October 2020 or no later than 4 November 2020 and continued until the Claimant's dismissal. This is because the Claimant repeatedly raised / suggested it during the internal processes and it was repeatedly rejected by those involved.

Section 15 EqA claim

128. As to the claim under s.15 EqA, the Respondent appears to have conceded that the Claimant's refusal to test was something arising in consequence of disability (see paragraph 54.3 of the amended grounds of response). Counsel confirmed this in submissions. This is a sensible concession given the Respondent's own OH report and the Claimant's own evidence.

129. The Respondent also accepts that it subjected her to the pleaded acts of unfavourable treatment, namely: (1) subjecting her to a final written warning on 21 September 2020; (2) sending her home on 11 November 2020; and (3) dismissing her on 23 April 2021, all of which were done because of the Claimant's refusal to test. Whilst the Respondent has not specifically accepted that such acts are "unfavourable", we find that the final written warning and dismissal plainly are.

130. As to sending the Claimant home on 11 November 2020, we find that this was not unfavourable or detrimental in the legal sense. This is because the Claimant was not required to work that day anyway and would have gone home after testing even if she had successfully taken the test. The claim was not advanced in terms of the way she was told to go home, or the words used, but on the basis of being asked to go home at all. Whilst we have no doubt that the attempt to test caused the Claimant significant anxiety, that is an act which falls under her s.20-21 claim as a PCP placing her at substantial disadvantage. The act of being asked to go home, in and of itself, is not detrimental or unfavourable in the context in which it occurred and we reject

this claim on this basis. In any event, we would have held that such a claim is out of time because it was a one-off freestanding matter. The analysis of this claim thus stops here.

131. As to the remaining two claims under s.15 EqA, the tribunal relies on its findings above in respect of knowledge and we reminded ourselves that the knowledge defence under s.15 EqA requires the Respondent to show that it did not know, and could not reasonably have been expected to know, that the Claimant was disabled. Accordingly, given our finding about the date of knowledge of disability, there is no tenable defence to the remaining two claims on that basis.

132. We then turn to consider the justification defence advanced by the Respondent. We have no hesitation whatsoever in finding that the Respondent's requirement that the Claimant test for covid-19 pursued a legitimate health and safety aim. The Respondent houses vulnerable elderly residents and the testing regime is laudable and is one of the many measures implemented to advance the legitimate aim. Others included cohorting, health screening, temperature checks, social distancing (save for where intimate care required closer contact), vaccines, PPE, handwashing, restrictions on visitors etc. We have great sympathy for the Respondent's predicament and its noble focus on resident safety which is admirable.

133. The next matter to consider then is whether the measure is necessary to achieve the aim and whether it is proportionate. This requires an objective balance between the discriminatory effect of the condition, and the reasonable needs of the party who applies the condition. We find that the measures adopted (final written warning and dismissal) were not proportionate or necessary. Indeed, we can think of a variety of alternative methods that the Respondent could have used to achieve its stated aims without needing to dismiss the Claimant or subject her to punitive sanctions. This could have included the adjustments to her hours as stated above under the reasonable adjustments claims.

134. This is especially so given that by April 2021, when the Claimant was dismissed, and into May 2021, when her appeal was determined and her employment ended, restrictions were being eased nationally and under Care UK's own policies. By April/May 2021, residents were permitted to go outside and spend time with carers in public, in recognition that the covid risk had reduced (due to widespread vaccinations, better NHS capacity and reduced infection rates).

135. The Respondent gave evidence that the Claimant's duties had been adequately managed without needing to hire a permanent employed replacement or even agency staff and therefore we cannot see why there was a need to dismiss the Claimant at the time that the Respondent did, given the circumstances. We note also that by this time, residents were permitted to have visitors attend the external part of the premises and interact with them through closed windows without being tested at all. We cannot see why therefore the Respondent considered that the Claimant working in the garden (untested) from 5-8am when there were no residents outside (or if they did come outside she could move to the side or front garden) was such a significant risk to resident's that it was necessary or proportionate to dismiss her.

136. In all the circumstances therefore, we find that the decision to dismiss the Claimant in April 2021, which was reaffirmed on appeal in May 2021 and which led to termination of her employment was an unlawful act of discrimination contrary to s.15 EqA and this claim is upheld.

