EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MS D THOMAS	**V**	**SUSSEX HEALTH CARE**

HELD AT: LONDON CENTRAL ON: 29-31 MARCH, 1 & 6 APRIL 2021

EMPLOYMENT JUDGE: MR M EMERY
MEMBERS: MR KENDALL
MR BABER

REPRESENTATION:
FOR THE CLAIMANT **Mr Henman (Consultant)**
FOR THE RESPONDENT **Mr Blitz (Counsel)**

JUDGMENT

1. The claims of direct age discrimination, harassment and victimisation fail and are dismissed.
2. The claim of unfair dismissal is well founded and succeeds.
3. The claim of wrongful dismissal is well founded and succeeds.

RESERVED REASONS

The Issues

1. The claimant was employed for 18 years in the respondent's home for the elderly, latterly as the Activity Coordinator, until her resignation without notice on 26 October 2018. She alleges age discrimination, harassment related to her age, victimisation for having made a protected act, and that her resignation amounts to an act of age discrimination / harassment. She alleges that she was constructively unfairly dismissed, and that she is owed notice pay. The respondent denies all allegations.

2. The claimant was permitted to amend her claim on two occasions, latterly at a case management discussion on 29 June 2020 (pages 207.12-15); the amended particulars of claim are at pages 207.17-27 and the amended response at pages 207.31-32.

Time

3. Are any or all of the claims for age discrimination and / or victimisation out of time?

4. If so, do the allegations amount to an act extending over a period of time so as to bring the claims in time?

5. If any of the claims for age discrimination are out of time, would it be just and equitable to extend the time limit for submitting such claims?

Constructive Unfair Dismissal

6. Did R fundamentally breach C's contract of employment entitling her to resign?

7. The following are alleged to be (separately or cumulatively) breaches of trust and confidence (paragraphs 48-50 Amended claim) entitling her to resign:

    a. changing C's responsibilities and reallocating her duties to another staff member without consent or consultation
    b. failure to pay a bonus
    c. suspending C's grievance
    d. instead disciplining C
    e. failing to deal with grievance fairly and impartially

8. Did C resign in response to that breach?

9. Did the Claimant resign without delay so as not to constitute affirmation or acceptance of the breach of contract or otherwise affirm any breaches?

Wrongful dismissal

10. Did the Claimant resign or was she constructively dismissed?

11. What notice period was the Claimant entitled to?

Direct Discrimination

12. Did R treat C as follows (paragraph 51 amended Particulars of Claim)?

    a. Allocating C's duties to TJW without obtaining her consent or consulting her;

    b. Failing to pay her the bonus received by other colleagues;

    c. Failing to consider her grievance impartially and fairly and in a timely manner

    d. Instead suspending the investigation whilst taking disciplinary action against C, thereby further prejudicing the possibility of the grievance being dealt with fairly;

    e. Disciplining C and giving her a disciplinary warning without good reason;

    f. Advising C on 2 October 2018 that her working patterns would change to include working in the evenings and over weekends;

    g. Dismissing her.

13. If so, did R treat C less favourably than it treated or would treat a relevant hypothetical comparator?

14. If so, was the less favourable treatment because of C's age?

Harassment

15. Did R engage in unwanted conduct (paragraph 51 of the amended Particulars of Claim)?

16. If so, was this unwanted conduct related to age for the purposes of the Equality Act 2010?

17. If so, did the unwanted conduct have the purpose or effect of:

    a. violating C 's dignity; or

    b. creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

18. If so, having regard to all the circumstances of the case and the perception of C, was it reasonable for the conduct to have that effect on her?

Victimisation

19. Was the Claimant's grievance on 8 August 2018 a protected act?

20. Did the Respondent engage in the conduct set out at paragraphs 51 (b), (c), (d), (e) and (f) of the amended Particulars of Claim?

21. Was such behavior a detriment within the meaning of s.27 Equality Act 2010?

22. Did the Respondent subject the Claimant to a detriment because the Claimant had:

    a. done a protected act; or

    b. because the Respondent believed that the Claimant had done a protected act?

Polkey / issues of remedy

23. If the claimant was unfairly dismissed, was there a prospect at some point in the future that she could have been fairly dismissed? If so, what was that prospect as a percentage; alternatively at what date would this have occurred?

24. If unfairly dismissed, did the Respondent fail to follow any part of the ACAS Code of Practice on disciplinary and grievance procedures under s207A TULRCA 1992? If so, is it just and equitable to increase any compensation pursuant to s207A TULRCA 1992 and by how much?

25. If unfairly dismissed, did the Claimant fail to follow any part of the ACAS Code of Practice on disciplinary and grievance procedures under s207A TULRCA 1992? If so, is it just and equitable to reduce any compensation pursuant to s207A TULRCA 1992 and by how much?

Relevant legislation and case law

The Law

26. Employment Rights Act 1996 – Pt X Dismissal

s.94 The right

(a) An employee has the right not to be unfairly dismissed by his employer

s.95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—

(a) …
(b) …
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

s.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) …
(3) ….

(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 issue

27. Equality Act 2010

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

26 Harassment

(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.

…

(1) 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.

27 Victimisation

(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—

…

(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.

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Relevant case law

28. *Direct Discrimination*

a. Has the claimant been treated less favourably than a hypothetical comparator would have been treated on the ground of her age? This can be considered in two parts: (a) less favourable treatment; and (b) on grounds of the age. Importantly, it is not possible to infer discrimination merely because the employer has acted unreasonably (*Glasgow City Council v Zafar [1998] IRLR 36)*

b. The requirement is that all *relevant* circumstances between complainant and comparator are the same, or not materially different; the tribunal must ensure that it only compares 'like with like'; save that the comparator is of a younger age group (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2013] ICR 337*)

c. The tribunal has to determine the *"reason why"* the claimant was treated as she was (*Nagarajan v London Regional Transport [1999] IRLR 572)* and it is not necessary in every case for the tribunal to go through the two stage procedure*;* if the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial *(Igen v Wong [2005] EWCA Civ 142). "*Debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of.*" (Chondol v Liverpool CC UKEAT/0298/08)*

d. Law Society v Bhal[2003] IRLR 640 - the fundamental question is why the discriminatory acted as he did. Was the claimant (in this case) treated the way she was because of her age? It is enough that a protected characteristic had a 'significant influence' on the outcome - discrimination will be made out. The crucial question is: 'why the complainant received less favourable treatment … Was it on grounds of [the protected characteristic]? Or was it for some other reason..?" *Nagarajan v London Regional Transport [1999] IRLR 572, HL.* "What, out of the whole complex of facts … is the effective and predominant cause" or the "real and efficient cause" of the act complained of?" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372*, *[1997] ICR 33)*

e. *London Borough of Islington v Ladele*: *[2009] EWCA Civ 1357* provides the following guidance:

   i. In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572, 575*—"this is the crucial question". In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator

   ii. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in *Nagarajan* (p 576) as explained by Peter Gibson LJ in *Igen v Wong [2005] EWCA Civ 142*, *[2005] ICR 931*, *[2005] IRLR 258* paragraph 37

   iii. As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in *Igen v Wong*

iv. The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of protected characteristic of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one.

v. It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it 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: see the decision of the Court of Appeal in *Brown v Croydon LBC [2007] EWCA Civ 32*, *[2007] IRLR 259* paragraphs 28–39.

vi. It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.

vii. As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in *Watt (formerly Carter) v Ahsan [2008] IRLR 243*, *[2008] 1 All ER 869* … paragraphs 36–37) …"

f. *Chondol v Liverpool CC UKEAT/0298/08*, *[2009] All ER (D) 155 (Feb), EAT*: A social worker was dismissed on charges which included inappropriate promotion of his Christian beliefs with service users. His claim for direct religious discrimination failed as the tribunal found that 'it was not on the ground of his religion that he received this treatment, but rather on the ground that he was improperly foisting it on service users'. The EAT accepted that the distinction between beliefs and the inappropriate promotion of those beliefs was a valid one, and it was correct to focus on the reason for the claimant's treatment. Citing *Ladele*, the EAT again confirmed that 'debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of'.

