Case Number: 3200630/2018

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EMPLOYMENT TRIBUNALS

Claimant: **Ms. G. Kahugu**

Respondent: **(1) BUPA Care Services (CFH CARE) Ltd &**
(2)HC-ONE OVAL LIMITED

Heard at: **East London Hearing Centre**

On: **4 January 2019**

Before: **Employment Judge A Ross**

Members: **Ms. Madeleine Long**
Mr. Jim Carroll

Representation:

Claimant: In person
Respondent: Declan O'Dempsey (Respondent 1)
Miss J. Hale (Respondent 2)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that: -

1. The complaints of unfair dismissal, direct race discrimination, disability discrimination by harassment, disability discrimination under section 15 Equality Act 2010, and breach of contract, are not upheld.

2. The Claim is dismissed.

REASONS

1. Claimant was continuously employed by the First Respondent from 27 January 2015 as a Care Assistant at Mornington Hall ("the Home"). The Care Home in which she worked was transferred to the Second Respondent on 14 December 2015. The First Respondent contends that Claimant's employment transferred under TUPE Regs 2006 to the Second Respondent on that date.

Reasonable Adjustments for the Hearing

2. The Respondents did not contest that the Claimant was disabled due to fibromyalgia.

3. Sensibly, by email in October 2018, the Claimant had requested adjustments at the hearing due to her impairment. The Tribunal accommodated these by the provision of a comfortable, adjustable, chair, and by inviting the Claimant to stand or sit as and when necessary, without seeking permission. In addition, the Tribunal had both morning and afternoon comfort breaks.

4. The Claimant was expressly invited to ask if any further steps were required.

5. On the final day of the hearing, the evidence concluded about 4pm. The Claimant explained that she was tired and sought time to make her submissions. Given the delays caused at the hearing due to the administration of the Tribunal misfiling documents, the Tribunal adjourned the case until 4 February 2019. Submissions were read and heard, before the Tribunal reserved judgment and went into Chambers to reach its decision.

Complaints and Issues

6. By a Claim presented on 23 March 2018, after a period of EC, the Claimant brought complaints of:

6.1. Unfair dismissal;

6.2. Direct race discrimination;

6.3. Discrimination arising from disability under section 15 Equality Act 2010 ("EA 2010");

6.4. Harassment related to disability contrary to s 26 EA 2010;

6.5. Breach of Contract.

7. The agreed list of issues is set out in the Preliminary Hearing Summary of Employment Judge Russell of 20 August 2018 and incorporated into this set of Reasons.

8. At the hearing, the Second Respondent accepted that Hayward House was a unit within Mornington Hall; and that, if the Claimant was employed by the First Respondent on 15 December 2018, her employment had transferred to the Second Respondent.

Evidence

9. Having clarified that the issues remained as identified by Employment Judge Russell, the Tribunal clarified what documentary and oral evidence was to be considered.

10. There was a bundle of documents, produced by the First Respondent, which the Respondents understood to be agreed. The Claimant stated that she had not agreed it and had her own bundle (not copied), which appeared to be her list of documents. In the event, the parties worked constructively to produce an agreed bundle whilst the Tribunal were pre-reading, by agreeing to add two pages to the Respondents' bundle. Subsequently, it was agreed that the document at p.89 was not relevant, and could be removed. Page references in these Reasons refer to pages in that agreed bundle.

11. There was a total of six witness statements. Prior to the start of the hearing, the Claimant had served and handed to the clerk an Amended Witness Statement. No objection was taken to this and it contained minor amendments to the original statement.

12. Helpfully, the parties worked together during the adjournment on the first morning (whilst the Tribunal were pre-reading) to add page references from the bundle for the documents referred to in this amended statement.

13. On clarifying whether the Claimant alone was giving evidence, the Claimant stated that Ms. Yusuf and Ms. Ashanti would be giving evidence. In addition, the Claimant handed in a list of witnesses in a document entitled “Witness Statement” (marked “C1”), stating that she had asked the Tribunal in about October 2018 for Witness Orders for these witnesses to attend (other than Ms Yusuf and Ms. Ashanti, who attended Tribunal with the Claimant). There was no application for a witness order on the Tribunal file and neither Respondent had received any such application.

14. The case was adjourned for one hour to allow for pre-reading of the evidence. In this time, an inquiry was made of the administration to check to see if any such application had been received from mid-October to end December 2018. No such application was found.

