



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Ms G Muriithi**

**v**

**Kingwood Trust**

**Heard at:** Watford

**On:** 21,22,23,25 May 2018  
and 5 June in Chambers

**Before:** Employment Judge Skehan  
Mrs B Osborne  
Mrs A E Brown

## Appearances

**For the Claimant:** In person  
**For the Respondent:** Mr K McNerney, Counsel

## JUDGMENT

1. The claimant's claims for:
  - 1.1 detriment contrary to Section 47B of the Employment Rights Act 1996 ;
  - 1.2 constructive unfair dismissal;
  - 1.3 wrongful dismissal;
  - 1.4 holiday pay; and
  - 1.5 unauthorised deduction from wages are unsuccessful and dismissed.

## REASONS

1. The issues in this case were initially set out at the case management hearing on 21/05/2018. This hearing commenced before a full employment tribunal on Tuesday, 22/05/2018. The issues were revisited at various stages during the employment tribunal hearing and finally revisited by the employment tribunal and clarified with the assistance of both parties at the conclusion of the evidence. The final list of agreed issues is set out below. The claimant's claims were difficult to decipher from her ET1. There was considerable confusion as to what was and was not included within the claimant's ET1. The claimant had submitted two forms ET1 that differed

slightly in content. The respondent had responded to both forms ET1, within its ET3, however by the time of the final hearing one version had been mislaid by the respondent. The attachment to each ET1 was lengthy and unstructured, consisting of 9 pages of relatively small type. The claimant was permitted by Employment Judge Jenkins at a case management summary 08/10/2017 to amend her claim to include unfair dismissal, and although not recorded within the case management summary, both parties accept that this amendment extended to a wrongful dismissal claim also. The employment tribunal in dealing with this matter took the view that, the fairest way to determine this claim, where there was any dispute as to the scope of the ET1, was to include all claims within the list of issues, and deal with all issues including whether or not they formed part of the claimant's claim, within our determination, once we had heard all the evidence.

### **The Hearing**

2. The claimant was assisted and represented by her husband, Mr Njagi who was an employee of the respondent at the date of the hearing. The claimant objected to the presence of the respondent's witnesses within the employment tribunal hearing room as the claimant was giving evidence. No reasons were given for this objection other than the claimant felt uncomfortable. It was explained to the claimant that the employment tribunal operated with a presumption of open justice. In this jurisdiction it was normal procedure for the parties to be present during the entirety of the evidence should they so wish. The claimant was informed that should any particular circumstances exist that would warrant the respondent's exclusion, these should be brought to the attention of the employment tribunal. No submissions were made by the claimant. The employment tribunal was not aware of any reason for the respondent's witnesses to be excluded from the employment tribunal hearing during the course of the claimant's evidence.

### **The Issues**

3. The claimant claimed constructive unfair and wrongful dismissal. The claimant relies upon each allegation are set out below as individually and/or cumulatively amounting to a fundamental breach of contract of employment. The claimant also alleges that each allegation as set out below amounts to an unlawful detriment on the grounds that the claimant has made a protected disclosure:

#### **3.1 Over-censorship and zealously of Ms Rawlings towards the claimant:**

- (a) 18<sup>th</sup> October 2016 by a 9.04am text;
- (b) 3<sup>rd</sup> November 2016 by a 7.00am text;
- (c) 25<sup>th</sup> November 2016 in relation to petty cash;

- (d) Ms Rawlings refusing the claimant permission to attend a hospital appointment.
- 3.2 Requiring the claimant to work three Bank Holidays during the Christmas break in 2016;
- 3.3 Altering the claimant's shift pattern without sufficient reason in late 2016;
- 3.4 Being assigned by Ms Rawlings on 7<sup>th</sup> December 2016 to work with three service users – DC, LC, and JN and being required by Ms Rawlings to make a Christmas tree in December 2016;
- 3.5 Ms Rawlings' instruction that the claimant take the client, DC, shopping on 20<sup>th</sup> January 2017 as left in the diary for Whitebarn;
- 3.6 Subjecting the claimant to the disciplinary process as a consequence of her alleged actions on 20<sup>th</sup> January 2017;
- 3.7 Suspending the claimant on 20<sup>th</sup> January 2017;
- 3.8 Ms Rawlings stating, "*I know how you black people think.*" 20<sup>th</sup> January 2017. The claimant had previously withdrawn her claim for race discrimination;
- 3.9 Assigning Ms Kate Allen to hear the claimant's grievance appeal against Ms Christmas' grievance outcome of 13<sup>th</sup> February 2017;
- 3.10 Failing to uphold the claimant's grievances dated 20<sup>th</sup> January 2017;
- 3.11 Failing to uphold the claimant's grievances dated 22<sup>nd</sup> February 2017;
- 3.12 The Respondent failed to carry out a reasonable investigation into the disciplinary allegations arising out of the events of 20<sup>th</sup> January 2017 (Ms Beaumont -Orr);
- 3.13 The Respondent failed to carry out a reasonable investigation into the claimant's grievances dated 20<sup>th</sup> January 2017 (Ms Christmas);
- 3.14 The Respondent failed to carry out a reasonable investigation into the claimant's grievances dated 22<sup>nd</sup> February 2017.( Ms Allen);
- 3.15 Ms Allen holding the appeal against Ms. Christmas' grievance (lodged on 20 January) outcome of 13<sup>th</sup> February in the claimant's absence;
- 3.16 The appointment of Ms Allen to hear the claimant's second grievance dated 22<sup>nd</sup> February 2017 and the appeal from the claimant's first grievance and the disciplinary;
- 3.17 Ms Allen holding the claimant's disciplinary hearing on 24<sup>th</sup> May 2017 without the claimant;

- 3.18 Ms Allen refusing to investigate within the disciplinary process whether the diary entry for 20<sup>th</sup> January 2017 was a forgery;
  - 3.19 Ms Allen failing to supply relevant documents for the disciplinary process (as set out at numbers 1 to 7 of page 292 of the employment tribunal bundle);
  - 3.20 Ms Allen issuing the claimant with a first written warning dated 25<sup>th</sup> May 2017 as a consequence of her alleged actions on 20<sup>th</sup> January 2017;
  - 3.21 The appointment of Ms Christmas to hear the disciplinary appeal hearing and that the appeal went ahead when the claimant was sick;
  - 3.22 Failure during the course of the appeal following the disciplinary, Ms Christmas failed to take into account the following:
    - 3.22.1 The claimant's car having broken down and thus, according to the claimant, explaining her delay in getting back to work on 20<sup>th</sup> January 2017;
    - 3.22.2 In relation to shouting, the internal layout Whitebarn;
    - 3.22.3 The failure to take into account the witness testimony of EK and OJ in relation to the incident on 20.01.17;
    - 3.22.4 Failing to see contradictions between the witness evidence of SR and DN as set out at pages 203 and 209 in relation to the incident on 20.01.17, limited to the references to 'floating around'.
4. Holiday pay: The claimant's claim for holiday pay was unclear.
- 4.1 The claimant's first form ET1 includes "Loss of holiday earnings as stated in claimant's particulars of claim". The second form ET1 includes the additional wording "loss of holiday earnings of £2260.35 between 2014 and 2016". The claimant explained this claim by reference to the fact that between 01/4/2014 to 31/03/2016 the claimant's contract was for 16 hours per week. The claimant claims that her actual working hours were 40 hours per week, when voluntary overtime was included. It is common ground between the parties that the claimant's holiday entitlement was calculated by reference to her contractual hours, without reference to overtime hours. The claimant's holiday pay claim relates to holiday accrued from the overtime worked during this period. Although not articulated by the claimant as such, her claim was an allegation that the respondent underpaid holiday pay during this period by failing to include her normal remuneration ie including overtime when calculating her holiday pay.
  - 4.2 The claimant also maintained that her holiday pay claim as set out in her ET1 includes the following aspects:

- 4.2.1 Between 01/04/2016 and 20/01/2017, when the claimant worked 30 hours per week under a contract of employment, the claimant claims that her actual working hours were 40 hours per week, when voluntary overtime was included and holiday pay is outstanding. Although not articulated by the claimant as such, her claim was an allegation that the respondent underpaid holiday pay during this period by failing to include her normal remuneration ie including overtime when calculating her holiday pay.
- 4.2.2 From 20 January 2017 to the termination of the claimant's employment on 7 July 2017, the claimant was suspended by the respondent and therefore not permitted to work overtime the claimant claims that holiday should have accrued from the overtime denied during her suspension and this holiday pay is outstanding. Although not articulated by the claimant as such, her claim was an allegation that the respondent underpaid holiday pay during this period by failing to include her normal remuneration ie including overtime when calculating her holiday pay.
- 4.3 The respondent maintains that the claimant should not be permitted to extend her claim beyond that as contained within the ET1 and raises the issue of statutory limitation being regulation 30 of the WTR 1998 that requires holiday pay claims to be brought within three months of the date when the specific payment in question fell due unless it is found to be not reasonably practicable for the complaint to be presented before the end of that period. In the event that the entirety of the claimant's claim for holiday pay is found to be within her form ET1, any argument in respect of a claim based on a "series of deductions" must generally be brought in a tribunal within three months of the last in the series. The respondent confirmed that the claimant last took annual leave on 31/10/2016.
5. Unauthorised deduction from wages: The claimant's claim for unauthorised deduction from wages was difficult to decipher. The claimant was asked on two occasions during her evidence to explain her claim for unauthorised deduction from her wages. The claimant referred to the sums of £33.65 plus £75.70 but was unable to explain what these figures related to. As the claimant was acting in person, the employment tribunal requested that the claimant return to this issue at the conclusion of her evidence. The respondent's representative stated that the respondent did not understand the basis for the claimant's claim for unauthorised deduction from wages, however as the claim amounted to a maximum of £33.65 plus £75.70, it would pay the sums without admission as to liability either by consent or settlement agreement, with a view to saving time and expense on all sides. The claimant refused to accept this offer and stated that she wished for the employment tribunal to determine the unauthorised deduction from wages claim and provide a judgement in respect of the same. As the claimant was

acting in person, the employment tribunal explained that the claimant that if the claimant was unable to explain her unauthorised deduction from wages claim, the employment tribunal were unlikely to be able to identify the basis for this claim and it would unlikely for that claim to succeed. The claimant was allowed additional time to consider her position and requested that the employment tribunal determine the unauthorised deduction from wages claim.

5.1 The claimant told the employment tribunal that on the week commencing 26/12/2016, the respondent did not schedule the claimant to work on Thursday 29 December, being her normal working day. The claimant was unable to work on Saturday due to her childcare commitments. The claimant claims that because of this rescheduling, she was prevented from working her contractual hours. The claimant was paid for her full contractual hours during this week and the overpayment (in respect of the hours not worked by the claimant ) was later deducted by the respondent. This related to the unauthorised deduction claim for £33.65. We were referred to a payslip as contained within the bundle with a pay date of 30/01/2017 showing unpaid leave deduction of £33.65.

5.2 The claimant told the tribunal that the second unauthorised deduction of £75.70 related to similar circumstances where she had been unable to work her contractual entitlement due to unreasonable scheduling on the respondent's part. The claimant stated that she could not explain the detail relating to this deduction without the rota for the relevant week. We were referred to a payslip produced in the employment tribunal bundle dated with pay date of 21/12/2016 showing unpaid leave deduction of £75.70.

## The Law

6. If the claimant proves that she has been constructively dismissed, meaning that the respondent is guilty of a breach of her contract by one or more of the alleged incident set out above that is a repudiatory or significant breach that either goes to the root of the contract or shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, this will give rise to a claim for damages for wrongful dismissal. The respondent accepts that should a wrongful dismissal exist in these circumstances it will also be considered unfair having regard to section 98(4) Employment Rights Act 1996 ('ERA').
7. It is accepted by the respondent that the claimant made a protected disclosure by letter dated 14/09/2015. Section 47B ERA provides that the claimant has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by the respondent done on the ground that the claimant has made a protected disclosure. Further, the claimant has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done by another worker of the respondent in the course of that

other worker's employment on the ground that she has made a protected disclosure

8. The unauthorised deduction from wages claim is based upon section 13 of the ERA. Under the *Deduction from Wages (Limitation) Regulations 2014 (SI 2014/3322)* (2014 Regulations) and *section 23 of ERA*, claims brought on or after 1 July 2015 to an employment tribunal can only look back two years from the date of the complaint. It is possible for such a claim to be based upon a single deduction or a series of deductions. In any claim for unauthorised deduction from wages the claimant must bring her claim before the employment tribunal within 3 months (subject to extension under the ACAS compulsory conciliation scheme) of the last deduction. An employment tribunal may still consider a complaint presented outside the time limit if it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the three-month period, and the claimant has presented it "within such further period as the tribunal considers reasonable. Where a complaint is brought in respect of a series of deductions or payments, the time limits begin to run with the last deduction or payment in the series, or the last of the payments so received (*section 23(3), ERA*).
9. In *Fulton and another v Bear Scotland Ltd (No.2) UKEATS/0010/16* it was confirmed that a where claims for underpaid holiday pay are brought under the unlawful deductions from wages jurisdiction, they must be submitted within three months of the last in a "series of deductions" (*section 23(3), ERA 1996*). This phrase is not defined in the legislation. However, the EAT held that there will be a break in the chain of any "series of deductions" where a period of more than three months has elapsed between the deductions

### **The facts**

10. The claimant participated within ACAS early conciliation and the certificate of completion of this process dated 15/03/2017. The claimant issued her claim on 18/04/201 and the claim was defended. The claim was amended during the course of the proceedings are set out above. As is not unusual in these cases the parties have referred in evidence to a wider range of issues than we deal with in our findings. Where we fail to deal with any issue raised by a party, or deal with it in the detail in which we heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance. We only set out our principal findings of fact. We make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.
11. We heard evidence from the claimant on her own behalf.
12. On behalf of the respondent we heard evidence from:

- 12.1 Ms Rawlings, who works as a support manager for the respondent. Her duties include managing rotas, line managing staff including the claimant and overseeing the support needs of the people supported by the respondent working in partnership with other agencies and completing support shifts.
- 12.2 Ms Beaumont-Orr, who was employed by the respondent as an area manager and conducted the disciplinary investigation following the incidents of 20/01/2017 on behalf of the respondent.
- 12.3 Ms Allen, who was Chief Executive Officer of the respondent. Ms Allen dealt with:
  - 12.3.1 the grievance appeal hearing following the claimant's first grievance submitted on 20/01/2017;
  - 12.3.2 the claimant's second grievance submitted on 22/02/2017.
  - 12.3.3 The first stage of the disciplinary process arising from the events of 20/01/2017 that culminated in a letter dated 25/05/2017 from Ms Allen to the claimant.
- 12.4 Ms Christmas, who is employed as the director of services by the respondent. Ms Christmas dealt with:
  - 12.4.1 the initial decision to suspend the claimant on 20/01/2017;
  - 12.4.2 the claimant's first grievance submitted on 20/01/2017;
  - 12.4.3 the disciplinary appeal process.
13. The claimant produced two additional witness statements from Jamal Sufi and Jamal Matanga, neither of whom attended employment tribunal. We note the correspondence to the employment tribunal from Jamal Sufi, explaining his personal circumstances and reasons for him not attending the employment tribunal hearing. The respondent produced a witness statement from Ms Longland, the head of HR within the respondent. Ms Longland was not called to give evidence. We explained to the parties that the employment tribunal had read these witness statement however the weight given to these witness statements would be detrimentally affected by the fact that the witnesses were not present (or called in the case of Ms Longland) at employment tribunal to give evidence under cross examination.
14. The respondent is a charity providing support to people with autism and Asperger's syndrome. The claimant was employed as a carer and support worker by the respondent between 18/09/2012 and her resignation on 07/07/2017. It is accepted by the respondent that the claimant made a protected disclosure by letter dated 14/09/2015.



15. The claimant and Ms Rawlings had a difficult working relationship. Ms Rawlings said in her witness statement that the claimant was often difficult to manage. When Ms Rawlings had to raise an issue with the claimant such as lateness for work or rudeness towards other members of staff, the claimant would often become extremely defensive and accuse her of discrimination against her or classify it as fault finding, as she did with other members of staff.
16. The claimant says that Ms Rawlings disliked the claimant. She believed that Ms Rawlings held a grudge against the claimant because she had raised her whistleblowing concerns relating to the unsafe working practices and discriminatory allegations concerning Ms Baldock, who the claimant said was Ms Rawlings' friend. The claimant said that all of the allegations related to Ms Rawlings were connected to her whistleblowing and an attempt by Ms Rawlings to make life difficult for the claimant. This is denied by Ms Rawlings. There was a large volume of documentation relating to matters predating and unconnected to those set out by the claimant within the list of issues. Other than to the extent these matters are referenced within this judgement, the tribunal considered them to be irrelevant.
17. On 18 October 2016, Ms Rawlings sent a text message to the claimant at 9.04. The text reads; *Hi where are you its gone 9.00am and you were late yesterday*, SMS 9:04. The claimant told us during the course of cross examination that at the time she received this message, it did not strike her as over censorship or overly cheeky on Ms Rawlings part. However the claimant considered that she had seen a repeated pattern of behaviour from Ms Rawlings and considered this text message to be over censure at a later date. The claimant told us that she was in the building when she received this text. Ms Rawlings told us that the claimant had been 10-15 minutes late the previous day. Ms Rawlings stressed her responsibility to ensure that the respondent's service was sufficiently staffed. She did not consider sending the claimant a text message minutes following her allocated start time in any way inappropriate. The claimant referred to her appraisal dated 4/3/16, where it was noted amongst other things that the claimant's punctuality was good. Ms Rawlings accepted that the claimant's punctuality had not been an issue previously.
18. On 3 November 2016, Ms Rawlings sent the following text to the claimant; *Hi Gladys I believed you called in to say that you had an emergency. Can you give me more detail please. Thanks. SMS 07:17.* It was common ground between the parties that the claimant had phoned and spoken to the night staff who took a message saying that the claimant had reported an emergency. Ms Rawlings wanted to know what kind of emergency and that all was ok. Ms Rawlings was responsible for staffing levels and had no information on the claimant's likely return other than 'an emergency' had occurred. Ms Rawlings said that the text message was sent early in the morning as that was when Ms Rawlings started her shift. The claimant told us that Ms Rawlings knew that the claimant was not going to be at work that day as she had already explained that she had an emergency. The

claimant cited her entitlement to confidentiality and said that the early-morning text message was inappropriate.