29. <u>Harassment</u>

a. Harassment involves unwanted conduct which is related to a relevant characteristic and has the purpose or effect of creating an intimidating,

hostile, degrading, humiliating or offensive atmosphere for the complainant or violating the complainant's dignity.

b. *Driskel v Peninsula Business Services Ltd [2000] IRLR 151*: Determining whether alleged harassment constitutes discrimination involves an objective assessment by the tribunal of all the facts; the claimant's subjective perception of the conduct in question must also be considered. The tribunal is therefore required to determine both the actual effect on the particular individual complainant and the question whether that was reasonable in the circumstances of the case. *Pemberton v Inwood [2018] EWCA Civ 564*: "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))." This means that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for them, then it should not be found to have done so.

c. *Richmond Pharmacology v Dhaliwal [2009] IRLR 336:* 'harassment' is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for him/her; (c) on the prohibited grounds. It would normally be a 'healthy discipline' for tribunals to address each factor separately and ensure that factual findings are made on each of them. It must be reasonable that the conduct had the proscribed effect. While there is a subjective element ('… having regard to … *the perception of that other person* …') there is no harassment if there is an unreasonable proneness to take offence. "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.'

d. 'Conduct': *'Prospects for People with Learning Difficulties v Harris UKEAT/0612/11*: suspension or other acts by an employer which would not normally constitute an act of harassment, can amount to acts

of harassment; in this case the lack of forethought on the part of the employer and the peremptory nature of the suspension, with scant justification and absent prior consultation with the claimant, justified the tribunal's finding of unlawful harassment in this case.

e. Purpose or effect: Harassment will be unlawful if the conduct had *either* the purpose *or* the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Where the claim simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention—which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the complainant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that requisite effect; the objective element. The fact that the claimant is peculiarly sensitive to the treatment accorded him or her does not *necessarily* mean that harassment will be shown to exist.

f. Related to the prohibited grounds: The conduct must be 'related to' a relevant protected characteristic, including conduct associated with that characteristic. The tribunal has to apply an objective test in determining whether the conduct complained of was 'related to' the protected characteristic in issue. *Hartley v Foreign and Commonwealth Office UKEAT/0033/15:* Where adverse comments were made by managers amount an employee, the fact that the intent of the managers was not to "aim" at her condition was irrelevant – the tribunal must assess *"if the overall effect was unwanted conduct related to her disability.'* Also *Brumfitt v Ministry of Defence [2005] IRLR 4, EAT* (a decision under the old wording, on grounds of, in the SDA 1975) the need for comparative disadvantage defeated a claim which was made by a woman who complained of offensive language delivered to her as a member of a mixed-sex audience. There was no doubt that she had been exposed to language that she found offensive, but she had not been exposed to this because she was a woman.

g. Prohibited grounds: it may be necessary to consider the employer's mental processes to determine whether the conduct was on the prohibited grounds. *Nazir and Aslam v Asim and Nottinghamshire Black Partnership [2010] EqLR 142*: when considering whether facts have been proved from which a tribunal could conclude that harassment was on a prohibited ground, it is relevant to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic and should not be left for consideration only as part of the explanation, at the second stage, once the burden of proof has passed.

h. *Land Registry v Grant* [2011] EWCA Civ 769: the tribunal must be careful not to cheapen the significance of the statutory wording; is must consider carefully whether the matters above can violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her.

i. No justification for harassment is possible and no comparator is needed; that said, conduct shall be regarded as having the required effect only if, having regard to all the circumstances, including in particular the perception of the victim, it should reasonably be considered as having that effect. In other words, the fact that the claimant is peculiarly sensitive to the treatment accorded him or her does not *necessarily* mean that harassment will be shown to exist.

j. *Pemberton v Inwood [2018] EWCA Civ 564*, *[2018] IRLR 542* "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."

k. *Whitley v Thompson EAT/1167/97:* (i) A characteristic of harassment is that it undermines the victim's dignity at work and constitutes a detriment on the grounds of sex; lack of intent is not a defence. (ii) The words or conduct must be unwelcome to the victim and it is for her to decide what is acceptable or offensive. The question is not what (objectively) the tribunal would or would not find offensive. (iii) The tribunal should not carve up a course of conduct into individual incidents and measure the detriment from each; once unwelcome sexual interest has been displayed, the victim may be bothered by further incidents which, in a different context, would appear unobjectionable. (iv) In deciding whether something is unwelcome, there can be difficult factual questions for a tribunal; some conduct (e.g. sexual touching) may be so clearly unwanted that the woman does not have to object to it expressly in advance. At the other end of the scale is conduct which normally a person would be unduly sensitive to object to, but because it is for the individual to set the parameters, the question becomes whether that individual has made it clear that she finds that conduct unacceptable. Provided that that objection would be clear to a reasonable person, any repetition will generally constitute harassment."

l. *Timothy James Consulting Ltd v Wilton [2015] IRLR 368, EAT* - held that a constructive dismissal could not constitute an act of harassment as a matter of law. Cf: *Urso v Department for Work and Pensions [2017] IRLR 304, EAT*, - held that a direct dismissal was distinguishable from a constructive dismissal, which could be an affront

to the employee's dignity and, as a matter of statutory interpretation, could qualify as something done 'in relation to employment.

m. *Driskel v Peninsula Business Services Ltd[2000] IRLR 151*, which concerned the approach to be taken by employment tribunals, in determining whether alleged harassment constituted discrimination on grounds of sex. In *Driskel* the EAT held that although the ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered.

n. *UNITE the Union v Nailard [2018] EWCA Civ 1203*, *[2018] IRLR 730*. The Court of Appeal said that the ET had gone too far in arguing that a failure to address a sexual harassment complaint, made against elected officials of the union, could itself amount to harassment related to sex 'because of the background of harassment related to sex'. While the union could be vicariously liable for acts of discrimination by its employees, there would need to be a finding that the employees in question were themselves guilty of discrimination.

o. *'Hartley v Foreign and Commonwealth Office UKEAT/0033/15 (27 May 2016, unreported)*. The claimant had Asperger's syndrome which was accepted as a disability. When dismissed for underperformance, she brought proceedings for disability discrimination, complaining (amongst other things) of harassment based on comments by two managers in discussions about her work. The first manager had drawn a distinction between commenting on her tenacity (related to her condition) and rudeness/abruptness (which he attributed to her character not her disability). The second manager had drawn a distinction between commenting on her communication problem and her intelligence/ability to understand a spreadsheet. The employment tribunal held these comments did not amount to harassment because that had not been the intent of the managers, who were not, in effect, aiming them at her condition. The EAT held that this was the wrong approach; the matter had to be reconsidered to see if the overall effect was unwanted conduct related to her disability.

p. *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, EAT*, a case in which a woman of British Asian origin complained that a remark by a psychiatrist that a young man in his clinic 'should join ISIS, that'll sort him out' was not found to be related to race. The ET had accepted it was racial harassment because of a 'perception that ISIS in the minds of a significant proportion of the general public is that it is an international organisation connected with Asian people, in particular in such areas as Pakistan, Afghanistan and Iran'. However, setting aside this finding the EAT held that an ET needs to 'articulate distinctly, and with sufficient clarity, what feature or features of the evidence or facts found have led it to the conclusion that the conduct is related to the characteristic as alleged'. Here, there was no evidence to

justify the finding that ISIS was related to Asian or South Asian people and it was not a matter of which judicial notice could properly be taken.