15. After the hearing resumed, it was explained to the Claimant that no application for Witness Orders had been received, and that the hearing would proceed unless she applied for an adjournment to obtain Witness Orders for the persons named as proposed witnesses. The Claimant made such an application, which was refused for reasons given at the time. In essence, the Tribunal decided that an adjournment for such purpose would not further the overriding objective, given the timing of the application, the lack of relevance of the proposed evidence, and considering proportionality.

16. On the morning of 13 December 2018, the Claimant attended with “C2”, a proof of posting of a package to the Tribunal by recorded delivery, and a receipt proving that it had been signed for on 20 November 2018. The Claimant stated that the package contained her supplemental documents which included a document headed “Witness Statement” (almost identical to C1), which contained the application for Witness Orders. The Claimant requested that the Tribunal reconsider its decision of 12 December 2018 to refuse the adjournment.

17. Inquiries were made of the administration. It transpired that a package had, indeed, been received but its contents misfiled, so that the documents had never been put on the case file.

18. In the light of these developments, the Tribunal decided to reconsider its earlier decision and to consider the application for the Witness Orders. Having done so, the Tribunal concluded that neither an adjournment nor the proposed Witness Orders would further the overriding objective for reasons given at the time. In particular, on the face of the issues identified, the witness evidence did not appear relevant or necessary to determine those issues.

19. The Tribunal read witness statements for and heard oral evidence from the following Witnesses:

For the Claimant (in addition to herself):

19.1. Basira Yusuf, a former colleague of the Claimant;

19.2. Beatrice Ashanti, a long-term friend of the Claimant;

For the First Respondent:

19.3. Annette Hill, Resident Experience Manager of Mornington Hall at the material times;

19.4. Samantha Bowie, Regional Support Manager of the First Respondent, who was temp covering for absence of the manager of the Home at the material times.

19.5. Anna Valcheva;

For the Second respondent:

19.6. Shahnaz Mehar, senior carer;

19.7. Jennifer Akoto, care assistant.

20. Given the pre-reading and the adjournment application, we did not begin hearing evidence until 13:45 on the first day of the hearing. The Claimant was cross-examined by Mr. O'Dempsey from about 14:00 until about 16:25, when the Tribunal hearing ended for the day. The Claimant's cross-examination by the Second

Respondent commenced at 11:00 on 13 December 2018. Her evidence concluded at 11:50 on the same morning.

21. We found that the Claimant was likely to have had a poor recollection of events because of her emotional and angry over-reaction to events when her actions had been challenged by colleagues and managers. We found that in evidence the Claimant displayed little insight into the effect of her actions on others.

22. We preferred the evidence of the Respondents' witnesses where there was any conflict of evidence. In general, the Respondents' witnesses were credible and reliable. Their witnesses corroborated each other on relevant factual disputes. This was not a case where it was only the word of one witness against another.

23. The Claimant pointed to alleged inconsistencies in the Respondents' evidence, but these were minor, when viewed against all the evidence. The Respondents' witnesses were all consistent on the key facts. Their evidence was generally consistent with the documentation.

24. The Claimant alleged that the evidence of Ms. Akoto and Ms. Mehar was fabricated because Ms. Akoto had a grudge against her arising out of historic matters. But Ms. Mehar had never worked with the Claimant before and there is no evidence that she knew of any history between Ms. Akoto and the Claimant, nor was it put to her that she was fabricating her evidence.

25. We found Ms. Akoto and Ms. Mehar to be credible and generally reliable witnesses. We found that they did not want to get into trouble with management for an incident that they were not responsible for, but which they became involved in. They minimised their role in the altercation on 14 November 2017, but we find that they acted as they were entitled to do given the actions of the Claimant. We did not find that they shouted at the Claimant nor that they created a hostile environment for her. We found that the Claimant created a hostile environment for others by her shouting and swearing.

26. The Claimant alleged in submissions that Ms. Valcheva had admitted discussing her evidence with other witnesses of the Respondents whilst under oath.

This was incorrect and there was no evidence to support this; Ms. Valcheva had merely admitted that in hearing the evidence of other witnesses, her memory of events had been refreshed. This was candid. We found her to be a credible witness, albeit one whose memory as to detail was not as reliable as Ms. Bowie or Ms. Hill.

The Facts

27. The following are the relevant facts.

28. The First Respondent operated Mornington Hall as part of its residential care home business until 14 December 2017, when this care home transferred to the Second Respondent.

29. The care home had capacity for 120 residents. Hayward House was one of four units within the care home. This unit provided residential and dementia services. Hayward House included a lounge area, with a dining area near to a small kitchen.

