EMPLOYMENT TRIBUNALS

Claimant: Ms Olga Antonova

Respondent: HF Trust Ltd t/a HFT

Heard at: Birmingham (via CVP)

On: 11, 12, 13, 14, 15, 18, 19, 20 January 2021 and 31 March 2021 (deliberations in chambers)

Before: Employment Judge Meichen, Mr C Greatorex, Mr R White

Appearances:
For the claimant: in person, with the assistance of a Russian interpreter as needed
For the respondents: Mr C Adjei, counsel

JUDGMENT ON LIABILITY

1) The claimant's claim for holiday pay is dismissed following a withdrawal of that claim by the claimant.

2) The reason or principal reason why the claimant was dismissed was not that she made a protected disclosure.

3) The claimant's dismissal was nevertheless unfair.

4) The claimant contributed to her dismissal by her blameworthy conduct and there shall be a 30% deduction to the basic and compensatory awards to reflect that.

5) There was a percentage chance that the claimant could have been fairly dismissed and a further 30% deduction to the claimant's compensatory award will be made to reflect that.

6) The claimant was mistreated at a meeting on 16 July 2019 and this was a detriment on the ground that she made a protected disclosure.

7) The claimant was wrongfully dismissed and is entitled to her notice pay.

8) All of the claimant's other claims are dismissed.

REASONS

Introduction

1. This hearing took place shortly after the announcement of a further period of lockdown. The parties were informed that it would be converted to be heard by CVP on the first day of the hearing and that arrangements for hearing the rest of the case would be discussed on that day. All parties were able to attend remotely on the first day and nobody had any issues with the case being heard remotely, so that's what we did. There were a few technical hiccups over the course of the hearing but no major difficulties. Neither party suggested that the fairness of the hearing was adversely affected by it being heard remotely and we were satisfied that there was no unfairness caused.

2. We therefore formally record that this was a remote hearing which was not objected to by the parties. The form of remote hearing was V: fully remote over CVP.

3. The claimant gave evidence and was cross examined. She did not call any other witnesses.

4. The respondent had 6 witnesses: Rachel Rone-Clarke, Linzi Selby, Clive Parry, Millie Davis, Michele Smirthwaite, and Kate Dishart. All witnesses, with the exception of Millie Davis, gave evidence and were cross examined. In respect of Millie Davis the respondent produced medical evidence to the effect that she was too ill to attend the hearing. The background to that is that Millie Davis has been signed off work with anxiety and depression since 17 December 2020 and those conditions resulted in her being unable to attend the hearing. The respondent did not apply for a postponement of the hearing but instead asked us to read Millie Davis' statement and attach such weight as we felt able to do so in light of the other evidence. We agreed to do that and we accepted that there was a good reason for Millie Davis' non-attendance at the hearing.

5. The claimant is Latvian and English is not her first language. In fact English is her third language. Nevertheless the claimant speaks and understands English quite well. She told us that she did not need everything to be translated for her but would call on the assistance of the interpreter as and when required. Mr Adjei did not object to this approach and we agreed to it. The claimant requested the assistance of the interpreter on a few occasions throughout the hearing.

6. The hearing was originally scheduled to last 7 days. However we were unable to keep to a timetable which would enable the case to be heard within that listing. The delays were mainly attributable to the claimant needing longer in cross examination with the respondent witnesses than had been anticipated and the time spent to deal with the case management issues which we describe below. We were able to extend the length of the hearing by one day which meant we could at least conclude the evidence and submissions. We

heard submissions on the final day of the hearing and by the time that was complete it was after lunchtime. We therefore reserved our decision.

7. We were not able to find a day for us to complete our deliberations until 31 March. That explains the delay in producing this judgment.

8. The claimant's interpreter did not attend on the last day of the hearing as she had only been booked for the original 7 days. We attempted to arrange her attendance through her booking agency but this didn't work. However the claimant confirmed she was happy to proceed without the interpreter on the final day. The parties had agreed to exchange summary written submissions in any event so the oral submissions did not need to be very long. We asked the claimant to let us know if she had any problems with understanding anything on that day and she did not do so.

Case management issues

9. Very unfortunately by the time this final hearing started there was no complete list of issues identifying all the issues we were being asked to determine. This caused some difficulties which we attempted to deal with in the way which we felt was most in accordance with the overriding objective. We gave summary reasons for our decisions at the time and we said that we would record our approach as part of these written reasons.

10. We bore in mind throughout our decision making on these matters that the claimant has represented herself throughout these proceedings and, as we have said, English is not her first language. As far as we are aware she does not have any legal expertise (although she is plainly intelligent). It would not be fair in light of these factors to have expected the claimant to have expressed herself as clearly and effectively as a professionally represented party or a party who speaks English as a first language.

11. The relevant background is as follows. On 24 November 2019 the claimant submitted her first claim. She did not tick any boxes to identify the type of claim she was bringing but there was a clear reference to whistleblowing. There was a relatively brief narrative of some relevant events but the claimant said her case was extremely complicated and she was unable to describe all that she had been through.

12. The claimant submitted her second claim on 10 January 2020. In that claim form the claimant ticked the boxes to indicate that she was bringing claims for unfair dismissal, race discrimination, notice pay and holiday pay. The claimant also ticked the boxes to say she was claiming arrears of pay/other payments but no allegations which could lead to claims of that nature have ever been made by the claimant. The narrative plainly identified that the claimant believed she had been treated unfavourably because of her race and treated differently due to her Latvian nationality compared to her British colleagues. Other than relating the discrimination to the dismissal there was not really any further clarification of the factual matters the claimant was complaining of on top of what had been included in the first claim. The claimant again said she felt her claim was complicated and she found it hard to write it all down. The

claimant also seems to have been under the mistaken impression that there was a word limit to what could be included in the ET1 claim form.

13. On 14 January 2020 EJ Broughton ordered that the two claims be heard together.

14. The first preliminary hearing was on 27 January 2020. At that hearing EJ Battisby identified that the claimant was bringing the following claims: unfair dismissal, dismissal and detriment for making protected disclosures, direct race discrimination, harassment related to race, wrongful dismissal (notice pay), holiday pay.

15. At the start of the hearing before us the claimant withdrew the claim for holiday pay and agreed that claim should be dismissed.

16. The issues in the claims were recorded at the first preliminary hearing, with the exception of the claim for harassment related to race. In respect of that claim EJ Battisby ordered the claimant to provide full details of the conduct she was relying on at a later date; the relevant conduct was not identified to any extent as part of the case management order.

17. The claimant then provided further information in writing. However this did not include a sufficient level of detail to properly identify the relevant conduct for the harassment claim and the claimant did not provide all the particulars which had been ordered by EJ Battisby. The respondent then made a request for further information but again the information provided was insufficient.

18. The claimant made an application to amend her claim to include a claim of victimisation. That application was granted following a hearing before EJ Algazy QC on 13 November 2020 and EJ Algazy QC set out the issues in respect of that claim as part of his order. It was not suggested that the claimant required permission to amend to proceed with any of her other claims. The problem in respect of the insufficient particulars for the harassment claim does not seem to have been raised at the second preliminary hearing.

19. It appears that the claimant may have had the assistance of an interpreter at the second preliminary hearing but not the first.

20. At the start of the hearing before us we expressed disappointment that the list of issues was incomplete and that there had been no proper identification of the issues in the harassment claim. Mr Adjei explained that the respondent had felt it was able to identify the issues from other sources and had answered those issues in its witness evidence. He suggested that we would be able to identify the issues from the respondent's witness statements.

21. We were not content with that approach as we felt that as a panel we needed to have clarity on what issues we were being asked to determine. We wished to deal with any potential disagreement on the issues at the outset as failing to do so could lead to problems if disputes arose after we had heard the evidence.

22. We therefore asked the respondent to produce a list of the issues in the harassment claim as they understood them. This was helpfully produced in table form by the second day of the hearing. We had spent the remainder of the first day completing our reading.

23. The claimant did not agree with the issues identified by the respondent. She sought to add a number of further allegations and changed some details of the allegations.

24. In the course of discussing this matter with the claimant it became apparent that she did not appreciate the difference between direct race discrimination and harassment related to race. Following our discussions, the claimant indicated she would wish to rely on the allegations as either harassment related to race or in the alternative direct race discrimination.

25. On behalf of the respondent Mr Adjei objected to the claimant's proposed variations to the issues. The essential point he made was that the respondent would be unfairly prejudiced if the issues were varied beyond those which the claimant had indicated in the further information she had provided following the first preliminary hearing.

26. We sought to understand from Mr Adjei how it could be said that the relabelling of the claimant's allegations from harassment related to race to either harassment related to race or direct race discrimination was something which would cause the respondent any meaningful prejudice as their evidence was likely to be the same no matter how the allegations were labelled. Mr Adjei asked us to record his formal objection to the relabelling but he did not seek to argue that it would cause any prejudice to the respondent. We therefore decided to allow the claimant to label her allegations as either direct race discrimination or harassment related to race.

27. We decided that it would not be fair to the respondent or in accordance with the overriding objective to permit the claimant to include issues which had not been foreshadowed to any extent in her further information or her pleadings. In short, we accepted the point made by Mr Adjei that the respondent would be prejudiced in dealing with allegations which it had not been put on notice of. The balance of prejudice in our view weighed against granting an amendment to include an allegation which the respondent had not been on notice of at this late stage.

28. Where the claimant's proposed variations amounted to changing the details (such as dates) or slight changes to the wording of allegations we permitted those on the basis that the respondent was on notice of the substantive issue and we would evaluate the claimant's late changes as part of our assessment of the claims, if it was relevant to do so.

29. One of the claimant's proposed additional allegations was as follows: *"HR Department received an official complaint but did not respond"*. In discussions with the claimant it was apparent that this was an important issue as far as she was concerned. The claimant had not included the date of her complaint in her proposed wording but we understood that she was referring to the grievance which she submitted on 22 September 2019.

30. This allegation had not been clearly identified as part of the further information provided to the respondent following the first preliminary hearing. However, when we reviewed the respondent's witness evidence we saw that one of the respondent's witnesses, Michele Smirthwaite, had explained exactly how the respondent had dealt with the claimant's grievance of 22 September and had referred to the relevant documentation which was all included in the bundle. We therefore could not see how the respondent would be prejudiced by the inclusion of this issue (as the relevant evidence had already been put before us) and we permitted the claimant to rely on it. We inserted the date of 22 September 2019 into the claimant's proposed wording to make it clear what the allegation was referring to.

31. Unfortunately during the claimant's cross examination of Michele Smirthwaite it became apparent that the claimant's complaint was not that there had been a failure to respond to her grievance of 22 September 2019 but that there was a failure to respond to her earlier complaint submitted on 25 July 2019. In the discussions which followed the claimant in effect requested a further variation to the issues which was to clarify that the complaint she was saying was not responded to was that submitted on 25 July, and not 22 September.

32. On behalf of the respondent Mr Adjei again objected essentially on the same basis as before; that the respondent was being unfairly prejudiced by a late variation of the issues which they had not tailored their evidence to answer.

33. The claimant emphasised the importance of this point to her case and she took us to her first ET1 claim form in which she said that she had clearly raised this allegation. In fact the claimant described it as the key allegation which she had made in that claim.

34. As we have said the narrative of events in the claimant's first claim was short. Upon re-reading it however we agreed with the claimant that she had clearly raised as a factual allegation that she had submitted a complaint on 25 July which had not been responded to. The claimant expressly said in her narrative that nothing was sent to her following her submission of the complaint, there was no contact about it for two months and that as a result she believed it was not taken seriously. Our view was that on a fair and natural reading of the claim form it was obvious that complaint was a significant issue being raised by the claimant. Notwithstanding that however, the respondent did not respond to the point in its response at all. We found that surprising.

35. Mr Adjei pointed out that the claimant had not expressly alleged in her first claim form that the failure to respond was race discrimination or harassment. In weighing that up however we had to take into account we were dealing with an unrepresented claimant for whom English is not her first language. We thought it was particularly important in that context not to construe the pleadings in a technical way but to focus on the substance of what the claimant had said. The second claim form - which had quickly been consolidated with the first - plainly identified that the claimant believed the reason for her alleged mistreatment was her race. The claimant had also remedied the mistake she made in the first claim form by not ticking the race

discrimination box. It seemed fair and logical to us to read the two claim forms together. Taking those matters into account we did not think that the claimant would require an amendment to her claim in order to pursue the allegation. Alternatively, if a formal amendment would be required the balance of prejudice would favour permitting it since the respondent had been on notice at least of the substance of the allegation since the claimant's first claim form.

36. We attempted to understand from the claimant why this allegation had not been clearly recorded as part of the first preliminary hearing or in her further information produced after that hearing. The claimant was adamant that she had raised the allegation at the first preliminary hearing. The respondent was represented at that hearing but by different counsel and so they could not shed any further light on that assertion. We felt that we could not discount the possibility that there had been some misunderstanding or miscommunication at the first preliminary hearing, and it seemed obvious to us that the claimant had not fully appreciated what was required of her when she was asked to provide the further information after that hearing. We noted that there had in fact been a misunderstanding at the start of this hearing when we thought the claimant was referring to the grievance of 22 September as the complaint which had not been responded to.