30. Victimisation

a. *Aziz v Trinity Street Taxis Ltd [1988] IRLR 204*, (under the RRA 1976 'by refence to' wording as opposed to the EqA 'in connection with'): A wide interpretation is allowed – in this case making a tape recording of conversations. An act could properly be said to be done 'by reference to the Act' if it was done by reference to the race relations legislation in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act.

b. *National Probation Service for England and Wales (Cumbria Area) v Kirby [2006] IRLR 508*: a manager interviewed as a witness in a complaint of race discrimination said she had not seen any issues of race. Held - the giving of information in connection with a complaint of race discrimination raised in internal grievance procedures was the doing of something by reference to the Act in relation to another person.

c. *Waters v Metropolitan Police Comr [1997] IRLR 589* – CA 'The allegation relied on need not state explicitly that an act of discrimination has occurred – that is clear from the words in brackets in [SDA 4(1)(d)]. All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of [s 6(2)(b) SDA].'

d. *Durrani v London Borough of Ealing UKEAT/0454/2012* – "I would accept that it is not necessary that the complaint referred to race using that very word. But there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies."

e. Chalmers v Airpoint Ltd *UKEATS/0031/19* – an email stating "I do not find you approachable of late. Your manner is aggressive and unhelpful… my work is mostly ignored and I have been excluded from both the Christmas night out and the hardware refresh … both of which may be discriminatory": EAT held that in determining that this was not a protected act, it was open for the Tribunal to conclude that the reference to "may" and the absence of "sex" plus other facts such as the claimant's HR knowledge, a finding which was plainly open to the Tribunal.

f. Reason for the treatment: The detriment must be 'because' of the protected act. *Greater Manchester Police v Bailey [2017] EWCA Civ 425* - it remains the case as under the pre-EqA legislation that this is an issue of the "reason why" the treatment occurred. Once the existence of the protected act, and the 'detriment' have been established, in examining the reason for that treatment, the issue of the respondent's state of mind is likely to be critical. However there is no need to

show that the doing of the protected act was the legal cause of the victimisation, nor that the alleged discriminator was consciously motivated by a wish to treat someone badly they had engaged in protected conduct. A respondent will not be able to escape liability by showing an absence of intention to discriminate, provided that the necessary link in the mind of the discriminator between the doing of the acts and the less favourable treatment can be shown to exist. *Woods v Pasab Ltd (T/a Jones Pharmacy*) *[2012] EWCA Civ 1578:* 'the real reason, the core reason, for the treatment must be identified'

g. Where there is more than one motive in play, all that is needed is that the discriminatory reason should be 'of sufficient weight' *O'Donoghue v Redcar and Cleveland Borough Council [2001] EWCA Civ 701*, *[2001] IRLR 615, CA*

h. Detriment: *MOD v Jeremiah [1979] IRLR 436*, *[1980] ICR 13, CA:* a detriment exists 'if a reasonable worker would take the view that the treatment was to his detriment'. A detriment must be capable of being objectively regarded as such - *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11*, *[2003] IRLR 285*, *[2003] ICR 337,* 'an unjustified sense of grievance cannot amount to 'detriment'. *Deer v University of Oxford[2015] EWCA Civ 52* - the conduct of internal procedures can amount to a 'detriment' even if proper conduct would not have altered the outcome.

i. The burden of proof: *Greater Manchester Police v Bailey [2017] EWCA Civ 425* - 'It is trite law that the burden of proof is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act…'

j. Where there is more than one motive in play, all that is needed is that the discriminatory reason should be 'of sufficient weight' *O'Donoghue v Redcar and Cleveland Borough Council [2001] EWCA Civ 701*, *[2001] IRLR 615, CA*

k. A claim for victimisation is not dependent upon the claim which gives rise to the protected act being successful - *Garrett v Lidl Ltd UKEAT/0541/08*

Witnesses

31. The Tribunal heard the following evidence: for the claimant we heard from Ms M Woods, Ms M Tanriverdi, Mr M Sullivan, Ms T Milburn Ms A Rayner and the claimant. For the respondent we heard from the Home Manager, Ms Beverley Gregory, Ms TJ Watson, Ms Nina Webb and Ms Susan Tansey. All witnesses were sworn in giving appropriate oaths/affirmations and confirming the contents of their statements. Not all the claimant's witnesses were asked questions.

32. The Tribunal spent part of the first day of the hearing reading the witness statements and the documents referred to in the statements. This judgment does not recite all of the evidence we heard, instead it confines its findings to the evidence relevant to the issues in this case, all of which was known to the parties during the investigation and disciplinary process.

33. This judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The relevant facts

34. Until the issues that arose at the end of her employment, described below, the claimant's employment record with the respondent during her long service was good. As Activity Coordinator at the respondent's Longfield Home she planned, coordinated and, along with staff in the Activities Team, ran activities for the respondent's service users, including those with dementia.

35. The claimant received positive appraisals from her former manager in post in 2017, performance stated to be exceeding expectations (e.g. 256-7, 264).

36. There was a CQC Inspection in July 2017 followed by the CQC report dated 19 October 2017. The overall rating of the Home was "Requires Improvement". No criticisms were made of the Activities in this report. Under the heading "Is the Service Responsive" the Home was judged as *"Good"* and the Activity programme was praised (e.g. 290).

37. There were in 2017 and ongoing several local authority safeguarding investigations because of issues arising at the Home, it was receiving regular inspections from West Sussex County Council. Ms Gregory described being appointed and taking over at the home in early 2018 and inheriting a 65 point action plan. These did not directly affect the claimant's role. In early 2018 the respondent appointed Ms Lisa Rowlands-Hall as Service Review and Transformation Lead with responsibility over several of the respondent's homes.

38. Ms Gregory described in her oral evidence at the hearing that she had *"concerns"* about resident's activities which were being run by the claimant *"…we had a regimented activities schedule which ran for two-weekly pattern with same activities on same days, these are limiting. I had done training on meaningful activities on dementia … there was an absence of meaningful activities with individuals who do not have capacity and a lot generated towards people with capacity…".*

39. The Tribunal accepted that Ms Gregory had some concerns about the activities being undertaken, but that these were just part of a very large number of issues which required addressing when Ms Gregory commenced in her role. They were not serious enough to take immediate action or to discuss Activities critically with the claimant.

40. The claimant's appraisal took place on 4 May 2018, conducted by Ms Gregory. The Tribunal accepted that this did not raise criticisms of Activities, in fact Ms Gregory praised their *"great atmosphere".* It noted that the claimant was *"increasing the variety"* of Activities; it asked her to *"gain more in-depth information"* on residents and to create a template to do so (267-8).

41. We concluded that Ms Gregory used this appraisal to ensure Activities were significantly developed from their current place, that its wording was designed to develop the areas which Ms Gregory saw at this time as a concern. This was of course an entirely appropriate step. The claimant's comment was that she was happy with her role, *"pleased with the progress of activities"* and excited about the future. There was to be a review in 3 months' time.

42. In June 2018 a "*Weekly Communication"* document was circulated throughout the respondent's homes. It states that confidential information relating to colleagues *"is treated with respect and kept confidential"* (300-01). This document because an issue in a later disciplinary process involving the claimant. This was posted on a staff notice board. We accepted that this was generally available to staff and should have been read by the claimant. We also accepted the claimant's evidence that she did not recall seeing this at the time.

43. A further CQC Inspection took place on 23, 24 and 28 July 2018. The initial inspection feedback summary provided on 24 July recognised that there had been some improvements since the last report. However there were some criticisms, including of Activities. Under "Responsive" the conclusion was the home "requires improvement" and the summary states that there was a *"lack of personalised activities…"* (306).

44. The CQC report which followed in October 2018 provided the following comments on Activities: *"Improvements were needed to the activities and stimulation provided to people."* It described a PAT dog only being present for 5 minutes; that in Rosewood (a wing in the home) *"there was little in the way of activities that provided stimulation for people…. People spent long periods of the day in front of the tv. We observed very little offered in the way of activities and occupation …"* (429-30).

45. The claimant was away on the date of the report. In her evidence she stated that had she been there she would have shown details of activities being undertaken; that she had kept documentary evidence of activities for respondents; her complaint is that these were destroyed. She disagrees with the CQC assessment relating to Activities,

46. Two days later, the CQC criticisms of "Activities" were being addressed within the Home. On 26 June 2018 Ms Rowland Hall (emailed Ms Gregory *"following the recent cqc inspection I would like you to implement some actions in regard to activities … I need some very specific work carried out. I believe that TJ [Watson] has the skill-set I require…"*.

47. The 'specific work' was for a timetable of activities; the use of choice boards to gain residents feedback in designing activities; to have activity outcomes; to

take residents' histories (work, hobbies) to enable community connections, and to tailor activities around that person's history *"… the aim would be for the person to have a stimulated session…"*. Ms Watson was also to visit local day centres to gain ideas. She was then to *"... liaise with the activities team and implement the programme."* (307-8).

48. Ms Gregory gave evidence on Ms Rowland-Hall's involvement; she said that she *"needed help to get support to get [Activities] right … I said to SMT that I needed senior management support to sort out activities".* The Tribunal accepted that this was Ms Gregory's rationale for seeking support, that she did not feel she had the skill-set to make what she considered to be the necessary improvements in Activities.

