EMPLOYMENT TRIBUNALS

Claimant: **Mrs Irene Morrison**

Respondents: **(1) JSB Healthcare Ltd**
(2) Kirsty Jones
(3) Rajdeep Tutt

Heard at: **Mold** **On: 5, 6, 7 and 9 February 2018**

Before: **Employment Judge P Davies**

Members: **Ms C O Peel**
Mr A J Fordham

Representation:
Claimant: Miss F Barker (Solicitor)
Respondents: Mr P Clarke (Consultant)

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

(1) The Claimant was directly discriminated against because of her age and is awarded £6560 for injury to feelings against the First and Second Respondents.
(2) The claim of harassment is dismissed.
(3) The Claimant was unfairly dismissed and the First Respondent is to pay compensation to the Claimant in the sum of £28,253.85
(4) All other claims are dismissed.

REASONS

1. By a claim received on 23 June 2017 the Claimant Mrs Irene Morrison complained of unfair dismissal, age discrimination, notice pay and arrears

of pay together with failure to give a Section 1 Statement of Particulars. The Response filed on behalf of the three Respondents denies all the claims and it is said that the Claimant was offered suitable alternative employment verbally on several occasions and also in writing. The hearing commenced in February 2018 and Judgment was due to be given orally on the 9 February 2018 but was postponed because on that day the Claimant presented to the Tribunal further documentation regarding alleged proof of posting of a document to the Respondents. The explanation given by Mrs Morrison and her son about this matter was challenged on behalf of the Respondents. Judgment was not given by the Tribunal but directions given about the filing of supplementary witness statements with reference to the documents including directions for the parties' representatives to write to the Tribunal about what further time should be given for this case for further evidence to be given. As a result of correspondence from the parties, and difficulties of re-listing this case because of the parties' availability and their representatives' availability, the case was re-listed for hearing on 1 August 2018. However there was no need for that hearing as the parties had indicated, following a Case Management Discussion by telephone, that no further evidence would be called on this matter and the Tribunal was invited to give its Judgment.

2. The Tribunal heard the following witnesses: Mrs Morrison, the Claimant; Mr Alexander Morrison, son of the Claimant; Mr Phillip Morrison, son of the Claimant; Mrs Kirsty Jones, ex-employee of the First Respondents but who was an Acting Manager and Second Respondent; and Miss Rajdeep Tutt, Third Respondent and Director of the First Respondent. At the commencement of the hearing the claim for indirect age discrimination was withdrawn and this claim dismissed by the Tribunal. The Tribunal dealt with an application by the Claimant for strike out of the Response which was refused by the Tribunal.

3. The Tribunals findings of fact are as follows: The Claimant Mrs Irene Morrison was born on 12 November 1935 and is now 82 years old. On 5 May 1991 the Claimant commenced employment at the Bay Nursing Home, Tywyn, Gwynedd. Her work was as a kitchen assistant. At the material times the company JSB Healthcare Limited, the First Respondent, owned and operated Bay Nursing Home. The Claimant had no issues with respect to her work except she had fractured her right humorous in 2013 and took time off work for which she was paid sick pay. Except for that period off sick and a period she remembers of one week off sick due to a chronic tooth problem, the Claimant had not taken any time off work due to ill health.

Events in 2016

4. On 1 February 2016 Mrs Kirsty Jones was appointed the Acting Manager at the home. Mrs Jones had the complement of about 40 staff members and

they provided a service for the 30 residents at the home who were aged 65 years and above. Mrs Jones was generally responsible for health and safety matters including risk assessments in the kitchen which covered food and hygiene. Although Mrs Jones was not the registered manager she had a background as a qualified nurse with care of the elderly being a speciality and had undertaken management responsibilities before February 2016. Mrs Jones would look after the day to day needs in respect of the home and if there were major issues she would email or phone Miss Tutt, the Director, to inform her and ask advice.

5. Unfortunately at the end of April 2016 whilst at her home, the Claimant tripped and fell fracturing her left femur. She was unable to work until returning to her work on 25 July 2016. Sick notes had been provided by the Claimant during this period of time.