37. We also took into account that the issues had not been fully agreed or identified by the start of the hearing. This was not in our judgement a case of a claimant attempting to resile from a clearly identified and agreed list of issues.

38. In the circumstances we decided that we would not be dealing with the case fairly and justly if we refused to allow the claimant permission to rely on this allegation. Our reasons were essentially as follows:

    a. The claimant had pleaded the allegation (at least in substance), and it was plainly a significant part of her claim.

    b. There was no complete list of issues agreed by both parties before the start of this hearing

    c. Although the allegation had not been included as part of the issues identified at the preliminary hearing or in the claimant's further information those documents were not as significant as the pleadings.

    d. In any event, there may have been some misunderstanding or miscommunication by the claimant which resulted in the allegation not been clearly recorded at the preliminary hearing or in the further information.

    e. In light of the information contained in the claimant's first ET1 it was not right to suggest that this was an allegation which the respondent was not on notice of.

39. Notwithstanding that last point we considered as part of our decision making that Mr Adjei submitted that the respondent had not prepared witness evidence to directly respond to the allegation of a failure to respond to the 25 July complaint. In light of the other factors which we have identified we did not

think that was a sufficient reason to refuse the claimant permission to rely on the allegation.

40. By the time this matter was being discussed we had considered the evidence in some detail and it was clear that there were contemporaneous documents which set out the respondent's explanation as to why the 25 July complaint was not initially responded to (in particular a letter from Joanna Malala dated 25 September 2019). Mr Adjei indicated that the respondent's approach, if we permitted the claimant to rely on the allegation, would be to rely on that contemporaneous evidence rather than seek to rely on any further witness evidence.

41. Notwithstanding Mr Adjei's indication we made it clear to the respondent when we communicated our decision that if they wished to rely on any additional evidence to answer the allegation concerning the 25 July complaint then we would consider any application to that effect. We said that we would consider any application to adduce further evidence including further witness evidence, even if that meant further delay in the hearing. At this stage there were 3 days of hearing time remaining but it was already clear we were not going to be able to conclude within the time allocated anyway.

42. The respondent did not make any application to adduce any further evidence and Mr Adjei relied on the contemporaneous documents as showing the reasons why the 25 July complaint was not initially responded to.

The issues

43. Following the above clarifications we can now record that the liability issues for us to determine were as follows.

Jurisdiction (Section 123 Equality Act 2010 - "EA")

44. Are any of the claimant's claims for discrimination out of time under s123 EA:

a. Do any of the claimant's complaints relate to matters occurring before 14 July 2019?
b. If so, in relation to each complaint: was that complaint part of a continuing course of conduct, with the last action occurring after 14 July 2019?
c. If not, would it be just and equitable for the Tribunal to extend time?

Unfair dismissal

45. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct.

46. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

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

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

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

Public interest disclosure ("whistleblowing")

50. Did the claimant make a protected disclosure in accordance with ERA section 43B as set out below:

On 5 July 2019, after making enquiries about how to make a disclosure with her manager, Mandy Russell, on 4 July 2019, informing Clive Perry, regional manager, of an accident involving a resident on 29 June 2019 when he fell out of bed and that this was a systemic and regular occurrence, which the respondent's local managers were doing nothing to prevent.

The claimant relies on subsections (b) and (d) of section 43B(1). The respondent defends the claim on the following basis in particular: that the disclosure made was not a protected one and/or was not made in the public interest and/or was not a cause of the dismissal or any detriment.

51. What was the principal reason the claimant was dismissed and was it that she had made a protected disclosure?

52. Did the respondent subject the claimant to any detriments, as set out below?

    a. the claimant was suspended from work on 4 July 2019 until her dismissal on 7 October 2019;

    b. the claimant was forced to endure a 4 hours long meeting with Mr Perry on 16 July 2019 in a small box room, during which she was shouted at, mistreated and threatened and told that, if she took the matter further, he would conclude she was guilty of the misconduct charges, which were then outstanding against her. Following the meeting the claimant says suffered ill health as a result of her treatment, which required hospitalisation and ongoing specialist treatment.

Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law.

53. If so, was this done because she made one or more protected disclosures?

Equality Act 2010, section 13: direct discrimination because of race (i.e. nationality)

54. Has the respondent subjected the claimant to the following treatment?

a. dismissal;
b. suspension from work;
c. the treatment of her by Mr Perry at the meeting on 16 July 2019 referred to above;
d. Natalie Smith Daniel (formerly Overton-Short) shouted and bullied the claimant in front of a resident and colleague in 2014 (the respondent believes the date should be 24 April 2014);
e. Rachel Rone-Clarke asked Emily Baker and allowed her to do an extra shift, even though at that time she had a Bradford Factor exceeding 200, and the claimant was not given this opportunity when asked in approximately 2016/17 (the claimant originally stated this occurred in 2016, but it changed to "approximately 2016/17" when the issues were being identified, then in the course of evidence that claimant said it could have occurred in 2016 or 2017 or 2018);
f. Rachel Rone-Clarke removed/changed the claimant's shifts and those of Joanna Trautman, who was a permanent, Polish co-worker, without any explanation and in order to punish the claimant in 2016;
g. After the claimant had voluntarily sewed some curtains for one of the residents, Rachel Rone-Clarke pushed the claimant to do some sewing work on her son's jeans in 2016;
h. Rachel Rone-Clarke refused the claimant's holiday request but granted the requests of others in 2016;
i. After Linzi White had removed the claimant from extra shifts without notice at the request of Rachel Rone-Clarke, the claimant asked Ms. Rone-Clarke why this had happened, and Ms. Rone-Clarke shouted at the claimant and said, "*Don't turn on things and end of story!*" on 10 June 2016;
j. After an incident involving Rani Lake on 7 October 2017 when the claimant was shouted at in front of a colleague the claimant sent a complaint form to Rachel Rone-Clarke and Linzi White about what had happened and what Rani had done but received no response;
k. The HR department received an official complaint from the claimant on 25 July 2019 but did not respond;
l. Millie Davis questioned about being late in an unpleasant and aggressive manner and did not apologise when the claimant proved that [it was not her who was late] in 2019 (the claimant was unsure about precisely when

this occurred but said she thought it was around the end of May or start of June 2019).

55. Was that treatment "less favourable treatment', i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") where there is no material difference in the circumstances of each case being compared?

    The claimant relies on the following comparators Becky Dale, Kelly Jones, Jo Peck, Rani Lake, Tom, Lorna Campion and/or hypothetical comparators, all of whom are of non-Latvian nationality.

56. If so, was this because of the claimant's nationality?

Equality Act 2010, section 26: harassment related to race (i.e. nationality)

57. Did the respondent engage in conduct as follows?

    a. Natalie Smith Daniel (formerly Overton-Short) shouted and bullied the claimant in front of a resident and colleague in 2014 (the respondent believes it occurred on 24 April 2014);
    b. Rachel Rone-Clarke asked Emily Baker and allowed her to do an extra shift, even though at that time she had a Bradford Factor exceeding 200, and the claimant was not given this opportunity when asked in approximately 2016/17 (the claimant originally stated this occurred in 2016, but it changed to “approximately 2016/17 when the issues were being identified, then in the course of evidence that claimant said it could have occurred in 2016 or 2017 or 2018);
    c. Rachel Rone-Clarke removed/changed the claimant’s shifts and those of Joanna Trautman, who was a permanent, Polish co-worker, without any explanation and in order to punish the claimant in 2016;
    d. After the claimant had voluntarily sewed some curtains for one of the residents, Rachel Rone-Clarke pushed the claimant to do some sewing work on her son’s jeans in 2016;
    e. Rachel Rone-Clarke refused the claimant’s holiday request but granted the requests of others in 2016;
    f. After Linzi White had removed the claimant from extra shifts without notice at the request of Rachel Rone-Clarke, the claimant asked Ms. Rone-Clarke why this had happened, and Ms. Rone-Clarke shouted at the claimant and said, “*Don’t turn on things and end of story!*” on 10 June 2016;
    g. After an incident involving Rani Lake on 7 October 2017 when the claimant was shouted at in front of a colleague the claimant sent a complaint form to Rachel Rone-Clarke and Linzi White about what had happened and what Rani had done but received no response;
    h. Clive Parry threatened the claimant in the informal meeting on 16 July 2019;
    i. The HR department received an official complaint from the claimant on 25 July 2019 but did not respond;

j. Millie Davis questioned about being late in an unpleasant and aggressive manner and did not apologise when the claimant proved that in 2019 (the claimant was usure about precisely when this occurred but said she thought it was around the end of May or start of June 2019).

58. If so was that conduct unwanted?

59. If so, did it relate to the protected characteristic of race (nationality in particular)?

60. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

Victimisation (s. 27 Equality Act 2010)

61. Did the claimant do a protected act as follows:

a. Make a complaint about race discrimination in a letter to the respondent dated 5 July 2019.
b. Issue a claim for race discrimination on 10 January 2020.

62. Did the respondent do the following things:

60.1 Provide information and/or references to prospective employers on 2 occasions, namely:

a) A company represented by Daisy Atkins, recruitment consultant, on or around 11 December 2019.

b) Rehability UK in or around December 2019/January 2020

63. By doing so, did it subject the claimant to detriment?

64. If so, was it because the claimant did a protected act?

Wrongful dismissal (notice pay)

65. To how much notice was the claimant entitled?

66. Did the claimant fundamentally breach the contract of employment by an act or acts of so-called gross misconduct? N.B. This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the gross misconduct; if so, did the respondent affirm the contract of employment prior to dismissal?

A summary of the essential law to be applied

67. Firstly, we must bear in mind the burden of proof provisions of the Equality Act 2010 ("EA"). Section 136(2) Equality Act 2010 sets out the applicable provision as follows: "*if there are facts from which the court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the court must hold that the contravention occurred".* Section 136(3) then states as follows: *"but subsection (2) does not apply if A shows that A did not contravene the provision".*

68. These provisions require the employment tribunal to go through a two-stage process in respect of the evidence. The first stage requires the claimant prove facts from which the tribunal could conclude that the respondent has committed an unlawful act of discrimination.

69. The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that he did not commit the unlawful act. That approach has been settled since the case of Igen Ltd v Wong [2005] IRLR 258 and has been reaffirmed recently in the case of Efobi v Royal Mail Group Limited [2019] IRLR 352

70. It is also well established that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate the possibility of discrimination. They are not, without something more, sufficient material from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination. These principles are most clearly expressed in the case of Madarassy v Nomura International plc 2007 [IRLR] 246.

71. In addition to the above case law has shown that mere proof that an employer has behaved unreasonably or unfairly would not by itself trigger the transfer of the burden of proof, let alone prove discrimination (see in particular the case of Bahl v The Law Society and others [2004] IRLR 799).

72. It is not necessary in every case to go through the two-stage process. In some cases, it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test. The employee is not prejudiced by that approach, but the employer may be, because the Tribunal is acting on the assumption that the first hurdle has been crossed by the employee (see Brown v London Borough of Croydon [2007] IRLR 259).

73. The claimant's direct discrimination claim falls under section 13 EA which provides that*: "a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others".* For the claimant's claim she relied on the protected characteristic of race, and in particular her Latvian nationality.

74. We shall also consider section 23 EA which relevantly provides as follows:

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

75. Insofar as the claimant's direct discrimination relates to her dismissal the questions for the tribunal are therefore whether someone who was not Latvian (the claimant relies on British comparators) and who had been found to have done what the Claimant had been found to have done would not have been dismissed; and if so whether the reason for the Claimant's dismissal was her nationality.

76. Regarding the claim of harassment section 26 EA states as follows:

> (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.*

77. In GMB v Henderson [2017] IRLR 340, the Court of Appeal suggested that deciding whether the unwanted conduct "relates to" the protected characteristic will require a "consideration of the mental processes of the putative harasser".

78. The test as to whether conduct has the relevant effect is not subjective. Conduct is not to be treated, for instance, as violating a complainant's dignity merely because she thinks it does. It must be conduct which could reasonably be considered as having that effect. However, the tribunal is obliged to take the complainant's perception into account in making that assessment.

79. Regarding the victimisation claim section 27 EA states as follows:

> (1*) A person (A) victimises another person (B) if A subjects B to a detriment because—*
>
> *(a) B does a protected act, or*

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act

80. If what is alleged would not be unlawful under the relevant legislation there is no protected act. The protected act must be more than simply causative of the treatment (in the "but for" sense). It must be a real reason.

81. For the claimant's whistleblowing claim the relevant parts of sections 43A and 43B ERA state:

43A Meaning of "protected disclosure"

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

…

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

…

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

…

82. There was no dispute in this case that (if it was a qualifying disclosure) the claimant's email of 5 July 2019 was sent to the employer in accordance with s43C ERA 1996. The real issue in this case was whether the claimant had a reasonable belief that the information she disclosed tended to show that the respondent had failed to comply with a legal obligation or that the health and safety of a particular person was endangered.

83. We must bear in mind also that in order to be qualifying the worker making the disclosure must have a reasonable belief that it was made in the public interest.