19. On 25 November 2016 Ms Rawlings sent a text message to the claimant saying, ' how much petty cash do you have on you please? Can you ensure that you sign it out from now on. Thanks'. SMS 13:51. The response from the claimant reads, ' I don't have any petty cash only Lucy's purse and I have signed for it'. SMS 14:00 and, 'is your petty cash not balanced. Sorry maybe check with others'. SMS 14:02. The claimant told us that it was not her responsibility to deal with petty cash and at that time she only had £20 or below for a service user's use. No disciplinary allegations were made or disciplinary issues raised arising from any of the text messages sent by Ms Rawlings to the claimant as set out above.
20. It is common ground that the claimant requested time off to attend a hospital appointment and Ms Rawlings asked to see her confirmation letter. The claimant showed a text confirming the hospital appointment to Ms Rawlings. Ms Rawlings initially told the claimant that the time off would be unpaid however Ms Rawlings then checked with HR and confirmed to the claimant that she would be permitted to attend the appointment with pay.
21. The claimant was asked to work three bank holidays during the Christmas break in 2016. The Christmas break in 2016 fell as follows; Sunday 25 December, Monday 26 December, bank holiday Tuesday 27 December, Saturday 31 December, Sunday 1 January 2017 and bank holiday Monday 2 January 2017. We were referred to the rota for the period from Monday 26 December to Sunday 1 January which contains two bank holidays, being 26 and 27 December. From the rota supplied it can be seen that Mr Norcutt is scheduled to work both of these holidays, Jamal is scheduled to work both of these bank holidays, Odette appears to be scheduled to work both of these holidays although on Monday 26 December there is an "S" which we assume means that she telephoned in sick and the claimant is also scheduled to work both of these holidays. Ms Rawlings said in her statement at paragraph 20 "I am also aware the claimant alleges that I forced her to work bank holidays in an attempt to force her to resign. This is completely untrue. All employees are required to work bank holidays on rotation, unless a member of staff asks to work a bank holiday. All the members of staff have worked the same amount of bank holidays as the claimant and she was therefore not singled out as alleged."
22. The claimant alleges that she was scheduled to work on Saturday in December 2016, however could not do so due to childcare commitments. This meant that the claimant was unable to work her full contractual hours during that particular week and while she was paid for her full contractual hours, the respondent deducted a sum equivalent to the hours not worked by the claimant from her pay in the following month. This situation was likely to have occurred in the previous month also resulting in a similar deduction,
23. The claimant's contract of employment commencing 1 July 2013 provided the following relevant terms;

**Job title and duties**

You have been appointed to the position of Support Worker.

**Hours**

Your normal working hours total 30 hours per week, to be worked in accordance with the rota, which will be notified to you on a weekly basis and will usually involve day, night and weekend shifts. In addition to these hours you may be required to participate in rota on-call duty which will ensure that the staffing rota is covered at all times. Your contracted working hours may be averaged over the monthly pay period.

24. The claimant raises a complaint about being assigned by Ms Rawlings on 7 December 2016 to work with three service users and in addition during that time being requested by Ms Rawlings to make a Christmas tree in December 2016. In the witness statement the claimant states on 7 December 2016 [Ms Rawlings] assigned me multiple duties by allocating three people to support when each support worker is only suppose to be responsible for one PWS. This places at risk both the individual resident and myself. This was not only an attempt to punish me, by making my work difficult, but an abuse of position and authority. [Ms Rawlings] also included physical workload on me at the same time to make a Christmas tree whilst still supporting the three residents. The entire workload was so severe and systematically aimed for me to fail. I was left opened to further high risk when [Ms Rawlings] left the service for Head Office without adequate cover or at all. Mark White an employee was instructed by [Ms Rawlings] to take out another resident while Dean Norcutt, a senior staff left to support another resident in a different service. The home service users and I were left at a high health and safety risk.
25. We heard from Ms Rawlings that on the day in question, the claimant's colleague, Odette had been scheduled to work however she had called in sick on that day. Ms Rawlings had identified that the service would be understaffed and called another support worker, Jamal, to come in early at noon. Ms Rawlings said that she asked Mark White to delay a scheduled visit with a service user until Jamal had arrived. Mark rang Ms Rawlings before he left and Ms Rawlings confirmed that Mark left just before Jamal commenced his shift. Ms Rawlings denied allocating duties relating to the Christmas tree to the claimant as a punishment as alleged and considered these duties in supporting the service users to be part of the claimant's normal duties.
26. Ms Rawlings told us that in December 2016, she tried to alter the claimant's shift pattern as she had identified a need for the claimant to start at 8.00am. All of the other day staff commenced at 8am. This change was to ensure that the day staff were able to relieve the working night staff efficiently. The service needs a safe number of staff present at any given time as there are four individuals with challenging support needs. There was a requirement for the day staff to start at 8.00am so that medication could be administered

to the service users. The claimant was invited by letter dated 07/12/2016 to discuss the proposed change to her starting time. By letter dated 28/12/2016 the claimant was informed that her starting time would change to 9am with effect from 30/01/2017. On 10/01/2017 the claimant made a request for flexible working is referred to in the letter from the respondent dated 17/01/2017. The claimant set out a request for flexible working in greater detail by letter dated 20/01/2017. The claimant noted within this letter that at that time three members of staff commenced at 8am. The claimant accepted during cross examination that at no time did she work a shift commencing at 8am and matters were superseded by the events of 20/01/2017.

27. On 20/01/2017 the claimant was scheduled to take a service user, DC, shopping. The respondent's diary entry the day states inter-alia 'car checks-Dean and Odette'; 'Dean- book meds in!'; 'LC coffee morning Tyndale church'; and 'GM and DC food shopping'. The claimant claims that at some point following the morning of 20 January, Ms Rawlings added further wording to the diary page being: 'Dean to drop off and collect'; 'Eric to support JM'; 'Odette to coffee morning with LC'; 'Dean and TD'. The claimant told us that she believed that these further instructions were added to the diary by Ms Rawlings to cover the fact that Ms Rawlings had included only instructions for the claimant in the diary. The claimant did not allege that the additional instructions were fabricated and accepted that they related to scheduled tasks for other members of staff however the allegation was that the tasks were added at a later date. The claimant told us that the alleged change to the diary shows bad faith on Ms Rawlings part and that the respondents were required to get a forensic expert to ascertain either the time various messages were written in the diary or the time between when various messages were written in the diary on 20/01/2017.
28. On 20/01/2017 the claimant says in her witness statement that DC was asked and declined to join [the claimant] on the shopping trip as he was unwell and very reluctant, showing no interest to be persuadable. Forcing him would amount to false imprisonment and action which is against his will and human rights. Therefore it was agreed with Mr Norcutt that it would be better if DC stayed at home and the claimant when shopping without him. Ms Rawlings described the events of 20 January. She told us that on 19/01/2017 she had allocated the claimant to go shopping with service user DC. She arrived at Kingwood approximately 11:30am on 20/01/2017, saw DC and wondered why he was not out shopping with the claimant. Mr Norcutt told Ms Rawlings that he had asked the claimant to get DC ready to go shopping. The claimant had told Mr Norcutt that DC was slow and she did not feel confident taking him with her. Mr Norcutt told Ms Rawlings that he was fed up with arguing with the claimant and had arranged to go out in the car with DC and his own service user. We were told that it was normal for DC to be slow and whilst his mobility is not the best, he is generally a happy-go-lucky boy who enjoys going out horse riding and stepping stones. Ms Rawlings believed that a trip to Asda would not have been outside of his limitations. He knows many of the staff in Asda and often likes to stop and chat to members of staff working there. Ms Rawlings noted that the

claimant had received active support training from the autism practice manager and there was no reason as to why the claimant could not take DC shopping.