6. When the Claimant returned to work on 25 July 2016, in order to assist her walking to work from her home she used a stick for a while. She did not use the stick in the kitchen and she returned to her duties gradually beginning working for 2 days per week. We accept the evidence of Mrs Jones that the Claimant came to see her together with Elaine, the cook, and their decision was the Claimant should not initially peel vegetables or potatoes or to bend to sweep under the work surfaces or to carry dishwasher trays and that the cleaning rota was re-jigged so that the floor was dry and that the Claimant would have extra break times. Mrs Jones agreed to these arrangements but over time the Claimant returned to do these tasks. The Claimant says the extra care about the floor only lasted for some 2 to 3 weeks and then she was able to mop the floor and bend to clean under work surfaces. Whatever the time scale, it is accepted that the Claimant had returned to these tasks by November 2016.

7. There is some disagreement between the parties about whether the Claimant was asking to do more hours than her contract. There is a document on page 99 which is signed by Mrs Jones and Mrs Morrison dated 10 November 2016 where there is a note that the Claimant has asked to do 5 days a week and wants to work more hours. Mrs Jones made a note that the Claimant is used to earning or needs money and is reluctant but did accept that at 81 years of age she should be slowing down a little and would she be doing this if it was unpaid or is the money aspect blinding her to realities. Mrs Jones notes the Claimant admitted she no longer bounces when she falls and her peripheral vision is not as good as it used to be. We accept the evidence of Mrs Jones that Elaine the cook would do the kitchen rotas and that Mrs Jones told Elaine and Mari, who does the payroll, to put the Claimant on 5 days per week permanently. We accept that it was the Claimant who discussed these numbers of hours. We accept that the Respondents used a capability plan being document 99 and that it records the conversation that took place on that date. We accept that Mrs Jones

asked to see the Claimant and that the Claimant did not know the reason she was asked to see Mrs Jones. We accept the Claimant's evidence that Mrs Jones was engaged with a computer and there was no eye contact. We do not accept that Mrs Jones said that she would not like her own mother to be working at 80 odd years of age but that Mrs Jones used the words as set out in document 26 (R). Whether this meeting took 5 to 7 minutes or 20 to 25 minutes we accept that Mrs Jones wrote down what was said except the Claimant did not use the word "peripheral vision" which is a term used by Mrs Jones because the Claimant said she had not looked down. This meeting and capability plan was because of the request via Elaine that the Claimant wanted 5 days a week work. Mrs Jones did not want the Claimant to tire herself out and that she admitted that at 81 she no longer bounces and was tired and with eyesight prob;ems. Mrs Jones did not think it was a good idea for her to increase her hours but she did not say that directly to the Claimant. Mrs Jones considered that she needed to discuss these matters because it was part of her responsibility to bring to the Claimant's attention about whether she realised she got more tired and what drives her. We find that Mrs Jones thought the Claimant should not be working and that she did not understand why the Claimant was working.

8. We find that Mrs Morrison did sign this document but that the general conversation with Mrs Jones unsettled the Claimant such that she spoke to her adult sons Mr Phillip Morrison and Mr Alexander Morrison about the meeting. Mr Alexander Morrison said to the Claimant that Mrs Jones may have been probing the Claimant to see if she could glean what her future intentions were in relation to work. Mr Phillip Morrison tried to reassure the Claimant, that she had probably read more into the conversation.

9. Prior to the conversation with Mrs Jones in November 2016, the Claimant had passed her food and hygiene course and scored 85 out of 100.

10. On 1 December 2016 the Claimant slipped whilst in her own garden at home and sustained a cut to her right forearm. She attended the Bronglais Hospital in Aberystwyth and was admitted to hospital overnight. The hospital notes say that the Claimant suffered a 10cm laceration to the right forearm and clinically there were no concerns with the margins being healthy and the wound is fine and sutured and "left hospital on 2 December 2016 was sent home with painkillers." On 8 December 2016 at clinic in Bronglais Hospital it was noted that the wound was healthy and the sutures could be taken out in Tywyn.

11. The Claimant was unfit to work from 2 December 2016 but did not submit any sick notes to the Respondents because she says that she forgot.

12. The Claimant says that on 12 December 2016 she visited the home to discuss with Mrs Jones her return to work. We accept the Claimant's

evidence about this meeting and that Mrs Jones told her that she needed the Claimant's permission to get a back to work fitness test. The Claimant gave the permission. Mrs Jones rang the GP Health Centre and was told that it would cost £36 and that the Respondents would pay. We accept that in a matter of fact way that Mrs Jones said to the Claimant that they could force retirement as ''she is a solicitor''. This was a reference to Miss Tutt who has business dealings with solicitors. We accept that there was discussed with the Claimant the possibility of doing alternative duties when she came back to work such as activities with the residents or some cleaning. The Claimant did not make any comments as she was not interested in that type of work. She was keen to get back to her old job.