30. Hamfirth House was another unit within the home, which provided nursing care with dementia services.

31. The administration office, where the administrator and managers of the home were based, was in a different building to Hayward House, but Hayward House was the closest unit to this office.

The Claimant's fibromyalgia impairment

32. The Claimant received a diagnosis of fibromyalgia in September 2016. She informed her manager at the time (who was not a witness) of this.

33. As a result of her fibromyalgia symptoms, a risk assessment was carried out by the First Respondent in October 2016, pending an Occupational Health report. This was signed by the Claimant, and she must have been aware of its contents, despite her claim not to be. This assessment listing manual handling hazards, but did not identify serving food or drinks as a risk to her (but did identify that she should not push or pull trolleys, but indicated that she could push the tea trolley with minimum equipment on it).

34. The "actions required" when it was reviewed on 20 January 2017 were: "*Awaiting to be seen by Occupational Health. Remains on light duties of one to one for one client*"

35. An Occupational Health report (p.116), following examination on 6 April 2017, included as follows:

> "*Miss Kahugu advised me that she experiences diffused joint pain which cause her tiredness and has been unable to undertake any lifting or heavy manual handling. Therefore, she has been accommodated to work one to one with clients avoiding any heavy manual work. She has also been allowed to work alternate days, …*
>
> *FITNESS FOR WORK*
> *…Fit with limitation… She is fit to continue her duties avoiding heavy lifting/manual handling including hoisting and pushing a wheelchair. It is unlikely this situation will change in the short to medium term*…."

36. We heard no evidence to suggest that the risk assessment was altered or further reviewed after the Occupational Health report was received.

37. Neither Ms. Hill nor Ms. Bowie had any knowledge that the Claimant had fibromyalgia nor that she was a disabled person until the events on 14 November 2017. Ms Hill did not have management responsibility for care staff (and managed hospitality and financial occupancy of the home, as well as gardening and health and safety). Ms. Bowie had been temporarily covering the Home, in the absence of the Home Manager, only from 7 November 2017.

38. Neither Ms. Akoto nor Ms. Mehar had any knowledge that the Claimant had fibromyalgia during the events on 14 November 2017.

39. Although the Claimant's impact statement alleged that she was disabled due to hypertension in addition to fibromyalgia, this was not identified as the disability relied

upon in the Claim or at the Preliminary Hearing on 20 August 2018. In any event, the impact statement states simply in respect of this impairment:

"*My symptoms are blood pressure goes up and down, I get dizzy spells and feel fatigued*."

40. The impact statement did not address how its symptoms affected her ability to perform day to day activities. We heard no oral evidence and no submissions were made about this alleged impairment. We found that the Claimant had not established that this hypertension impairment had a substantial adverse effect on daily activities, nor that it was long term. In any event, for reasons that will become apparent from our findings of fact, this impairment was not relevant to the complaints of disability discrimination.

Events on 14 November 2017

41. In October 2017, the Claimant's one to one placement in Hamfirth House came to an end.

42. The Home Manager was absent. The Claimant's case is that she approached Ms. Hill, and that she was in charge of the home at the time; and that she informed her of her condition. We find that this was unlikely. The Claimant cross examined Ms. Hill to the effect that she did not know her well, which Ms. Hill agreed with. We preferred the evidence of Ms. Hill which was that: this conversation did not take place, nor would it have, because she had no line management responsibility for the Claimant; that she had no authority to instruct her to perform care work; and that the Claimant most likely instructed by her line manager Christine Odedele, the then Deputy Home Manager and Clinical Manager.

43. We find that the Claimant is likely to be mistaken at Paragraphs 5-9 of her witness statement, because we found that, given her role and responsibilities as Resident Experience Manager, Ms. Hill was unlikely to know the condition of a specific resident and could not have allocated one to one work to the Claimant.

44. The Claimant was assigned to provide one to one care of a Hayward House resident, A, from 3 November 2017.

45. We find that this assignment was not done by Ms. Hill, but more likely by Ms. Odedele following discussion with Nina Murithini.

46. The Claimant did not carry out the manual personal care work for A, which was carried out by Jennifer Akoto, another care assistant.

47. On 14 November 2017, the Claimant commenced work at 8.05am.

48. The Claimant was not asked to monitor residents in lounge. If she was supposed to be doing 1-to-1 duty with a resident, she would not be asked to do this. The timings given in the Claimant's witness statement are not consistent with her account in any event.