84. The leading authority on these matters is Chesterton Global Ltd v Nurmohamed [2018] ICR 731. Underhill LJ's judgment includes the following:

    82.1 while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it – Underhill LJ doubted whether it need be any part of the worker's motivation,

    82.2 a disclosure which was made in the reasonable belief that it was in the public interest might nevertheless be made in bad faith,

    82.3 the statutory criterion of what is "in the public interest" does not lend itself to absolute rules but the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest.

85. A particularly lucid distillation of the key principles arising from Chesterton was recently given by the EAT in Dobbie v Paula Felton t/a Feltons Solicitors UKEAT/130/20/00 (the summaries above are taken from that judgment). The explanation in Dobbie also included the following:

    "a disclosure could be made in the public interest although the public will never know that the disclosure was made. Most disclosures are made initially to the employer, as the statute encourages. Hopefully, they will be acted on. So, for example, were a nurse to disclose a failure in the proper administration of drugs to a patient, and that disclosure is immediately acted on, with the consequence that he does not feel the need to take the matter any further, that would not prevent the disclosure from having been made in the public interest – the proper care of patients is a matter of obvious public interest (4) a disclosure could be made in the public interest even if it is about a specific incident without any likelihood of repetition. If the nurse in the example above disclosed a one off error in administration of a drug to a specific patient, the fact that the mistake was unlikely to recur would not necessarily stop the disclosure being made in the public interest because proper patient care will generally be a matter of public interest"

86. In Dobbie it was therefore regarded as uncontroversial that proper patient care should be regarded as a matter of public interest. We regard it as similarly uncontroversial that the proper care of the people the respondent looks after is a matter of public interest. The respondent looks after vulnerable people with significant disabilities and it is plain to us that their proper care is a matter of public interest.

87. However, we bear in mind that the fact that a disclosure is about a subject that could be in the public interest does not necessarily lead to the conclusion that the worker believed that she or he was making the disclosure in the public interest: Parsons v Airplus International Ltd UKEAT/0111/17/JOJ. This

reinforces the point that in this case it is the claimant's belief when making the disclosure that must be determined.

88. The relevant part of section 47B ERA states:

> *47B Protected disclosures*
>
> *(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*

89. Accordingly, a worker is protected from being subject to a detriment done on the grounds that he has made a protected disclosure. The leading authority on what is meant by the term "done on the ground that" is Fecitt and others v NHS Manchester (Public Concern at Work intervening) [2012] ICR 372. In that case the Court of Appeal stated that: "*liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act."*

90. Section 103A ERA states:

> *103A Protected disclosure*
>
> *An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.*

91. Regarding the claimant's claim for 'ordinary' unfair dismissal the relevant parts of the ERA state:

> *94 The right*
>
> *(1) An employee has the right not to be unfairly dismissed by his employer.*
>
> *. . .*
>
> *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—*
>
> *. . .*
>
> *(b) relates to the conduct of the employee*

. . .

(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. It is for the respondent to show that the reason for dismissal was potentially fair. The potentially fair reasons for dismissal include conduct which is the reason relied on in this case.

93. Guidance as to what constitutes reasonableness in the context of a dismissal for conduct was given in the case of BHS Ltd v Burchell [1980] ICR 393. The guidance suggests that the tribunal should consider whether the employer had a genuine belief in the misconduct alleged and whether that belief was held on reasonable grounds formed after a reasonable investigation.

94. We shall also consider whether the sanction of dismissal fell within the range of reasonable responses open to a reasonable employer. We remind ourselves that it is not for us to substitute our own view for that of the respondent.

95. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.

96. In this case the claimant raised arguments to the effect that one of the reasons why her dismissal was unfair was because the respondent treated her inconsistently compared to other employees who had not been dismissed (or in some cases even disciplined) for similar misconduct. We must bear in mind that the question of consistency is also subject to the 'range of reasonable responses' test. The EAT in Wilko Retail Ltd v Gaskell and anor EAT 0191/18, said:

'provided the assessment of the similarities and differences between different cases was one which a reasonable employer could have made, the employment tribunal should not interfere even if its own assessment would have been different'.

97. Employers are therefore permitted some flexibility in deciding whether a supposedly comparable situation is sufficiently similar.

98. As part of our decision making the tribunal will consider whether there were any procedural flaws which caused unfairness. Guidance on that part of the exercise was given by the Court of Appeal in the case of OCS v Taylor [2006] ICR 1602, which clarified that the proper approach is for the tribunal consider the fairness of the whole of the disciplinary process. The court stated that our purpose is to determine whether, due to the fairness or unfairness of the

procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at a particular stage.

99. The Court went on to say that the tribunal should not consider the procedural process in isolation but should consider the procedural issues together with the reason for dismissal as it has found it to be and decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss.

100. The claimant's claim for notice turns on whether the respondent was entitled to treat the claimant's actions as a breach of the contract of employment entitling them to dismiss without notice. In practical terms we must be satisfied on the balance of probabilities that the claimant actually committed an act of gross misconduct entitling the respondent to summarily dismiss her.

Findings of fact

101. The respondent is a national charity providing services and support to adults with disabilities. It has 300 centres across England providing services including supported living and support for adults ranging in age from age 18 upwards.

102. The claimant started her employment with the respondent on 14 May 2012. She was employed in the position of support worker.

103. The claimant, who is Latvian, worked in Clementi Court. This is one of the respondent's centres providing care to people with disabilities. There were two separate houses making up this centre. As a support worker the claimant was involved in providing care and support services to the people who the respondent looks after. In the interests of brevity and to avoid referring to people by name we shall refer to the people who the respondent looks after in Clementi Court as "residents".

104. The events with which we are primarily concerned took place in 2019. At that time the respondent was going through a recruitment crisis which meant it was increasingly reliant on agency staff and there were increased pressures on permanent employees such as the claimant. A particular result was that the claimant was working long hours and was doing regular long shifts, including night work/sleep ins.

105. The service manager who had day to day responsibility for the management of Clementi Court was Rachel Rone Clark. Ms Clark was extremely experienced and had been in her role for a long time. In fact, 5 July 2019 was due to be Ms Clark's last day working for the respondent after around 30 years' service. Her role was to be taken over by Millie Davis. Ms Davis was a senior support worker who would in effect be stepping up to take over from Ms Clark as service manager. This was a significant change and it was clear that Millie Davis required a lot of support to assist her in taking over

from Ms Clark. This support was provided primarily by Clive Parry. Mr Parry was the senior regional manager. He is an extremely experienced operations manager in an adult social care setting.

106. In his witness statement Mr Parry described himself as a "hands on" manager which we think is accurate. He was relatively new to the respondent having joined in September 2018 and he was new to Clementi Court having only been given responsibility for the Worcestershire region in April 2019. Mr Parry told us in his statement, and we accept, that the previous regional manager for Worcestershire had been in post for 39 years and she had not been visible to the staff working there. In contrast to Mr Parry then her approach was "hands off". Mr Parry took the view that there had been a lack of managerial oversight at Clementi Court and the service needed "re-setting" to get back on track.

107. The clear picture we formed from the evidence was that there was a marked change in culture following Mr Parry taking over responsibility for the region. His hands on approach meant that things which had been tolerated previously were not to be tolerated any longer.

108. Around the end of May or start of June 2019 Millie Davis was incorrectly informed that the claimant had been late for work. Ms Davis asked the claimant about this and the claimant denied it. Ms Davis subsequently found out that it was another support worker, Jo Peck, who had been late and not the claimant. Ms Davis addressed the issue with Ms Peck but she did not go back to the claimant and explain the mistake. The claimant felt aggrieved about that.

109. In June 2019 three incidents of potential misconduct relating to the claimant were identified. These all arose within a short period of time – the weekend of 29/30 June which was only a few days before Ms Clark was due to leave. At this time Millie Davis was in the process of taking over from Ms Clark and was being heavily assisted by Mr Parry.

110. The issues had been identified by Millie Davis who had raised them with Clive Parry on 2 July. It was Mr Parry who decided that the matters needed to be considered formally. Ms Clark was not involved and we understand this was because it was her last few days of employment.

111. We think it is quite possible that the issues were matters which might previously been tolerated or dealt with informally, but that was not the way Mr Parry operated. Until speaking to Mr Parry Millie Davis had not reported the 3 potential incidents of misconduct or made a decision that a formal disciplinary process was required. It was Mr Parry who suggested the claimant should be suspended and a disciplinary process initiated.

112. In his witness statement Mr Parry explained that in his view 3 reporting measures should have been done: to the CQC, the local authority and internally via the safeguarding log and a service called Assessnet. Millie Davis

had however not done these reports and it was Mr Parry who helped her complete them.

113. Moreover, Mr Parry identified with Millie Davis that other issues (not concerning the claimant) had not been reported and they should have been. Mr Parry then went through a process of making 26 notifications of previously unreported issues. Mr Parry was clear in his evidence that issues which he expected to be reported had not been and that he, with Ms Davis, was working to change the culture so that staff reported promptly when issues arose. Plainly there had previously been a culture of issues not being reported and not being dealt with formally and this is a clear example of the change of culture which we mentioned above.

114. The first two issues relating to the claimant were said to have occurred on 29 June 2019.The first allegation was that one of the residents had a choking incident and it was alleged that this was because the claimant had moved him into a reclined position shortly after eating and drinking.

115. The second allegation was that the claimant had left the house where she was working when she was the sole support worker on site. It was said that that left four vulnerable people alone without support.

116. The third allegation arose on 30 June 2019. It was alleged that the claimant positioned a vulnerable non-mobile resident in their bed and then intentionally removed one of the safety rails which created a risk that the resident could have fallen out of bed.

117. The claimant was informed of those allegations on 2 July 2019. The respondent investigated. The claimant was then suspended on 4 July 2019 and the investigation process continued following the claimant's suspension.

118. On 5 July 2019 the claimant submitted a document outlining a number of concerns, in particular concerning the care of a particular resident. This is the claimant's alleged protected disclosure for the purpose of her whistleblowing claims. The claimant's concerns were referred to Mr Parry.

119. The concerns raised by the claimant related primarily to events which had taken place on 30 June 2019. It has been pointed out that the claimant waited until after the allegations were made against her before raising her concerns. The claimant's response to that was that it was not until 4 July that she was able to speak to other staff members and understand the background and extent of the issues. We accepted her evidence on that point.

120. What the claimant reported was that on 30 June one of the residents had had a bad seizure as he had fallen out of bed. She described that when she had entered the room she had seen that the resident had fallen face down on the floor and his arm was in a bad position between two cushions which were on the floor. The cushions had been placed on the floor because it

was known that the resident could fall out of bed as it was not appropriate for cot rails to be attached to this particular resident's bed.

121. The claimant also described how another support worker had first found the resident after he had fallen but she had left him alone and went to phone for support instead of pressing the emergency aid button that would have quickly and automatically brought help. The claimant reported that she had subsequently found out that the reason why this was done was because the emergency aid button did not work. The claimant observed that that would make it difficult to urgently get help in an emergency situation. The claimant said she didn't understand why no one had reported this or why management had not fixed it if they were aware of the problem.

122. Millie Davis explained in her statement that two other support workers had already reported that the resident had fallen out of bed, his arm had become trapped in the mats on the floor and he was in distress. This occurred a few days prior to the incident reported by the claimant. As a result Millie Davis took steps to obtain advice from John Peakman which we explain below. Millie Davis was not however aware of the issue with the broken alarm button until the claimant raised it. In light of the claimant raising it was fixed.

123. The fact that other support workers had also reported the situation over the resident falling out of bed suggests to us that the claimant's concerns were genuinely and reasonably held. Plainly it supports the claimant's contention, which she found out from speaking to other staff members, that the situation had happened before.

124. The claimant identified other concerns which she said led to an unsafe environment and these related to insufficient staffing and in particular insufficient staff to help with hoisting residents who could not move themselves. These matters are not relied upon as protected disclosures.

125. In any event it was clear that the claimant's principal concern was over the resident who had fallen out of bed. The claimant said that she was shocked and upset to have seen what happened and she described the resident as being in a distressed state around the time he had fallen and had the seizure. The claimant described how the cushions on the floor had resulted in the resident becoming stuck and difficult to move.

126. The claimant identified that she was concerned that this incident could happen again and that the resident was effectively in an unsafe environment. The claimant was concerned that if he did fall out of bed again he may hurt himself more seriously; perhaps breaking his arm or twisting his neck. The claimant felt that management were not taking appropriate steps to prevent this dangerous incident from occurring. She suggested that there should be a risk assessment and guidelines put in place.

127. The claimant's understanding which she set out in her email was that the matter had been brought to management's attention, but that nothing had

been done. She had the impression that the resident might need a different type of bed but that would be expensive. The claimant understood that there were specific reasons why cot rails could not be placed in the resident's bed but she questioned why alternative measures could not be put in place to prevent him falling out of bed. The claimant described herself as being shocked to have found out from other staff members that this was a regular occurrence and she said that she was writing her complaint in effect to protect the resident.

128. The claimant contrasted the situation with the resident who had fallen out of bed with the allegation of misconduct which had been made against her. The claimant said that when she had left one of the cot sides down in a resident's bed she had left that resident in the recovery position on her side and used pillows to make it impossible for something to happen to her. This was potentially relevant information for the claimant's subsequent disciplinary case, which we think should have been properly considered as part of the disciplinary process.