13. On 16 December 2016 stitches were removed at the Health Centre and the Claimant was discharged. The Claimant wrote in a letter of 7 February 2017 (page 26) that she had anticipated returning to work on 17 to 19 December for 5.5 hours a day and after Christmas was hoping to return on 22 to 26 for 5.5 hours on those days and again on 29 to 31 for a further 5.5 hours/day.

14. The Claimant says that at a meeting which was on 16 December 2016 with Mrs Jones that she was told that she was required to be medically certified as fit to return to work. The Claimant says that she gave verbal consent for medical information to be obtained and assumed that Mrs Jones would act upon this. The Claimant says she did not know that written consent was required and that after the conversation with Mrs Jones ended, a colleague, Mari Smith, came to see her while she was still in the staff room and said to her ''No'' which the Claimant took as a final reply she could not return on 17 December 2016. We accept that Mrs Jones said words to the effect her hands were tied without a fit to return note and that Mrs Jones meant this to refer to the risks identified regarding which duties she could safely offer the Claimant.

15. We accept the evidence of Mrs Jones that the Claimant did give verbal permission for Mrs Jones to ring the Claimant's GP which she did and was told that he, Dr Stockton, would not discuss the Claimant and that he was not able to issue a fit to return to work as he was unaware of recent treatment at the hospital. Dr Stockton said to Mrs Jones she would need written proof that she had been given permission to speak to any doctor and she advised Mrs Jones to tell this to the Claimant and that she should consult the doctors who treated her and ask them to do a return to work letter. Mrs Jones did not return to speak directly to the Claimant but Mari Smith spoke to her. Although the Claimant believes that on the 16 December 2016 that Mrs Jones went to discuss the Claimant's return to work with Miss Tutt, we do not find that this in fact is what happened. We accept that Mrs Jones made enquiries after the conversation with the Claimant of the Claimant's GP Dr Stockton and did not telephone Miss Tutt. We accept the evidence of Miss Tutt that she did not know of the concerns

that Mrs Jones had about the Claimant returning to work at the end of December 2016 when Miss Tutt was doing the payroll.

16. We accept that Miss Jones may have had some concern regarding the Claimant undertaking work such as washing up duties because she believed the Claimant was on antibiotics. It is clear from a note made by Mrs Jones, being a risk assessment in December 2016, that there were more concerns that Mrs Jones had about the return to work of the Claimant than simply a question of the impact of the wound on her and the Claimant undertaking duties. On page 26(R) Mrs Jones made a note which brought together conversations that she had had earlier with the Claimant about falls and about what steps had been taken to accommodate the Claimant and that Mrs Jones had concluded that "no further safety measures can be put in place I/we concluded that the kitchen was an unsafe area for Irene to work. Irene was offered some care hours but declined as she expressed that she felt shy at communicating with residents and would miss her friends in the kitchen. A phone call was made to Irene's GP but they declined to give her a fit for work certificate". The reference to extreme outcomes was noted by Mrs Jones to be in relation to extreme 1, indicates the potential risk of falling on the kitchen floor without the anti-slip mat as it has an edge 2cm high which Irene might not see due to 5 above (reference to peripheral vision) and extreme 2 which indicates the potential for a fall with the anti-slip mat in situ due to 2 above (that is a reference to balance of the Claimant). This conclusion of Mrs Jones that the Claimant could not return at all to the kitchen to work was not communicated to the Claimant.

17. The Claimant did not receive any pay during this time and was worried about her income. She telephoned the Citizens' Advice Bureau in Manchester and they provided advice on employment and benefits issues. The Citizens' Advice Bureau wrote to the Claimant on 19 December 2016 (page 25). In that letter it was stated "the employer must act reasonably when dismissing an employee. It must be clear that the employer is dismissing the employee, and when the dismissal is to take effect. If the employer is vague about whether or not he/she wants the employee to leave she/he could be held not to have dismissed him/her." Then there is discussion about contractual and statutory notice.