49. The Claimant's evidence was that the unit was short-staffed and that Ms. Mehar asked her to work on the floor; that she explained she was working on 1-to-1 and referred her to Ms. Hill for information; and that Ms. Mehar and Ms. Akoto subsequently came out of the nurses' office and shouted at her. We found that this account of events was not correct.

50. We accepted the evidence of Ms Akoto and Ms. Mehar that the unit was not short-staffed. Their evidence was detailed and credible in this respect. Moreover, it was corroborated by the allocation sheets at p.122, 124 and 125, which do not suggest the unit was short of staff on 14 November 2017.

51. The Claimant entered the lounge area and sat in a chair to the right of the large open doors leading into the lounge. She was carrying a mug of tea and speaking into her mobile phone. It was contrary to BUPA policy to use personal phones at work.

52. It was not disputed that the Claimant was sitting in the lounge. She alleged that it was because she had been asked to monitor it; but we found that the unit was not short-staffed on the morning in question so no such request would have been necessary.

53. There were two visitors present, in the form of two District Nurses, one of whom was the regular District Nurse. They were administering insulin to a resident.

54. The Senior Carer was Shahnaz Mehar. She was in charge of the unit in the absence of the Deputy Manager. She had never worked with the Claimant before.

55. Having reviewed the residents to see who was sleeping and who needed assistance, and having allocated carers to tasks, Ms. Mehar went to the kitchen just by the dining area, and prepared the trolley from which morning drinks were served. As residents arrived in the dining area, the procedure was that the care assistants served them drinks from the trolley. Some residents needed prompting or encouragement to eat or drink.

56. At about 08:30, Ms Mehar came into the lounge with the drink trolley. She served a few residents, then saw the Claimant.

57. At around 08:45, Ms. Mehar asked the Claimant if she would serve a drink for her. The Claimant refused. Ms. Mehar challenged the Claimant about this and an argument ensued. We find that Ms. Mehar, who was Senior Carer on that morning, was entitled to challenge the Claimant. This was a reasonable step for an employee in her position.

58. The Claimant reacted by standing up, shouting at and swearing at Ms. Mehar. The Claimant used offensive language. We accepted Ms. Mehar's evidence of the words used. The Claimant's conduct went on for two to three minutes.

59. We found Ms. Mehar to be a nervous witness. The reason was that she was afraid that she would get into trouble for raising her voice, not because she was not telling the truth. We consider it likely that Ms. Mehar had to raise her voice to some extent, because of the volume employed by the Claimant, but that she did not act unreasonably in the circumstances.

60. We rejected the Claimant's account of events in the lounge on the morning of 14 November 2017. We rejected the Claimant's account that she was shuttling

between the lounge and A's room because the fact that she was drinking tea, making a call, and had care plans with her, indicated that this was most unlikely.

61. After the initial outburst from the Claimant, Ms. Mehar retreated to her office to calm herself before she left to dispense from the medicine trolley. When she left office with this, the Claimant proceeded to continue to shout at Ms Mehar.

62. At this point, a DN approached Ms Mehar and asked her why she was not complaining. Ms Mehar responded that she did not want to.

63. The DNs spoke to the Claimant stating that she should not speak that way to a Senior Carer at this time (when medicine was being dispensed) nor in front of residents.

64. Ms Akoto asked the Claimant to stop shouting, because the residents were eating. Ms. Akoto was scared that all of them would be reported to management. The Claimant replied: "*Who the fuck are you to tell me what to do?*"

65. At about this point, a DN asked Ms. Akoto to be taken to the Manager. At that point, the Claimant was sat in a chair, shouting at Ms. Mehar, and, between shouts, looking at her phone.

66. Ms. Akoto took the DNs to the Manager's office. Ms. Bowie was not present. Ms. Valcheva was there, so Ms. Akoto explained the Claimant was angry, shouting and arguing with Ms. Mehar.

67. The DNs met Ms. Bowie and reported an altercation between several members of care staff, with one being particularly loud and aggressive.

68. Ms. Bowie went to the lounge with Annette Hill and Ms. Valcheva to see what was happening. On the way to the lounge, they came across A, alone in the corridor and unsteady. The fact that A was not his room, and was moving about, is further evidence that suggests that the Claimant's account of events that morning was wholly unreliable and amounted to evidence that she was not doing the tasks that she was supposed to do.

69. In the lounge, Ms. Bowie found the Claimant sitting alone in a chair. Ms. Bowie bent down and asked the Claimant what she was doing; the Claimant replied that she was doing 1-to-1 care. The Claimant stated that her resident was in his room; when Ms. Bowie questioned how could provide 1-to-1 care if sitting in the lounge, the Claimant said he was being aggressive and she could not remain with him.