129. In addition to the concerns which the claimant raised over the safety of residents the claimant also raised issues about her own alleged treatment. In particular the claimant described the incident where she was believed to have been late. The claimant alleged that Millie Davis had been unpleasant towards her and aggressively asked her if she had been late the previous week. The claimant said that she told Ms Davis the answer was no she wasn't late but Millie Davis had not believed her and she ignored what the claimant had said. The claimant went on to say that she told Millie Davis that she hadn't even been in work on the day in question. The claimant described that she had been surprised that Millie Davis had not apologised to her in light of finding out that information and that she had been left feeling upset. The claimant suggested that Millie Davis had treated her in that way *"maybe because I'm from Latvia?".*

130. The claimant went on to describe other incidents where she believed she had been mistreated and again the claimant related what had happened to the misconduct allegations which had recently been made against her.

131. Of particular significance is that the claimant described that on the night that she was accused of having left the house leaving residents unattended her colleague who she was working with on that night - Jo Peck - had left the house without telling her. The claimant had therefore assumed that Jo Peck was still in the house at the time she left. Again that information was clearly relevant to the disciplinary case.

132. The claimant sent a further email about her concerns on 7 July 2019. In this email the claimant expanded on her suggestion that she may have been mistreated because of her nationality. The claimant gave a further example of when she had recently announced that she had finished her University course and was planning to move onto a Masters degree. The claimant said that

following her announcement she was told by a colleague – Pete Gordon - that everyone was jealous of her and that that had upset her. The claimant said that Mr Gordon told her that her colleagues at Clementi Court may have seen her as a *"fat foreigner".*

133. In our view although there was a lot of different information within the claimant's two emails of complaint it was clear that she was raising a number of serious matters which merited proper attention.

134. The claimant met with Mr Parry on 16 July 2019 to discuss the concerns she had raised on 5 and 7 July 2019. We note the respondent's grievance procedure anticipates that the first step in dealing with a grievance is to have an informal meeting either with the employee's line manager or if the complaint is concerning the line manager with the line manager's manager. The respondent describes the meeting of 16 July as the informal stage of the grievance procedure.

135. Plainly there is nothing wrong in principle with the respondent holding an informal meeting with the claimant as the first step in a grievance procedure. Similarly there is nothing wrong in principle with Mr Parry conducting the meeting even though he was a senior manager as the claimant's complaints involved issues concerning her own line manager, Millie Davis.

136. However in practise we find that the meeting was badly handled by Clive Parry. As a starting point we would venture to suggest that an informal meeting at the first stage of a grievance procedure should firstly be a listening exercise where the employer attempts to understand the reasons why the employee has felt it necessary to raise the grievance and perhaps then to move onto discuss constructive ways in which the grievance may be resolved. The meeting conducted by Mr Parry however did not follow an appropriate format such as that and his conduct of the meeting was in some respects concerning.

137. The claimant covertly recorded the meeting which she had with Mr Parry on 16 July and this was the first in a number of meetings and conversations which the claimant had with the respondent and covertly recorded. In respect of this meeting the transcript of the recording was made available to the tribunal and therefore we've been able to consider that. We shall now record the relevant findings we made about the meeting:

a. By the time of the meeting Mr Parry had already completed what he referred to as "some initial fact finding" in relation to the claimant's concerns. This was not a formal investigation and it was not a process which the claimant had been involved in. Other than what was discussed by Mr Parry at the meeting the claimant had not been provided with any evidence or outcomes from the initial fact finding. Again we do not think there is anything wrong in principle with an employer doing some initial fact finding prior to an informal meeting at

the start of a grievance process. However it must be important in those circumstances to keep an open mind as to what the outcome may be following a full investigation. We regret to say that we do not believe that Mr Parry approached the matter with an open mind following his initial fact finding. This is clear from some of the views he expressed at the meeting which we record in more detail below. This is a significant matter because Mr Parry's proposal was that if the claimant wanted to progress to a formal investigation then he would investigate.

b. The meeting took place in a small room. We take into account however that an employer of this nature is not likely to have large conference or meeting rooms at its disposal.

c. What is of greater concern is that the meeting lasted for four hours and at no point during that four hours did Mr Parry take a break or even offer the claimant the opportunity of a break. The most that he did was to offer her a drink on one occasion. The respondent pointed out during the hearing that the claimant could have requested a break and she did not do so. We take that into account but we are of the view that it was inappropriate for this meeting to have lasted for as long as it did without a break and that it was Mr Parry's responsibility as the senior manager who was in charge of the meeting to ensure that breaks were taken and that the meeting was kept to an appropriate length.

d. There was a note taker present for about the first hour of the meeting but they left as they needed to pick their child up from school. We think that that would have been an obvious and natural point to call the meeting to a close. The continuation of the meeting after that for about a further 3 hours in a small room with just the claimant and Mr Parry present was in our view excessive. Our view is that the respondent's emphasis on the fact that the claimant did not request a break misses the point that this was not a meeting of equals. Mr Parry was a senior manager who was plainly controlling the meeting. In contrast the claimant was a junior colleague who was in a vulnerable position having recently been suspended on charges of gross misconduct. We accept that at points in the meeting the claimant was able to "fight her corner" but there were in our view other times when the claimant became overwhelmed.

e. During the meeting the claimant was at various stages upset and emotional. Despite that Mr Parry sought to explain to the claimant often in considerable detail and at considerable length his viewpoint on the various matters which the claimant had raised. We find that Mr Parry's conduct towards the claimant was rather overbearing and he was in effect seeking to impose his views upon her. This led to the meeting becoming unnecessarily intense and confrontational on occasion. Both the claimant and Mr Parry raised their voices at some points.

f. During the meeting Mr Parry suggested that the reason why the claimant had raised her concerns at this stage may have been because of the allegations

that had been raised against her. He developed that point at some length and the purpose appears to us to have been to undermine the claimant's complaint. Mr Parry suggested the claimant's concerns may not be genuine and he also told the claimant, quite emphatically, that she was "wrong" about some aspects of her complaint. We do not think those were appropriate views to express at an informal meeting of this nature. There had been no formal investigation of the claimant's complaint by this stage and no outcomes had been provided to the claimant. Mr Parry's views did not suggest that a neutral investigation would take place.

g. Mr Parry was also critical of the claimant for not reporting her concerns over the resident falling out of bed sooner. This related to the gap between the 30 June and 5 July. The claimant said it would have been her colleague's responsibility to write this down as it was the colleague who had found the resident on the floor and the claimant had in effect been supporting her after that discovery. Mr Parry disagreed and told the claimant it was also her responsibility. Mr Parry effectively warned the claimant that if the matter was investigated and it was found that it hadn't been reported properly then the respondent would need to take action. Mr Parry therefore suggested that the claimant should think carefully about what she wanted to do.

h. Mr Parry did not directly address the claimant's concerns that she could have been treated differently due to nationality and that she had been told she may be perceived as a "fat foreigner". However, the factual content of the claimant's complaints – relating to jealousy over her degree and Millie Davis' approach to the allegation of lateness – was discussed.

i. In respect of the allegation about Millie Davis' approach to the allegation of lateness Mr Parry asked if there were any witnesses. What the claimant first said was that she didn't know who was there but there were other people on the shift. The claimant then specified that Jo Peck was a witness to what had gone on. Despite that there is no evidence that Jo Peck was ever asked about what she may have witnessed.

j. In relation to the issue around jealousy over the claimant's degree Mr Parry suggested that there was nothing he could investigate, as the claimant was describing a feeling of not being accepted.

k. During the meeting Mr Parry appeared to robustly defend Millie Davis and/or offer mitigation for any mistakes she may have made. Mr Parry suggested that Millie Davis was quite nervous due to the fact of her being new in the job, that she was still relatively young and that she had taken on a massive challenge. Mr Parry indicated that he would never be able to prove that Millie Davis spoke abruptly to the claimant over the lateness issue and that she had not done anything that was even arguably serious. Again we consider it was not appropriate for Mr Parry to express those views at an informal hearing when there had not been any formal investigation or outcome communicated to the claimant.

l. Mr Parry raised that the claimant may have made a medication error in relation to a resident. This had not been raised previously and it was not one of the 3 allegations which the claimant had been suspended over and which were being investigated. Nevertheless Mr Parry said it may be that the claimant would be asked about it in the investigation. We can understand how the claimant was worried about this further allegation being introduced without any notice. It appears that it was not in the end investigated as Mr Parry had suggested it would be.

m. Mr Parry identified that the most serious thing which the claimant had raised was about finding the resident who had fallen out of bed. However he went on to tell the claimant that if he were to investigate that he would be able to prove that the managers did know about it and that they were doing something about it. He told the claimant that he thought the investigation would not substantiate the concern that she had raised that management knew and had done nothing about it. Mr Parry said that the investigation would not prove that because he already had evidence to show otherwise.

n. Mr Parry returned to his point that the incident had not in his view been properly recorded. He told the claimant that the investigation would find that all the staff who knew about the incident and didn't record it were at fault. The claimant was told that would include her and Kat Morgan. Mr Parry developed that point at some length and made it clear to the claimant that the investigation could criticise the people who knew about the incident but didn't properly record it at the time. Mr Parry again encouraged the claimant to go away and think about what she wanted to do in light of this. He suggested the claimant should read her letter to herself and then ask herself what she wanted him to do about it. Mr Parry made it clear that he was asking the claimant to think about that because if a full investigation would take place it would find the claimant *"guilty"* as she hadn't recorded the incident properly.

o. Similarly Mr Parry developed his theme that it looked as though the claimant had raised her concerns in response to the allegations that had been made against her. Mr Parry said he couldn't prove that but the timing was "*really interesting, unfortunate and difficult".*

p. We found it difficult to see Mr Parry's conduct in these last three respects as anything other than Mr Parry seeking to dissuade the claimant from taking her complaint further.

q. Mr Parry made it clear to the claimant that he took the view that some of the things that she said would be very hard to substantiate and very hard to prove particularly as he believed it would amount to her word against Millie Davis'. This was a reference to the claimant's belief that Ms Davis had spoken to her rudely over the lateness issue. Mr Parry had not taken on board that there was a potential witness to this incident (Jo Peck). In his witness statement Mr Parry described that he did not view this as a significant incident and he did

not consider it was worth taking forward to a formal investigation. That view was obvious from what he said to the claimant at this informal meeting.

r. Notwithstanding the views he expressed Mr Parry said that if the claimant said she wanted her complaint investigated formally he would do so and he hadn't made any decisions. We take that indication into account but we think it must be pointed out that the claimant can hardly have been confident that Mr Parry would undertake an open minded investigation in light of the views he had expressed during this meeting.

s. Considering in particular the points made by Mr Parry about what would happen if the claimant progressed the matter, which we have summarised above, we concluded that his overall approach was an attempt to dissuade the claimant from taking her complaint further.

138. Although Mr Parry suggested that the claimant was wrong to have raised some parts of her complaint he indicated that she was right to have raised other aspects of it. For example Mr Parry told the claimant that she was right to have raised the issue about the emergency call button not working and that as a result of the claimant's complaint that was going to be fixed. On any view therefore there were aspects of the claimant's complaint which reflected genuine and reasonably held concerns.

139. After the meeting Mr Parry wrote to the claimant on 17 July 2019. In this email Mr Parry recorded some of the things that had been discussed at the meeting. He again said that if the claimant still wanted there to be a formal investigation he would do so.

140. The claimant responded to that email on 25 July to say that she did not believe Mr Parry's email was a true reflection of what was said at the meeting. Mr Parry responded to ask the claimant in what way she felt his email was not accurate. The claimant did not respond to that. Instead she raised a complaint about Mr Parry's conduct of the meeting, which we describe below.

141. Also on 17 July 2019 John Peakman of the Worcestershire Health and Care NHS trust wrote to Millie Davis about issues concerning the resident who had fallen out of bed. It appears that Mr Peakman was involved in advising the respondent how the care of this particular resident could best be managed. In his email Mr Peakman said that the resident's bed did not drop close enough to the floor which meant that there was a need for crash mats and also for foam protectors on a chest of drawers. Plainly those were measures to be put in place in an attempt to protect the resident if he did fall out of bed again. Mr Peakman said however that he did not see how it would be possible to make the resident's bed safe. He recommended that there was a need to look at beds that would go closer to the floor than the current bed and it was agreed that there would be an attempt to source funding for a new bed and a full assessment should be undertaken in order to achieve this.

Millie Davis subsequently agreed that an assessment would be appropriate so that funding could be obtained.

142. In our view Mr Peakman's email tends to support the claimant's suggestion that the resident's health and safety was potentially being endangered by the situation around his bed. Although the claimant would not have known Mr Peakman's position when she wrote her email the fact that he had many of the same concerns as the claimant would suggest that her concerns were genuinely and reasonably held.