49. Ms Gregory's evidence was that Ms Watson had appropriate training, in particular she had organised activities in a previous role *"… she can give insight…".* We accepted that the rationale for approaching Ms Watson for this specific work was because of her recent experience organising activities in another workplace, that she did have, in Ms Gregory and Ms Rowland-Hall's belief, the right "skill-set" to take on this role. Ms Watson was paid an additional sum for carrying out this additional work over a two week period.

50. The Tribunal accepted Ms Gregory's evidence that the aim of the review was to improve activities undertaken at the Home, that one aim was to reorganise activities so that support workers could also undertake activities with residents, that the CQC had noted that activities stopped at 5.00, that there was a need to restructure Activities so that they ran at different times, that the aim was for other staff to *"engage more"* with Activities.

51. At a full staff meeting on 28 June 2018, Ms Rowland-Hall referenced activities, saying that they *"… need to be more imaginative and tailored to individual needs…. Activities should be done every day …"* (302).

52. Ms Watson was asked if she wished to undertake this 'specific work'. The Tribunal also concluded that Ms Watson was told that she may gain be additional responsibilities, that the Activities Department needed to be revamped. Ms Watson was told to keep this confidential, but she failed to do so.

53. Ms Tanraverdi's evidence was that Ms Watson said to her that there would be *"young fresh blood with new ideas"*; and a reference to current activities as "fuddy-duddy". There was some confusion as to how these alleged remarks came to be said. Ms Tanraverdi's evidence was that these words had originated from Ms Watson who had said they were from an email to Ms Gregory.

54. But Ms Tanraverdi did not refence all of this wording in a subsequent grievance meeting; she said in her evidence that she did not recall it all at the grievance hearing. She also said that she did not say everything she was told by Ms Watson at this *"as it's in the email"*. The claimant's evidence was that she believed this wording had originated in an email, that she had been told this by another member of staff, Ms Milburn.

55. The Tribunal noted that no email had been produced which suggests that this wording originated in an email. We noted that the actual email was from Ms Rowland Hall (308), and this does not make any allusions to age.

56. In the subsequent grievance report there is a reference to *"whispers"* between staff creating the wrong impression. The claimant accepted in her evidence that these remarks came to her *"through the rumour mill".*

57. We concluded that whatever was said to whom about activities, the claimant was led to believe that her activities were under the microscope, that the impression she was given was that her age ('young fresh blood' etc.) was a factor in the change of direction of the Activities Department.

58. We considered carefully whether these words were used by senior management to Ms Watson. We concluded that there may well have been criticism of the activities being undertaken, that there was a suggestion that there was a need to have fresh, new ideas, that Ms Watson would have readily agreed and contributed to this discussion.

59. We concluded that when subsequently discussing this meeting with colleagues, Ms Watson overlaid her views with those of management. In her evidence, Ms Watson accepted that she was not a fan of the Activities at that time. She accepted that she referred to the current activities as including the PAT dog as "shit".

60. The Tribunal accepted that Ms Watson alluded to change and to fresh, new ideas in the Activities Department. However, we concluded that management had not used pejorative or age-related words such as "young blood" being required. The comments made by management to Ms Watson were not, we concluded, remarks connected to the age of the claimant.

61. When it became apparent that Ms Watson had discussed the issue with staff, she was reprimanded.

62. For the claimant, a significant issue was why was she not the one asked to undertake this 'specific work', and then implement it amongst the Activities Department (and on the respondent's case other employees also). She said in her evidence that she had documents – for example of residents' histories *"… This was how I organised my choice activities … this was my job role, to liaise and implement programme is my responsibility - this was undermining me as activities Manager. … I should have been spoken to, I was told Activities were fine before this".*

63. The Tribunal did not accept that the claimant had been told activities were fine (whilst also accepting that this was the claimant's genuinely held view). There had been criticism of activities in the last staff meeting; her last appraisal had highlighted the lack of personalised histories, which she appeared not to have disputed. There appeared to have been no movement to take forward the 4 May appraisal action plan by the claimant.

64. The Tribunal did accept that there was a failure to discuss the implications of Ms Rowland-Hall's email with the claimant. We concluded that immediately on her return to work at end July 2018 the implications of the CQC inspection should have been discussed with the claimant, also what steps senior management were proposing. This was an urgent issue, but that does not mean consultation is waived, particularly given Ms Watson was being consulted with. As the claimant put it in her evidence *"I was not spoken to, and I should have been spoken to…".*

65. We also accepted Ms Gregory's evidence that she and management genuinely felt that the claimant believed Activities were fine, when in fact they did need improvement, that the claimant was "rigid" in her planning, and *"resistant to change"*. We noted the claimant's evidence that she believed she could have demonstrated to the CQC inspectors that Activities were better than they were assessed; that the resident's histories were appropriate.

66. We accepted that Ms Gregory was concerned at whether the claimant could implement any change needed. For Ms Gregory this was not about the claimant's age *"… I'm an old dog, a Nurse since 1981 and I have had to change through career; to be able to do so not about age, it's about change and what's best for people we support."*

67. On 8 August 2018 the claimant complained in writing about what she had been told. Her complaint says that she was told that "major changes" in Activities were taking place, that TJ Watson was taking over the Activity Department, and major changes would be occurring; that she would be getting rid of some of the activities *"as in her words they were shit!".* It refers to an email from Ms Rowland Hall to Ms Gregory apparently opened by mistake by Ms Duffel, stating a need for *"new fresh blood and new ideas as she felt I was too old and fuddy duddy. And that the activities … were tired".* The claimant complained of a lack of consultation thereafter when she tried to meet with Ms B, that she felt *'so traumatised, hurt that at the moment I do not know how I can move forward and continue…"* (322-25).

68. This was treated as 'formal grievance' and the claimant was informed an investigation would take place (328). Ms Helen Spencer and HR Advisor with the respondent was tasked with undertaking the investigation.

69. There was dispute whether the respondent received all pages of the grievance – and in particular whether it was aware that the claimant was making allegations related to her age. The Tribunal concluded from the notes of interview that the respondent was aware that the claimant was complaining about issues of discrimination from an early stage in the grievance process.

70. Interviews were arranged with 8 members of staff. Prior to them occurring, on 20 August 2018 Ms Gregory complained that Ms Watson had been informed by a handyman, Mick Sullivan*, "that we are all going to be called in as [the claimant] has taken if further. In fact Mick is telling whoever will listen…"* (345).

71. As a consequence, the claimant was informed by letter to her home address dated 22 August 2018 that a decision had been made to investigate a *"breach of confidentiality"* by her, and that her grievance would be *"deferred"* until after its conclusion, at which time *"a decision will be made as to the next steps regarding your grievance"* (352).

72. The Grievance "case note" states that Mr Sullivan admitted the claimant had informed him about her grievance. Mr Sullivan, who was within his probation period, was dismissed. The claimant was interviewed and said that she had discussed her grievance was Mr Sullivan because she had asked him to accompany her to meetings. The claimant was told that because of this breach of confidentiality, the grievance had been 'compromised' and a formal investigation would be undertaken.

73. The investigation was undertaken by the respondent's Head of HR, Brigette Bryce. Several members of staff were interviewed; Ms Gregory stated that Ms Watson was *"very distressed"* to hear about the grievance against her from Mr Sullivan (377). The claimant repeated that she had told Mr Sullivan to accompany her, *"… I told him not to say anything"* (386).

74. The investigation report concluded that confidentiality had been breached as the claimant had told two members of staff about the grievance and there was a recommendation to proceed to a formal process (389-92).

75. The respondent operates a "Cash Reward and Recognition" scheme under which the claimant was in line to receive a £100 bonus in September 2018 payroll. The terms of the scheme state that it is discretionary and that the cash reward can be withheld if subject to a disciplinary process. The claimant and another member of staff did not receive a bonus in September (or at all) because they were subject to this process. This decision was made by the Chief Operating Officer (398-9).

76. On 28 September 2018 the claimant was written to saying she was required to attend a disciplinary hearing on an allegation of "misconduct" – a breach of confidentiality (437-8).

77. On 2 October 2018 the claimant was written to saying that there *was "a review of working patterns for Activity Staff taking place"* across all homes; that the aim of the review was to *"provide more robust activities for the people we support"* and that the *"days of the week on which you may be required to work and the number and timing of working hours … may be varied from time to time… in accordance with operational requirements".* The arrangement was to be a shift-pattern with shifts notified in advance, and *"…there will be a change to how you work your weekly hours".* A 14 day consultation process would start with a meeting with an HR advisor (445).