70. We accepted the evidence of Ms. Bowie about what happened next, which is corroborated by Ms. Hill and Ms. Valcheva. Ms. Bowie was not "harshly interrogating" the Claimant; she spoke to her in a measured way and asked reasonable management questions that she was entitled to ask. Ms. Bowie asked whether the Claimant had filled in A's behavioural chart to record his aggressive behaviour; the Claimant said she had not. Ms. Bowie asked the Claimant to take her to the chart, which the Claimant did. It was placed in a public part of the home, in a bookcase in a corridor. It was not a place for confidential records to be stored.

71. Ms. Bowie noted that the chart was completely blank. On challenging the Claimant about why this was, the Claimant became angry again and asked why Ms. Bowie was on her case. Ms. Bowie stated that she was not and the Claimant began filling in the form.

72. Ms. Bowie then noted that one of the Claimant's entries on a care plan for the day was timed at 10:00, although it was only around 09:20. Ms. Bowie pointed out that this was falsification of a record which was serious misconduct. By this point, the Claimant was shouting and would not calm down.

73. Ms. Bowie told the Claimant to go to the office with her so that they could talk in private. At first, the Claimant refused. Eventually, she agreed but proceeded to shout at Ms. Bowie on the way to the Office. By this point, the Claimant was very angry, and would not accept any challenge to her view of events.

74. At the Office, Ms. Bowie asked her to stop shouting. The Claimant explained that a senior carer had asked her to make a cup of tea for a resident, but she could not do so, because of her health. Ms. Bowie managed to persuade the Claimant to explain that her health condition was fibromyalgia. Up to that point, Ms. Bowie had had no knowledge of the Claimant's impairment.

75. Ms. Bowie was sympathetic, because she has psoriatic arthritis, and asked permission to check the Claimant's file and Occupational Health report.

76. The Claimant was given opportunity to write statement about events of the morning, but refused.

77. Ms. Bowie telephoned HR who sent the most recent Occupational Health report (p.116) to Ms. Bowie. Extracts of this are set out above. Ms. Bowie went through it with Mr. Taylor of HR. She noted that there were many duties of carer which did not involve heavy lifting or manual handling including washing and dressing and serving food and drinks.

78. In the afternoon, Ms. Bowie and Ms. Hill met the Claimant in the office again and went through Occupational Health report with her. Ms. Valcheva present as note-taker.

79. Ms. Bowie explained that there was nothing in the report which would prevent her from delivering more care than simply 1 to 1 observation. Immediately, the Claimant began shouting and was aggressive in tone.

80. Ms. Bowie challenged the Claimant by asking whether she could make a cup of tea at home. The Claimant took this as an accusation that the Claimant was lying. We found that this was a reasonable management inquiry and that Ms. Bowie did not accuse her of lying. The Claimant stated that this was nothing to do with Ms. Bowie and she became loud, angry, and incoherent. Ms. Bowie did rise from her chair, leant on desk, and told the Claimant that she had to calm down so they could have a conversation. Ms. Bowie did this in attempt to assert her authority and de-escalate the situation.

81. The Claimant eventually said that she was not fit to do any tasks except 1-to-1 observation. To this, Ms. Bowie informed her that she needed to go back to see her GP. It was explained to the Claimant that she either needed to return to the unit to assist with the care of residents doing light duties (as per the Occupational Health report) or, if not fit to do so, she would need to be signed off sick.

82. Ms. Bowie did not state to the Claimant at any point that she should "*pack her bags and go home*" as alleged. The Claimant was in such an angry state by the end of meeting, alleging Ms. Bowie picking on her and being racist, that it is unlikely that she had a clear recollection of what was said to her.

83. The Claimant stated that she was not going to the unit, but was just going to go home. The Claimant asked for a letter to say that she was not working at the Home anymore. Ms. Bowie refused, explaining that the Claimant needed to seek further medical assistance or, if she wanted to return to work, the First Respondent would support her.

84. Ms. Bowie's account of what was said at the close of this meeting is corroborated by the time sheet at p.123, dated 16 November 2017, on which Ms. Bowie has written: "*Not fit for work as per her instruction and* Occupational Health *statement. Visiting GP.*"

85. Moreover, the accounts of the end of this meeting given by Ms. Bowie and Ms. Hill generally corroborated each other. Given her mood at the time, we find that it is likely that the Claimant stormed out of the room, with her voice still raised.