143. Following Mr Parry meeting with the claimant on 16 July he met with Gail Beasley who was investigating the disciplinary allegations against the claimant. Mr Parry told Gail Beasley that his view was that there was a "toxic culture" at Clementi Court which needed to be addressed. The specific allegation which the claimant had made about being seen as a "fat foreigner" was discussed. It transpired that Ms Beasley had spoken to Pete Gordon about that and he had agreed that he had speculated that the claimant may have been seen as a "fat foreigner". We have not had any evidence from Ms Beasley and her discussion with Mr Gordon does not appear to have been recorded in any way. According to Mr Parry Mr Gordon had not elaborated on why he had said that.

144. The fact that Ms Beasley had confirmed with Mr Gordon what he had said was never fed back to the claimant and it did not form part of Ms Beasley's investigation report.

145. On 25 July 2019 the claimant raised her complaint about what happened to her during the meeting with Mr Parry on 16 July. The complaint was in writing and it was handed over to Gail Beasley in a meeting.

146. In her written complaint the claimant pointed out firstly that the meeting had been four hours long. The claimant said that she had been confused about the purpose of the meeting to begin with and that Mr Parry had argued with her over her concerns about the resident falling out of bed.

147. The claimant said that when she had tried to speak Mr Parry had sharply and aggressively said that he was going to talk. The claimant described how she felt she had been put under pressure by Mr Parry and she said that she felt humiliated by the fact that Mr Parry had suggested that she'd only raised her concerns because of the allegations that had been made against her. The claimant explained that she had decided to make her complaints in light of finding out that it was known that the resident regularly fell out of bed but nothing was being done about it.

148. The claimant reported that she had been told by Mr Parry that it was only her word against that of Millie Davis. The claimant pointed out that Mr Parry had ignored the fact that she had identified Jo Peck as a witness.

149. The claimant also identified that Mr Parry had asked her to be understanding towards Millie Davis, despite the fact the claimant was accusing her of bullying, as he had described that she was a young woman who had been given a massive responsibility and a massive challenge.

150. The claimant said that she had been left upset to the point of feeling ill as a result of the pressure she felt was applied to her in the meeting and that she'd been to her GP who had recorded her high anxiety levels and blood pressure. The claimant said that she'd been placed under huge stress.

151. The claimant also said that she hadn't understood why Mr Parry had raised a possible medication error, and she had come to the conclusion that that was a threat.

152. In light of our findings of fact we observe that there was some substance to the points which the claimant raised concerning Mr Parry's conduct of the meeting on 16 July.

153. As part of her 25 July complaint the claimant included an excerpt from her earlier complaints. The particular excerpt which the claimant included referred to her allegation that she may have been mistreated by Millie Davis as she is Latvian and also the reference to her colleagues viewing her as a "fat foreigner".

154. Plainly in this letter the claimant was drawing attention to some important parts of her earlier complaints and emphasising her expectation that they would be dealt with. The claimant was also saying that she felt there was a witness to the part of her complaint which referred to Millie Davis. We think this should have made it clear to the respondent that a proper investigation was possible, expected and necessary in the circumstances. The claimant was also raising a number of serious complaints about the treatment of her by Mr Parry.

155. We accept the claimant's evidence that Gail Beasley informed the claimant that her complaint would be passed to HR. We think it is more likely than not that Ms Beasley did pass on the complaint to HR on or shortly after 25 July. Despite that however the claimant's complaint was not acted on.

156. The claimant had a telephone conversation with Mandy Russell, who was her designated support person/point of contact, on 12 August in which she raised concerns about her complaint of 25 July not being responded to. Mandy Russell informed the claimant that her complaint had been sent to HR and that Joanna Malala would be dealing with it. The claimant was informed that due to the sensitivity of her complaint it would be looked at "in depth".

157. On 28 August 2019 the claimant had a further conversation with Mandy Russell in which she was assured that she would receive an official response from the HR Department.

158. By 22 September 2019 the claimant had still not heard anything about her complaint. The claimant emailed Joanna Malala saying that she wished to formally raise her concerns through a grievance in accordance with the respondent's procedure. The claimant said she understood there would be a grievance meeting in which she could discuss her concerns. The claimant also emailed Mandy Russell to say that she had had an appointment with ACAS and that she'd come to the conclusion that she needed to raise a formal grievance directly to HR. The claimant therefore asked for her grievance of 25 July to be treated as a formal grievance and sent to the right person who could deal with it in a professional manner.

159. There should have been no need for the claimant to have to take these additional steps to try and get her complaint heard. It was clear from the 25 July communication that the claimant was raising serious issues which ought to be dealt with. The claimant had already had to chase her complaint as described above.

160. A response was sent to the claimant on 25 September by a HR Officer, Joanna Malala. That said her letter of 22 September had been reviewed in line with the previous concerns raised on 25 July and the concerns the claimant had raised on the 5 and 7 July. It was pointed out that the claimant had raised her concerns on 25 July with Ms Beasley. HR had apparently said they had provided advice to Ms Beasley which was to confirm to the claimant that her concerns would need to be raised in a different forum as she had raised them in an investigation meeting. However it appears there had been some failure of communication as that HR advice was never provided to the claimant.

161. Joanna Malala's letter also said that the claimant would have been expected to respond to Clive Parry with any items that she was dissatisfied with as that was what he had requested in his email on 25 July.

162. The claimant was informed that the disciplinary hearing which was then scheduled to take place on the 27 September to be heard by Clive Parry was going to be rescheduled with a different decision maker. The letter concluded by saying *"I trust that the rearrangement of the disciplinary hearing will satisfactorily resolve your formal grievance dated 22 September 2019".*

163. The claimant was asked to get into contact by 2 October 2019 if that was not the case and she would like to pursue any further elements of her formal grievance. The claimant did that.

164. Gail Beasley produced her investigation report on 28 August 2019. The investigation report recorded that there was insufficient evidence to support the first allegation. However the investigation report found that there was sufficient evidence to support the second and third allegations. The recommendation was therefore that the matter proceed to a disciplinary hearing.

165. In relation to the allegation that the claimant left the house and left residents on their own it was not in dispute that the claimant had left the building around the time her shift finished at 10:00 PM and that there was no other support worker present at that time. However, the investigator identified two significant mitigating circumstances. Firstly that the claimant had believed that Jo Peck was still in the building at the time she left. Secondly that the claimant had been on shift since the previous day at 3:00 PM.

166. The investigator recorded her findings about Jo Peck as follows. Jo Peck had left the building shortly before the claimant left at around 9.50 PM. Jo Peck left the house that the claimant and herself were working in in order to go to the other house which was part of Clementi Court (they are two separate houses which are not physically connected). Jo Peck had accepted during the investigation that she had called out to the claimant before she left but as the claimant was in another room and did not reply she was not sure if the claimant had heard her or not.

167. Jo Peck's evidence therefore directly supported the claimant's explanation that she had been unaware that Jo Peck had left the building.

168. In relation to the allegation over leaving a bed rail down it was accepted by the claimant that she had left the top part of the resident's bed rail down and that she was aware of a risk assessment and support plan which specified that the bed rail should be left up when the resident is in bed.

169. As mitigating circumstances however the investigator identified that it was a very hot day and the claimant believed she had made the resident safe and comfortable by putting only the top side of the rail down so that the resident could have the benefit of a fan being placed on them.

170. It should also be noted that in the investigation meeting on 18 July 2019 the claimant explained that she had put the resident in the recovery position and placed her pillow between her legs and in her opinion that meant it was not possible that she could have rolled out of the bed. This was consistent with what the claimant had said in her email of 5 July. However, the investigation does not appear to have specifically considered the claimant's assertion that it was not possible for the resident to have rolled out of bed. This could have been investigated by considering the mobility of the resident and the positioning of the other rails and the pillows.

171. In addition to the investigation report the tribunal also had a further document before it which was produced by the respondent's investigator, Ms Beasley. This is a one page document which sets out recommendations relevant to the investigation ("the recommendations document"). It is relevant to the disciplinary decision; it summarises the findings of the investigation and also identifies a number of points which the investigator considered could be mitigation. Some of the potential mitigation points contained in the recommendations document were not identified in the investigation report.

172. On a fair reading of the recommendations document it is helpful to the claimant – perhaps more explicitly so that the investigation report itself. The investigator's view that a sanction should be given is recorded but the investigator did not specify what sanction she considered may be appropriate. Dismissal is not mentioned, even as a possibility, and neither is gross misconduct.

173. The recommendations document was not provided either to the claimant or to the disciplinary decision maker. It is an obvious area of concern that a document produced by the investigator in relation to the disciplinary process which was relevant and seemingly supportive of the claimant was apparently withheld.

174. We did not have any evidence from the respondent as to why the recommendations document was created separately to the investigation report but the fact that the document identifies mitigation strongly suggests that its purpose was to inform the disciplinary decision. We therefore conclude that it was intended to be available to the disciplinary process.

175. The relevant information included in this document which we consider the claimant and the decision maker should have been made aware of included the following:

a. That the investigator considered that the failures in relation to the first allegation were a collective responsibility and that other staff were also at fault.

b. In relation to the second allegation that there were "circumstances that led [the claimant] to think that [Jo Peck] was in the building" and that "all staff" should ensure they do a handover and leave a shift "face to face". Communication needs to get better with this with "all staff".

   The finding that there were circumstances which led the claimant to believe that Jo Peck was still in the building was obviously relevant and in the claimant's favour. It is not a finding which is explicitly recorded in the investigation report.

   The points about the need for better communication about handovers and a need for "all staff" to do a handover and leave a shift "face to face" were potentially significant. It is unclear if the respondent had a formal handover procedure for staff leaving the building or ending a shift. The claimant was not alleged to have failed to comply with a specific handover policy (although it is obviously best practice to do a handover). The investigator's references to "all staff" appear to suggest that it was not just the claimant who had failed to do a handover. Particularly when read in conjunction with the investigator's belief that the matters the claimant was being disciplined for had happened before but not been reported (we consider this point further below).

The actions of Jo Peck and the apparent lack of any clearly communicated procedures around handover/leaving the shift were in our view matters which were clearly relevant to the disciplinary decision. The way in which the recommendations document is written implies these matters should have been considered as points in the claimant's favour.

c. In relation to the third allegation that the claimant had made an "error of judgement" and left the resident vulnerable but this was to keep the resident cool on a hot day and the investigator advised that a support plan or guideline should be put in place as to the use of the bed rail.

   Again the investigator was expressing herself in a way which appeared sympathetic to the claimant on these points. The reference to the need for a support plan or guideline might suggest that the procedures which were in place were not sufficiently clear or detailed. We note that the claimant herself suggested that a guideline should be in place as to how to care for the resident on a hot day. It might be the case that the investigator was referring to a need for guidelines over whether part of the rail could be left down, as the claimant had done. We do not wish to speculate too much but we mention these matters as we think this was a recommendation which merited further consideration or investigation to see how relevant it may have been to the claimant's case.

d. The investigator identified that the claimant had done a lot of shifts that weekend.

e. Ms Beasley's belief that the matters which were reported about the claimant on the weekend of the 29 June had happened before but were not reported, and that this has made the claimant feel "victimised". We consider this point in more detail below.

176. In addition Ms Beasley recorded a number of other issues which had come up during the investigation which she said concerned her. These included that the comment had been made to the claimant about her being perceived as a fat foreigner, and this had confirmed the claimant's view that she was not included or respected.

177. It is not immediately clear how the other issues recorded by Ms Beasley may have been relevant to the claimant's case. However Ms Beasley had obviously thought they might be relevant as she had decided to do some investigation into them (for example by speaking to Pete Gordon). Ms Beasley was never tasked with investigating the claimant's grievance; she was only appointed as investigator to the disciplinary case. That being the case we think it was incumbent on the respondent to clarify how these matters may have been relevant to the disciplinary. We do not think there was any reasonable justification for not informing the claimant of what the investigator had found.

178. The apparent finding in the recommendations document that the matters which the claimant was being disciplined for had happened previously but not been reported was not mentioned at all in the investigation report. However it is our view that this matter was plainly potentially relevant to the disciplinary decision. In short if there was any truth to the suggestion that the claimant had been victimised (which we take to be meant in the sense of being singled out) then this may affect the decision of whether it was appropriate to dismiss. A reasonable decision maker would have to weigh up whether it was appropriate to dismiss the claimant for things which had been done previously but not reported. The obvious implication is that there were no disciplinary proceedings in respect of the unreported issues as this has led to the claimant feeling singled out. Accordingly what is being referred to is a potential issue of inconsistency. This is the most likely explanation for the investigator's reference to the claimant feeling victimised.

179. We observe that the allegations the claimant faced were raised at the very point that the region was going through the culture change which we described above. Mr Parry was plainly implementing a new approach with a particular emphasis on proper reporting and formal procedures. In that context we think it was reasonably necessary for the finding of potential inconsistency to be explored further.

180. We note that the reference to matters that have happened before but not been reported had at least two possible meanings. Firstly it could have meant they had happened and management were aware but they had not been reported through the proper channels. As we explained above Mr Parry had already found that matters which should have been reported through the prosper channels were not and there was a much greater emphasis on doing so after he took over responsibility for the region. Secondly it could have meant they had happened and not been reported by staff to anyone, including management. In this scenario it would be important to understand who was aware and how and why matters had not been reported to a managerial level. It could have been the case that senior support workers were aware for example. Again we do not wish to speculate but we think that any reasonable employer would have at least clarified what Ms Beasley meant, then provided the findings and allowed the decision maker to consider how they might be relevant to the disciplinary decision.