78. A manager, Ms Susan Tansey oversaw the disciplinary investigation. Prior to the meeting she asked about the issue of confidentiality, and was told that a staff member who raises a grievance is not given the grievance policy

"highlighting the need for confidentiality" but that the policies are available at the claimant's place of work and are accessible at all times (463).

79. At the disciplinary hearing the claimant disputed the account of one witness who she said advised her to take out a grievance; she said that the policies are locked in the manager's office and she had not read the grievance policy prior to taking out her grievance. In her evidence she accepted that the grievance process was a confidential one. The outcome of the disciplinary process was that the claimant received a first written warning (491-2).

80. The claimant's grievance was restarted and the claimant was invited to a meeting on 18 October 2018; other staff were also invited to interviews.

81. On 16 October 2018 the claimant appealed against her disciplinary warning, saying that the facts were not correct; she had not breached any policy; that the disciplinary was an act of victimisation, the *"protected act"* being her grievance (516).

82. On 16 October 2018 the claimant made a flexible working application request; asking to work her current working hours of 9-4, Monday, Tuesday, Thursday and Friday (527-8). The claimant has other work commitments many evenings and weekends meaning she cannot undertake this role, despite doing so flexibly when required.

83. In the grievance investigation, witnesses described how the information on the changed structure in the Activities Department came to be disseminated and discussed in a week when the claimant was on leave; as one witness put it *"it really should have been a sat down with [the claimant], because she runs the activities …"* (542); Assistant Manager Ms Duffle said that there had been a discussion about an Activity champion and that Ms Watson was thought to be suitable for this role; that Ms Watson discussed this role with other staff members, telling them that she as going to be their *"new manager"* (548).

84. Ms Rowlands Hall set out her views on the activities being undertaken and her discussions with the claimant about whether some activities were meaningful activities *"… and that I had concerns and we would really need to look at doing very personalised specific sessions… and I wasn't convinced that she understood any of that and would take that on board…"* that there was consensus with managers that the claimant may not take on board the requirement for change (562).

85. The claimant had asked for a witness to be interviewed who had left the company. This witness had been approached and declined to be interviewed as she believed that grievance was against her (as did other members of staff, due to the wording of the letters sent to them). This witness then gave consent to the claimant; this was just before the grievance decision was delivered, and this witness was not interviewed.

86. The claimant's grievance was upheld in part by letter dated 22 October 2018 – *"relating to the communication of the legitimate changes within the activities*

team". The allegations of ageism *"can also be refuted"* as the email in question did not reference any ageist remark (fuddy duddy); however Ms Watson did share a conversation she was asked not to. On the operational changes, there was no unfairness, but *"Had this information not been leaked you could have had the opportunity to be communicated more effectively of the changes that the management team had made, as they are entitled to do so in response to the CQC inspection and corporate strategic direction"* (587-8).

87. The claimant was informed that her appeal against the disciplinary outcome was scheduled for 29 October 2018 to be undertaken by Martin Hill, Regional Operations Director. The flexible working meeting was scheduled to take place on 9 November 2018.

88. On 25 October 2018 an all staff meeting was held. The CQC report had been previously received and the respondent had sent evidence and questioned some of the decisions; the final report had just been received. Ms Gregory stated that there were *"many reasons"* for the Requires Improvement, and referenced issues with nursing, including planning and training.

89. Ms Gregory next referenced Activities – she said there were not enough activities, the timings of activities could be better, assistance for activities would be given by care staff. It referenced the CQC report's summary - that some people are watching too much tv and the PAT dog was not present for long enough. *"Beverley explained that the activities department would be going through a total revamp."*

90. The Company CEO, Ms Morgan-Taylor was present, and she then outlined the way Activities were going to change – to become more personalised, and made real life; that *"activities are being overseen by Nina Webb"* in three of the homes. She stated that Activities as a whole within the company failed the CQC report, not just Longfield (604-5).

91. In her evidence, the claimant stated that she felt publicly humiliated *"… any criticism should be in private. I had not been asked to a meeting to address changes. I heard it in front of whole team."*

92. The Tribunal accepted the claimant's evidence that this meeting was the tipping point and that she resigned at this point because she had not been informed in advance of the chances and what would be said at this meeting. We accepted that this was the last in a line of issues which led to her resignation: *"… this was the last thing - public humiliation - but it's collectively what's happened beforehand … I felt everything would be resolved though the grievance, but it became clear that they were turning against me - it was a continual bombardment towards me, I became ill, I could not take any more. I had been working there for 17 years, good supervisions and appraisals, and this behaviour was so bad I could not cope."*

93. Later that day, 25 October 2018, the claimant resigned *"with immediate effect"* citing the *"appalling way I have been treated over the past few months … indeed the company's behaviour leads me to believe that it does not want to continue*

to employ me". She referenced her complaints of age discrimination and breach of contract, that the grievance was handled incompetently and was not impartial with no "…*genuine interest in resolving it."* She complained that a witness had not been interviewed, that she had been *"disciplined without justification".* She argued that *"the handling of the grievance and the recent outcome is the final straw… I can't go on any longer"* (602-3).

94. Authority to recruit to the role of Activities Coordinator was approved on 8 November 2018; the role was specified to be a *"flexible 7 day rota"* (613). Ms Watson was appointed to this role from 1 January 2019 (615).

Submissions

95. Both representatives handed up written submissions.

96. Mr Blitz' proposition was that where there is a simpler or more obvious explanation, this is the more likely explanation. He accepted that the respondent was "not perfect" that some issues had not gone as they should have done, for example the leaking, and so this was partly upheld. But the claimant already had a *"sense of unease"* about her role.

97. The issue is that the respondent has taken decisions in the disciplinary and grievance that the claimant disagrees with.

98. If there was a change in the Activities team, it is not a change which affects the claimant's duties; Ms Watson has not been allocated the claimant's duties and so there is no breach of contract which can be made out. While the claimant may have had a degree of responsibility for rotas within activity team, this was subject to the hours of work her team had been given by management. But the claimant also accepted that her duties did not in fact change. There may have been concerns about not being in the know about Ms Watson's involvement, but her duties had not been reallocated and she in fact resigned before a wider restructuring.

99. The failure to pay the bonus: it's accepted that the policy postdates the decision not to award the claimant a bonus, but the emails at 398 show that several people did not get a bonus, one of whom is subject to a disciplinary process. There must be unreasonable conditions placed on the bonus for it to amount to a breach of contract.

100. On the suspension of the grievance investigation to give preference to a disciplinary process; there is no direct reference in a policy in this circumstance, so the question to consider is did the respondent act reasonably; and if not was it so unreasonable to amount to a repudiatory breach of contract. It may appear in hindsight to appear to be unreasonable, but it was a matter which needed to be dealt with -relatively promptly. And the claimant's main objection was that the grievance was rendered null and void. The fact that the claimant had spoken to Mr Sullivan was not an issue, the issue was that she had explicitly drawn his attention to the allegations.

101. Also, the claimant's main argument is the effect of the disciplinary causing the grievance to be null and void; but *Aldi/Blackburn* – the outcome of the disciplinary was a breach in itself. With the claimant, the disciplinary was dealt with in a timely manner. There is a "degree of leeway given to employers" – there must be "reasonable or proper cause" to start a disciplinary process for it not to amount to a breach of trust and confidence.

102. Also, the grievance was dealt with properly and impartially. It was partly upheld and separate from the disciplinary events; there were interviews of relevant witnesses and it's outcome was correct on the evidence.

103. The cause of the claimant's dismissal. The claimant saying in august saying she can't continue. The grievance was suspended on 2 August, and the failure to pay the bonus occurs on 25 September and she resigned on 25 October. At this time she has access to legal advice.

104. While the resignation later refers to disciplinary this is not pleaded as a breach of contract. The outcome was on 8 October and she appealed. And the resignation letter refers to the final straw – the manner in which grievance was dealt with. This must be intended as it's on legal advice - so final straw is the grievance. So if the grievance is undertaken reasonably, *"the claim must fail."*

105. While a last straw does not have to amount to a repudiatory breach, it does have to add to the other breaches.

106. Mr Blitz accepted that there was no last straw pleaded, but that the thought process of the claimant was clear – the last straw was the grievance. If there was in fact no last straw, what events led the claimant to resign – the last event is the non-payment of the bonus. The final meeting on 25 October 2018 is not pleaded, and it took on significance in the claimant's statement paragraph 97: it was following this meeting her position became untenable and she resigned. "What caused her to resign was not the issues in the letter."