18. The Claimant did not attend any Christmas functions at the home. The Claimant says that in about December 2016 or early January 2017 she phoned the home to speak to Mrs Jones a couple of times but no-one answered and the voicemail was full. The Claimant went to the Health Centre about a fitness to return to work note and was informed eventually that the local doctors did not carry out the service of fit notes for work but there was a government advice service available to contact in Cardiff. The Claimant says she phoned the home and spoke to Mari Smith and gave her the details of the government scheme and the number to get in touch with.

The Claimant said that she had contacted Cardiff but it needed the employer to put in place the arrangements. Mari Smith said maybe not today but she will tomorrow.

Events in 2017

19. Having heard nothing from the home, on 12 January 2017 the Claimant telephoned and spoke to Mrs Jones. The Claimant says she was waiting to hear from them regarding progress with options about her medical. Mrs Jones said that Mari was in tomorrow to speak to her. The Claimant therefore visited the home on 13 January to see Mari. The Claimant was unhappy when she discovered that no-one had been in touch with the government advice agency. The Claimant asked for a copy of her contract which was from 1991 and asked if anyone had taken over the kitchen assistant role. She was told that there was someone interested. Later that day Mari telephoned the Claimant to say that there was a medical department in Shrewsbury and that for a return to work fitness test a doctor would charge £200 and a nurse £60. Mari said that she had informed Mrs Jones to get in touch with Miss Tutt about the matter. The Claimant was left with the expectation that she would be contacted about an appointment by the home or direct from the service. We accept that the Claimant did ask Mari about whether an appointment could be made for her to see Miss Tutt personally but was told it was not a good idea and nothing further was offered.

20. On 7 February 2017 the Claimant wrote to Mrs Jones (page 26). Part of this letter has already been referred to above but it goes on to say that ‘’at the meeting (16 December 2016) you said you were unable to offer me any work, and you suggested a medical assessment to establish my fitness for work. Since then, I have heard nothing about this assessment and I would like to hear from you, in writing, if any progress has been made. I would point out that I have been employed by the Bay since May 1991, and therefore entitled to at least 12 weeks’ notice or 12 weeks’ pay in lieu of notice. I would also like to receive a statement of both my holiday and sick pay to date”. There is no dispute that that letter was received by Mrs Jones because she replied in a letter of 15 February 2017 (page 27). In that letter Mrs Jones says there appears to be a misunderstanding since at the last meeting the Claimant was asked to provide an authority allowing Mrs Jones to contact the GP. Then Mrs Jones refers to having carried out a risk assessment and being concerned that the kitchen may not be a safe place for the Claimant to work. Mrs Jones says once your doctor confirms that you are fit to work in a kitchen environment we would be happy for the Claimant to resume regular shifts. Mrs Jones says that they would not be acting in the Claimant’s best interests if they allowed her to work in the kitchen without first satisfying themselves that the Claimant was safe from

harm and that the role did not place the Claimant at any risk. Mrs Jones refers to the fact that no sick notes had been produced and that the Claimant should produce medical authority urgently as the current absence is effectively unauthorised. She confirms the entitlement to holidays in the letter as well.

21. The Claimant took advice from Citizens' Advice Bureau and then wrote a letter on 23 February 2017 to Mrs Jones. There was reference to a pre-occupational health assessment scheme and Mrs Jones and the Claimant says she will be happy to participate in such an assessment scheme and gives the name of her GP Doctor Stockton and that she has enclosed a copy of her authority for Mrs Jones to contact her.

22. Mrs Jones says that she did not receive this letter. The Claimant says that she sent this letter via the post office signed for service. The Claimant also says that she sent a copy to the Health Centre to make sure that they got the information. There is a letter in the bundle (page 38) from the Health Centre saying that since the 24 February 2017 the Bay Nursing Home had not asked for a medical for the Claimant. It goes on to say "the Manager, Kirsty, however, did contact us by telephone on 6 March 2017 to enquire about the "fit for work" scheme. She was informed we were unable to complete this but she could do this online" Mrs Jones confirms that she did contact the surgery by telephone regarding fit to work but could not remember being told that this could be done online. We find that the letter written by the Claimant on 23 February 2017 was received by Mrs Jones since there would be no reason for Mrs Jones to make contact with the GP surgery unless some further information had been given to her by the Claimant after Mrs Jones's letter to the Claimant earlier in February 2017.