181. We did not receive any evidence about why the recommendations document was not provided to either the disciplinary decision maker or the claimant, or indeed why it was not simply provided as part of the investigation report. Nevertheless counsel on behalf of the respondent suggested it must not have been provided for two reasons. Firstly that the investigator had gone outside her remit by recommending a sanction. Secondly that a number of the points contained in the document were irrelevant. In our view neither of those possible reasons provides a reasonably satisfactory explanation.

182. Ms Beasley had not recommended a specific sanction; all she had said was that a sanction in her opinion should be given. It is difficult to see how merely expressing that view could justify suppressing these recommendations. Given the potential relevance of the recommendations the reference to a sanction could easily have been redacted or removed.

183. In respect of the relevance of the mitigation factors it seems to us that a number of the points were plainly at least potentially relevant. A number of others may have had little or no relevance but their relevance or otherwise should be a matter for the decision maker to reach a decision on and, importantly in our view, the claimant should have had the opportunity to make representations based on the investigator's findings as to what she considered mitigation. We emphasise that the recommendations document was not just making suggestions as to the respondent's procedures or practices generally; it was making points which were directly and specifically relevant to the claimant's disciplinary case.

184. We think it is an important part of a fair investigation that the investigator identifies not only matters which support a finding of misconduct but also matters which may amount to mitigation for that misconduct. We do not think it was fair or reasonable for the respondent to withhold a document which set out the investigator's findings as to possible mitigation.

185. We should also record that counsel on behalf of the respondent also submitted that a number of the points in the document produced by Ms Beasley appear to be unsubstantiated. In particular it is not explained how Ms Beasley reached a conclusion that instances similar to the ones which were reported against the claimant had happened before but had not been reported. We have not had the benefit of Ms Beasley appearing as a witness in front of us so we are not in a position to understand how she reached those conclusions. However it seems to us that as the investigator appointed by the respondent had reached those conclusions the onus would be on the respondent if they felt they were unsubstantiated to establish how and why its investigator had made those findings. We think any reasonable employer would have at least sought to clarify how the investigator had substantiated her findings rather than withholding the document and not even referring to this particular finding.

186. On 30 September 2019 the claimant was invited to a disciplinary hearing to take place on 7 October 2019. The claimant was warned that if the allegations were found proved they would constitute gross misconduct and could result in summary dismissal. The disciplinary was now to be heard by Linzi Selby.

187. On 2 October 2019 the claimant responded to Joanna Malala on the issue of her grievance. The claimant said she wanted to make it clear that her grievance of 22 September was exactly the same as the one she raised on 25 July to which she had not had any response. The claimant said it was a result

of that that she had been advised by ACAS to specify that she was making a formal grievance.

188. Regarding the suggestion that the claimant should have raised her concerns with Clive Parry directly the claimant explained that she was advised by Ms Beasley that she should put in an official complaint to the effect that she did not agree with what Mr Parry had done. The claimant at this stage specified that she would like a formal grievance meeting rather than an informal one. She referred to the delay in dealing with her complaint so far.

189. The respondent responded to say that they would be in touch with proposed grievance hearing date. The respondent organised a grievance hearing to take place on 1 November 2019 and they wrote to the claimant confirming that the hearing would be heard on that date on 30 October. The respondent also attempted to phone the claimant on 31 October. The claimant did not attend the grievance hearing on that date and it did not take place. By that stage however the claimant had been dismissed for several weeks.

190. It is in our view highly unfortunate and unsatisfactory that the respondent did not arrange a grievance hearing prior to the claimant's dismissal.

191. The disciplinary hearing went ahead as planned on 7 October 2019. The disciplinary manager did not uphold the first allegation but considered that allegations two and three were proven. In reality the facts of those allegations were not in dispute but they had to be considered in context of the potential mitigation points in the claimant's favour identified by the investigator and expanded upon by the claimant.

192. In relation to the second allegation, at the disciplinary hearing the claimant said that Jo Peck had medical issues which meant she had to go to the toilet a lot whilst on shift. The claimant suggested that it was quite common not to be able to find her and she would feel uncomfortable going up to the toilet and talking through the toilet door to check that Jo Peck was in there. Nevertheless the claimant accepted that she had left the premises without 100% knowing someone was actually in the building.

193. The claimant emphasised however that Jo Peck had not let her know that she was leaving the building and she had no reason to believe that she had left. The claimant suggested that it was bad practise for Jo Peck to have left without saying anything. This was consistent with Jo Peck's own evidence that she left without being sure if the claimant heard her and that at the time she left the claimant was not visible to her.

194. There has been some debate over who left the building at what time. The next shift did not meet the claimant when she was leaving so it must have been the case that either they were slightly late or the claimant left slightly early. The claimant was not dismissed on the basis that she left early. We think that was the right decision because there was no conclusive evidence

either way and the timings involved were not substantial. It was clear that the residents had been unattended for a period of a few minutes only.

195. The decision maker accepted the point that the claimant had been on shift for a long time.

196. In relation to the third allegation the claimant again confirmed that she was aware of the relevant guidelines and risk assessments. It was clarified that there were four separate bed rails around the resident's bed and that the claimant had left one rail down which was the top rail on one side of the bed.

197. The claimant said that she believed the resident was safe and that she was being kept comfortable as the fan could be directed on her as a result of the rail being down. The claimant again said that she had put the resident in the recovery position and she said that in light of that there was not even a 1% chance that anything could happen. At a later stage the claimant clarified (which we think was obvious anyway) that by referring to not even a 1% chance that anything could happen she meant that it was impossible that the resident could fall out of bed.

198. It was also established that the claimant had only left the resident with the rail down for a short period of time while she went to fetch a neckerchief from outside the room. This was an obvious point in the claimant's favour.

199. The claimant further said that the resident herself had said that she wanted the cot rail down. This point was not taken to be in the claimant's favour however as the resident was not in a position to understand the consequences of having the rail down. The claimant admitted that she had been in the wrong and said she felt guilty. She said that she would not do it again.

200. Notwithstanding the above points the conclusion was reached that the claimant's actions had posed a serious risk to the health and safety of the persons who the respondent supports and created a safeguarding risk. The decision was taken to dismiss the claimant summarily for gross misconduct. The decision was confirmed in writing and the claimant was given the opportunity to appeal.

201. The decision maker took into account the claimant's length of service which at that point was more than seven years but concluded that her actions were not consistent with the practises of an experienced support worker.

202. In relation to the second allegation the decision maker found that the claimant had been in breach of a specific regulation which stated "you will support people to keep their homes secure". The decision maker found that by leaving the site without ensuring that another colleague was in attendance the claimant had failed to meet this requirement.

203. There does not appear to have been much analysis of the fact that Jo Peck had left the building without informing the claimant. In the investigation Ms Peck had accepted that she had not seen the claimant when she left or ensured that she'd been heard when she shouted out. The reality was therefore that the claimant had left believing that Jo Peck was still in the building because Jo Peck had failed to communicate with the claimant before she left. However, the tribunal were informed that no disciplinary action at all (no sanction and no investigation) was ever taken against Jo Peck in relation to her actions. Moreover, it does not appear that the decision to dismiss took account of the fact that Jo Peck's actions directly contributed to the situation where residents were left unattended.

204. In relation to the third allegation the circumstances which the claimant had described were effectively accepted. In other words it was agreed that it had been a hot day and the claimant had left one of the four cot sides down in order to enable the residents get the full benefit of the fan which was placed near the bed. It was also accepted that the resident had been placed in the recovery position and that there was a pillow placed between their legs. It was further accepted that the claimant was only away from the room for a very short period of time while she fetched a neckerchief.

205. No investigation had been done into the point raised by the claimant which was that placing the respondent in the recovery position and positioning a pillow meant it was not possible for her to come out of the bed when only one of the four rails was down. The decision maker had no personal knowledge of the resident's mobility and how the claimants actions may have restricted her mobility. Her decision was based on the claimant's failure to follow the risk assessment and support plan, and the assumption that created a risk to the resident's health and safety on this particular occasion.

206. As with all the people who the respondent looks after the resident had disabilities and mobility issues. In her witness statement Millie Davis said that the resident "can self-mobilise a little bit so with her cot sides down, she could have rolled out of bed and hurt herself". This was not information that the disciplinary decision maker was aware of however. Moreover, it is not supported by any other evidence and is contradicted by the claimant's evidence. It also appears that Millie Davis was referring to the resident potentially being able to roll out of bed with more than one cot side down ("sides"). She does not specifically address the likelihood of the resident being able to roll out of bed with one part of one cot side down which was what the claimant did. She also does not say anything about the claimant's evidence as to the position she left the resident in and the placement of the pillows. In those circumstances we could not conclude from Millie Davis' evidence that the resident was in fact able to roll out of bed when she was left by the claimant.

207. The claimant appealed against her dismissal on 15 October 2019. As part of her written appeal the claimant effectively drew attention to the mitigation points which she relied upon.

208. In relation to the second allegation the claimant pointed out that she had been working extra shifts on the days leading up to this incident and in particular that she had been working from 7:00 AM till 10:00 PM for 3 days and had also had a sleep in shift. The claimant said that had affected her decision making.

209. In relation to the third allegation the claimant again emphasised that it was only one of the four cot sides which had been left down and that had been done because it was extremely hot and so that the resident could have the benefit of a fan. The claimant again emphasised that she had left the resident in the recovery position and had placed a cushion between her legs. She did not dispute that she was aware of the risk assessment but she pointed out that that did not cover what should be done in situations of hot weather. The claimant clarified that her position was that there was not even a 1% chance of an accident in light of the actions she had taken, i.e. it was impossible.

210. The claimant's appeal hearing was arranged for 17 December 2019. However on 16 December the claimant confirmed that she would not attend the appeal and she understood it would proceed on the basis of her written submission. The claimant's reasoning for not attending was based on what she described as her bad experiences since July.

211. The respondent's appeal manger was Keith May. The claimant's email of 16 December was forwarded to him by HR on the morning of 17 December and he responded as follows:

"This is really annoying, as I have just got to Worcestershire. I would say that she clearly states she will not be attending this afternoon, the only part of the gibberish that is clear. Should she turn up at the service, I will not be holding any meeting with her."

212. Mr May did not give evidence and it is unclear to the tribunal why he appeared so hostile to the claimant in this email. It was not fair to characterise the claimant's email as *"gibberish"* and there could have been no reasonable justification for refusing to meet the claimant if she had attended.

213. In any event on 17 December 2019 Mr May considered the claimant's appeal against dismissal in her absence and he decided that it would not be upheld. The appeal decision was sent to the claimant on 20 December 2019. Mr May's reasoning in the appeal outcome letter as to why he was not upholding the appeal was brief. Mr May said that he felt it was clear that the claimant had understood her responsibilities and the risks which she needed to manage and that the right decision had been made in terms of the

disciplinary outcome. It is not clear that the claimant's appeal grounds were specifically considered.

214. In all the circumstances we did not feel that this was the type of appeal where we could conclude it had the effect of remedying any defects earlier in the process.

215. A grievance outcome was sent to the claimant on 12 March 2020. The respondent's grievance decision maker was Sarah Cast. In her outcome letter Sarah Cast said that she had been appointed to hear the grievance on 10 October 2019 (i.e. after the claimant had been dismissed). Ms Cast described attempting to contact the claimant between 14 October and 1 November, when the grievance hearing was originally scheduled for. The outcome letter does not explain why the hearing did not take place in the claimant's absence on 1 November 2019 nor why it had then then taken until 12 March 2020 for an outcome to be sent to the claimant.

216. Accordingly, the grievance decision was suddenly sent to the claimant more than 5 months after the hearing was meant to have taken place without any explanation. Ms Cast did not suggest that she had attempted to contact the claimant at any stage between 1 November and 12 March. It is unclear if a grievance hearing actually took place in the claimant's absence in March 2020 or what was done to enable Ms Cast to produce an outcome in March 2020.

217. The grievance outcome letter deals with the concerns that the claimant had raised about the conduct of Mr Parry in some detail. In short however the decision maker concluded that Mr Parry had not behaved inappropriately at the meeting on 16 July.

218. Ms Cast also identified that the claimant had raised concerns about how Ms Davis had spoken to her and suggested this may be because she was from Latvia and also that her colleagues viewed her as a "fat foreigner".

219. In respect of Millie Davis Ms Cast referred to information she had provided to Mr Parry as part of his initial fact find denying that she had been rude to the claimant. Ms Cast concluded that there was "no evidence" to support the suggestion that Millie Davis had treated the claimant inappropriately. In reaching that conclusion Ms Cast did not specifically refer to the possible witness - who was Jo Peck – and it is therefore unclear if she spoke to her.

220. In respect of the "fat foreigner" comment Ms Cast said that the claimant had not provided her with any details or evidence to support the allegation and therefore she could not make a finding on it. Again Ms Cast does not explain whether she has spoken to Pete Gordon and it appears she may have been unaware of Ms Beasley's finding that Pete Gordon had in fact said the "fat foreigner" comment.