107. The age discrimination claims: the heart of the claim are the words the claimant has attributed to the respondent - new fresh blood, old, fuddy-duddy – this is the only real piece of evidence which points to age being of any concern – this is not a repeating theme. Even if said – old, tired, this could be about the activities rather than the claimant. "Age" only comes about through the rumour mill and it appears that the conversations with Ms Watson were *"misremembered"* by the two members of staff. There were in fact differing views on the activities being undertaken, and these were not related to the claimant's age.

108. The changes on working patterns – this applied to all of the activities team not just the claimant.

109. The claim of victimisation: page 532 – the grievance does not make an allegation of discrimination. While there does not need to be explicit reference to discrimination *"it's a fine line and this grievance falls short of that line".* The

claimant is upset and is making allegations but no allegations relating to contravening the Act.

110. Time limits: the primary limitation date is 11 September 2019 – the last date on which an act would be in time. Any acts prior to this are out of time unless they form part of a continuing act.

111. Polkey: there were changes occurring and evidence of how the claimant felt about different working hours and different activities. *"So the Tribunal will have to consider whether the claimant would have decided to move on for own personal reasons relatively shortly thereafter".*

112. Mr Henman for the claimant: after the Tribunal had read his submissions we asked questions: in particular we discussed whether or not the disputed words were said by Ms Watson and whether they related to the claimant's age: he argued that the fact that the respondent had picked someone who was inexperienced and throwing her into the position over a more experienced and older employee with 18 years' experience – this is age-related.

113. The sequence of events and "time" there is a continuation of events. The claimant was affected by them, and she does not become ill for no reason – there must have been a driving force via work.

The Tribunal's Conclusions on the law and the evidence

Constructive unfair dismissal

114. We first considered whether the respondent changed the claimant's responsibilities and reallocated them to Ms Watson without consultation or consent.

115. We noted the involvement of Ms Rowland-Hall, Ms Webb and the statement of the CEO. Changes were being made to Activities which included to the activities themselves, their planning, the way they would be undertaken, their timing. This was in part a response to the CQC inspections across its homes. It was also in part an issue which the respondent was aware prior to the CQC inspection that needed addressing. These changes were then discussed at least in part with Ms Watson. The claimant was not consulted with.

116. We concluded that the reason why the respondent took this course of action was that it considered Ms Watson had the skill set to address and potentially implement changes in Activities. She was given some extra work with pay to come up with ideas and speak to residents.

117. There was also, we found, a view that the claimant did not have the skill-set, being seen as inflexible and resistant to change; we accepted also that Ms Gregory had some concerns about Activities before the CQC inspection, as did for example Ms Watson.

118. However, no matter the reason for not consulting with the claimant, the fact is that this did not happen, and she learned of potential changes 3rd hand through

the rumour mill, and subsequently at staff meetings. We concluded that this was a humiliating experience for the claimant, that it led to her raising a grievance and was a significant factor in her decision to resign – the fact as she saw it that she had been sidelined by the respondent.

119. We concluded that this act – the failure to consult - amounted to a repudiatory breach of contract by the respondent. It follows also that there was no attempt to gain the claimant's buy-in, or consent to its planned changes to Activities. Instead, she felt that her work over the years was being unreasonably criticised. We concluded that this breach amounted to a continuing breach for the remainder of the claimant's employment – that there was a requirement to consult, this was a continuing requirement which the respondent failed to do.

120. The claimant's job title was Activity Coordinator: it was we concluded a significant part of the claimant's role to plan activities and how they are undertaken. The Tribunal agreed that this was a duty which was taken away from her and allocated to Ms Watson, for the reasons above – that the respondent believed in the need to change Activities, this was given impetus by the CQC report, and its SMT believed Ms Watson had the right skill-set to take this forward. We accepted that the respondent believed significant change needed to be made to Activities.

121. Was the failure to pay a bonus a repudiatory breach of contract? We noted the terms of the Bonus eligibility – not to be under a disciplinary process, the claimant was. We concluded that it could only be a breach of the bonus process *if* the decision to initiate the disciplinary process was itself a breach of contract. For the reasons below, we concluded that the disciplinary process did not amount to a breach of contract and accordingly the failure to pay a bonus did not amount to a repudiatory breach of contract.

122. We dealt with the respondent's decision to suspend the grievance process and instead undertake a disciplinary process as an interlinked decision. This arose from Mr Sullivan informing members of staff about the claimant's grievance and the names of individuals the claimant was complaining about.

123. We noted that the respondent treated this issue seriously enough to dismiss Mr Sullivan. We concluded that the respondent genuinely believed that there was a serious breach of confidence by the claimant.

124. We accepted that the claimant had not read the grievance policy. But we concluded that it is self-evident to any employee in the claimant's position - long serving and in a position of responsibility - that a grievance is a sensitive issue. We accepted that it may be reasonable to discuss issues of concern to a trusted colleague, who may also accompany to meetings. However we concluded that all employers would reasonably expect that trusted colleague to maintain confidentiality. We concluded that any employer would be very concerned about such a breach of confidentiality, that one step to take in such circumstances would be to consider disciplinary action by way of a disciplinary investigation.

125. The tribunal also concluded that in deciding to suspend the grievance the respondent was making a decision which it was entitled to make and which did

not amount to a breach of contract. We concluded that this was an unusual situation; policies usually deal with the opposite, a grievance following a disciplinary allegation. We concluded that there was no easy way forward: to not deal with the disciplinary until after the grievance? That would leave a disciplinary process overhanging the claimant for a longer period. To deal with both at the same time? That becomes resource hungry, time consuming and messy.

126. We accordingly concluded that the respondent did not act in a manner which was intended or had the effect of repudiating the contract of employment in deciding to go down a disciplinary route and suspend the grievance.

127. We next considered the issue of whether the respondent failed to deal with grievance fairly and impartially. We concluded that the grievance was conducted in an impartial manner, that this can be demonstrated that it was, in part, upheld.

128. However, we also concluded that there were two significant issues relating to the change in Activities within the grievance. The first was that she had head through the grapevine/gossip about changes, and this allegation was upheld.

129. The second significant issue within the grievance was that Ms Gregory told the claimant, she says in her grievance, *"Activities … were letting the home down and that Ms Rowlands-Hall would talk to me when she had time. … I also asked why I was not informed if there was a problem and made aware of even discussed any changes. No answer! Meeting ended!"*

130. The tribunal concluded that this second significant issue was one of a failure to consult with the claimant. In its findings, the grievance report states, *"had this information not been leaked, you could have had the opportunity to be communicated more effectively of the changes that the management team had made…".*

131. The Tribunal concluded that this was not addressing the issue of complaint, which was that the claimant was not consulted with about the planned changes. As a matter of fact the changes had not been made at the time the information was leaked and there was still an opportunity to consult with the claimant even after this information had been leaked.

132. The tribunal noted the statement of Ms Rowlands-Hall at the grievance meeting – that *"none of us felt [the claimant' was going to take [change] on board … she will just start putting … barriers up … and it won't actually make meaningful activities"* She states that she did not speak to the claimant about the changes (562). In her evidence Ms Rowlands-Hall accepted that by the date of the grievance meeting, 27 October 2018, she had not spoken to the claimant about the changes for the 3 months to this date.

133. We concluded therefore that there was no consultation at all with the claimant about the changes to Activities, and that the grievance did not address this issue, instead blaming the leak for the failure to consult. We concluded that a failure to deal with what the tribunal accepted was a legitimate grievance complaint to make amounted, in the circumstances, to a repudiatory breach of

contract. It was, we concluded fundamentally unfair for the grievance not to address an allegation of real and continuing concern to the claimant. We concluded that this constituted a repudiatory breach of the claimant's contract which caused the claimant to further lose trust and confidence in the respondent.