23. The Claimant's view at this time was that the home and its management did not really wish to obtain evidence of her fitness to work and to allow her to return. The Claimant did not want to lose her holiday pay as it was approaching the end of the holiday year. She wrote a handwritten letter dated 8 March 2017 (page 29) saying that she would very much appreciate if they would arrange for the remaining 48 hours for the period 2016 and 17 to be settled at their earliest convenience. The Claimant's opinion at this time was that trust and confidence had been destroyed by the way she had been treated by being not wanted at work and that it would be impossible for her to return. Her family, Mr Phillip Morrison and Mr Alexander Morrison, then arranged for the Claimant to speak to a solicitor. Mr Phillip Morrison and Mr Alexander Morrison had visited the Claimant at her home on 18 March 2017 and found that the Claimant was very upset and distressed at the way the Respondents were dealing with her. Consequently a solicitors firm, Block Solicitors, were instructed to write to Mrs Jones which they did on the 6 April 2017 (page 30). It was said they reserve the position and the Claimant's right to regard the employment as having been ended by the

Respondents by discrimination constructive dismissal and made a proposal of settlement. That letter was copied to Miss Rajdeep Tutt.

24. Miss Tutt visits the home once every 3 months to undertake an audit report. She is the Line Manager of Mrs Jones. She has contact about 2 or 3 times per week with Mrs Jones. Miss Tutt knew all the staff by name including the Claimant. Miss Tutt would also visit randomly perhaps 4 or 5 times per month but no particular pattern. Miss Tutt was not aware of any concerns regarding the Claimant and did not know that Mrs Jones had explored the issue of retirement with the Claimant. Miss Tutt says that Mrs Jones told her that she presumed the Claimant would come in when she was ready to give authority. Miss Tutt was aware of the fall of the Claimant in December and was aware that in January Mrs Jones had done a risk assessment. She said that they employ staff which include the eldest person being 71 years old. Miss Tutt said she had no input into the letter written by Mrs Jones on 15 February 2017 (page 27). However she was aware of the handwritten letter 8 March 2017 written by the Claimant as well as the letter written by the solicitors on 6 April 2017. Miss Tutt wrote to the solicitors for the Claimant on 24 April 2017 (page 33), which denied any discrimination. It said that the Claimant has been AWOL Miss Tutt said “Mrs Morrison’s position is open to her to return to work when she has satisfied us that she is not at risk of working in the kitchen environment. You will appreciate that verbal consent to contact a third party is insufficient. Alternatively, in the absence of medical evidence, we have offered Mrs Morrison a variety of roles within the home, all of which she has declined. We would encourage Miss Morrison to enter dialogue with us as to her continuing role, we are happy to accommodate so long as there is no risk to her or other members of our staff, and residents”. Miss Tutt said that if the Claimant came in, there would be another risk assessment.

25. There was a telephone conversation on 1 June 2017 between the solicitor for the Claimant, Miss Barker, and Miss Tutt. The solicitors note is on page 35. Miss Tutt told Miss Barker that she had been told that the children of the Claimant had been into the home and said they would wish their mother to be encouraged to retire. Miss Tutt says she said that there was a telephone call and that it was Mrs Jones who told her that it was the Claimant’s daughter who had telephoned. Mrs Jones says that the Claimant’s daughter phoned the home and said words to the effect I don’t want her to come back to work only to give presents to my brothers. Mrs Jones thinks this may have been after the Claimant had cut her arm. She does not know which of the daughters telephoned. Both the Claimant’s daughters, Pauline Anne Perkins and Pamela Victoria Combstock have made statutory declarations to say they did not contact the home at any time to indicate that their mother should stop doing a job there. Neither of the daughters has given oral evidence to the Tribunal. Given the lack of detail and recording of this matter by Mrs Jones, the Tribunal finds on balance that this telephone conversation

did not take place. Mrs Jones says she said during this telephone conversation that she could not let the Claimant come back to work. However the actions and notes by Mrs Jones demonstrate that she did not want the Claimant back working in the kitchen at all, for example, as risk assessment undertaken by Mrs Jones shows in December 2016.