137. In respect of the written warning, the act occurred on 21 September 2021, hence it ought to have been subject to ACAS early conciliation by 20 December 2020. It is therefore out of time by about five months when viewed as a discrete act. However, we considered there was a link between the final written warning and the later decision to dismiss. Both were decided upon due to the Claimant's refusal to test and both were decided by Ms Martinez. Accordingly, we find that there is the necessary link between these two acts, both in subject matter and in respect of the perpetrator, such that they form part of a discriminatory state of affairs such as to amount to a continuing act of discrimination, within the meaning of *Hendricks*.

138. Given the above findings, we therefore uphold the claim based on the final written warning also.

Unfair dismissal claim

139. The Respondent bears the burden of proving the reason for dismissal. In its amended grounds of response, it relies on capability (ill-health) and/or some other substantial reason (SOSR) namely the Claimant's refusal to test. Capability is defined in S.98(3)(a) ERA as 'capability assessed by reference to skill, aptitude, health or any other physical or mental quality'.

140. In her live evidence, Ms Martinez confirmed that she did not dismiss the Claimant due to the absence incurred to that date (i.e. the disciplinary was not looking backwards at accrued absence against absence triggers / targets under the policy) but rather due to the fact that the Claimant continued to refuse to test such that she could not foresee a return to work.

141. In *Ridge* the EAT emphasised that the correct characterisation of the reason for dismissal will depend on what was at the forefront of the employer's mind. If it was the employee's "skill, aptitude, health or any other physical or mental quality", then the reason for dismissal will be capability under section 98(3)(a) ERA. But where the recurring absences themselves are the reason for dismissal (which is not unusual) and an attendance policy has been triggered, the better characterisation may be SOSR.

142. We find that the Claimant was actually capable of her role at the date of dismissal (as confirmed by the medical reports), but it was her past and ongoing refusal to test that was in Ms Martinez's mind at the material time. Therefore, the reason for dismissal was not capability as defined. However, we do find that the reason was capable of being SOSR.

143. This means that the various authorities raised by counsel for the Respondent in respect of capability dismissals do not strictly apply, but we nonetheless considered them to be of some relevance.

144. Based on our findings above in respect of the ss. 20-21 and 15 claims, and due to the following, we find that the decision to dismiss the Claimant was

outside the range of reasonable responses in all the circumstances. The reasons for this are as follows:

144.1 The Respondent did consult with the Claimant in some form, but its engagement with what she was saying was superficial and somewhat dismissive, such that its consultation was not effective in substance. Each individual she proposed adjustments to and informed of her condition, simply reiterated the mantra that the home must test all staff without genuinely engaging with the adjustments she was suggesting to see if they could have been workable in practice given her disability;

144.2 Whilst the Respondent offered career breaks to the Claimant, after she refused them, a reasonable employer would have considered options short of dismissal such as allowing her to remain on sick leave for a time to see if testing was revoked and she could have returned to work. It could also have trialled the adjusted hours she suggested to see whether it would have had a detrimental impact on residents at all. In all the circumstances, dismissing her instead of one of these alternative outcomes was outside the range of reasonable responses.

144.3 The process adopted was unsatisfactory and outside the range of reasonable responses: the Claimant should have been provided with a disciplinary pack of documents prior to the disciplinary hearing, and before the appeal hearing, enclosing all relevant material to be relied on at the hearing. Instead she was given only the sickness absence policy and she was not even informed which part of that policy the meeting with Ms Martinez was said to fall under. Further, we considered it procedurally unfair that Ms Martinez was the chair person given she had been the subject of two prior complaints by the Claimant, one before Ms Martinez joined Field Lodge in 2018, and one in the Claimant's email to Ms Maiden on 16 September 2020 [113-114]. We also consider it inappropriate that Ms Bell was the appeal chair given that she had been involved in the earlier (16 September 2020) grievance raised by the Claimant. In light of the Respondent's size and resources, we consider the processes therefore fall outside the range of reasonable responses.

144.4 Finally, we find that the dismissal was predetermined in that Ms Martinez and Ms Bell (on advice from Sharnna Coates) believed there was nothing to look into, that the requirement to test was absolute, from which no deviations could be made and this affected their mindset such that they did not properly consider the legal obligation to make reasonable adjustments to be weighed against the risk to residents in making an exception to testing (of the kind proposed by the Claimant, namely altered hours ensuring no physical contact with residents and outdoor working).

_____

Employment Judge Dobbie

_____

Date 9 January 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

13 January 2023

FOR EMPLOYMENT TRIBUNALS