134. Did the Claimant resign in response to the breaches of contract, as found? We considered the wording of the resignation letter, noting that it had been written after the 25 October 2018 staff meeting. She refers to the *"appalling"* way she has been treated over the past few months, that the grievance was not considered impartially and with no genuine interest in responding it; that the handling of the grievance and its outcome *"is the last straw…".*

135. The Tribunal concluded that the principle reasons for the claimant's resignation were (i) the failure to consult with her about the changes to the Activities department – that this was in significant part a referenced by the comment the 'appalling way' she had been treated and (ii) the failure to properly address her grievance, in particular there was a failure to address the allegation that there had been a failure to consult with her.

136. We concluded also that the failure to consult with the claimant was a continuing failure after the grievance had been submitted – the reference to the 'appalling' way she had been treated over the last months. The respondent at no time suggested that it made a decision not to consult – it just appeared that no one made a conscious decision to do so, despite the claimant being told this would happen.

137. We concluded that this failure to consult continued until the date of the grievance report – at which time it became clear that the respondent was not going to consult with the claimant, and was not going to investigate further the allegation that there had been a failure to consult.

138. The claimant resigned within 2 days of the grievance outcome being communicated to her (598). We concluded that the claimant resigned without delay and did not affirm the breaches of contract. She had complained about the leak – and the grievance had found in her favour on this point. She had also complained about the failure to consult, and this was not properly considered in the grievance process; also there was the continuing failure to consult which she addressed in her dismissal letter.

<u>Wrongful dismissal</u>

139. We concluded that the claimant was wrongfully dismissed as she did not work her notice period.

140. The claimant is entitled to pay for a period of notice of 12 weeks (216).

<u>Direct Discrimination</u>

141. Did the Respondent treat the Claimant as set out below; if so did R treat C less favourably than it treated or would treat a relevant hypothetical comparator; If so, was the less favourable treatment because of C's age?

142. We concluded the following:

143. The respondent did allocate duties without consulting with or seeking the claimant's consent. We noted the respondent's views of the claimant as resistant to change, inflexible and we concluded that this was the reason why it allocated duties to Ms Watson. We considered carefully whether these were age-related views – the words themselves can suggest an age-related factor, that older employees are perceived as resistant to change or lacking flexibility. We also noted that it was the much younger employee, Ms Watson, who was given the role to develop different activities.

144. However, we also considered that the respondent's SMT's belief was not related to the claimant's age. We noted the claimant appeared defensive when questioned about her activities: she believed that if she had been present at the CQC inspection Activities would not have been criticised. We noted that at the time the respondent's witnesses believed that the claimant would not handle this process well and would potentially resist significant change. We noted that the claimant had been asked at her appraisal to develop a template to gain users' histories – this appeared not to have been progressed.

145. We concluded that all of these factors were in the respondent's SMTs minds when they decided that the claimant was not the best person to drive forward significant change. These factors were not based on the claimant's age, but based on her performance in role.

146. We concluded that a hypothetical comparator would be an Activities Coordinator with significant experience in role – perhaps aged mid-30s, whose Activities had been criticised (the hypothetical comparator believed unfairly) in a CQC report, and who was seen as defensive and resistant to change by the SMT. We concluded that such a comparator would have been treated in the same way by the SMT, that there would have been a failure to consult and a decision taken to allocate planning for new activities and changes to Activities to another employee.

147. It is accepted that the respondent failed to pay her bonus received by other colleagues. We concluded that this was not a decision taken because of the claimant's age. The decision was taken because she was in a disciplinary process; we concluded that a younger employee (mid-30s) would have been treated in the same way.

148. Failing to consider her grievance impartially and fairly and in a timely manner: As set out above, we concluded that the respondent did not consider the grievance fairly, even though it did find on a significant issue in her favour. Was this less favourable treatment? We concluded that a hypothetical comparator in the same circumstances – i.e. who had not been considered with and who had gained information impacting on her role via leaks and who had submitted a grievance would be treated in the same way – there is no evidence to suggest that the respondent would have been more responsive and dealt with the grievance differently simply because the comparator is younger.

149. Instead suspending the investigation whilst taking disciplinary action against C, thereby further prejudicing the possibility of the grievance being dealt with fairly: we again concluded that the decision of the respondent to suspend the investigation and commence disciplinary was not an act of direct age

discrimination: this decision was taken because of the respondent's genuine concern at the dissemination of confidential information about the grievance. We concluded that the respondent would have treated a hypothetical comparator exactly the same way in similar circumstances.

150. Disciplining C and giving her a disciplinary warning without good reason: We concluded the same for the decision to go through the disciplinary policy and the sanction applied – a hypothetical comparator who had given information to a colleague without ensuring that it would be treated in confidence would have bene subject to the same process and received the same sanction. We saw no direct analogy with Ms Watson who had achieved new duties and knowledge of change and whose views on the claimant's activities were in any event known amongst colleagues.

151. Advising C on 2 October 2018 that her working patterns would change to include working in the evenings and over weekends: one of the claimant's witnesses accepted that she received the same letter. All staff in Activities were being asked to change their working hours to more flexible shifts. This was not less favourable treatment – a comparator would have been treated in the same way.

152. We accordingly concluded that the decisions taken and processes undertaken were not because of the claimant's age. A younger Activities Coordinator running the same or similar activities as the claimant, where a CQC inspection report had similarly criticised activities, and who was seen as defensive and resistant to change, would have been treated in the same way. We concluded accordingly that her dismissal did not amount to an act of age discrimination.

Harassment

153. Did the Respondent engage in the unwanted conduct – see above. We concluded that all of the conduct above was unwanted conduct – from the allocation of duties and a failure to consult, to the working pattern changes communications.

154. Was this unwanted conduct related to age? We noted that the test is an objective one – was the overall effect of this conduct related to her age? We concluded not. We concluded for the reasons above that the drive for rapid change was the CQC report, that the perception was that the claimant was not best placed to deliver this change. We concluded that this perception was based on discussions with the claimant and the view that she would be resistant to change. We concluded that this perception was not in any way related to the claimant's age.

155. We concluded the same for the other acts of alleged harassment: we considered that the claimant was treated in the same way any other employee would have been treated in the same or similar circumstances, the treatment she experienced was in no way related to her age.

156. If we are wrong on this point, and if any of the allegations were related to her age, we then accepted that they all had the effect (*not* the purpose) of violating her dignity and creating a hostile working atmosphere for her – from the failure to consult onwards. The strength of feeling of the claimant because she had

not been consulted with, her grievance is then halted and she is put thorough what she considers to be an unjustified disciplinary; some of her grievance is ignored. These actions all violated the claimant's dignity and for her created a hostile environment – she felt she was being ignored. On the failure to consult with her on the changes in Activities, the claimant was right, she was being ignored. An unjustified disciplinary process will of course have the effect of violating an employee's dignity, or creating a hostile working environment.

157. If the acts alleged to amount to harassment were, in fact, related to the claimant's age, the Tribunal considered that it would be reasonable for this conduct to violate her dignity and create a hostile working environment.

Victimisation

158. Was the Claimant's grievance on 8 August 2018 a protected act? We noted that the respondent suggests it did not get all pages of the grievance letter. We concluded that it did, and that the grievance constituted a protected act – it makes allegations that the claimant is regarded as *"too old and fuddy fuddy"* her activities are *"tired".* This was an allegation of discrimination based on age. We concluded that the claimant reasonably believed that this is what the respondent was saying about her.

159. As set out above, some of the allegations are not made out on their facts – we did not consider it was inappropriate to suspend the grievance process; the disciplinary sanction was, in context, justified. We did not consider that these acts could therefore amount to victimisation – but, for the purposes of this claim we treated all allegations as amounting to a s.27 detriment.

160. However, it was also clear to the tribunal that none of the acts complained of occurred because of the protected act: the "reason why" the treatment occurred, was as set out above: the grievance was suspended because the respondent believed the claimant had breached confidentiality and wanted to undertake a disciplinary investigation; the failure to pay the bonus was because the respondent was undertaking a disciplinary investigation it had good cause to commence; the notification of change of hours was because of a change in the way Activities were to be undertaken. None were because of the claimant's protected act.

161. If we are wrong, and all of the acts complained of were because of the protected act, we considered whether such conduct amounted to a s.27 detriment. We concluded that all conduct did amount to a detriment – we concluded that a reasonable employee would conclude that being disciplined after having raised a grievance, losing an expected bonus, the grievance being delayed and then not properly considered, were all objectively capable of amounting to detriments.