26. As already referred to the claim to the Tribunal was issued on 23 June 2017.

Submissions

27. The Claimant's submissions were made partly by written notes handed in and also by oral submissions. It was submitted that there was evidence of direct discrimination and harassment. They related to remarks of Mrs Jones at a meeting in November, and whether it was 10 or 12 November is immaterial. These matters relate to Mrs Jones and the company as employer and to Miss Tutt if the Tribunal believes on balance that Miss Tutt would be party to it herself individually for the company, and particularly for the company for the purposes of s.111. It is submitted that being excluded from work from 17 December onwards is evidence of direct discrimination. It is submitted that the Respondents have not discharged the burden to prove either they did not treat the Claimant less favourably than they would treat others because of the protected characteristic of age or that the treatment was a proportionate means of achieving a legitimate aim, or that they did not harass the Claimant. The comparator would be a hypothetical comparator being a younger person who is in their 50's say would not have been treated in the same way. They were unfair stereotypical assumptions made about the Claimant. It was submitted that there would need to be a proper occupational health risk assessment which took account of the actual capabilities of the Claimant, the actual risks in the workplace, and not based on the Claimant's own assessment of her capabilities or the alleged own assessment of her abilities. It is submitted to Mrs Jones the indefinite absence would bring about the retirement from work she considered was desirable for the Claimant and to Miss Tutt it was the removal of a potential problem. It is submitted that all three Respondents are engaged in harassment of the Claimant. In respect of constructive unfair dismissal, it is submitted there were various breaches amounting to a repudiatory breach of contract which include unpaid and unjustified prolonged suspension, deduction from wages, failure to maintain contact with her to an extent, discrimination, and breach of the implied duty of trust and confidence. The final straw was the period of time since suspension and continued inaction and that on 6 April the breached were no longer waived and the Claimant's employment was over. There were submissions in respect of wrongful dismissal, statement of terms and particulars, and remedy.

28. The Respondents submissions were that they were keen for the Claimant's employment to continue and that there had been no suspension. 13% of the staff are 63 years old plus. Any employer would require an employee to

produce sick notes or fit to return notes regardless of age. There was no conspiracy to remove her. The Claimant did not visit her GP and in the past when she was absent she has always returned to work. Other risk assessments would have been carried out and the Claimant resigned by reason of the Claimant's representatives' letter of the 6 April 2017. There were submissions regarding Polkey which is there would have been a fair dismissal in any event.

29. Mrs Morrison was recalled to give further evidence regarding matters of remedy. The Claimant said that she had lost count of the number of jobs she had applied for and mentioned 25. She has looked in newsagents once a week every week to see if there are any jobs. She gave evidence of various applications but they were all unsuccessful. She did not consider full time work and some of the applications were 30 to 35 miles away from where she lives.

The Law

30. Direct discrimination is defined in s.13 of the Equality Act 2010. It states "(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. (2) if the protected characteristic is age, (A) does not discriminate against (B), if (A) can show (A)'s treatment of (B) to be a proportionate means of achieving a legitimate aim.

31. Harassment is defined in s.26 of the Equality Act 2010 namely "(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). By sub section (4) "in deciding whether conduct has the effect referred to in sub section (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. By sub section (5) the relevant protected characteristics include age.

32. S.212(1) of the Equality Act 2010 says that "detriment does not, subject to sub section (5), include conduct which amounts to harassment." Sub section (5) says "where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within s.13 because of that characteristic".

33. S.136 of the Equality Act 2010 relates to the burden of proof. This section applies to any proceedings relating to a contravention of the Act and it says "(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 sub section (2) does not apply if (A) shows that (A) did not contravene the provision.

34. It is important to note that harassment and direct discrimination claims are mutually exclusive and that the complainant cannot claim both definitions as satisfied simultaneously by the same course of conduct.

35. In the case of ***Essop and others -v- The Home Office*** **[2017] UKSC 27** Lady Hale said in paragraph 1 that "direct discrimination is comparatively simple: It is treating one person less favourably than you would treat another person, because of a particular protected characteristic that the former has. In paragraph 4 Lady Hale said "the concept of discrimination obviously involves comparisons between groups or individuals. Section 23(1) provides that "on a comparison of cases for the purpose of s.13, 14 or 19 there must be no material difference between the circumstances relating to each case". Lady Hale continues in paragraph 5 "having defined what is meant by discrimination, the Act goes on to define the circumstances in which it is unlawful. Relevant to these appeals is s.39(2); "an employer (A) must not discriminate against an employee of (A)'s (B) – (a) as to (B)'s terms of employment (b) in the way (A) affords (B) access, or by not affording (B) access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service".