86. At this afternoon meeting, Ms. Bowie saw the Claimant roll her eyes at her. Ms. Bowie told her not to be rude; the Claimant stated it was not rude in her culture. We find that Ms. Bowie said it was rude in England and this was how she had taken it. Ms. Bowie's account is corroborated by Ms. Hill. We did not find that the Claimant had merely swayed her neck, as her witness statement suggested.

87. The Claimant attended the office at the Home on 17 November 2018 to collect her timesheet for the week ending Thursday 16 November 2018 and she collected her personal belongings.

88. On the timesheet, Ms. Bowie had recorded that the Claimant had left the Home on 14 November 2017 at 4pm, which had been the case. The Claimant demanded that she should have been paid to 8pm (the rostered finish of her shift). Ms. Bowie refused because the Claimant had not worked the full shift, and stated that she would receive SP for balance of it. Again, the Claimant became angry and was

shouting at Ms. Bowie. She demanded Ms. Bowie provide her a letter to say she was not working at Home anymore, but Ms. Bowie refused.

89. The Claimant refused to state if she would return to work, stating none of Ms. Bowie's business. She was told that, if not fit, she would need to provide a sick note or self-certify absence.

90. The Claimant subsequently submitted a self-certification form to her employer, demonstrating that she had not accepted any alleged breach of contract at that point.

91. The documentary evidence corroborated Ms. Bowie's evidence that the Claimant was not dismissed at the second meeting on 14 November 2017. We found that Ms. Bowie believed that the Claimant remained in employment up to the point of the TUPE transfer, which is supported by the documentary evidence generated after the 14 November 2017.

92. Ms. Bowie spoke to HR again. It was agreed that an investigation into the conduct of the Claimant was required, but that Ms. Bowie should not undertake this. A manager from another home was appointed. This further demonstrates that Ms. Bowie did not believe that the Claimant had resigned.

93. By an invitation letter of 27 November 2017 (p.127), the Claimant was invited to an investigation meeting on 4 December 2018 to investigate alleged gross misconduct. We considered this letter to be reasonable management action, given what the Regional Manager and Resident Experience Manager had witnessed. The First Respondent had an honest suspicion that the Claimant was guilty of gross misconduct.

94. By an email dated 30 November 2017, the Claimant stated that she would not be attending the investigation meeting due to "*being unwell*" (p.128). We found this response inconsistent with her case, in that, if she genuinely believed that she had been dismissed or had resigned on 14 November 2017, she would have complained at this point that there was no need for such a meeting.

95. By 30 November 2017, the Claimant's self-certification had expired. Ms. Bowie requested an update as to her sickness. The Claimant did not reply, which was inconsistent with her case that she had been dismissed already.

96. On 5 December 2017, the Claimant was sent a further letter requesting an urgent update on her health and a certificate to cover her absence. Again, we found that the terms of this letter were reasonable, in the circumstances, and it fairly warned of the risk of disciplinary action. Again, the Claimant did not respond so as to challenge this by stating that she had already been dismissed.

97. The Claimant's TU rep contacted Ms. Bowie. She explained the Claimant's case to be that she was suspended on 14 November 2017 and dismissed on week ending 8 December 2017. This is inconsistent with the Claimant's case before this Tribunal, because the Claimant never alleged that she was suspended at any time.

TUPE transfer

98. The Home transferred to the Second Respondent on 14 December 2017. The care assistant staff who worked there transferred to the Second Respondent in a transfer under the TUPE Regulations 2006.

99. The Claimant was on a Schedule of names of employees who were to transfer to the employment of the Second Respondent.

100. The Claimant did not return to work after 14 November 2018. The Claimant did not provide any "Fit Note" after her self-certification of sickness expired (which was in or about the last week of November 2018). The Claimant never presented for work to the Second Respondent, and never complained to either Respondent that she had not been paid sick pay or notice pay.

The Law

Discrimination arising from disability

101. Section 15 EA provides:

"*(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."

102. In the case of section 15(1) discrimination, it is the treatment, rather than the PCP, which has to be justified.

103. The Equality and Human Rights Commission's Code of Practice on Employment states that the consequence of a disability "*includes anything which is the result, effect or outcome of a disabled person's disability*": see para 5.9.

Justification defence: Proportionality

104. The correct test for assessing whether treatment is proportionate was explained (in the housing context) in *Akerman Livingstone v Aster Communities* [2015] 2 WLR 721.

104.1. is the objective sufficiently important to justify limiting a fundamental right?

104.2. is the measure rationally connected to the objective?

104.3. are the means chosen no more than is necessary to accomplish the objective?

104.4. Are the disadvantages caused disproportionate to the aims pursued? Put in context, does the treatment strike a fair balance between the employer's needs to accomplish its objective and the disadvantages thereby caused to the Claimant as a disabled person?

Requirement of knowledge

105. The requirement of actual or constructive knowledge in section 15(2) and section 20 EA (or, rather, in the equivalent DDA 1995 provisions) was

addressed in *Gallop v Newport CC* [2013] EWCA Civ 1583. The Court held, per Rimer LJ:

"*36 I come to the central question, namely whether the ET misdirected itself in law in arriving at its conclusion that Newport had neither actual nor constructive knowledge of Mr Gallop's disability. As to that, Ms Monaghan and Ms Grennan were agreed as to the law, namely that (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. Counsel were further agreed that, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in section 1(2). I agree with counsel that this is the correct legal position*."

Harassment

106. Section 26 provides, where relevant:

"*(1) A person (A) harasses another (B) if –*

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

107. Paragraph 7.9 of the EHRC Code of Practice states that "related to" in section 26(1)(a) should be given "*a broad meaning in that the conduct does not have to be because of the protected characteristic*".

Burden of proof in discrimination cases

108. We reminded ourselves of the reversal of the burden of proof provisions within section 136(2) EA 2010, as explained in *Igen v Wong* [2005] EWCA Civ. 142 and *Madarassy v Nomura* [2007] ICR 867.

109. In the event, although the Tribunal considered section 136, it did not find it necessary to apply it in this case, where positive findings of fact have been made which did not depend on whether the burden of proof had shifted or whether the Respondents had then managed to discharge it.

Submissions

110. The Tribunal read written submissions from each party, which were expanded upon in oral submissions. We mean no disrespect to any party by not dealing in these Reasons with every submission made; all submissions were taken into account.

111. Applying the facts and the law set out to the issues to be determined, we have reached the following conclusions.

Was the Claimant dismissed?

112. The Claimant was not dismissed. Ms. Bowie did not use the words alleged by the Claimant (that she should pack her bags and go). We accepted Ms. Bowie's account of events because she was a credible and reliable witness. As we have explained, the Claimant was an unreliable witness. Her anger and emotional state on 14 November 2017 meant that her ability to remember what had happened was greatly reduced.

Was the Claimant constructively dismissed?

113. The Claimant was not constructively dismissed by the Respondent's conduct. We repeat the findings of fact set out at paragraphs 56-86 above, which demonstrate that the First Respondent did not breach the implied term of trust and confidence; the Respondents' witnesses did not commit acts likely to destroy on seriously damage the degree of trust and confidence that the Claimant was entitled to have in her employer.

Was the Claimant employed by the First Respondent immediately before the TUPE transfer?

114. For the reasons set out in the findings of fact at paragraphs 89-96 above, the Claimant had not resigned by the date of the TUPE transfer. The steps that she had taken in providing a self-certificate, responding to correspondence, and not objecting to proposed management action demonstrated that she was employed by the First Respondent immediately prior to the TUPE transfer on 15 December 2017.

115. On the first morning of the hearing, the Second Respondent conceded that the Claimant was assigned to Mornington Hall at the date of the TUPE transfer.

Section 13 EA 2010: Direct race discrimination: did Ms. Bowie treat the Claimant less favourably by using the words alleged?

116. We have explained in our findings of fact at paragraph 86 that we accepted the evidence of Ms. Bowie as to what was said, which was corroborated by Ms. Hill. We found the Claimant to be an unreliable witness for the reasons set out above; she was neither listening to nor hearing what was said, given the state that she was in at this time.

117. We consider that a hypothetical comparator, a white British care worker who rolled her eyes in the same meeting, would have been treated in the same way by Ms. Bowie. Ms. Bowie perceived the action of the rolling of eyes to be rude in the context in which it was done. We conclude that her perception would have been the same whatever the race or ethnicity of the employee.

Section 15 EA 2010: Did the Respondents treat the Claimant unfavourably in any of the ways alleged?

(i)

118. We concluded that Ms. Mehar and Ms. Akoto did not shout at the Claimant on 14 November 2017. We found that it was necessary for them to raise their voices, but only insofar as it was necessary for them to communicate their point to the Claimant, because the Claimant was shouting.

119. Moreover, if the raising of voices was unfavourable treatment, this was not because of something arising in consequence of the Claimant's disability. From all the evidence, including the Occupational Health report, we concluded that, as a matter of fact, the Claimant was able to help in the lounge, serving drinks from the trolley.