Polkey

162. We were addressed on the issue of Polkey – i.e. would the claimant have been dismissed fairly or resigned in any event? If so, what is the percentage chance of this happening; alternatively when would a fair dismissal have occurred?

163. We noted the claimant's request for flexible working, and her reasons for this request – she lives on a farm and has commitments in a livery and competition yard *"this would not be viable or at all possible if I worked on a shift pattern".* We noted that the Activity Coordinator role was advertised on a flexible 7 day rota, with a start date of 1 January 2019.

164. The Tribunal concluded that the claimant would have been consulted with, and her flexible working request would we considered, have been rejected on valid business grounds - a requirement to change the way Activities were structured, to have specialist Activity staff including the coordinator on site at different times on different days for different shifts. Also there would be more supervision of other staff undertaking activities as well as a significant change in the activities undertaken. These were all valid operational decisions for seeking to change the hours of work of a member of staff, and to engage in consultation.

165. We concluded that at the end of such a process, given the significant change of hours and nature of duties, that the claimant would have rejected the revised position. We concluded that this may amount to a potential redundancy situation, noting that we had not heard submissions on this point. We did note that the role of Activity Coordinator as well as the hours of work were significantly changing, and it was felt that the claimant was not suited to this role.

166. Accordingly, we conclude:

    a. In any consultation process the claimant would have rejected the new/revised role

    b. A fair consultation process would have taken to the end of 2018, the new role starting 1 January 2019

    c. If this is a redundancy situation, we conclude that the claimant's notice would have commenced 1 January 2019 (or she would have received a payment in lieu of notice). The claimant would also become entitled to a redundancy payment.

TULCRA Uplift

167. The claimant resigned in part due to a failure to properly consider her grievance. We concluded that the respondent had failed to follow the ACAS Code of Practice on disciplinary and grievance procedures under s207A TULRCA 1992.

168. We noted that the respondent had attempted to deal with the grievance, that this was not a deliberate failure. However, it was a serious failure, one that led her to resign.

169. We concluded that it was just and equitable to increase compensation payable by an uplift of 20%.

Remedy

170. The parties have been provided with a tentative listing date for a remedy hearing of 1 October 2021. This hearing is vacated and instead a 1 hour remedy

case management discussion will be listed for 1 October at 10.00. If this is no longer required the parties are asked to inform the Tribunal.

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EMPLOYMENT JUDGE M EMERY

Dated: 19 September 2021

Judgment sent to the parties
On: 21/09/2021

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For the staff of the Tribunal office

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Direct Discrimination

171. Did the Respondent treat the Claimant less favourably than it treated or would treat another person because of her age, a hypothetical comparator, by reason of any or all of the alleged acts set out below:
    a. The **purported** sending of an email saying that the Respondent needed *"new, young, fresh blood'* that the Claimant was *"old and fuddy duddy"* and her activities *"tired'* when talking about the activities team which the Claimant ran;
    b. Allocating her responsibilities as Activity Co-Ordinator to a younger colleague without the Claimant's consent or consultation, which included
    c. Referring to the activities being run by the Claimant as being *"shit"*
    d. Issuing a directive that the Claimant was not to be informed of the planne d changes to the activities team;
    e. Requesting the Claimant's password to access the Respondent's comput er system;
    f. Locking a box of activity equipment and issuing a directive that the Claim ant was not to be told where the key is;
    g. Holding a meeting with, and allegedly reprimanding, the Claimant in relation to her booking and attending a fire training course;
    h. Failing to consider the Claimant's grievance impartially and fairly and in a timely manner and suspending the investigation whilst taking disciplinary

action against the Claimant, thereby prejudicing the possibility of the grievance being dealt with fairly;

i. Disciplining the Claimant and giving her a disciplinary warning without good reason; and

j. Dismissing the Claimant.

172. Did the Respondent treat the Claimant less favourably than it treated or would treat the relevant comparator?

173. If so, was the less favourable treatment because of the Claimant's age, contrary to the Equality Act 2010?

Harassment

174. Did the Respondent engage in unwanted conduct related to age for the purposes of the Equality Act 2010?

175. The unwanted conduct that the Claimant will allege took place by the Respondent is:

a. The **purported** sending of an email saying that the Respondent needed *"new, young, fresh blood',* that the Claimant was *"old and fuddy duddy"* and her activities *"tired '* when talking about the activities team which the Claimant ran;

b. Allocating her responsibilities as Activity Co-Ordinator to a younger colleague without the Claimant's consent or consultation, which included

c. Referring to the activities being run by the Claimant as being *"shit"*

176.

177. Issuing a directive that the Claimant was not to be informed of the planned changes to the activities team;

178. Requesting the Claimant's password to access the Respondent's computer system;

179.

180. Locking a box of activity equipment and issuing a directive that the Claimant was not to be told where the key is;

181. Holding a meeting with, and allegedly reprimanding, the Claimant in relation to her booking and attending a fire training course;

182. Failing to consider the Claimant's grievance impartially and fairly and in a timely manner;

183.
184. Suspending the grievance investigation whilst taking disciplinary action against
the Claimant, thereby prejudicing the possibility of the grievance being dealt with fairly;
185. Disciplining the Claimant and giving her a disciplinary warning without good reason; and
186.
187. Dismissing the Claimant.
188.
189. If so, did the unwanted conduct have the purpose or effect of:
190.
191. violating the Claimant's dignity; or
192.
193. creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
194. If so, having regard to all the circumstances of the case and the perception of the Claimant, was it reasonable for the conduct to have that effect on the Claimant?
195.
196. **Victimisation**
197.
198. Did the Respondent subject the Claimant to a detriment because the Claimant had:
199.
200. done a protected act; or
201.
202. because the Respondent believed that the Claimant had done a protected act?
203.
204. The alleged protected act is the Claimant raising a grievance on 8 August 2018.
205.
206. The alleged detriments that the Claimant will say she has been subjected to are:
207.
208. Holding a meeting with the Claimant in relation to her booking and attending a fire training course;
209. Being informed by the Respondent of
the sickness policy for reporting absences in an allegedly hostile way;
210. Not receiving a long service
bonus from the Respondent received by other colleagues;
211. Failing to consider
the Claimant's grievance impartially and fairly and in a timely manner;
212. Suspending the grievance investigation whilst taking disciplinary action against the Claimant, thereby prejudicing the possibility of the grievance being dealt with fairly;
213. Disciplining the Claimant and giving her a disciplinary warning without good reason;

214. The Respondent's handling of the disciplinary process, including the R espondent not interviewing a witness which could support the investigation into the Claimant's alleged misconduct and the Respondent suspending the grievance process in order to deal with the disciplinary process.
215. Dismissing the Claimant.
216.
217. **Amended Claim:**
218. **Direct Discrimination**
219. Did the Respondent treat the Claimant as set out at paragraph 51 of her amended Particulars of Claim?
220. **If so,** did the Respondent treat the Claimant less favourably than it treated or would treat the relevant **hypothetical** comparator?
221. If so, was the less favourable treatment because of the Claimant's age?
222. **Harassment**
223. Did the Respondent engage in **the** unwanted conduct **s**et out at paragraph 51 of the amended Particulars of Claim?
224. **If so, was this unwanted conduct** related to age for the purposes of the Equality Act 2010?
225. If so, did the unwanted conduct have the purpose or effect of:
226. violating the Claimant's dignity; or
227. creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
228. If so, having regard to all the circumstances of the case and the perception of the Claimant, was it reasonable for the conduct to have that effect on the Claimant?
229. **Victimisation**
230. **Was** the Claimant**'s** grievance on 8 August 2018 **a protected act?**
231. **Did the Respondent engage in the conduct s**et out at paragraphs 51 (b), (c), (d), (e) and (f) of the amended Particulars of Claim?
232. Was such behavior a detriment within the meaning of s.27 Equality Act 2010?
233. Did the Respondent subject the Claimant to a detriment because the Claimant had:
234. done a protected act; or
235. because the Respondent believed that the Claimant had done a protected act?
236.
237. **REMEDY**
238. What, if any, compensation
239.

Time

1. Are any or all of the Claimant's claims for age discrimination **and / or victimisation** out of time?

2. If so, do the allegations made by the Claimant amount to an act extending over a period of time so as to bring the Claimant's claims in time?

3. If any of the Claimants claims for age discrimination are out of time, would it be just and equitable to extend the time limit for submitting such claims?