29. Ms Rawlings told us that the claimant returned to the workplace at 12:47pm. Mr Norcutt told Ms Rawlings that the claimant had gone shopping around 11am. Ms Rawlings asked the claimant to come into her office and take a seat. Ms Rawlings asked the claimant why she had not taken DC shopping with her. Ms Rawlings says that the claimant became defensive repeated over and over that DC was slow. Ms Rawlings says that at no point did the claimant inform Ms Rawlings that DC was unwell or that he did not want to go shopping. Ms Rawlings asked the claimant whether DC had wanted to go shopping that the claimant answered that 'well I asked everybody ', when Ms Rawlings repeated the question the claimant did not answer. Ms Rawlings says that the claimant became agitated and started to discuss other members of staff with no relevance to their issue and repeatedly said 'this is a witchhunt'. The claimant was shouting and Ms Rawlings asked her to keep her voice down. Ms Rawlings says that the claimant stormed out of the office.
30. Following this meeting Ms Rawlings was provided with the shopping receipt from Mr Norcutt. The receipt showed that the claimant had gone through the Asda checkouts at 11:57am. The local Asda store is a 5 to 10 minutes drive from the claimant's workplace. Ms Rawlings asked the claimant to return to her office. She showed the claimant the till receipt and asked her why she had been gone so long the claimant told her it was because it was busy. The claimant agreed that she had left the service at 11am. Ms Rawlings explained that the receipt showed that she went through the checkout at 11:57am but arrived back at the service at 12:47pm. Ms Rawlings asked the claimant where she had been for 50 minutes the claimant shouted that it was none of her business. Ms Rawlings told the claimant that it was her business as the respondent was paying her to be on shift. Ms Rawlings repeatedly asked the claimant where she had been 50 minutes. The claimant refused to answer her.
31. Ms Rawlings complains that the claimant banged things in the office where the cash tin was stored. Ms Rawlings told the claimant to stop banging or she would be asked to leave. Ms Rawlings was upset and reported the matter to Ms Longland and thereafter discussed it with Ms Longland and Ms Christmas.
32. The claimant alleges that Ms Rawlings said 'I know how you black people think'. Ms Rawlings denies making this comment. The claimant says she was completely taken aback by this broke down in tears in her car shortly afterwards. The claimant said that she unsuccessfully attempted to contact Ms Burman. During the investigatory meeting on 24/01/2017 between Ms Rawlings and Ms Beaumont the minutes reflect Ms Rawlings asking the claimant where she was for 50 minutes, the claimant responded that it was not her business, Ms Rawlings repeating the question with the claimant responding 'you tell me where I was Sarah?'. Ms Rawlings responded,

'Home probably as you are local'. Ms Rawlings told us that she probably should not have made that comment but believed that the claimant had gone home.

33. The claimant told us that she had a brief discussion with Ms Christmas who told her that complaints had been raised against her. The claimant said she had no chance to explain she had been racially abused and the management was conspiring to block her from raising a grievance. The claimant said that she could not continue her discussions with Ms Christmas and was suspended. Ms Christmas told us that when she spoke to Ms Rawlings on that day, Ms Rawlings appeared upset. The claimant was invited to head Office to discuss the incident. Ms Christmas says that she asked the claimant to explain what has happened and why the claimant had not taken DC shopping with her. The claimant said that Mr Norcutt had asked her to take DC shopping. She had not done so because DC was slow and she did not feel confident in taking him out shopping with her. The claimant did not tell Ms Christmas that DC was unwell. Ms Christmas asked the claimant why it had taken her so long to return to the service. The claimant said she did not believe it had taken her that long to return. The claimant denied that she had raised her voice or banged on the table. It is common ground between the parties that the claimant did not tell Ms Christmas that Ms Rawlings made any discriminatory remark against her. The claimant did not tell Ms Christmas that her car had broken down.
34. Ms Christmas decided that there were reasonable grounds to suspend the claimant pending an investigation into the allegations that the claimant had failed to follow instruction given by her line manager, failed to follow support guidelines, had an unauthorised and/or unexplained absence, and that her behaviour in the whole in relation to her interaction with Ms Rawlings could be detrimental to the people they support. Ms Christmas informed the claimant of her decision and this was confirmed in writing to the claimant on the same day.
35. Later on that same day, 20/01/2017 the claimant raised a grievance in respect of the incidents that occurred that day. This grievance related to race discrimination by Ms Rawlings in particular the alleged comments 'I know how you black people think'; and bullying and harassment on the part of Ms Rawlings. The claimant alleged that she did not bring DC shopping as he appeared unwell did not want to go shopping with her.
36. During the hearing the claimant told us that she did not bring DC shopping as requested as he was very unwell and he did not want to go shopping.
37. Ms Christmas dealt with the claimant's first grievance hearing. The claimant was accompanied at the grievance meeting on 10/02/2017 by the claimant's representative. During this meeting the claimant reiterated that she did not take DC shopping because he was unwell and Mr Norcutt was present during this conversation the claimant had with the DC. The claimant also said that when she returned to the car park after completing the shopping, her car would not start. This was the first time that the claimant mentioned

that her car did not start and thus delayed her return. The claimant produced a engineers report as corroboration of the difficulties she had with her car. This report was dated 02/02/2017 and stated inter-alia 'steering badly off centre suspect cause of steering sensor code (cannot guarantee no electrical fault present).....'

38. Ms Christmas concluded on 13/02/2017 that there is no evidence to support the claimant's allegations set out in her grievance and decided not to uphold the claimant's grievance. The claimant was provided to the right of appeal to Ms Allen.
39. The respondent's disciplinary procedure had been suspended while the claimant's grievance was ongoing. On 14/02/2017 the claimant was invited to a investigatory meeting on Friday 17 February to be held by Ms Beaumont -Orr. The claimant responded on 15/02/2010 stating that she wished to be accompanied at this meeting and her union representative was not available until Friday the 24/02/2017. On 22/02/2017 the claimant was invited to a rescheduled investigation meeting on Friday the 24/02/2017 at 9:30am.
40. The claimant attended a fact-finding meeting with Ms Beaumont-Orr on 24/02/2017. During this meeting the claimant said that she was present under duress. The claimant says that she had requested to be accompanied by her union however the respondent has denied her the opportunity. The claimant said that she did not feel safe to continue without the presence of her union representative. The meeting was concluded at this point by Ms Beaumont-Orr.
41. On 22/02/2017 the claimant raised her second grievance. This grievance included allegations that the claimant suspension by Ms Christmas was illegal and unlawful, constituted less favourable treatment, it was a malicious response, premeditated and oppressive creating a hostile atmosphere for the claimant, that the suspension was targeted to obstruct the claimant's legitimate grievance and a use of a position of authority to discriminate against the claimant. This grievance made detailed allegations of race discrimination, procedural unfairness and harassment by Ms Rawlings and Ms Longland, together with a wide-ranging detriment allegation.
42. On 24/02/2017 the claimant appealed against the outcome of her first grievance to Ms Allen. She complains of procedural unfairness, victimisation, discrimination and harassment and a biased premeditated decision.
43. By letter dated 27/02/2017 the claimant was invited to a grievance hearing (relating to the second grievance ) with Ms Allen due to be held on Thursday 9 March. The claimant responded by letter dated 02/03/2017 asking for the meeting to be rescheduled as a trade union representative was not available confirming that trade union representative would be available on 17 March between 11am and 2pm.

44. On 08/03/2017 the claimant was invited to a grievance appeal hearing(relating to the first grievance) and the grievance meeting for the second grievance by Ms Allen to be held on Friday, 10/03/2017. The claimant did not attend this meeting, following the time scheduled for the meeting Ms Allen emailed the claimant to record that the claimant failed to attend the meeting. The claimant did not provide notification of her whereabouts or notification that the date was not suitable. The hearing was rescheduled for the afternoon of Friday, 10 March. The claimant did not attend nor did she contact the respondent. Ms Allen made numerous attempts to contact the claimant on her mobile phone. Ms Allen wrote two letters to the claimant on 10/03/2017 advising her that failure to attend the scheduled meetings may result in the respondent concluding that the claimant did not wish to proceed with her grievances.
45. The claimant responded to Ms Allen on 13/03/2017, requesting that the meeting be rescheduled for when the union representative is available. The claimant's grievance meeting relating to her second grievance was held on 20/03/2017 with the claimant's union representative, Ms Allen and a notetaker in attendance. During this meeting the claimant produced a 5 page statement for Ms Allen to consider. This grievance dated back to 2015. Ms Allen informed the claimant that grievances she had raised previously had been concluded and would not be revisited. The claimant also raised concerns in respect of Ms Allen chairing her grievance meeting. Ms Allen explained to the claimant that it was only herself or Ms Christmas were part of the senior leadership team and available to deal with the claimant's concerns. As Ms Christmas had dealt with the first grievance meeting, Ms Allen considered that she was the most suitable person to hear the second grievance and the appeal following the outcome of the first grievance. It was agreed that the meeting in relation to the second grievance would be adjourned and rescheduled and that Ms Allen would read the statement that the claimant have produced ahead of the next meeting. On 20/03/2017 Ms Allen provided the claimant with a follow-up letter confirming what had been discussed during their meeting and invited the claimant to attend a further meeting with her on 24/03/2017. The claimant failed to attend this meeting and subsequent meetings arranged by Ms Longland. We were referred to the respondent's correspondence dated 05/04/17 and 11/04/2017. We note the claimant's response on 19/04/2017 objecting to Ms Allen's involvement and stating that 'I do not intend to communicate with you any further until I have received the ET3 back from yourselves'. We note that the respondent wrote to the claimant again on 21 April offering further dates for the meetings. The claimant's response on 21 April set out below
46. By letter dated 21/04/2017, the claimant was invited to a further investigation meeting with Ms Beaumont-Orr. This meeting was scheduled to be held on Monday, 15/05/2017. The claimant responded to Ms Longland on 21/04/2017 as follows:



*Please note as stated in my letter dated 19/04/2017 I have already filed the claim to court.... Following [the respondent's] refusal to appoint a third party to hear my second grievance and first grievance appeal is confirmed in your letter of 11/04/2017 and my email on 18/04/2017. Therefore, this is no longer an intention as you now allege but an action that has already been executed. I must remind you that any attempt by [the respondent] to knowingly undermine the court process will be viewed as contempt of court. [The respondent] has already lost the right to hear and conduct this grievance process until the matter is determined by the court. Any efforts or attempt to progress your investigation before the grievance is heard amounts to further evidence of your acts of victimisation. Therefore I confirm that I will not be attending the investigation meeting with Danielle on Thursday, 27/04/2017 because the grievance matter is already pending in court.*

47. Ms Beaumont-Orr had conducted investigatory meetings relating to the incident in question with Ms Rawlings, Mr Norcutt, Ms Goode, and a further colleague known as Eric. The claimant accepted that she had no dispute with Mr Norcutt and he had no axe to grind with the claimant.
48. Within Ms Beaumont-Orr's statement she incorrectly referred to this colleague Eric, as Eric Charlema. During cross examination Ms Beaumont-Orr explained that she did not know Eric's surname and requested confirmation of it from her colleague who provided the wrong surname. There was no confusion between the parties in respect of the identity of the colleague involved, only a mistake as to his surname. We accept Ms Beaumont-Orr's evidence that this is a genuine mistake as to this employee's surname and we do not consider that this mistake affected her credibility. As the claimant refused to participate within the investigation Ms Beaumont-Orr considered the evidence that she had collated during her investigation and produced a report of our findings on 27/04/2017. These findings can be summarised as:
  - 48.1 In respect of the allegation that the claimant had refused to take DC shopping: Ms Beaumont-Orr considered the interviews she had conducted with Mr Norcutt and Ms Rawlings. Mr Norcutt confirmed that he believed DC was okay and there was no reason not to take him shopping. It was usual for DC to go shopping and at no time did DC say he was feeling unwell or that he did not want to go shopping. The claimant had a history of not wanting to carry out the shopping task. It was noted that Ms Rawlings had written in the diary that the claimant was required to take DC shopping. It was usual for DC to work at a slow speed. The claimant has undertaken training and was familiar with him having supported him on previous occasions. There was nothing in the guidelines that suggested that DC was unable to go shopping. Ms Rawlings says that DC liked going shopping and this was part of his social interactions. As the claimant had not taken DC shopping, Mr Norcutt was required to provide 2:1 support in place of the 1:1 support that had been scheduled for the other service user. Ms Beaumont-Orr considered that there was sufficient evidence to support

the allegation that the claimant failed to take DC shopping without a reasonable excuse

- 48.2 In relation to the allegation that the claimant was absent from the service for an unnecessary length of time Ms Beaumont-Orr noted that Asda was located approximately 5 minutes away. Ms Rawlings confirmed that the claimant had returned at 12:47 pm and that she should not be gone for more than an hour. Ms Beaumont-Orr considered the till receipt and the proximity of the supermarket. Ms Beaumont-Orr was unable to determine whether there was any legitimate reason for the length of the claimant's absence as the claimant declined to participate in any fact-finding meeting. Further the claimant discussed her length of absence on her return with Ms Rawlings and Eric, the claimant offered no explanation as to why she was late. At no time on 20/01/2017 did the claimant tell anyone that her car had broken down as she now alleges. Ms Beaumont found sufficient evidence to support the allegation that the claimant had been absent from this service for an unnecessary length of time without a reasonable excuse.
- 48.3 In relation to allegation 3, that the claimant raised her voice and banged on the table: Ms Beaumont-Orr noted that Mr Norcutt confirmed that he had heard the claimant shouting and that he could only hear one raised voice, being the claimant's. He also heard a loud bang which he believed was caused by the claimant hitting the cash tin on the table. Ms Rawlings complained that the claimant shouted and banged the cash tin. Ms Beaumont noted that Ms Goode and Eric did not hear banging or raised voices. Ms Beaumont-Orr said that she considered the location of the various members of staff. Ms Beaumont-Orr noted that while there were discrepancies within the accounts she considers there was sufficient evidence to support the allegation that the claimant had raised her voice. Ms Beaumont-Orr did not consider there was sufficient evidence in relation to the allegation that the claimant had banged her fist on the table.
49. By letter dated 08/05/2017 The claimant was invited to a disciplinary meeting on Monday, 15/05/2017. The claimant chose Mr Njagi as her companion and asked for the hearing to be rescheduled to Friday, 19/05/2015. The claimant also asked for a long list of documentation.
50. By letter dated 12/05/2017, the respondent confirmed that the meeting was rescheduled for Friday 19 May as requested by the claimant. In relation to the request for documentation, the respondent requested the claimant to confirm the relevance of certain documentation to investigation and stated that only relevant documentation will be disclosed.
51. The claimant wrote to the respondent on 16/05/2017 making a further request for the documentation. The claimant requested a forensic examination of the diary entry for 20/01/2017. By letter dated 17/05/2017 the respondent responded to the claimant confirming that a forensic

examination of the diary would not be possible and enclosing a copy of the floorplan as requested. In relation to the remainder of the information requested, the claimant was asked to explain the relevance of it and how it was connected to the investigation specifically to the events of 20/01/2017. The respondent informed the claimant that they were now unable to further reschedule the disciplinary meeting scheduled for Friday, 19/05/2017 and a failure on the claimant's part to attend may result in the hearing going ahead in the claimant's absence.

52. The claimant wrote to the respondent on 18/05/2017 stating that she was taken ill and unable to attend the hearing on 19/04/2017 and attached a doctor's note referring to 'stress at work'. This note was said to last from 18/05/2017 to 04/06/2017.
53. By letter dated 19/05/2017, the respondent said that while it could proceed with the disciplinary hearing in the claimant's absence it had chosen to reschedule the date. The disciplinary meeting was rescheduled to Wednesday, 24/05/2017. The claimant responded by email dated 23/05/2017 stating that she was unwell and certified unwell until 04/06/2017.
54. Ms Allen proceeded with the disciplinary meeting on 24/05/2017 in the claimant's absence. The outcome letter notes that, 'unfortunately due to the fact that you did not participate in the first investigatory fact-finding meeting and did not attend the reschedule second investigatory fact-finding meeting, disciplinary hearing or participate within one of the proposed alternative options we do not have an account of your version of events'. After considering the matter Ms Allen concluded that the claimant should be issued with a first written warning that would remain on her file for 12 months. The claimant was given the right of appeal.
55. The claimant told us during the course of her evidence that her ill health was caused by the ongoing procedures at work. Ms Allen told us during the course of her evidence that she considered the claimant's ill-health to be contributed to by the ongoing procedures at work and believed that it was in the best interests of all parties to conclude matters without delay. Ms Allen told us that there was no reason to believe that while the claimant was off sick with stress that she was unable to attend an internal meeting to deal with outstanding internal matters. Ms Allen took the decision to proceed with meetings in the claimant's absence.
56. The claimant appealed the disciplinary outcome and the disciplinary appeal process was handled by Ms Christmas. The disciplinary appeal meeting was scheduled to take place on Thursday, 29/06/2017. The claimant submitted a further sickness certificate referring to 'stress at work' lasting between 20/06/2017 and 10/07/2017. The claimant requested that the disciplinary appeal meeting you reschedule for after 10 July. By letter dated 30/06/2017 the respondent agreed to reschedule the disciplinary appeal meeting until Thursday, 06/07/2017. The claimant did not attend. Ms Christmas concluded the appeal hearing in the claimant absence on

06/07/2017 and the outcome was sent by letter to the claimant on the same day.

57. The claimant resigned by letter dated 07/07/2017 claiming direct and indirect discrimination, harassment, victimisation, over censorship, excessive monitoring, procedural unfairness, deduction of wages, unfair denial of holiday pay, denial of equal pay, injury to feelings, stress and ill-health.
58. The respondent's witnesses were cross-examined at length in relation to why other senior members within the business or members of the trustees board or officers of the respondent were not requested to participate within the various stages of the grievances and appeals. Ms Allen and Ms Christmas told us that it was entirely appropriate for them to deal with the grievances and disciplinary as they did. Ms Allen told us that she considered it was inappropriate to involve other senior colleagues who did not have experience of conducting grievances or disciplinary matters. Nor did she think it was appropriate to involve non-executive officeholders within the internal process.