221. In light of her findings Ms Cast's decision was that she did not uphold the claimant's grievance. We think the claimant's grievance issues would have received more careful consideration, including formally interviewing the relevant witnesses, had the grievance process taken place while the claimant was still employed. This makes the respondent's delay all the more regrettable.

222. Following her dismissal the claimant applied for other jobs in the care industry and the respondent was asked to provide references. An example of the type of reference sent by the respondent could be seen at page 566. This was the reference sent by Mr Parry to Rehability UK on 9 January 2020 and the claimant alleges this was a detriment for her victimisation claim. In the tribunal's view however the reference is entirely unobjectionable – it simply records the claimant's role, her length of service and her reason for leaving.

223. The claimant also used the services of a recruitment consultant, Daisy Atkins. It is unclear if Daisy Atkins was a recruitment consultant acting on behalf of Rehability UK or another potential employer. Daisy Atkins emailed the claimant as follows: *"I have been in touch with the house managers and they have let me know that given the on-going investigation into your dismissal from your last role we are unable to interview you at this time. Please do keep in touch with us once you have the result of the tribunal, and we will happily reconsider you for the role then".*

224. The claimant relies on this email as evidence that the respondent provided information to Daisy Atkins and that by doing so they subjected her to a detriment which amounted to victimisation. We have been unable to clearly discern from this email what information, if any, the respondent actually provided to Daisy Atkins. It is unclear who the "house managers" referred to are but it seems likely that they are managers in the new prospective employer rather than anyone at the respondent (as they appear to have made the decision not to interview the claimant). It is also unclear what is meant by the "ongoing investigation" into the claimant's dismissal. As far as we are aware that was no ongoing investigation after the claimant had been dismissed. It seems this may refer to the tribunal process as the decision being communicated by Daisy Atkins appears to be that the prospective employer is only willing to interview the claimant once the result of the tribunal case is known. We think the most we could infer from this email is that somebody at the respondent may have told Daisy Atkins that the claimant had brought a tribunal case arising out of her dismissal and the outcome of that was not yet known. If that was the information passed on then it too was factually accurate and, in our view, unobjectionable.

The relevant law in relation to time limits and our approach to them in this claim

225. The date before which any issue viewed individually is out of time is 14 July 2019. This means the complaints relating to the claimant's dismissal are in time.

226. Section 123 Equality Act 2010 states:

> *123 Time limits*
> *(1) Subject to sections 140A and 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.*

227. The claimant relied on there being a "continuing act" - in the sense that the individual acts she is complaining of should be viewed as sufficiently similar to constitute conduct extending over a period.

228. The effect of the claimant's argument is that she says that the acts which occurred prior to 14 July 2019 should be treated as part of the same course of conduct as the acts occurring afterwards and therefore all acts of discrimination are in time. This argument can only succeed if we find there are acts of discrimination which are in time.

229. The respondent disputes that the acts complained of by the claimant can be classed as a continuing act.

230. We think it is appropriate to focus firstly on the allegations which are in time. The in-time allegations include the allegations relating to the claimant's dismissal and matters occurring from the meeting on 16 July onwards. Therefore on any view they incorporate the most important matters in this claim. If we uphold any of the allegations which are in time, we will consider whether there has been a continuing act.

231. If we do not uphold any of the in-time allegations (or we find there has not been a continuing act) we will consider whether there should be an

extension of time on just and equitable grounds. If we conclude in the claimant's favour on that point then we will consider the out of time allegations in detail.

Our conclusions on the claimant's claims which are in time

232. We reached these conclusions based on our findings of fact set out above.

Disclosure on 5 July 2019

233. We find that the claimant did make a protected disclosure on 5 July 2019:

a. The claimant did disclose information.

The information included that the resident had fallen out of bed, that he had had a seizure, that he had become stuck in the cushions that were positioned on the floor, that he was distressed and that the emergency call aid button was not working. The claimant also disclosed that this had happened before and management were not doing anything to prevent it.

b. The claimant reasonably believed that the disclosure of information was made in the public interest.

The proper care of residents is a clear example of a matter in the public interest and we are satisfied that the claimant reasonably believed she was making the disclosure in the public interest. We were satisfied that the claimant had a genuine concern for the resident who fell out bed. We noted that at the meeting on 16 July the claimant challenged Mr Parry over his insinuation that she was not genuinely concerned. We think this reflected real surprise by the claimant that Mr Parry may have thought that. We do not consider the claimant was acting to serve any private or personal interest.

c. The claimant reasonably believed that the disclosure tended to show that the health or safety of the resident who fell out of bed had been, was being and/or was likely to be endangered.

The claimant had observed the resident on the floor having fallen out of bed and the distressing aftermath of that herself. We felt it was clear that what the claimant witnessed and then described in her disclosure tended to show that the health or safety of the resident had been, was being and/or was likely to be endangered. The resident falling out of bed, having a seizure, becoming stuck in the cushions, being distressed and the emergency button not working were all matters which tended to show the resident's health and safety had been endangered. In our

judgement the claimant reasonably believed that when she wrote her disclosure.

The claimant had spoken to other staff members to establish that this was an ongoing issue. The claimant therefore had a reasonable belief that this was the case. We note that the issue was in fact ongoing and serious and this is demonstrated by the fact that other staff members had reported it to Mille Davis, the involvement of John Peakman and the contents of his email.

We do not think that the evidence that the respondent was doing something about the issue, i.e. by placing cushions on the floor, can possibly be said to have negated the claimant's reasonable belief that there was a health and safety risk. This is because part of the information the claimant disclosed was that the actions taken by the respondent of placing cushions on the floor was actually contributing to the health and safety risk as the resident had become stuck in them.

Detriments

234. The claimant was suspended from work on 4 July 2019 until her dismissal on 7 October 2019. This was a detriment, but it was not done on the ground that the claimant made a protected disclosure. The respondent has satisfied us it was done because of the allegations of misconduct which had been made against the claimant. We found no evidence to suggest that the disclosure was a material factor in the decision to suspend. In fact it cannot possibly have been as the decision to suspend predated the disclosure. This complaint must therefore fail.

235. We find that the treatment of the claimant by Mr Parry on 16 July 2019 was a detriment in light of the findings we made about what took place at the meeting as set out above. It was reasonable for the claimant to consider that she was put at a disadvantage through the conduct of this meeting.

236. In view of our findings we find that the claimant was mistreated by Mr Parry. In relation to the other specific allegations made by the claimant about this meeting:

a. The meeting did last nearly 4 hours. Mr Parry was in control of the meeting and he was responsible for it lasting as long as it did.
b. The meeting did take place in a small room.
c. The claimant was not shouted at. Rather Mr Parry and the claimant both raised their voices.
d. The claimant was threatened in the meeting. The threat was that if the claimant wanted her complaint to be formally investigated she, and others, would be criticised and found to be at fault for not having reported the incident with the resident falling out of bed. We found Mr Parry's assertion that a formal investigation would find the claimant and another person "guilty" to be particularly egregious and threatening.

e. The claimant was not told that if she took the matter further Mr Parry would conclude she was guilty of the misconduct charges, which were then outstanding against her. The threat was as we have recorded in the nature of Mr Parry indicating that the claimant would be found guilty of reporting failures.
f. The claimant has not substantiated her allegation that she suffered ill health as a result of her treatment, which required hospitalisation and ongoing specialist treatment. Therefore we do not find that she did suffer ill health to that extent. We accept however that the claimant was upset by Mr Parry's conduct of the meeting to the point of becoming stressed and anxious. We accept it was reasonable for the claimant to have felt that in light of our findings of fact.

237. We found that the mistreatment of the claimant was because Mr Parry was seeking to discourage her from pursuing her whistleblowing complaint. This is particularly clear in relation to Mr Parry's description of what would happen if he investigated formally and especially his threat that the claimant would be found to be at fault and "guilty" for not having reported the incident that formed the basis of the whistleblowing disclosure. We consider that Mr Parry was motivated by the fact that the claimant had made a protected disclosure and his desire for the disclosure to be taken no further. Our view was therefore that the effective cause of the mistreatment was the disclosure.

238. The respondent argued that the fact that Mr Parry also indicated that the claimant's colleague would be found to be at fault fatally undermined the suggestion that this was a detriment for having made a protected disclosure as the colleague had not made a protected disclosure. We do not agree. The fact is that it was only the claimant and not the colleague who was being threatened in this way. If the failure to report was a serious matter which justified censure of those involved then that should have taken place whether or not the claimant took her complaint further. The fact that Mr Parry specified that censure would result if the claimant took her complaint further emphasises in our view that he was attempting to dissuade the claimant from doing so.

239. In light of the above we concluded that the claimant's protected disclosure was a material factor in the mistreatment of her at the meeting on 16 July. We find the mistreatment was done on the ground that the claimant made a protected disclosure. The claimant's detriment claim succeeds to that extent.

Equality Act 2010, section 26: harassment related to race (i.e. nationality)

240. We find that Mr Parry did threaten the claimant in the informal meeting on 16 July 2019 as we have described above. This was unwanted but it was not related to race. We found no evidence from which we could conclude that it was. Rather, on our findings it was related to the fact that the claimant had made a protected disclosure. This complaint must therefore fail.

241. We find that the HR department did receive an official complaint from the claimant on (or shortly after) 25 July 2019 but did not respond. This was unwanted as the claimant clearly wanted a proper response. The failure to respond meant the claimant was required to chase a response and she did not receive one until 25 September. It would then be fair to observe that there was a further significant delay as the grievance outcome was not communicated until March 2020.

242. We did not find that this failure was related to race. Just because the complaint contained allegations of race discrimination does not make the failure to respond to it in good time discriminatory. We found no evidence from which we could conclude that this failure was related to race. Stepping back and looking at the whole picture it seemed obvious to us that the HR department had communicated badly and acted slowly but we could not see any evidence from which we could conclude that those undoubted failures and poor practices might be related to race.

243. The claimant's harassment claim concerning the failure to deal with her grievance cannot therefore succeed.

Equality Act 2010, section 13: direct discrimination because of race (i.e. nationality)

244. The respondent dismissed the claimant, suspended her, failed to respond to her grievance of 25 July 2019 and mistreated her at the meeting on 16 July 2019 as referred to above.

245. We do not think any of these matters were less favourable treatment. There were material differences in the circumstances of cases compared by the claimant, in particular because she had raised the protected disclosure and she faced 3 separate allegations of gross misconduct. We find that an employee of a different nationality in the same circumstances as the claimant would have been treated in the same way. We think the HR department would have been as slow to act in response to a grievance raised by an employee of a different nationality.

246. We do not think any of these actions were because of the claimant's nationality. We did not find any evidence from which we could conclude that they were.

247. The dismissal and suspension were in our view quite plainly done because of the disciplinary allegations. We made no findings from which we could conclude that the allegations were in any way constructed because of or influenced by the claimant's nationality.

248. We similarly saw no evidence from which we could conclude that the treatment of the claimant at the meeting of 16 July was because of nationality. We refer to our finding that the material factor at play there was the claimant's disclosure, rather than her nationality.

249. We also reiterate our finding that the reason for the failure to deal with the grievance was essentially poor organisation and communication on the part of the HR department. We did find any evidence from which we could conclude that these failures were because of race.

250. The in time direct discrimination claims must therefore fail.

Victimisation (s. 27 Equality Act 2010)

251. The claimant did the following protected acts:

a. A complaint about race discrimination in a letter to the respondent dated 5 July 2019.
b. A claim for race discrimination on 10 January 2020.

252. The respondent provided information and/or references to prospective employers on at least 2 occasions, namely:

a. To a company represented by Daisy Atkins, recruitment consultant, on or around 11 December 2019.
b. To Rehability UK in or around December 2019/January 2020

253. By doing so, the respondent did not subject the claimant to a detriment. This is because by reference to our findings of fact the information provided by the respondent was basic, factual and true. In that context we did not see how the claimant could reasonably consider that she had been put at any disadvantage.

254. We would not have found that any information provided by the respondent was because the claimant did a protected act. It was because the respondent received reference requests and they honestly sought to provide basic factual information in response to those.

255. The victimisation claim must therefore fail.

Unfair dismissal

256. The respondent has established that the reason for the dismissal was a reason related to the claimant's conduct, and therefore a potentially fair reason. We were satisfied that the respondent dismissed because of a genuine belief in the basic misconduct alleged. We noted that the essential nature of the claimant's actions was not in dispute. We did not consider there was any evidence that the respondent dismissed because of the disclosure. We took into account that the decision to suspend and treat the misconduct concerns seriously and formally predated the making of the disclosure.

257. The reason or principal reason that the claimant was dismissed was not therefore that she had made a protected disclosure and her claim of automatic unfair dismissal under s. 103A ERA 1996 must fail.

258. We next consider whether the respondent acted reasonably or unreasonably in treating the conduct found as a reason for dismissing the claimant. This is not a matter for the respondent to prove: it is a question for the tribunal.

259. We remind ourselves of the cardinal principle that we must not substitute our own view for that of the respondent, if the latter was acting reasonably. Essentially, the question is: did the employer act in a way in which no reasonable employer could have acted in the circumstances?