120. The raised voices of Ms. Mehar and Ms. Akoto arose entirely because of the misconduct of the Claimant, specifically her shouting and hostility.

121. In any event, in the circumstances, even if section 15(1) were satisfied, the actions of Ms. Mehar and Ms. Akoto in trying to communicate with the Claimant were proportionate.

(ii)

122. On 14 November 2017, Ms. Bowie did not accuse the Claimant of lying about her disability. We repeat the relevant findings of fact set out above, specifically at paragraph 80.

(iii)

123. In the final meeting attended by the Claimant on 14 November 2017, Ms. Bowie did not behave in a hostile manner. By way of reasons, we repeat the findings of fact set out at paragraphs 78-86 above. We concluded that the Claimant was angry and hostile at that meeting.

124. It is true that Ms. Bowie did investigate what tasks the Claimant could perform, for the reasons that she gave. This was not unfavourable treatment, but reasonable

management action. The reaction of the Claimant demonstrated that she had difficulty in dealing with any form of challenge to her actions at that time.

125. In any event, as we have explained, the Claimant was able to do the trolley tasks such as serving or pouring drinks to residents. Accordingly, the questions of Ms. Bowie were not at all because of something arising in consequence of the Claimant's disability.

Section 26 EA 2010: Harassment

(i)
126. Acts and comments of Ms. Mehar, Ms. Akoto, and/or Ms. Bowie on 14 November 2017

127. We found that the action of Ms. Mehar, in asking the Claimant to help, was unwanted by the Claimant. We found that the Claimant did not want any challenge to her actions, however unreasonable they might be.

128. The actions of Ms. Akoto and Ms. Mehar, in challenging and arguing with the Claimant, were unwanted by the Claimant.

129. The actions of Ms. Bowie in the morning of 14 November 2017, questioning why the Claimant was not helping her colleagues, why confidential records relating to A were left on a public shelf, and why she had made a false record on a plan, were all unwanted by the Claimant.

130. The words and actions of Ms. Bowie at the first meeting on 14 November 2017, in requiring the Claimant to attend a meeting in her office and in challenging the Claimant's conduct, and at the second meeting, having read the Occupational Health report, and having told the Claimant to fulfil the adjusted carer duties proposed in the report, or go back to her GP, were all unwanted. The Claimant lacked insight into her actions and could not accept any challenge to her actions, however merited these were.

131. We have taken account of Paragraph 7.9 of the EHRC Code of Practice. We recognise that "related to" in section 26(1)(a) should be given "*a broad meaning"*.

However, we found that the unwanted conduct had nothing to do with the Claimant's disability. It was entirely because of her misconduct.

132. If we are wrong about this, we are satisfied that the unwanted conduct did not have the purpose of creating the environment prohibited by section 26(1)(b) EA 2010 nor did it violate the Claimant's dignity.

133. Moreover, on the facts that we have found, the circumstances demonstrated that the Claimant was guilty of misconduct, and that she was able to do the tasks of serving drinks that she was asked to do.

134. In harassment cases, context is everything. In the context in which the unwanted conduct arose, it was not reasonable for any unwanted conduct to have the effect alleged by the Claimant.

135. The requests for meetings after 14 November 2017 probably were unwanted by the Claimant. Again, however, we found that this unwanted conduct had nothing to do with her disability.

136. Moreover, even if this unwanted conduct was related to her disability in the broadest sense, it was not reasonable for reasonable management requests to attend meetings to violate the Claimant's dignity nor to have the proscribed effect on the Claimant. The circumstances – the events of 14 November 2017 – meant that it was almost inevitable that the First Respondent would need to take some management action.

(ii) *Repeated requests made after 14 November 2017 that the Claimant attend meetings or be dismissed*

137. The requests for meetings after 14 November 2017 probably were unwanted by the Claimant. Again, however, we found that this unwanted conduct had nothing to do with her disability.

138. Moreover, even if this unwanted conduct was related to her disability in the broadest sense, it was not reasonable for reasonable management requests to attend meetings to violate the Claimant's dignity nor to have the proscribed effect on the Claimant. The circumstances – the events of 14 November 2017 – meant that it

was almost inevitable that the First Respondent would need to take some management action.

Breach of contract: notice pay

139. Given our findings and conclusions, the Claimant was not entitled to notice pay from either the First or the Second Respondent. There was no breach of contract by the First or the Second Respondent.

Employment Judge A Ross

Date: 27 February 2019