36. In paragraph 17 of the Judgment Lady Hale says "under the Sex Discrimination Act 1975 and the Race Relations Act 1976, direct discrimination was defined as treating a person less favourably than another "on the ground of her sex" or "on racial grounds". Under s.13(1) of the Equality Act 2010, this has become treating someone less favourably "because of" a protected characteristic. The characteristic has to be the reason for the treatment. Sometimes this will be obvious, as when the characteristic is the criterion employed for the less favourable treatment: An example is ***Preddy -v- Bull*** **[2013] UKSC 73**, where reserving double bedded rooms to "heterosexual married couples only" was directly discriminatory on the grounds of sexual orientation. At other times, it will not be obvious, and the reasons for less favourable treatment will have to be explored: An example is ***Nagarajan -v- London Regional Transport*** **[2000] 1AC 501**, where the Tribunal's factual finding of conscious or sub-conscious bias was upheld in the House of Lords, confirming the principle, established in ***R -v- Birmingham City Council Ex Parte Equal Opportunities Commission*** **[1989] AC 1155** and ***James -v- Eastleigh Borough Council*** **[1990] 2AC 751**, that no hostile or malicious motive is required. ***James -v- Eastleigh Borough Council*** also shows that, even if the protected characteristic is not the overt criterion, there will still be direct discrimination if the criteria used (in that case retirement age) exactly

corresponds with the protected characteristic (in that case sex) is thus a proxy for it."

Conclusion

37. We have made our findings of fact in relation to a meeting between the Claimant and Mrs Jones on 12 December 2016. The context in which the meeting took place is important. Mrs Jones was genuinely concerned for the welfare of the Claimant and following the fall of the Claimant on 1 December 2016 it would be appropriate for Mrs Jones to discuss with the Claimant about the work at the home. The Claimant says that in that conversation with Mrs Jones when she alleges that Mrs Jones said that she would not like her own mother to be working at 80 odd years of age, which the Tribunal have found was not said by Mrs Jones, that the Claimant did not reply and she says there was nothing else forthcoming only silence. The Claimant says there was a bit of small talk. This was a formal conversation. In determining whether there has been harassment within the meaning of s.26 of the Act, we find that there was no harassment by Mrs Jones. There was a perfectly proper and sympathetic discussion with the Claimant regarding her working at the home. Amongst other matters, we do not think that it is reasonable for Mrs Jones's conduct to have the effect it is alleged by the Claimant regarding violating her dignity or creating hostile or degrading, humiliating or offensive environment for the Claimant. Alternatively we do not consider that there was discrimination within the definitions above because of the Claimant's age.

38. It was clear to Mrs Jones that the Claimant was anxious to return to her work and was cooperative regarding any contact with her GP. Indeed Mrs Jones at one time did contact the GP as we have found. However Mrs Jones did have stereotypical assumptions regarding the Claimant's continued employment because of her age. As a nurse Mrs Jones referred to the fact that she knew about balance matters and made assumptions about the Claimant's balance without proper medical diagnosis. Mrs Jones's references to the use of a stick for a period of time by the Claimant and her peripheral vision in the risk assessment are based upon conscious or sub-conscious bias because of the Claimant's age. These assumptions would not have taken place in relation to a hypothetical comparator of an age much less than the Claimant's. Mrs Jones said that she thought it was a good idea for the Claimant to stop work but did not say that to her. We find that this led Mrs Jones to adopt a passive attitude to following up the obtaining of proper medical diagnosis and prognosis regarding the ability of the Claimant to work in the kitchen. Mrs Jones is not an Occupational Health Physician, nor is she qualified in relation to undertaking specific risk assessments. This is particularly important in relation to what was identified by Mrs Jones as being the risk of slipping in the kitchen. We accept the evidence of the Claimant that there is an anti-slip mat in front of the sink and she has never tripped up on this. We accept that the mat reduces risks

and that the Claimant's belief that there is no reason why she should be thought likely to trip to fall due to the anti-slip mat or otherwise is well made. If there were such matters then a proper health and safety audit and discussion with the Claimant about these matters should have been made. The Claimant should have been involved in this risk assessment and be appraised of its conclusions. She was not. The reality is that Mrs Jones was not told by either Miss Tutt to remove the Claimant or not to pursue medical reports or assessments, but rather took it upon herself not to do this. The detriment to the Claimant was that she was excluded from her work for a considerable period of time with no feedback of information being provided by Mrs Jones or her employers. The Claimant did her very best to try to assist her employers in obtaining necessary information to carry out a proper assessment of her ability to carry on working in the kitchen. There can be no criticism of the Claimant in this respect.