#### **Deliberations and conclusions**

59. We were provided with written submissions on behalf of both parties. These are a matter of record and not repeated herein. We confirm that we have only addressed the submissions that are relevant to the list of issues as agreed with the parties at the outset of the hearing. We take this opportunity to comment generally on the evidence that we heard. We appreciate that the claimant was acting in person however we found her evidence difficult to follow and unhelpful at times. The claimant had difficulty in answering the questions put to her. She tended to give answers to questions which were not asked. In some circumstances the claimant refused to answer straightforward questions, requiring the questions to be repeated by the respondent's representative and sometimes the tribunal. For example, the claimant was asked whether she considered her suspension by Ms Christmas following the incident on 20 January to be reasonable. She did not answer. The claimant was asked whether she considered that her suspension on 20 January was tainted because of whistleblowing. The claimant did not answer the question. It was explained by the tribunal to the claimant that if she did not answer the questions put to her, the employment tribunal would have to decide this case in the absence of the claimant's responses. The claimant was also prone to exaggeration, for example, the references to 'false imprisonment' of DC within her witness statement. The claimant's credibility was damaged by these actions on her part. The respondent witnesses were open and helpful in giving their evidence.
60. Turning to the individual allegations, for ease of reference our deliberations are set out in line with the agreed list of issues.

61. Over-censorship and zealousness of Ms Rawlings towards the claimant: 18<sup>th</sup> October 2016 and the 9.04am text; We accept Ms Rawlings evidence that the claimant had been late the previous morning. While, Ms Rawlings had not seen the claimant by 9am on 18/10/2016, we accept the claimant's evidence that she was in the building at this time. The claimant did not claim that she had started work by 9am being her scheduled start time. The claimant was late, albeit by minutes only. We consider that it was reasonable of Ms Rawlings to send the text message to the claimant. We consider that the likely reason why the claimant did not consider this to be over censorship at the time, was because it was not. We note and accept that the claimant did not have timekeeping issues recorded with any previous manager and there was a positive reference to punctuality within a previous appraisal. However we accept Ms Rawlings' evidence and do not consider a lack of previous timekeeping issues to indicate any inappropriate conduct on the part of Ms Rawlings.
62. On the 3<sup>rd</sup> November 2016 enquiring of the claimant prior to her start time at approximately 7.00am about an emergency at Whitebarn; The claimant had simply left a message on this occasion stating that she had ' an emergency'. We consider it reasonable for Ms Rawlings to follow up with the claimant to request more details. Who did the emergency relates to, how long would the claimant be away? These were all relevant questions and it was reasonable for Ms Rawlings to require this information to allow her to plan her staffing cover. Ms Rawlings evidence in respect of a general concern for the claimant is also accepted.
63. 25<sup>th</sup> November 2016 in relation to petty cash; Ms Rawlings asked a question of the claimant in respect of petty cash. We consider that it was reasonable of Ms Rawlings as manager to make the request of the claimant should she need to do so as part of her duties in managing petty cash. The claimant answered Ms Rawlings' question and assumed, rightly, that Ms Rawlings' petty cash did not balance. We can identify nothing that is inappropriate or unreasonable in Ms Rawlings' approach.
64. Ms Rawlings refusing the claimant permission to attend a hospital appointment. It is not correct that Ms Rawlings refused to allow the claimant permission to attend a hospital appointment. We consider it reasonable for Ms Rawlings as the claimant's manager to request to see confirmation of the hospital appointment. We note that there was confusion on Ms Rawlings part initially as she wrongly told the claimant that the hospital appointment would be unpaid time off work. However, Ms Rawlings checked with the respondent's HR department and rectified her mistake telling the claimant that the time would be paid. We consider that Ms Rawlings acted reasonably and appropriately in dealing with the claimant's request for a time off.
65. In relation to all of these allegations of over censorship we note that no complaint was raised by the claimant at the time. We also note that no disciplinary matters were raised by the respondent with the claimant. We have seen no evidence to support the allegations that Ms Rawlings subjected the claimant to over censure.

66. Requiring the claimant to work three Bank Holidays during the Christmas break in 2016: We accept that the claimant was required to work on three bank holidays during the Christmas break in 2016. From the limited information available we can identify that at least 2 of the claimant's colleagues were required to work on 2 of the bank holidays. We were not provided with any information in relation to the employees who worked on the third bank holiday. We accept Ms Rawlings information that bank holiday work will be divided between the various support workers over the course of the year. We do not accept that the claimant has been treated inappropriately or less favourably than any of her colleagues by the relatives to work the bank holidays over the Christmas break in 2016
67. Being assigned by Ms Rawlings on 7<sup>th</sup> December 2016 to work with three service users – DC, LC, and JN and being required by Ms Rawlings to make a Christmas tree in December 2016. The claimant had put forward this claim on the basis that Ms Rawlings had intentionally unreasonably increased her workload by allocating the service users to the claimant. On hearing the evidence, we accept Ms Rawlings' evidence that the issues experienced by the claimant on 7 December 2016 arise from the claimant's colleague phoning in sick. It appears from the evidence that rather than leave the claimant to cope alone considerable steps were taken by Ms Rawlings to ensure that the respondent had adequate cover to deal with the service users requirements. We accept Ms Rawlings evidence that adequate cover and assistance was provided to the claimant on this occasion. We note the claimant's complaint in respect of preparing the Christmas tree. We accept that the claimant was likely to be busy on that day. There was no evidence whatsoever to suggest that this task, which we consider a usual tasks to be carried out during December, was in any way designed or requested with a view to placing the claimant at a disadvantage or under the burden of a unreasonable workload. We address the claimant's concerns that the respondent should have disclosed the residents' diaries an activity log sheets as these are completed and signed by the person supporting the residents in any activities engaged. We do not consider that such documentation would have assisted the tribunal. The staffing levels were not necessarily on a one:one basis and were decided by Ms Rawlings. We accept Ms Rawlings evidence that resources were juggled to provide adequate staffing cover on that occasion.
68. Altering the claimant's shift pattern without sufficient reason in late 2016. It is the case that the respondent sought to alter the claimant's shift pattern and requested the claimant to start work at 8am rather than 9am. The remainder of the claimant's colleagues working during the day started work at 8am. We accept Ms Rawlings evidence that the respondent wished for the claimant to work at 8am for legitimate business reasons. The respondent did have sufficient reason to alter the claimant's shift. In any event at no time did the claimant commence work at 8am as other events overtook this particular issue. It is clear that initially the respondent attempted to agree the proposed change with the claimant. When it became apparent that the claimant would not be in agreement with the

proposed change, the respondent sought to introduce that change following discussion on notice. We are unable to identify any error on the respondent's part in dealing with the proposed change in start time.

69. Ms Rawlings' instruction that the claimant take the client, DC, shopping on 20<sup>th</sup> January 2017 as left in the diary for Whitebarn. During cross-examination the claimant told us that she considered Ms Rawlings instruction for her to take DC shopping on 20/01/2017 was a reasonable one. We take this opportunity to address the claimant's complaints in respect of the diary page for 20/01/2017. We consider the claimant's request for a forensic expert to examine this page to ascertain the time when the ink on various lines as applied to the paper to be unreasonable. Even within the notes accepted as genuine by the claimant existing on the morning of 20/01/2017, there are instructions for other members of staff to complete various tasks. We have seen no evidence that would suggest that the claimant was singled out in any way by reference to Ms Rawlings including a reasonable instruction in the work diary for the claimant to take DC shopping on 20/01/2017.
70. Subjecting the claimant to the disciplinary process as a consequence of her alleged actions on 20<sup>th</sup> January 2017. The respondent carefully considered the allegations arising from the claimant's conduct on 20/01/2017. The allegations were investigated by Ms Beaumont-Orr. The claimant refused to participate within the investigation. We note that there is no statutory right to be accompanied at an investigatory meeting. We consider the claimant's refusal to participate within the investigatory meeting to be unreasonable. The claimant considered that the respondent was prevented from completing its investigation or concluding its disciplinary procedure because the claimant has issued proceedings. This is a misunderstanding on the claimant's part. We consider that the respondent took every reasonable step to conduct a fair and thorough investigation. Taking the circumstances as a whole we consider it reasonable on the part of the respondent to commence and proceed with the disciplinary process against the claimant as a consequence of her actions on 20/01/2017.
71. We note that the claimant complains in her submissions that Ms Rawlings attempted to 'sex up' the complaints against her by complaining of banging her fist on the table. This allegation was not pursued by the respondent within the disciplinary allegation. We accept Ms Rawlings evidence that her complaint was brought in good faith.
72. Suspending the claimant on 20<sup>th</sup> January 2017. We accept Ms Christmas' evidence in relation to her actions and motivations for suspending the claimant on 20/01/2017. There is no evidence to support any allegation that anything other than the claimant actions of 20/01/2017 prompted the claimant's suspension.
73. Ms Rawlings stating, "*I know how you black people think.*" 20<sup>th</sup> January 2017. The claimant has withdrawn her claims for race discrimination in their entirety. This comment is disputed by Ms Rawlings. We have taken into account that the claimant did not relay this comment to or complain to any of

the staff members she encountered immediately following her meeting with Ms Rawlings. This included Mr Norcutt, Eric and Ms Christmas. There was a considerable divergence between the evidence given by the claimant and Ms Christmas in relation to the length of the discussion they had prior to the claimant being suspended. We prefer Ms Christmas' evidence on this point and consider it more likely than not that Ms Christmas discussed the allegations with the claimant as set out above prior to reaching her decision to suspend the claimant. We find that the claimant had an opportunity to inform Ms Christmas of her allegation of race discrimination and we consider it unusual that the claimant chose not to do so. In the circumstances we find it more likely than not that the comment was not made by Ms Rawlings

74. Assigning Ms Kate Allen to hear the claimant's grievance appeal against Ms Christmas' grievance outcome of 13<sup>th</sup> February 2017. The claimant placed considerable reliance upon the ACAS code of practice. In particular the claimant highlighted paragraph 27 of the disciplinary code of practice which states, in relation to appeals, that, 'the appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case.'. It appears that there was a dispute between the parties as to the meaning of 'the case' in these particular circumstances. The claimant submitted that any previous dealing within either grievance or disciplinary matters would constitute previous involvement on the part of the individual. This is not our understanding of the intention behind this particular paragraph of the code. Appeals should obviously be dealt with impartially. Wherever possible, an appeal in a disciplinary matter should not be heard by the same manager who has made the original disciplinary finding. The reference to 'the case', relates to the disciplinary case being considered by the respondent. We also note that the paragraph in question is not set out as an absolute. It says, 'wherever possible'. The respondent is a small employer. We consider it reasonable and appropriate for Ms Christmas and Ms Allen to have undertaken their roles within the various processes. We accept Ms Allen's evidence that it would be unreasonable to seek to allocate these responsibilities to senior employees who do not have sufficient staff management experience or external non-executive officeholders. We consider that the respondent, Ms Christmas and Ms Alan complied with the ACAS code for disciplinary and grievance matters in their dealings with the claimant
75. We note the claimant's complaint that Ms Allen has used her power as CEO of the organisation to intimidate the claimant and frustrate the process. We do not find any evidence to support this allegation. The actions of Ms Allen when viewed individually and cumulatively can only be described as reasonable, appropriate and proportionate.
76. Failing to uphold the claimant's grievance dated 20<sup>th</sup> January 2017. Ms Christmas dealt with the claimant's original grievance. We are unable to identify any flaw or unreasonable conduct on the part of Ms Christmas in conducting this grievance.



77. Failing to uphold the claimant's grievances dated 22<sup>nd</sup> February 2017. Ms Allen dealt with the claimant's second grievance. We consider Ms Allen's involvement in the claimant second grievance to be entirely appropriate and reasonable for the reasons given above. The claimant did not cooperate with Ms Allen and therefore it was impossible for Ms Allen to conclude the claimant's second grievance. We consider that the claimant behaved unreasonably during this internal process.
78. The Respondent failed to carry out a reasonable investigation into the disciplinary allegations arising out of the events of 20<sup>th</sup> January 2017 (Ms Beaumont-Orr). We consider that Ms Beaumont-Orr conducted a reasonable investigation into the events of 20/01/2017. Ms Beaumont-Orr identified each witnesses' location clearly. Had the claimant participated within the investigation, she would have had the opportunity to contribute. The claimant chose not to participate within the investigation. We are unable to identify any issue omitted from Ms Beaumont-Orr's investigation the claimant refused to participate within this investigation and we consider the claimant's refusal to participate to be unreasonable.
79. The Respondent failed to carry out a reasonable investigation into the claimant's grievances dated 20<sup>th</sup> Jan. As stated above we consider that Ms Christmas is handling of the claimant grievance was reasonable and appropriate.
80. The Respondent failed to carry out a reasonable investigation into the claimant second grievance of 22<sup>nd</sup> February 2017. We consider that Ms Allen took all reasonable steps to deal with the claimant's second grievance. The claimant refused to accept Ms Allen as an appropriate person to deal with the grievance and effectively withdrew from the process. For this reason, the matter was not concluded. We make no criticism of Ms Allen in respect of her handling of the claimant's second grievance.
81. Ms Allen holding the appeal against Ms. Christmas' grievance (lodged on 20 January) decision of 13<sup>th</sup> February and the claimant's disciplinary hearing on 24<sup>th</sup> May 2017 without the claimant. We consider it reasonable for the respondent and Ms Allen to deal with the claimant's grievances and disciplinary issues without undue delay. It is clear from the facts are set out above that the respondent was flexible and reasonable in attempting to schedule all the meetings at a time convenient for the claimant. The claimant told us during her evidence that her ill-health was caused by the ongoing procedures at work. Ms Allen told us during her evidence that considered the claimant's ill-health to be contributed to by the ongoing procedures at work and believed that it was in the best interests of all parties to conclude matters. Taking all the evidence into account we consider that it was reasonable for Ms Allen in the circumstances to hold the meetings in the claimant's absence.
82. The appointment of Ms Allen to hear the claimant's disciplinary hearing, the claimant's second grievance dated 22<sup>nd</sup> February 2017 and the appeal from the claimant's first grievance. We accept Ms Allen's evidence and consider

it appropriate and reasonable for Ms Allen to have undertaken these roles. We refer to our findings made above.

83. Ms Allen refusing to investigate within the disciplinary process whether the diary entry for 20<sup>th</sup> January 2017 was a forgery. The claimant does not allege that the diary entry in question was a forgery, in the sense that the claimant accepts that the words were written by Ms Rawlings. The claimant alleges that it was written following the claimant's return from shopping. We have addressed this matter above and consider this aspect of the claimant's claim to be a red herring and irrelevant to the disciplinary proceedings brought against the claimant arising out of her actions of 20/01/2017.
84. Ms Allen failing to supply relevant documents for the disciplinary process as set out at numbers 1 to 7 of page 292. We note that Ms Allen sent the claimant documents she considered were relevant. She asked the claimant to provide an explanation as to why the remainder of the documents were relevant. The claimant failed to respond to this request. We accept Ms Allen's evidence and accept that the documents were reasonably considered by the respondent to be irrelevant to the matters under consideration. We consider Ms Allen's actions to be appropriate, proportionate and reasonable.
85. Ms Allen issuing the claimant with a first written warning dated 25<sup>th</sup> May 2017 as a consequence of her alleged actions on 20<sup>th</sup> January 2017. In considering the evidence, it is our opinion that Ms Allen's issuing the claimant with a first written warning as a consequence of her alleged actions on 20/01/2017 was reasonable appropriate and measured. We note that a full range of disciplinary sanctions were open to the respondent yet Ms Allen chose a sanction on the lower end.
86. The appointment of Ms. Christmas to hear the disciplinary appeal hearing and that the appeal went ahead when the claimant was sick. We refer to our findings above and confirm that we accept Ms Christmas' evidence that she was an appropriate person to hear the disciplinary appeal hearing. We note that Ms Christmas is junior to Ms Allen however Ms Christmas is a senior individual within a small organisation and we accept both her and Ms Allen's evidence that she was free from any undue influence in making her decisions during the appeal process. For the reasons as set out above we confirm that it was reasonable and appropriate for the hearing to continue during the claimant's sickness leave.
87. During the course of the appeal following the disciplinary, Ms Christmas failed to take into account the following:
  - 87.1 The claimant's car having broken down and thus, according to the claimant, explaining her delay in getting back to work on 20<sup>th</sup> January 2017.
  - 87.2 It was clear to us from hearing the evidence in this matter that Ms Christmas did consider the claimant's evidence that her car had broken down. However, in considering the evidence as a whole Ms

Christmas did not accept the claimant's excuse. Ms Rawlings evidence that she repeatedly asked the claimant to explain her whereabouts on 20/01/2017 is accepted. Ms Christmas considered it odd that the claimant did not bring the trouble that she claimed to have had with her car to Ms Rawlings attention. When the claimant was summoned to head Office on 20/01/2017, she drove her car. Ms Christmas considered it odd that she expressed no concern in relation to undertaking this trip, considering her earlier car issues.

87.3 In relation to the shouting and the internal layout Whitebarn.

87.4 Ms Christmas told us that she did take the internal layout of Whitebarn into account. This was a factor that Ms Christmas weighed up when considering whether the claimant had shouted. Mr Norcutt reported that he heard the claimant shouting. The claimant accepted that she had no dispute with Mr Norcutt and he had no axe to grind with the claimant. We consider it reasonable for Ms Christmas to conclude that the claimant had shouted while taking the internal layout into account.

87.5 The failure to take into account the witness testimony of EK and OJ in relation to the incident on 20.01.17

87.6 Ms Christmas told us that she did take into account the witness testimony of Eric and Odette. Neither of these employees heard any shouting or banging. This is expressly acknowledged within the investigation report. Ms Christmas weighed up the evidence of two employees who did not hear anything against one employee who did hear shouting, and then viewing it alongside Ms Rawlings evidence concluded that the claimant had shouted. We accept that Ms Christmas took the evidence of EK and OJ into account and this evidence was dealt with appropriately and reasonably.

87.7 Failing to see contradictions between the witness evidence of SR and DN as set out at pages 203 and 209 in relation to the incident on 20.01.17, limited to the references to 'floating around'.

87.8 The claimant confirmed that her allegation in respect of this particular matter was confined to the difference in meaning when Ms Rawlings said on 24/01/2017 that she did not know where Mr Norcutt was during the incident and later refers to Mr Norcutt as 'floating around'. Obviously the expression 'floating around' is not intended literally. Our understanding of this expression is that a person may be in the vicinity, potentially moving around however the precise location is unknown. We have carefully considered the claimant's allegations and accept Ms Rawlings evidence. We find no material inconsistency within her evidence.

88. We have carefully considered each allegation above separately and cumulatively when considering the claimant's allegations that these actions were taken for a reason connected with the fact that the claimant blew the whistle in September 2015. We accept that it is more likely than not that all

members of the respondent's small managerial team would be aware at least on a high level that the claimant had made whistleblowing disclosure. We have found no evidence in relation to any individual allegation or combination of allegations to support a finding of detriment due to the claimant making a protected disclosure. We have examined each individual allegation in detail and have found reasonable and appropriate behaviour on the part of the respondent. In viewing the evidence as a whole we conclude that the claimant has not suffered a detriment because of making a protected disclosure in September 2015.

89. For the sake of completeness It is noted that the claimant issued her claim in the employment tribunal on 21/04/2017. At no time following that claim has the claimant sought to amend her claim for detriment following her whistleblowing. Therefore, any allegations occurring after 21/04/2017 cannot form part of the claimant's claim for detriment as they cannot have been contained within the claimant's original ET1. We note however that the allegations in respect of the events following 21/04/2017 remain relevant in respect of the claimant's constructive wrongful and unfair dismissal claims.
90. We have also carefully considered each allegation above separately and cumulatively to examine whether the respondent has breached the claimant's contract of employment. It appears to us that the majority of the allegations made against the respondent are in themselves indications that the respondent is abiding by and wishes to continue abiding by the terms and conditions of the claimant's contract of employment. We have preferred Ms Rawlings evidence to the claimant's for the reasons set out above and consider that she has acted appropriately and reasonably throughout. When viewing this matter as a whole, we accept Ms Rawlings evidence that the claimant was difficult to manage. The respondents have shown a considerable amount of flexibility and patience when dealing with the claimant's grievances and the disciplinary procedure arising out of the incidents on 20/01/2017. We consider the claimant's failure to cooperate with the respondent's process to be unreasonable. We accept the respondent's evidence that it bent over backwards to accommodate the claimant. In taking the evidence as a whole we conclude that the allegations are set out above do not either individually or cumulatively amount to any breach of the claimant's contract of employment and we can see no basis for the claim that the respondent has by its actions committed a significant or repudiatory breach of the claimant's contract of employment. In the circumstances the claimant has not been constructively dismissed. We conclude that the claimant claims for constructive wrongful dismissal and constructive unfair dismissal must fail.

Holiday pay:

91. The claimant's claim for holiday pay was only clarified during the course of the hearing. The first aspect we have considered is whether the claims are included within the claimant's forms ET1. The claimant told us that the

second form ET1 containing the wording “loss of holiday earnings of £2260.35 between 2014 and 2016”, was intended as a particularisation omitted from the first ET1. We therefore conclude that the claimant has included within her form ET1 arrears of holiday pay claim arising between 01/04/2014 and 31/03/2016 only. The holiday pay claims arising from later time periods are not included within the claimant claim. The additional holiday pay claims appear to be afterthoughts on the part of the claimant, however there has been no amendment to the form ET1.

92. The claim for holiday pay was issued as an unauthorised deduction from wages claim, as the claimant remained in employment at the time the claim was issued. The holiday pay claim has not been amended since this time. An employment tribunal can only look back two years from the date of the complaint. That means that the earliest possible holiday pay claim that the claimant may bring under these provisions arises on 18/04/2015.
93. When considering the claimant’s claim in respect of holiday pay for the time period 18/04/2015 to 31/03/2016, there is an obvious limitation issue. Even on the assumption that the claimant could show a series of deductions during this time period, the claimant was obliged to bring her claim before the employment tribunal within 3 months (subject to extension under the ACAS compulsory conciliation scheme) of the last deduction, being 31/03/2016. An employment tribunal may still consider a complaint presented outside the time limit if it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the three-month period, and the claimant has presented it “within such further period as the tribunal considers reasonable”. We have heard nothing to suggest that it was not reasonably practicable for the claimant to bring her claim to the attention of the tribunal within the time limits. Therefore, this claim is substantially out of time and the employment tribunal has no jurisdiction to consider it.
94. For the sake of completeness, even if we are wrong on the above limitation point. To succeed within this claim the claimant would need to show a series of deductions from her holiday pay. We have been provided with no evidence in relation to when holiday pay was paid throughout the time in question. However, It was agreed between the parties that the claimant last took annual leave on 31/10/2016. This agreed date causes a further limitation problem. Even if the claimant could show a series of deductions, and we have no evidence to show this to be the case, the last date within the series of deductions is 31/10/2016. The claimant has not brought her claim within the required time limit and we heard no evidence as to why it was not reasonably practicable for her to do so. We therefore conclude that in any event the claimant’s claim for holiday pay could have been brought within the statutory time limit and the employment tribunal has no jurisdiction to consider it.
95. If it was the case that the claimant could overcome the issues in respect of normal statutory time limits, we note that we have no evidence whatsoever in relation to the frequency of holidays taken, holiday pay made by the

respondent during the relevant period(s). In *Bear Scotland* it was held that underpaid holiday pay cannot be claimed as the last in a series of deductions where more than three months has elapsed between deductions. We have not been provided with any information from the claimant that would allow us to determine a holiday pay claim in her favour.

96. It is agreed between the parties that all overtime worked by the claimant was voluntary overtime. We have found the suspension to be a reasonable step taken by the respondent. Even if included within the ET1, we can see no entitlements to holiday pay on the claimant's part calculated by reference to voluntary overtime not worked by the claimant.
97. For the avoidance of doubt, we confirm that we have considered the holiday claim in the way as presented by the claimant, being a claim for additional days holiday arising from the overtime worked. We are unable to identify any legal basis to consider such a claim.

Unauthorised deduction from wages:

98. The claimant's claim for unauthorised deduction from wages was difficult to decipher as set out above. The tribunal starting point was to consider what claims were included within the claimant ET1. We note that the claimant second ET1 in which the claimant attempted to particularise her claims includes 'Deduction of wages £33.65 for 29/12/2016'. This claim arises because the claimant's working days were changed by the respondent. The claimant said that she did not agree to this change, and therefore was prevented from working her contractual hours and no deduction from her pay was justified. We note the claimant's contract and in particular the fact that the claimant did not have set contractual work days. The claimant was required to work in accordance with the rota, which was notified to her on a weekly basis. On this basis if the claimant did not attend work as reasonably requested by the respondent in accordance with the contract of employment we consider that the respondent was not required to pay the claimant for hours which the claimant had not worked. Therefore the deduction in relation to 29/12/2016 is a deduction of an overpayment of salary that had been paid in error by the respondent. Further it is an express term of the claimant's contract at clause 14 that the respondent is authorised to deduct any sums due to it from the claimant's salary (eg as a result of overpayment of salary or any other sums due to you in respect of your employment ....).
99. We can find no mention of the second alleged deduction of £75.70 within the claimant's form ET1 and conclude that the second deduction did not form part of the claimant's original claim. This claim has not been added at any time since the issue of the Form ET1 and therefore the employment tribunal does not have jurisdiction to consider it. In any event, even if the employment tribunal has jurisdiction to consider this particular claim, the claimant was unable during her evidence to provide any details as to when this deduction arose. The claimant indicated that the circumstances were similar to the previous deduction, ie where she was prevented from working her contractual hours. Therefore any such claim would also fail for the

same reasons as the previous unauthorised deduction from wages claim. We note that in the submissions made by the claimant, it is alleged that the claimant's hospital appointment, referred to above, resulted in an unauthorised deduction from wages of £75.70. This directly conflicts with the evidence provided by the claimant during the tribunal and is not considered further.

100. In summary, in reviewing the evidence as a whole, we conclude that the claimant's claims fail in their entirety and are dismissed.

\_\_\_\_\_  
Employment Judge Skehan

Date: .....

27 July 2018

Sent to the parties on: .....

.....  
For the Tribunal Office