260. We found that the respondent acted outside the range of reasonable responses in some important respects.

261. We found that the investigation in this case fell outside of the reasonable range and there was a procedural flaw which caused unfairness to the claimant.

262. Taking the points together we concluded that this dismissal was unfair.

263. Regarding the investigation we reminded ourselves that the relevant standard is not that of a perfect, or ideal investigation, or that of what we consider that we would have done in the circumstances. The issue is whether the investigation that was carried out fell outside the range of reasonable investigations in the circumstances. In A v B [2003] IRLR 405 the EAT observed that, when assessing the reasonableness of an investigation, one factor might be the gravity of the charges and their potential effect on the employee. In the present case, the potential consequences for the claimant were severe, involving not only the loss of her job but also the finding that she had failed in her duty of care to the residents and not kept them safe. Plainly that is a finding that may affect the claimant's future prospects in the care sector.

264. We found that the respondent failed to investigate a crucial aspect of the claimant's case. This is the claimant's assertion that it was not possible for the resident to fall out of bed in the circumstances in which she was left. The claimant raised this repeatedly and made it clear she was saying there was not even a 1% chance (i.e. it was impossible) for the resident to fall out of bed. We find that this was a critical consideration which no reasonable employer would ignore. This matter could have been corrected on appeal as the claimant raised it as one of her appeal points but it was not. By reference to our findings of fact we summarise the approach of the appeal officer as superficial.

265. The reason why this was such a serious failure was because the respondent's rationale for dismissing the claimant rested heavily on the

assumption that the claimant's actions in leaving the cot rail down posed a risk to the resident's safety (i.e. because she could have fallen out of bed). This is clear from the following among other matters:

a. The dismissal letter stated: *"The risk assessment and support plan exists to ensure that the safety of individuals and staff is upheld. As a result of your actions there was potential for significant consequences, both in terms of possible harm to [the resident], and reputational damage to [the respondent]".*

b. The respondent's response stated: *"The disciplinary manager considered that Allegations Two and Three were proven, that they had posed a serious risk to the health and safety of the persons the Respondent's supports and created a safeguarding risk. As the safety and security of the supported persons is paramount to the Respondent due to its regulatory framework, the decision was taken to dismiss the Claimant for gross misconduct."*

c. In Ms Selby's witness statement she explained her reasons for dismissing the claimant and there was a very strong emphasis on the risk the claimant's actions had caused. For example, Ms Selby said in conclusion: *"[The claimant] knowingly breached a Risk Assessment, putting a person she was paid to care for at risk. She also left her shift without checking any other Support Workers were in the building, leaving the very vulnerable people we support alone, again in breach of HFT's rules. I did not consider that Olga had good reasons for her actions, which constituted a safeguarding risk and put the people we support at risk. I am confident that the decision to dismiss was the right one".*

266. On the basis of the above and the evidence overall we concluded that the reason for dismissal was not simply that the respondent found that the claimant failed to adhere to procedures rather it was that in doing so her actions created a risk to residents' safety. We do not think any reasonable employer could have dismissed using the rationale that the claimant's actions posed a risk without ever investigating the claimant's assertion that in fact there was no risk.

267. We found it was procedurally unfair for the respondent not to provide the recommendations document to the disciplinary decision maker or the claimant. In our judgement no reasonable employer would have withheld it.

268. If there were concerns that some of the mitigation points identified by the investigator may be unsubstantiated and/or not relevant these were matters for the decision maker to consider and the claimant should have had the opportunity to make representations based on all of the investigator's findings. If they had those concerns any reasonable employer would have clarified the points to establish why the investigator thought they may be relevant and what the evidence was for them rather than suppress the whole document.

269. We considered the failure to provide the recommendations document caused unfairness. As we described above a fair reading of the document is that it is helpful to the claimant and at least some of the mitigation points identified were clearly relevant. The finding relating to inconsistency of treatment which we described above and which does not appear to have been identified by the investigator elsewhere was one which we think was at least potentially in the claimant's favour and could well have affected the dismissal decision. Any reasonable employer would at least have clarified that point rather than suppress it and not make any reference to it at all.

270. We considered the possible inconsistency of treatment between the claimant and Jo Peck for leaving the residents unattended. We found that Jo Peck's case was the only one identified by the claimant where the actions were sufficiently similar.

271. There was a difference in that Ms Peck had shouted to the claimant to say she was going whereas the claimant had not made any attempt to communicate with Ms Peck before going. However, we cannot see how this could reasonably be treated as a material factor going in Ms Peck's favour when Ms Peck's own evidence had been that she had not had any answer from the claimant and therefore did not know if she had heard her.

272. The similarities were that neither support worker had done any sort of handover or even checked in with their colleague to inform them they were leaving. There were circumstances which led both support workers to believe the other was still in the building. The reality was that by not checking before they left they both just assumed the other was still there.

273. In the dismissal letter it was said that the claimant *"made a decision to leave the site, without first taking proactive steps to ensure that your colleagues were present, and able to provide support"* and that the claimant had failed to meet the regulatory requirements *"by leaving the site without ensuring that another colleague was in attendance".*

274. In our view neither support worker can reasonably be said to have taken a proactive step to ensure that a colleague was present and able to support before they left. We do not see how Jo Peck shouting out to the claimant but not knowing if she was heard can reasonably be said to have done that or properly ensured that another colleague was in attendance.

275. Ultimately however we had to bear in mind that consistency is also subject to the 'range of reasonable responses' test. We found that a reasonable employer could view Jo Peck's circumstances as different. We based this conclusion on the fact that whereas the claimant left her shift for the night to go home Jo Peck had left to go to another house and intended to return.

276. On any reasonable view however Jo Peck's actions contributed to the situation where residents were left unattended. This is because she had not

told the claimant that she was leaving and there were circumstances which led the claimant to believe that she was still in the building. It seemed to us therefore that on any reasonable view the claimant had genuinely believed Jo Peck was still present when she left.

277. Despite the fact that there were only two care workers on site the respondent did not have any procedures in place for what should happen if one worker needed to leave the site, or any clearly communicated handover procedure. The lack of any action at all against Ms Peck would suggest that her actions in leaving without properly telling the claimant were regarded as acceptable.

278. In the disciplinary hearing the claimant said that "a lot of staff" go off site when their shift finishes without saying a word. This appears to be consistent with the investigator's finding that there was a need for "all staff" to do a handover and her belief that the claimant was being dismissed for incidents that had happened before and not been reported. However the respondent failed to investigate or properly consider the suggestion that what the claimant did was in effect common practice.

279. In this context we were not satisfied that dismissal for allegation two would fall within the reasonable range. This appeared to be reflected in Ms Selby's statement when she said that on its own this matter might have warranted a warning.

280. For the above reasons we concluded that the claimant's dismissal fell outside the range of reasonable responses. We have therefore found that the complaint of unfair dismissal is well founded.

Wrongful dismissal

281. There is no doubt that the claimant left one of the resident's cot rails down and that she left the building without checking another support worker was present. Those are the essential findings of fact which demonstrate there was misconduct in this case.

282. In light of our findings however we concluded that the respondent has not shown that the claimant committed a breach of contract that was sufficiently serious as to entitle the respondent to dismiss her without notice.

283. Regarding leaving the building we have found the situation where residents were left alone came about because both Jo Peck and the claimant failed to inform the other they were leaving. This was not a situation which the claimant was solely responsible for and her actions have to be evaluated in the context we have described above. The context includes that there is evidence to suggest that the claimant's actions were common practice and that evidence has not really been challenged by the respondent. Moreover, there were circumstances that led the claimant to think that Jo Peck was in the building, there was no clearly communicated procedure for handover or

leaving shift and the respondent regarded it as acceptable for staff to leave without properly informing the only other colleague on shift.

284. Regarding the claimant leaving a cot rail down there was a failure to follow the procedure. However as the respondent's own approach demonstrates the real seriousness of that failure had to be established by reference to the risk the claimant's actions may have created. As we have explained the claimant's repeated assertion that the resident could not fall out of bed in the circumstances she left her in and therefore there was no risk was never investigated. On the evidence put before us the respondent has not substantiated the assertion that the claimant's actions created a risk.

285. The claim of wrongful dismissal therefore succeeds.

Contributory conduct and Polkey reduction

286. We find that the claimant's actions in leaving a cot rail down and failing to check another support worker was present before she left the building were blameworthy. We are also satisfied that they contributed to the claimant's dismissal.

287. We therefore find that it is appropriate to make a deduction to the claimant's compensatory and basic awards of 30% to reflect her contributory conduct. We consider this percentage to be just and equitable taking into account the seriousness of the conduct, the mitigation and the context of the misconduct which we have described above.

288. We consider there is a percentage chance the claimant could have been fairly dismissed for her conduct. A fair approach would entail investigation into whether it was really possible for the resident to fall out of bed and the investigator's belief that other employees had done the same things as the claimant, and consideration of whether dismissal was appropriate if there was inconsistency arising from the new approach being adopted by Mr Parry. A fair process would also take account of all the mitigation points identified by the investigator and summarised above. Accordingly dismissal would be by no means inevitable.

289. In light of that we find it is appropriate to make a further reduction of 30% to the claimant's compensatory award to reflect the percentage chance that she could have been fairly dismissed.

Our findings on the out of time allegations

290. The out of time allegations are the historic allegations of direct race discrimination or harassment related to race.

291. We have now considered all of the claimant's discrimination/harassment complaints which are in time, and we have concluded that each allegation has failed. As part of our assessment, we have

taken into account the evidence which we saw and heard relating to the claimant's out of time complaints of discrimination but we were not referred to anything which might be considered to be relevant background evidence supporting the in-time complaints. We shall now consider whether we have any jurisdiction to hear the complaints which were brought out of time (i.e. those relating to acts alleged to have occurred prior to 14 July 2019).

292. In this case the claimant relied on showing there was an act of discrimination extending over a period in order to bring all of the allegations of discrimination in time. Following the decision of the Court of Appeal in Hendricks v Metropolitan Police Commissioner [2003] IRLR 96 the burden was on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period. There was no suggestion in this case of a continuing act which should be approached as being a rule or a regulatory scheme which during its currency continues to have a discriminatory effect.

293. As the claimant has failed on the allegations of discrimination which are in time this means there can be no continuing act which would bring the earlier acts in time. Accordingly, the tribunal only has jurisdiction to hear the earlier allegations if they were brought within such other period as we think just and equitable.

294. We remind ourselves that the just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. We should take into account any relevant factor.

295. Although the tribunal has a wide discretion it is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit. There is no presumption that the Tribunal should exercise the discretion in favour of the claimant. It is the exception rather than the rule. These principles were clearly expressed in the case of Robertson v Bexley Community Centre 2003 IRLR 434:

> *"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."*

296. There is no requirement that a tribunal must be satisfied that there is good reason for a delay in bringing proceedings. However, whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal should have regard. See

Abertawe Bro Morgannwa University Local Health Board v Morgan [2018] IRLR 1050.

297. A list of relevant factors which may (not must) be taken into account are set out in British Coal Corporation v Keeble [1997] IRLR 336 derived from section 33(3) of the Limitation Act 1980, which deals with discretionary exclusion of the time limit for actions in respect of personal injuries or death. Those factors are: the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by it; the extent to which the respondent had cooperated with requests for information; the promptness with which a claimant acted once aware of facts giving rise to the cause of action; and steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

298. We do not think it would be just and equitable to extend time to consider the matters pre dating 11 January 2019 for the following reasons:

a. The claimant has failed to show a cogent case why it would be just and equitable to extend time.

b. The claimant did not have a good reason for failing to bring her claim earlier.

c. There is no evidence that the claimant would have been unable to bring a claim earlier. The claimant is intelligent and, as her written complaints demonstrate, articulate. We find she could and should have brought a claim earlier.

d. Many of the allegations are historic and substantially out of time.

e. The respondent has clearly struggled to obtain direct witness evidence in relation to a number of the historic allegations, and was reliant on constructing its case from documentary evidence which did not tell the whole story. The claimant has been uncertain and inconsistent over the date of some of the allegations. This indicated the cogency of the evidence has been affected by the delay.

f. We considered all the evidence to which we were referred in respect of the out of time claims and we concluded that we had not been referred to any compelling evidence which indicated the claimant had been or may have been discriminated against. The claimant did not call Jo Peck as a witness who could have spoken to the most recent out of time allegation (Millie Davis's questioning of the claimant over being late). There was nothing to indicate the out of time complaints were meritorious.

g. We concluded the prejudice to the respondent in considering the out of time claims outweighed the prejudice to the claimant in not considering them.

299. In those circumstances we decline to extend time to allow the claimant to rely on the out of time allegations of discrimination. The claims pre dating 14 July 2019 have not been brought within a period which we think is just and equitable and we do not therefore have jurisdiction to hear them. We shall therefore dismiss them.

Next steps

300. The claim has succeeded in part. This means there may need to be a remedy hearing to decide compensation. We express a hope that that may not be necessary given the delay in concluding the liability hearing and consequently producing this judgment. The parties should at least be talking to one another to see if matters can be agreed. If that proves to be impossible then we have made a separate case management order to prepare the case for a remedy hearing.

Employment Judge Meichen

19 April 2021