39. We find that the Claimant suffered detriment by reason of the actions of Mrs Jones and the employers, who are jointly liable for the actions of Mrs Jones in failing to take reasonable steps to allow the Claimant to return to her employment. This is not harassment but rather is direct age discrimination. The age discrimination is not justified and is based upon assumptions of a stereotypical nature regarding the ability of those individuals aged 80 plus. It is less favourable treatment. The consequence of this discrimination was graphically described by the Claimant in that she was hurt by the slow undignified ending of her long time working at the home and lost a role which was humiliating and undignified when she had to push for progress. There were no health problems to prevent the work being undertaken and the Claimant has a very strong belief that the employers and Mrs Jones wanted her out of the kitchen. This was despite the fact that the Claimant was a robust and hardworking individual which we accept. In the circumstances there was a fundamental breach of contract by the employer relating to the implied term of trust and confidence and entitled the Claimant to terminate the contract of employment within the meaning of s.95 of the Employment Rights Act 1998. Further we find that applying the test in s.98(4) that the dismissal was unfair.

40. We have heard evidence regarding remedy in this case. It is not our intention to repeat everything that we heard in evidence. We accept the evidence of the Claimant that she was distressed by the events leading up to her consulting solicitors and giving instructions. This ending of employment has affected her greatly and she had a GP appointment on 11 January 2018 where she was diagnosed with depression with low feelings regarding her job and given a low dosage of anti-depressant Sertraline. The matters disclosed in the case is the risk assessment and reference to a mat which could have been possibly replaced if it was genuinely felt to be a slipping hazard by the Respondents have led to continued upset. Taking into account the guidance of the well-known case ***Vento***, as amended by

subsequent Authorities and Presidential guidance, we assess the injury to feelings to be in the sum of £6,000. To this amount must be added interest which we calculate to be £560.

41. The Claimant gave evidence of mitigation of attempts to mitigate her loss financially. She lost a relatively low income but a local job and a way of life with routine and company. We are satisfied that the Claimant has attempted to mitigate her loss. The Claimant's Schedule of Loss at page 111 show a basic award of £5,940 and assessments for future loss of wages.

42. For the avoidance of doubt we do not find that there is any contributory conduct or that there should be deductions under the ***Polkey*** principle nor do we consider there should be an award in relation to particulars of failure to provide particulars of employment on the basis it is unjust and inequitable to make such an award. We do not consider the circumstances are such that there should be any aggravated damages. Nor do we consider that these are circumstances in which there should be any ACAS uplifts.

43. Total amount awarded for direct age discrimination is £6,560 and that is an award against both Mrs Jones and the employers JSB Healthcare Limited. We do not make any award against Miss Tutt as we do not consider that she was responsible for the discrimination as her involvement was much later in this case.

44. In relation to the claims for unfair dismissal the award is against the employer only JSB Healthcare Limited. and the figure is for basic award £5,940 (1.5 x £198 x 20). The compensatory award is the figure from 17 December 2016 to 6 April 2017 being 15 weeks at £198 being a total of £2,970 less pension credit of £396 leaving £2574 ; for loss of earnings to the Tribunal hearing up to the 5 February 2018 being 31 weeks at £206.25 being a total of £6,393.75. That gives a total of £9,363.75 but adding in 12 weeks covering the notice period of £2475 giving a grand total of £11,442.75. We do not consider it appropriate to make an award for damages for loss of earnings being notice pay of 12 weeks of £2475 as this is subsumed in the past losses figure above. In respect of future loss this is estimated to be £10,725 per annum (but there is an additional pension credit of £19.21 to be deducted) which we consider to be a reasonable forecast of future loss but due to the uncertainties of a working life, we limit the future loss to a 12 month period. The future loss will be £9,898.97. We should add some interest for the past loss of wages which we estimate to be £572.01.

45. In summary the award is:

    Basic award……...£5940
    Loss of statutory rights…….£300

Expenses…….£100

Past loss of wages…£11,442.75
Interest……..£572.01
Future losses……£9898.97

Total award for unfair dismissal is £28,253.85
(The prescribed period is from 17th December 2016 until the 5th February 2018
The prescribed amount is £11,442.75
The amount of the balance is £16,811.10
However the Recoupment Regulations do not apply)

46. This is the unanimous Judgment of the Tribunal.

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Employment Judge P Davies
Dated: 01 October 2018

JUDGMENT SENT TO THE PARTIES ON

……2 October 2018……..

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS