EMPLOYMENT TRIBUNALS

Claimant: Ms E Babalola

Respondent: Nottinghamshire County Council

Heard at: Nottingham

On: 4 July 2018 – Reading in day
5 to 13 July 2018
17 August 2018 **-** Reserved decision

Before: Employment Judge P Britton
Members: Mr R Jones
Mr W Dawson

Representation
Claimant: Mr P Ihebuzor, Solicitor
Respondent: Mrs E Hodgetts, Barrister at Law

RESERVED JUDGMENT

The claim is dismissed in its entirety.

REASONS

Introduction; the law engaged; first observations

1. The Claim (ET1) was presented to the tribunal on 5 May 2017. It is to be found in the extensive bundle before us at bundle page (Bp) 1 – 28. For the purposes of this judgment, it is important that there was no claim based upon the Working Time Regulations 1998 (the WTR). Specifically, if the Claimant was seeking to make such a claim pursuant to Regulation 30, in terms of this tribunal's jurisdiction it would have had to have been on the basis that she had been refused the exercise of rights to take such as leave or rest breaks and/or that there was an underpayment to her in terms of the work that she undertook. For the avoidance of doubt in all other respects the tribunal has no jurisdiction in terms of breaches under the WTR. Enforcement is not within the tribunal.

2. This becomes important because as developed in the closing written submissions for the Claimant, Mr Ihebuzor has endeavoured to in effect raise a claim based upon the WTR. For the avoidance of doubt, there is no such claim

before the tribunal and there was never any application to amend the existing claim so as to bring claims within the jurisdiction of the tribunal under the WTR.

3. Essentially what the claims are therefore about is as follows. There was a wide-ranging claim based upon direct race discrimination pursuant to section 13 of the Equality Act 2010 (EqA). This stretches over a range of issues and which we shall deal with in the context of this judgment.

4. The second claim is one of harassment pursuant to section 26 EqA, the principal perpetrator being Jane Wardle (JW) who was at all material times the Unit Manager responsible for Wynhill Lodge (Wynhill). Essentially this is a facility run by the Respondent which offers residential respite care and also day facilities for severely disabled young people. Throughout material events, the Claimant was employed at Wynhill as a care worker. The primary accusations against JW in terms of harassment and as clarified before us are as follows:

> 4.1Incepting the Management for Attendance Policy (MAP) against the Claimant in relation to then attendance issues on 19 January 2016, as to which see the notes of Natalie Flavill at Bp 365 – 366.
>
> 4.2 The evidence she gave in terms of the Claimant being given the role of a senior relief night worker circa March 2015 to the disciplinary hearing on 6 January 2017 Bp577). This was in answer to a question from Ms Babalola, her trade union official having already asked questions of JW. The question was:
>
> "*I've worked for Nottinghamshire Council for several years – how many times have I been problematic and if I'd been there, why did you ask me progress*?"
>
> The answer was:
>
> "*Ms Wardle stated as Esther loves working nights, she was asked to progress up to Senior on night shifts. It was explained the reason behind this was because Esther wasn't mixing with other colleagues and would not be upsetting them*."
>
> As to whether that an accurate note of what JW said, leave on one side. In the context to which we shall come back in due course, this was a scenario where the Claimant in effect got a promotion but also by that time, there were problems with her and various work colleagues commencing, in terms of this particular issue, with the incident circa 27 May 2015 (Bp254-5) with inter alia an Acting Team Leader, Andy Russell. It comes in a context of preceding concerns about the Claimant over the years, to which we will return but in respect of which there is a lot of evidence. That of course has a corroborative effect in terms of the Respondent's conclusion in relation to the incidents at the heart of this case commencing 29 October 2015.

5. At this stage we can deal with a preliminary point. The definition of harassment is as follows – Section 26 EqA

> ***"26 Harassment***
>
> *(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *…*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1) (b), each of the following must be taken into account—*
>
> *(a) the perception of B;*
>
> *(b) the other circumstances of the case;*
>
> *(c) whether it is reasonable for the conduct to have that effect*."

6. The Employment Judge early on in the proceedings when this issue as per Para 4.2 above was first under the forensic microscope so to speak, pointed out to Mr Ihebuzor with the leave of his colleagues on the panel the import in terms of this issue of the case of ***Richmond Farm Ecology Ltd -v- Dhaliwal [2009] IRLR 336 EAT*** per Mr Justice Underhill (as he then was). Inter alia, perception is not the only factor, context is fundamental. The Claimant is black Nigerian but she has lived in this country for some considerable time. It is self-evident from the evidence that we have heard about events over the years that the Claimant is very sensitive indeed about her colour and has regularly over the years made accusations when being taken to task over various issues, such as time keeping, that she is being discriminated against because she is black. We shall come back to that.

7. But the fundamental is this. JW was being asked a question in the context of a disciplinary hearing to which she gave a truthful answer. We say the latter because one thing that shone out like a beacon in this case was the honesty and integrity of all the witnesses, apart from the Claimant and her husband the Reverend Daniel Babalola and son Samuel. Observations on the credibility of the Claimant and those two witnesses are extensively and accurately set out in the first section of Counsel's written closing submissions commencing under the topic "credibility". We will return to that under the issue of "enslavement" in due course.

8. If a question is asked in a disciplinary hearing and a truthful answer is given, albeit the answer might not be what Mrs Babalola wanted to hear and

might therefore have upset her, how can that be harassment within the context of the definition and applying the dicta in ***Richmond***? The answer to the question is self-evident – it is not harassment: A point that was made clear by the Tribunal to the Claimant and her representative early on in this proceeding when they were asked to reflect upon continuing with the allegation. Mr Ihebuzor said he would reflect with his client over the weekend; nevertheless the Claimant pursued this head of claim.

9. The same goes for the suggestion that the inception of the MAP in terms of the meeting in particular on 19 January 2016, constitutes harassment. The tribunal is well aware of the import of MAPs. The policy document before us Bp121-136) in that respect meets best practice. There are, therefore, usual triggers for intervention under the MAP in terms of absences. As at 19 January 2016, the Claimant had returned from the 2 week absence covered by a sick note from her doctor dated 30 December 2015 stating "work related stress". The effect of that period of absence meant the MAP was correctly triggered as per the policy[1].

10. Furthermore the problem with this part of the case is that it was not JW who saw the Claimant to inform her that she was therefore at stage one of the MAP. It was Natalie Flavill (NF), her direct line manager who in turn reports to JW. We heard from NF, and what was abundantly clear is that the inception of the MAP was automatic because the threshold had been reached. She therefore was instructed how to approach the matter by HR. She saw the Claimant alone. Thus, how can this be harassment by JW?

11. Again, the Claimant was asked to reflect on the tenability of that claim but still decided to persist with it. For the avoidance of doubt, and we take a broad brush to the sub issues in this case, the inception of the MAP has never been alleged by the Claimant to be direct discrimination: the charge is one of harassment and only by JW. . The evidence is that the use of the MAP had always been as per policy. A good example is that she had to have time off for surgery for Carpal Tunnel Syndrome commencing 28 January 2013. Quite properly in terms of return to work, a risk assessment was done and there was no action taken in relation to the absence. The same goes to the utilisation of the MAP by Sally Handley (SH) (her then team leader) on 28 February 2015 and who gave evidence before us. Again, this was an automatic inception of the MAP under the procedures because of at that stage two short triggering absences.

12. Also in passing, and we shall come back to this, NF and SH were two of five witnesses before the tribunal because of witness orders at the request of the Claimant. At the last of the preliminary hearings (in fact held by this Judge) on 17 May 2017 and with Mr Ihebuzor by now acting for the Claimant, it was stated by this judge (as to which see Bp 77C):

> "… *As to those witnesses I can only urge that the Claimant should seek to interview the same and prepare witness statements. …*"

13. As it is, no such attempts were made and all these witnesses had to be called

[1] See NF's letter to the Claimant dated 27 January 2016 confirming the outcome of their meeting on the 19th (Bp363-4)

unproofed, and extensive questioning was undertaken of them in particular for the Claimant; and all gave evidence which substantially undermined the Claimant's case. This of course cut into the time remaining for the rest of the witnesses including the Claimant; and so when Mr Ihebuzor in his closing submissions seeks to suggest that his opportunities to cross-examine witnesses later on was curtailed, he fails to note the questioning in particular by him of these 5 witnesses and where of course had they been seen beforehand he would have realised they were of no help to the Claimant. Finally the tribunal reluctantly has to observe that it was self-evident that there was a considerable lack of preparation from the way that the questions were asked and indeed generally in terms of the claimant's case and despite the extensive procedural history. This impacted upon time management of the hearing.

14. The witnesses that we are referring to are:

- Josie Bemrose
- Purity Muriuki
- Natalie Flavill
- Sally Handley
- Kimberley Phimister

We will come back to the mainstream issues in relation to them in due course.

15. The point therefore is that these harassment allegations were untenable and misconceived from very early on in this case and self-evidently from an analysis of the material sections of the three volume bundle before this tribunal. Yet the Claimant decided to continue.

16. As already said the primary thrust of the discrimination claim is based upon section 13 EqA. At this stage we will set out the definition.

> ***"13 Direct discrimination***
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
>
> *…*
>
> *(5) If the protected characteristic is race, less favourable treatment includes segregating B from others."*

We will come back to the segregation issue in due course.[2]

17. The third limb of the claim in terms of the EqA is victimisation. In terms of the ET1, reliance in terms of a protected act was on a grievance (Bp581) said to have been raised on 16 January 2017 in which she alleged race discrimination. She said the consequence of her raising that protected act was

[2] Ms Hodgetts has correctly noted that the Claimant's complaint is a contradiction in terms in that she wished to be teamed with black workers – see Bp 752, 753 and 756 circa 23 September 2011. We agree with Mrs Hodgetts that acquiescence with that request would prima facie be unlawful.

that she suffered the following detriments:

> *25.1 The Claimant's integrity and honesty was put into question by management claiming she could not be trusted in a job as she had been doing for almost 10 years without any record of harm to service users or any safeguarding conviction on record.*
>
> *25.2 The fact that NCC has sent the Claimant's details to DBS for barring the Claimant from working in the health care industry.*"

18. During the course of the proceedings, the Claimant sought to amend to now include as a protected act the complaint (Bp386-7) she raised on 21 March 2016. As to the significance of that amendment it is on the basis that Mr Ihebuzor, on the instructions of his client, essentially argues that the undertaking of a disciplinary investigation into the Claimant in relation to the incidents at the heart of this matter, which span between 29 October 2015 and 19 January 2016, was motivated by the raising of that protected act.

19. As to that protected act, the chronology is as follows. In relation to these incidents the Claimant was informed by JW in the presence of NF at the second of the meetings held on 19 January 2016, that there would now be a disciplinary investigation and that she would be placed on special leave whilst it took place (see Bp 275). At that stage, the investigating officer was appointed, namely Kate Wilson (KW) who in due course gave evidence before us, her statement-in-chief being in the witness statement bundle before us at witness statement bundle pages 77 – 82.

20. In terms of these preliminary observations, we can add in at this stage that in so far as we are dealing in due course with the unfair dismissal claim and cross-referencing to the relevant ACAS Code of Practice, and indeed the Respondent's own disciplinary processes, the disciplinary investigation and the ensuing report published on 17 March 2016, meets best practice. It was fair and thorough, in the context of which the Claimant was interviewed in the presence of her trade union official and a conclusion that there was a case to answer was within the range of reasonable responses of a reasonable management of the size of the Respondent given the evidence.

21. In terms of the compass of the disciplinary investigation and the allegation of race discrimination made by the Claimant in her interview with KW on 1 March 2016 (Bp377-384) she concluded there was no substance to it.

22. Stopping there, and again as a preliminary observation, at the heart of the first of the incidents in terms of the disciplinary charges (namely 29 October 2015), another care worker, namely Purity Muriuki who is black African but from Kenya (in other words the other side of what is a huge continent) was preferred in terms of her evidence on what occurred as opposed to the Claimant. It needs to be added that Purity (PM) was corroborated in terms of events by the acting team leader at the material time, Josie Bemrose (JB), who also gave evidence before us.

23. Thus what we have is an employer preferring the evidence of one black person in relation to an incident to another black person and in circumstances where there is corroborative evidence. We observed to Mr Ihebuzor as to how can that be race discrimination; the Claimant has been less favourably treated if that is the interpretation in comparison with another black person? Also there is in this case a history on occasion of the Claimant being demeaning and/or offensive when it comes to other black people, such as the incident with Faith Gakanje, as to which see the documentation commencing with complaint on 25 October 2012 (Bp 245) and which in that sense corroborates that the Claimant behaved in a similarly unacceptable way to PM on the 29th October 2015.

24. Finally, in this sense we can bring in that one of the disciplinary panel who decided to dismiss the Claimant for gross misconduct on 23 January 2017 was Natalie Bryan who is also the Chair of the Respondent's BAME group (Black African Minority Ethnic). Of course Counsel put to the Claimant that surely this was indicative of a balanced panel and one which could therefore not be seen as being tainted by racism towards the Claimant. The tribunal found it somewhat troubling that on this issue when giving her evidence, the Claimant described Natalie Bryan as "*she is half caste not black*".

25. In the event, back to this protected act. The point that the tribunal therefore engages, again as a preliminary point, leads us to the definition of victimisation which is to be found at section 27 EqA:

> ***"27 Victimisation***
>
> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
>
> *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act—*
>
> *…*
>
> *…*
>
> *…*
>
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act."*

26. As at 16 March 2016 , shortly before the Wilson report was published but after the Claimant had been interviewed in the process and in the presence of her trade union official Ged Talty, the latter wrote (Bp285) to Sue Jeffery, Senior Business Partner in HR for the Respondent:

> "… *I am contacting you in your capacity as HR lead ASCH. The above ie Esther, is a UNISON member and is seeking support into an*

investigation under the disciplinary procedures for alleged bullying. An initial investigation meeting took place on 1st March 2016 where I was present. It transpired that Esther made an allegation of what seems is both institutional and individual racism at Wynhill Lodge.

Due to the seriousness of the allegation, I have taken the advice of UNISON Regional Office who suggested that the matter of alleged racism be dealt with as a priority. It is my understanding the allegation of racism was made prior to the allegations made against Esther. It so, the concern is whether the allegations against Esther are malicious and retaliatory rather than based on objective fact.

…"

27. Suffice it to say, we have no preceding protected act relied upon by the Claimant in her claim or as now amended. The response of Sue Jeffery was to effectively say to let the investigation complete and thence the matter can be further considered "*once Esther has provided evidence to substantiate her allegation …*"

28. So, post the publication of the Wilson report, via her husband the Claimant duly issued her complaint of racism in terms of the events prior thereto on 21 March 2016 (see Bp 385 – 387). The net result was that she was then interviewed by Ian Masson (IM) , Group Manager (Residential), accompanied by Francesca Waldrom of HR; the Claimant again having present Mr Talty. This was on 15 April 2016, as to which see Bp 388 – 391. As a consequence of that, to put it at its simplest, the disciplinary process went on hold and there was a first investigation by IM, who gave evidence before us, as to which see evidence-in-chief statement at witness statement bundle Bp 94 – 111.

29. He published his own report on 10 August 2016 concluding there was no such racism (Bp 395 – 401) but decided in terms of the Claimant reiterating her complaints that he would commission a further report, this time by Janine Vardy, Service Manager for Care and Support Services. She commenced her investigation on 5 September and completed the same on 18 November 2016 concluding that there was no race discrimination within Wynhill. Her report is extensive and is to be found at Bp 444 – 459.

30. That chapter of events having therefore ended, the disciplinary process resumed. The Claimant received what we would describe as an ACAS CP compliant step 1 letter (Bp495-7) setting out the charges she had to meet on 8 December 2016, her being provided with the disciplinary pack, ie in particular the Wilson investigation report and statements and appendices thereto. Thence we get the disciplinary hearing starting on 6 January 2017.

31. The point is simply this, which was again made early on in these proceedings to the Claimant, if it is being said that the disciplinary process was incepted because the Claimant had made a protected act, it is on the timelines an untenable argument. As is now self-evident, the decision to go ahead with the disciplinary investigation starting as it did on 19 January and ending with the publication of the Wilson report circa 17 March, just cannot flow as a causative

action from the protected act. It is obvious that KW would have completed her report in terms of all the interviews by 16 March when the first element of the protected act was made and therefore the victimisation claim just simply does not hold water in that respect.

32. Where it might engage as a residual point is on the Respondent referring the Claimant to the DBS following the outcome of the disciplinary process, including the appeal. But we are well aware as an experienced tribunal of the protocols of such as this local authority and indeed of health authorities also. Where a carer is found guilty of gross misconduct following an extensive process such as this one and one of those findings relates to shortcomings in relation to a vulnerable person under care (and that is one of the issues on 29 October 2015), then it is usual practice that the outcome is reported to the DBS. This IM made plain before us was why the referral was made to the DBS. The Claimant has deployed no evidence to the contrary. It follows that she was not reported to the DBS because she had made a protected act but because of the outcome of the proceeding. What it means is that the victimisation claim therefore falls at the first fence.[3]

33. Thus under the EqA based claims we are left with dealing with whether or not under section 13 in terms of the material events, the Claimant was less favourably treated as a black person and because that is what she has alleged: that she was treated less favourably than her white colleagues. In the hearing before us, the Claimant sought to argue (and indeed Mr Ihebuzor has put it in his submissions) that allowance has to be made for the fact that African people (which is where he started from) have a characteristic of being loud, which might upset others but is part of their culture. This was then narrowed down before the tribunal in terms of his final written submissions and doubtless because of the problem about Purity M, to being it is a trait of Nigerians. But where is the evidence? The problem there is also as to what extent is an employer required to accommodate the behavioural characteristics of an individual where they cause problems, such as upset, with colleagues? Also where is the evidence for this sweeping generalisation? We have heard from no expert on the topic.

34. Finally, contrasting the Claimant to Purity (PM) the Claimant is combative and forceful and clearly on occasions over the years has shouted at others in the workplace in contrast with Purity: a much smaller person, both in stature and personality; quiet and restrained.

35. In any event, we have to deal with the section 13 issues. We remind ourselves of course of the burden of proof as reaffirmed of recent time by the Court of Appeal[4]. It is for the Claimant to establish on the facts before us that there is a prima facie case to answer that there has been race discrimination as defined under section 13 and an inference can therefore be drawn. Having done so, the burden of proof reverses and it is for the Respondent to show on a balance of probabilities that no part of the treatment complained of was because of the protected characteristic.

[3] On19 March 2018 the DBS decided to take no action against the Claimant. We have no documentation relating to their investigation. There was no hearing. The decision (Bp702A-B) sheds no light as to its reasoning.

[4] Ayodele v City Link Ltd (1) and Paul Napier (2) (2017) EWCA Civ 1913

36. That leaves the unfair dismissal claim. This engages the Employment Rights Act 1996 (ERA) and section 98:

> *"**98 General.***
>
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it—*
>
> *…*
>
> *(b) relates to the conduct of the employee,*
>
> *…*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

37. We remind ourselves that we do not substitute our own view as to what we would have done in terms of fairness but we must make our decision by applying the range of reasonable responses test. In other words, is the decision that the employer reached to dismiss the Claimant one which an employer could have reasonably reached on the established scenario being of similar size and administrative resources: so another local authority of similar size (substantial) engaged in the care of vulnerable adults.

38. In terms of the seminal test to be applied in dealing with decisions to dismiss an employee for conduct, we reminded the Claimant in particular of the seminal authority on this issue, namely ***British Home Stores Ltd v Burchell [1978] IRLR 379 EAT***:

> "…*First there must be established by the employer the facts of that belief* (ie the misconduct)*; that the employer did believe it. Second it needs to*

be shown that the employer had in his mind reasonable grounds upon which to sustain that belief and third the employer at that stage at which he formed that belief on those grounds must have carried out as much investigation into the matter as is reasonable in the circumstances of the case."

39. This is followed through with additional assistance per Stevenson LJ in ***W Weddel & Co v Tepper [1980] IRLR 96 CA***. The employer must make reasonable enquiries appropriate to the circumstances, not form a belief hastily or act hastily upon it; and "give the employee a fair opportunity to explain themselves".

40. As is by now self-evident, all of that happened in terms of the Wilson investigation. The disciplinary hearing was conducted by a 3 person panel and we heard from in particular the Chair thereof, Paul Johnson (see witness statement bundle Bp 112 – 132).

41. The next point to make is that an employee must be offered an appeal. This the Claimant took and the appeal was heard by a panel of elected Councillors from the Respondent, one of whom was Councillor Sheila Place from whom we heard, as to which see her witness statement commencing at witness statement bundle Bp 124. She was the Chair of that disciplinary panel which heard the appeal on 26 April 2017. They upheld the decision to dismiss (Bp 702).

42. The final point to make is that we are also dealing with a breach of contract claim. That is because the Claimant was dismissed summarily. That is without notice. The test there is a different one. It is not the reasonable responses test, it is whether the tribunal objectively on the evidence before it concludes that the Respondent was entitled to find that in terms of the proven conduct which led to the dismissal that the Claimant had repudiated the contract of employment such as to mean that the Respondent could treat it as being at an end because the Claimant, by her behaviour, had fundamentally undermined trust and confidence. The Claimant's position is that that which she did was not such as to justify any conclusion that it was repudiatory and that therefore she should have her notice pay. The Respondent's position is that it must assuredly follow that given she was found guilty of gross misconduct, that if the tribunal finds that that was reasonable as a conclusion then the conduct cannot but be repudiatory.

43. Touching upon the Response (ET3), essentially it is a straightforward detailed denial of the Claimant having been treated less favourably because of her being a black African or indeed in relation to her minority ethnicity whatsoever. It pleads that in all the circumstances the dismissal was a fair one and that it was entitled to summarily dismiss her.

Credibility

44. First as to the Respondent, we found all witnesses called by the Respondent, and indeed the 5 witnesses required to attend under witness orders for the Claimant, to be honourable, consistent and credible witnesses.

45. As to the credibility of the Claimant and her two witnesses this subject is extensively covered by Ms Hodgetts in the first section of her closing submissions and which we have touched upon. It brings in a contention made by Mr Ihebuzor in his submissions, and thence replies to the Respondent submissions, and which engages the point about the agency work documentation which the tribunal eventually had before it. The contention of Mr Ihebuzor is that this was in breach of the Data Protection Act; that it contravened the Claimant's human rights and finally it was oppressive and unreasonable.

46. But, the issue of agency working has become at the heart of this case. Furthermore, it was a topic at the preliminary hearings in this matter. It started off because the Claimant in her first schedule of loss was claiming a very substantial sum of damages and which by the time of her revised schedule of loss (Bp 56) was now standing at £422,500. The point being that in the first schedule of loss she had stated, having signed said document, that she had received no income since the dismissal. In the second revised schedule, she was stating that had earned only £14,500 since her dismissal. The Respondent was aware that historically the Claimant had undertaken agency work and it was sceptical in terms of these statements. Thus, from early on in this proceeding it wanted her to fully disclose all sources of income. It also believed that she could be running a business or company. This was denied, as to which see paragraph 17 of Employment Judge Heap's published record (Bp57-76) of the second case management discussion which she held on 29 January 2018 and inter alia:

> "*… Mr Babalola (*then acting for his wife) *has confirmed the Claimant is not and has not been running any business or company …*"

47. Put at its simplest, she ordered discovery of agency working; any corporate documentation; and starting from 1 January 2016. The Claimant did not comply with that order, as to which see the orders made by Employment Judge Vernon on 13 February 2018 at the third preliminary hearing – Mr Babalola still acting for this wife - and see in particular Bp 73. This had still not occurred when this presiding Judge heard as a matter of urgency the preliminary hearing on 17 May 2018 (Bp77A-G), by which time Mr Ihebuzor was acting for the Claimant. Suffice it to say that this judge made an order requiring full disclosure by 4pm 1June.

48. As at the commencement of this hearing, there also having been an order in terms of those preceding preliminary hearings that the Claimant fully disclose her medical records – there was now a supplementary bundle. It contained some data from the agencies but it is to be noted that this had been obtained by the Respondent. They had also obtained details of various companies which flies in the face of the Claimant saying that she had not been engaged in any company apropos what her husband had said at the second preliminary hearing.

49. But as the case developed the issue of agency working became very much at the heart of matters and because it also went to whether concerns over the years up to material events expressed by the Respondent and in particular JW as to the extent of this working were an unwarranted intrusion by the Respondent as opposed to being necessary in terms of its duty of care. Also as

to whether or not the Claimant had on occasion lied when she had for instance sought reduced working hours to care for relatives or circa 16 January 2016 had to go off work because she was ill when in fact it was because she worked more lucrative agency shifts'. We therefore ordered the disclosure of the entirety of the agency records for the Claimant, including on the NHS bank. This was an order of the tribunal and for the reasons we have now stated.

50. Second, Mr Ihebuzor submitted that this disclosure was a breach of the Data Protection Act. This is plain wrong. The DPA does not apply to a court of law. Secondly, human rights are not specifically engaged before a tribunal as such unless a legislative provision before the tribunal is in some way or another inconsistent with the intentions of a European Union Directive engaged, in which case the Marleasing principle can engage.

51. In any event, for the avoidance of doubt, in so far as it matters the Claimant's right to privacy is balanced of course against inter alia the interests of justice in terms of a fair hearing and the right of the respondent to defend itself in terms of the issues: Also when we go back into the main issues in this case, an employer's right to manage its employees to ensure that they are not overworking ie moonlighting with an Agency thus jeopardising the quality and reliability of the work they are employed to do and inter alia potentially putting put at risk such as service users. This becomes very much engaged in this particular case under the "enslavement[5] "topic.

52. It follows that we dismiss out of hand these protestations by Mr Ihebuzor.

53. The problem is that the eventual disclosure had an absolutely fundamental impact upon this Claimant's credibility. What those agency records show (as to which see supplemental bundle commencing page 1) is extensive working throughout the years as an agency worker whilst in the employ of the Respondent, such as to mean that when she argues that she was made to work more than 48 hours and her health was thus affected because of the Respondent, it flies in the face of reality. The Claimant was hungry for hours and also despite entreaties from the employer stretching back to 2010 (as to which see the extensive evidence of SH before us and then the documented extensive evidence cross-referencing to pages in the bundle of inter alia JW and IM) the Claimant worked elsewhere many hours a week and furthermore when saying (for instance in 2015) that she needed reduced hours to care for relatives, the reality is that she worked elsewhere. There is also the question mark which is raised by Counsel in her submissions as to whether the Claimant was being honest anyway about the need for reduced hours and whether she was really caring for a relative and particularly the reference to Aunty, and whether in fact it was that Aunty was actually in London for the purposes of a holiday when the Claimant visited her: be that as it may.

54. They are also dramatically relevant in terms of 16 January 2016 and the Claimant's maintained position in terms of the disciplinary investigation and, indeed until challenged, her evidence before us that she had had to leave by 1 pm on 16 January because her return to work after the fortnight's leave for stress

[5] A phrase used by the Claimant.

reasons had in effect been premature as she remained unwell and that she should have been given a phased return. In fact it now turns out that the Claimant left at 1 pm because she had booked herself a shift with the NHS bank, as to which see supplemental Bp 5. This she was forced to concede under cross-examination.

55. Prior thereto, the Claimant under cross-examination on this topic of agency working had been repeatedly defiant in refusing to answer questions on the basis of "*it's my personal life*". But in seeking to argue that the employer was overworking her and denying her sufficient rest between shifts and making her work, for instance late to early shifts and undermining her health, then she cannot have it both ways. What this evidence did was to very much undermine her credibility.

56. Furthermore, there is the issue of her health. Her husband and son Samuel gave evidence before us see statements at witness bundle Bp 42 – 50 and 51 – 52. These were to the effect that from the circa at latest the start of 2015, the Reverend had to give up his own work (and indeed running his own church) and the two sons had to give up their plans for university because mum was so ill that she needed their support and that this remained the position through until well after the commencement of these proceedings.

57. This turned out to be just plain wrong. First there is the medical evidence as it now is before us, the Claimant having been so reluctant early on to disclose the same. This is to be found in the same supplemental bundle as the agency workings.

58. As to her having serious mental health issues (if that is what is being argued), there is no evidence to that effect in the GP bundle. Occasionally she might have reported in the past complaints about work and stress, ie in 2012 but there is nothing thereafter in those medical notes at all on that topic all the way through until on 30 December 2015 when she complained of stress and got herself a sick note for a fortnight over the telephone. She then failed to attend a follow up session booked for her on 21 January 2016 but then sought another sick note relating to work stress on 8 February 2016. That fits in in terms of material events, to which we shall return.

59. There was never any diagnosis of anything more than work stress (ie 9 April 2016) and then she wanted on 11 May 2016 a further sick note but on the basis that it did not prevent her from working other than at Wynhill. The doctor did not know what to do and so at that stage did not issue a sick note. As at 27 July, the problem was still work related stress: - effectively unable to go and face working at Wynhill but looking for work at other places. The doctor was not of course told that she was in fact extensively working elsewhere as the agency records before us show.

60. Thereafter, those records never go further than work related stress. The other problems that they refer to prima facie have got nothing whatsoever to do with problems at work and are clearly not such as to prevent her from being able to work as she was doing so and indeed continuing, and that brings us back again to the extensive working as shown by the agency records all the way

through. The overall GP record also never goes further than a diagnosis of work related stress (Bp 418 – 419). The handwritten note of a Mr Licfold, stated to be a counsellor, but we do not know his qualifications, is dated late in the proceeding, ie 25 January 2018, so well after the material events.

61. So, the evidence that the Claimant was so unfit that she needed support at home flies in the face of both the medical notes and the agency records. It turned out that the two sons had not given up going to university until 2017 because of caring for their mother; that had had to undertake resits. Father is still it seems running a trading business.

62. That is a short summary of a much wider point but it shows why we are with Counsel that it goes very much to undermining the credibility of the Claimant. It is to be noted that in terms of corroborating her case, she has not called any colleague workers such as Juliana Jemwa, to whom she refers extensively and who is another BME employee, or any of the other BME employees in a workforce composition which is somewhat unusual in that some 39% of the staff at Wynhill are BME. She has not called Mr Talty of the union, albeit during her evidence she seemed to be suggesting he had failed her in his conduct of matters. He ceased to act for her by the time of her appeal when her husband took over. We can only observe that we heard how experienced a trade union officer Ged Talty is and particularly from Cllr Place and he is clearly respected. His representation of the Claimant within the internal proceedings shows no shortcomings. He did his best to try and defend the Claimant, questioning witnesses appropriately. We do course do not know what UNISON's stance may have been by the end of matters and why it did not attend at the appeal and that would be a matter for speculation.

63. What it does mean is that we agree with Counsel, that in a case where we find all the Respondent's witnesses (and those called under witness orders) to be as already said highly credible and where we have a Claimant whose evidence is discredited, that we would look to objective evidential corroboration for her accusations to stand up. To turn it around another way, in this case for reasons which we shall now come to, the weight of the evidence is quite overwhelming in terms of the Claimant having been addressed in terms of the issues over agency working and the impact upon her efficiency etc; there is abundant evidence of the Claimant on several occasions behaving inappropriately to workplace colleagues and on occasion overtones of her own racist stance; and there is the clear cut evidence against her corroborated in relation to the material events that we shall be dealing with.

64. Also there is the evidence of the Varney investigation that black people were not segregated from white workers at Wynhill Lodge; that there was no unfair picking on BME workers to undertake caring for difficult service users; and insofar as one or two of the BME workers might have had some complaints, it is to be noted that none of them had any complaint at all against JW. In particular that she had shouted at them or behaved in a racially discriminatory way and which is an essential plank in the Claimant's case.

65. What it means is that we have looked to the Claimant to provide corroboration of these very serious allegations and, put at its simplest, that there

is really none at all.

66. It follows that the next step in our adjudication becomes somewhat simpler. We do not intend to rehearse the minutiae of the claims. We have thoroughly, as perhaps is now self-evident, heard all the evidence in this case and paid close regard to all the documentation. For a detailed critique of where to find all the documentation that was engaged, this can be found in the closing submissions of Counsel which are accurate and fair in that respect. We shall deal with matters on a somewhat more broad-brush approach. In that respect, the allegations in this case are some 25, which have been broken out so to speak by Mrs Hodgetts and which we obviously have before us at page 4 – 5 of the bundle. She also prepared a list of issues at page 6 – 7. In terms of the allegations, we are not going to address each one in the sense of a detailed critique. We are going to deal with the issues under the broad themes and give our findings.

Residual findings of fact

Topic number 1 – "Enslavement and given no rest"

67. On this topic, the Claimant utilises four actual comparators who she says were treated more fairly than her, namely

- Samantha Papworth
- Donna Riley
- Nicola Adcock
- Karis Cranwell.

Inter alia what she is alleging is that she was made to work unreasonable hours all the way through the employment unlike these comparators. She was disproportionately made to work back to back shifts so to speak, ie a late ending at 10 pm and then an early starting at 6.45 am. Somewhat confusingly, in that it contradicts being over worked, she also claims that unlike them she was not given additional shifts.

68. Mr Ihebuzor has in his submissions cherry picked the evidence on the rotas. Suffice it to say that there was extensive evidence in particular by Jane Wardle on this topic and the tribunal was taken in detail via the cross-examination of the Claimant by Mrs Hodgetts to the all-important sample rotas commencing Bp 816 – 887. These show a pattern that flies in the face of this assertion. We can see that white colleagues were also working from time to time these two shifts one after the other, as to which for examples see Bp 816 (Gemma Fazackerley) or Bp 817 (Adam Morley or Samantha Papworth) and so on and so forth. We need go no further. Those rotas speak for themselves and contradict the Claimant's assertion.

Topic number 2 including further on "enslavement and given no rest"

69. The Claimant was hours hungry to such an extent that because of her agency working, the Respondent's line managers (and going up to the higher level JW and then IM) were repeatedly concerned in terms of its impact upon her health and service users. For instance, there were times over the years when she would come in late for a shift and it became clear that the reason was because

she had just done an agency shift, ie a night and was now starting an early. On occasions, reports came back from other places within the Respondent caring department where the Claimant had been working say a night and had fallen asleep, or that there were occasion where when she had come into work she was not engaging as she should do with the service users but watching television.

70. On this topic it was the Claimant who chose to call Sally Handley (SH). The evidence that emerged via SH is that, to take an example, during the period of her line managing the Claimant in 2010, she was voicing repeatedly these concerns about the Claimant working too many hours and its impact (as we have now described) and her concerns for not just the Claimant but of course the welfare of the service users. Examples, therefore, in terms of the records are Bp 715 and 12 February 2010; Bp801 as an example in 2014; Bp808 on 19 March 2015 when she was granted a request to reduce her working hours because of a family situation which flies in the face of course of "enslavement"; Bp812 on 18 June 2015 and thence 28 November 2015, as to which see Bp814 – 815. There is clear evidence that the Claimant was very hungry for hours, albeit SH recorded "*Trying to make sure she took time off*".

71. Then cross-reference to JW's efforts on this subject and also the inter-related concern that the Claimant was dropping shifts at short notice, which of course would disrupt the rota and allocation of experienced carers to service users and also increase the need to get in agency workers at increased costs to the respondent. The anecdotal evidence was that the Claimant was doing this in order to earn more as an agency care worker. This flags up commencing in 2010, an example being 15 June (Bp 218 – 219) and in February 2011 how Jane Wardle was in fact looking into the Claimant's agency working circa February 2011 (Bp 222 – 224). There was a meeting on 18 April to discuss concerns over her working these excessive hours and its impact on performance and lateness.

72. It is to be noted that the Claimant raised race discrimination as a defence, which simply does not fit with the overarching concerns. Put at its simplest, it has got nothing to do with race because JW was repeatedly over the years also issuing edicts to other members of staff on this topic, in particular their cancelling shifts at short notice or people wanting to leave early without proper explanation, ie let's assume to do an agency slot, as to which see 24 September 2015. This was an issue addressed to all staff (Bp 2096) and the edict (which was not the first published) on 18 November 2015 to all staff (Bp 2099) to the effect that late cancellation of shifts (unless there was a very good reason, ie urgent childcare emergency) would incur the penalty that no extra shifts would be offered to that employee for a month thereafter.

73. There was the issue in October 2011 as to whether the Claimant had falsely stated she had been telephoned because she had not arrived when after exhaustive checks the evidence was that it was the Claimant who had phoned in and the evidence was that she was late because she had worked an agency nightshift.

74. This theme was repeated again in 2012, ie the meeting on 15 January to discuss concerns about the Claimant undertaking nightshifts elsewhere

through agencies (see Bp 242). Suffice it to say that the clear evidence as now established via the supplemental bundle is that the Claimant was throughout these years, in that the documentation goes from 2012, was working extensive agency hours (an example being for Precedo). Indeed, the tribunal observes that it has rarely seen in its extensive experience somebody who worked so many hours.

75. So, for the Claimant to argue that she was "enslaved" by the Respondent flies in the face of the evidence. As to the WTR point, the Respondent closely manages hours, working as it can of course over the 17 week averaging period and in fact incepts to ensure that over that period, the hours are not exceeded apropos the WTR. But what it cannot do is to control the Claimant's hours elsewhere unless it is going to ban her from working as an agency worker, which would be contractually very difficult. What it could do would be to make some imposition by managing the Claimant down the capability route. But her performance by and large did improve in this respect from the documentation in that there are no serious time keeping/capability issues until of course we get to late 2015.

76. To turn it around another way, the Respondent did its utmost to accommodate the Claimant's request for hours in terms of its working, subject to the averaging under the WTR over the 17 week period. Throughout her employment, it gave her the reduced hours (which we have already referred to) when she raised family issues, albeit from the evidence now available it seems that she actually did agency working during those periods. Then despite the Respondent's reservations from time to time as to the impact this may be having in terms of the Claimant's own welfare , it was the Claimant who was repeatedly wanting (other than say during the period when she was saying she needed reduced hours because of needing to care for a relative) extra hours.

77. An example also of this is that it was the Claimant who would regularly complaint that if she was available to do such as extra hours over those rostered, that if an agency worker had otherwise been already booked they should be cancelled in order that she could be preferred. JW's point there (which is perhaps self-evident) when giving her evidence was that this cannot be done at such short notice, agency fees would still be incurred and it is not reasonable to cancel in such circumstances in terms of needing to keep good relationships with the agencies.

78. Without further ado, what it means is this that the contention that she was "enslaved" or denied sufficient rest flies in the face of the evidence.

79. It also means that we do not find that she was less favourably treated than the comparators that she has referred to.

Service user selection

80. The regime at Wynhill obviously is primarily focussed on caring for the needs of the service users. We have already referred to the fact that they are by and large profoundly disabled. Some may have severe behavioural issues; others may not. There are obviously care plans for all of them. The evidence

that we heard from NF, SH, JB, Kimberley, Phimister (KP), thence followed by JW and IM can be summarised as follows. It also fits with the care plans that we saw. We can factor in that by and large the Claimant was good at this job. Of course it requires an intuitive rapport with the relevant service user and the more experienced a care worker might be with the particular service user (and let us take for example the Claimant's regular working with DS and which fits in with 29 October 2015) would mean that it would make sense for the team leader at the commencement of any shift to pair up the first carer to a service user on the basis of first hand caring experience of that service user if at all possible. The first carer has the primary responsibility. They may receive support from another member of staff including agency depending on the needs of the service user.

81. The evidence of all of them combined together (we repeated in each case highly credible) backed by such things as the care notes which we saw, shows that there was no disproportionate selection of the Claimant for onerous caring in contrast with white carers in the workforce at Wynhill. This finding is supported first by the IM investigation and then the extensive investigation and ensuing report of Ms Vardy. We have no corroborative evidence to support the Claimant's contentions. What it means is that we do not find on the evidence that there was direct discrimination of the Claimant in the allocation of service users and by reason of her race.

Isolation/visiting the kitchen/segregation

82. Again, this was extensively covered by the witnesses to which we have referred and by first IM's investigation and second the Vardy investigation. The Claimant was the one who only wanted to work if at all possible with colleague black workers. JW's stance, which mirrors the Respondent's equality and diversity policies approach to integration, was that this was inappropriate; the workforce should work together and be integrated.

83. On the topic of visiting the kitchen, JW's position was that staff should not go into the kitchen when the cooks were working because this would disrupt them. To say that the Claimant was singled out in this respect flies in the face of the evidence. Thus, the team meeting minutes of 12 February 2011 at Bp 2016: "*… if staff want a meal they need to order it … they do not make it themselves …*" Also Bp2059 – team meeting 1 May 2012 - "*… if* [the cooks] *are not in the kitchen staff can go in … Staff are not to go into the kitchen when* [the cooks] *are working …*"

84. On the issue of allegation number 8 (which is on the same theme): "*Not allowed to chat with service users or in office".* The first is of course misconceived. Talking to service users is a fundamental part of the job as to which the evidence was overwhelming. As to the office, the problem here is the staff had a very keen interest in the rota for reasons which are now self-evident. This meant that they went into JW's office where at that stage it seems the rota was and could spend a lot of time talking about it. A subsidiary issue there, which SH dealt with, is that rotas are always problematic – trying to juggle the demands of the undertaking against the preferences of the care workers.

85. Thus again see team meeting minutes at Bp 2059:-

"*Staff in the Care Office*

… should be communicated at handover who will be working in the office … Sally agreed with Juliana and she felt that the rota was being looked at too much. Juliana felt that too many staff were chatting unnecessarily in the care office lll"

86. Bp 2093, team meeting 18 September 2014 and reference to team leader Andy Roberts:-

"*…*
Andy asked staff to stop spending a lot of time looking at the rota. …"

87. Again, back on the theme of the allegation that the Claimant not allowed to chat with service users, suffice it to say that JW encouraged interaction with service users as to which there are repeated references over the years. Thus see Bp 2032:-

"… There are too many care workers who spend the majority of the shift sitting at the table or watching TV. …"

Bp 2035:-

"*…*

Care workers should continually engage with service users throughout the shift …"

Bp 2038:-

"*…*

The reading of magazines, newspapers or watching television ***is only acceptable*** *when you are doing it* ***with*** *a service user* ***and*** *interacting with the service user … Any one not adhering to this will be challenged.*

…"

Bp 2052:-

"*…*

Jane feels that some of the team are watching too much TV. …"

Bp 2055:-

"*… frequently staff are watching programmes they want to watch and not paying full attention to the service users. …"*

Bp 2078:-

"*Nicola*[6] *had concerns about staff not taking service users out …*"

Bp 2097 (this is 15 November 2015):-

"… staff needed to engage in more activities …"

88. Also as an observation we endorse the observation of Mrs Hodgetts at her paragraph 16:-

"… *Notably, C takes objection when another member of staff (not JW) reprimands her for apparently ignoring a service-user: pp753-754.*"

This was 19 September 2011 and is a reference to Annette Waterfield, another employee who acted up as a team leader from time to time.

89. So, again this allegation just flies in the face of the evidence.

Jane Wardle repeatedly shouting at the Claimant

90. Leaving aside for one moment the core issues in this case (which we repeat start on 29 October 2015) and the overwhelming evidence of all witnesses (other than the Claimant) who gave evidence, is that JW was a long-suffering and patient line manager who never shouted. Indeed, as a by no means isolated example, when giving her evidence (and we remind the reader that this was at the behest of the Claimant by way of a witness order) on this topic SH said with considerable emphasis "*As to allegation J Wardle shouting or screaming, I have worked for her 15 years I have never ever seen her shouting at any member of staff or service users*". This statement is comprehensively endorsed by the findings in the Vardy investigation commencing at Bp 444. We agree with Counsel in her closing submissions at paragraph 5; there are multiple references to the fairness of and the support given by JW to the team. We remind the reader that there were 34 employees at the material time at Wynhill. Her approach in terms of methodology is very structured and designed to get a fair and frank input from each of the employees of whether or not there is racism. She was able to interview 30 of the employees; 3 of the remainder provided written statements saying they had no concerns and did not wish to meet; one had left the employ. A full analysis of the outcome is at table 1 – an issue which reflects what we have said already was about allocation viz shifts etc where there was a 75% finding amongst the employees that this was undertaken fairly. This high rating is the lowest score; on the other four criteria, the satisfaction rating ranged between 90 and 97%.

91. Most important of all, nobody supported the Claimant in relation to her allegations that JW behaved inappropriately to staff, ie such as shouting or screaming or belittling them. The only person who wished to say that JW was not fair and did not treat everybody equally was in fact the Claimant (Bp 449).

92. Only one witness gave partial support in terms of issues relating to the minority, which we can detect was Juliana, but none of that related to

[6] Reference to team leader from time to time Nicola Adcock

inappropriate behaviour by JW. We agree with Mrs Hodgetts's observation regards Juliana Jemwa that the few concerns she does raise do not support the Claimant's case and if there was any doubt about that, then the Claimant could have secured her attendance to articulate under oath – after all she got witness orders in relation to the 5 to whom we have referred.

93. There is also the point that subsequent to the Claimant's dismissal, Ms Jemwa has developed well and she is now a relief team leader.

94. So there is no evidence that support the Claimant in saying that JW shouted or screamed at her. This is in relation to events prior to that which occurred on 30 December 2015. The fact that the evidence before us (other than the Claimant) is to the opposite can only but corroborate JW's assertion that she did not shout on 30 December 2015 and was by now in a position of nil desperandum when it came to the Claimant having been treated by the Claimant on that day to a rant leaving JW with her head in her hands feeling she could no longer cope; leaving the office very upset; thence found by a cook in that condition and sent home.

Carpel tunnel syndrome

95. This issue comes in in relation to the Claimant's allegation 2. The point is that the Claimant having developed carpel tunnel syndrome in 2012, JW undertook a risk assessment (Bp 246 – 247); adjustments were made and then post the Claimant's surgery and return to work after recuperation, she did another risk assessment (Bp 250); albeit no adjustments had been recommended by the medics (Bp 193). An occupational health report was obtained and the advice followed; and the absence incurred because of the surgery was not one which triggered intervention of the MAP.

96. The suggestion by the Claimant that she was allocated to a higher needs service user on return from sick leave therefore flies in the face of the evidence to which we have just referred. There is no evidence that draws any inference that less favourable treatment let alone race was therefore engaged.

The team leader role

97. Circa 2014 there was a vacancy posted for a relief team leader role. The evidence is that the Claimant declined to pursue the vacancy because she felt she lacked the necessary computer skills. In any event, it seems that the vacancy was withdrawn. The Claimant's contention appears to be that the evidence is that the BME carer employees at Wynhill are declined opportunities to advance. There had not at that stage of the Claimant's dismissal been the appointment of any of them to a team leader role.

98. JW made plain to us that she had tried to encourage the BME carers to apply but vacancies were very few and far between. As it is post the Claimant's departure, a vacancy did emerge and we have now of course referred to the fact that Juliana was appointed into the role and which she is undertaking very successfully.

99. What the evidence does show is that the Claimant was throughout the later years of the employment being very much encouraged to develop her skills: As to which see as an example Bp 805 - 21 January 2015. She was put through courses for "senior nights"; she was going to start an NVQ in April 2015 at level 3 and she was signposted to avenues where she could access computer training. We can only note that throughout the proceedings, her husband and the present son were using laptops and it looked like the Claimant was quite capable herself of looking into them from time to time; and so it does seem surprising that if she was being held back by lack of computer skills in what is after all a caring role and where for instance the nursing notes are handwritten, then it seems surprising that she did not enlist her family's help to obtain those skills. In any event, all the ways in which JW was supporting the Claimant (and which we have touched upon and as set out in her witness statement at paragraph 41) were not challenged.

100. Finally, the Claimant was appointed circa March 2015 to acting up as a senior on nights. Again what it means is that the evidence is simply not there of the Claimant being less favourably treated by reason of her race. If this claim was anything in terms of lack of advancement of the BME workers per se, then that would have been a claim for indirect discrimination pursuant to s19 of the EQA and there is no such claim.

Events starting 29 October 2015

101. It follows that we are now going to move on to the core issue in this case, which is events starting on 29 October 2015. There is a stark conflict on the evidence. Purity and JB in their sworn evidence before us were consistent with the content of their interviews to KW and indeed their evidence at the disciplinary hearing. The Claimant similarly was consistent. We have already made findings adverse to her credibility. Thus we find as follows on the weight of the evidence.

102. On this day, the Claimant was scheduled to undertake the late shift between 2 pm and 10 pm. The team leader was Josie Bemrose (JB). As is clear from the latter's evidence and in relation to which see her interview with Kate Wilson (KW) on 3 February 2015 (Bp 339- 40) as team leader and following discussion at handover with the team leader she was taking over from, she decided that the principal carer that day of DS would be the Claimant and for the reasons we have gone to previously. She knew that inter alia on the shift that day would be Purity Muriuki (PM). She is an experienced carer that had worked for the Respondent since 2008. But up to then she had been working at another similar care unit operated by the Respondent known as Kings Bridge but it was in the process of closing. She had on occasion worked as an agency worker at Wynhill and it seems was there in that capacity on 29 October.

103 To turn it around another way, as she told the tribunal she had never cared for DS. In contrast the Claimant was very experienced in caring for DS. So, it made sense, and which is corroborated by JB that PM be given front line caring responsibilities for 2 other attendees, namely LC and KM. These too did not have such intense caring needs albeit LC would need assistance at meal times and because otherwise she might choke. She was told by JB that she would be second carer to DS, the principal carer being the Claimant.

Incidentally, the Claimant arrived late for this shift.

104. Much was debated before us by the Claimant that PM should have read the care plan for DS. But all the other evidence that we heard (including such as JW and IM and on this topic JB) was that she would not expected to do so, albeit it might be a counsel of perfection. What PM would need to do was to read the care plans for those she was first carer for and which she did.

105. Either on arrival or during the shift and certainly well before we come to shortly before 8 pm, the Claimant had announced that she was leaving at 8 pm. JB was new to being a team leader and it is fair to say that on all the evidence that we have (and we will be referring to behavioural issues from now on) the Claimant could be an intimidating person to work with. That is maybe why JB took the action, or rather did not take the action, in relation to what happened on this day. Suffice it to say that the evidence is clear that the Claimant had no permission from JW as per the edict previously referred to, to leave early on this shift. She had permission from no one. She presented JB with a fait accompli. As to why JB did not challenge her telling is the end of her interview at Bp 341:-

> "*Josie said that these situations have made her feel like Esther has no regard or respect for her position as Team Leader "Esther is like a law unto herself". …*"

106. As to what then happened first we have the evidence of JB and PM, both of whom we repeat we found credible in contrast to the Claimant about whom we have already made findings undermining her credibility. As to the relatively contemporaneous evidence, first we have JB's interview with KW (to which we have already referred). Second, there is the interview on this topic by KW of PM on 17 February 2016 at Bp 309. Thirdly, there is the interview with the Claimant on 1 March 2016 commencing at Bp 377 and at which she had a trade union representative present. There is a stark conflict in terms of material events between what she has got to say as opposed to Purity and JB. She makes a very serious accusation about PM and the treatment of DS:-

> "*… threw the guy on the bed and let him fall onto it, this meant he was lying at the end of his bed with his legs hanging over it. Esther told Purity that "you cannot treat him this way it is abuse, you should have asked me to help. …"*

PM is clear that this is a distortion of events.

107. There was a care plan for DS (Bp 313). The Claimant says there was another care plan. We have not had it before us and JB is quite clear (as is JW) that the care plan in operation for DS is that which is at Bp 313 and which had commenced on 2 September 2014 replacing a previous care plan dated 17 November 2011. Inter alia, the importance of it is:

> *"(*DS) *previously had his pad changed whilst in a standing position. The angle of … legs when he stands together with his variable mobility makes this support potentially unsafe both for (*DS*) and for the staff assisting him.*

> *A safer practice would be to use his bed to change him. (*DS) *also sleeps with the bed against the wall as he has been known to fall out. In order to be able to provide this support for* (DS) *we would need to use a bedroom that has a moveable bed …*"

108. Of course, depending on the circumstances if there was a risk that he could fall out of his bed although not said in the plan, it is self-evident that if applicable rails be placed against the side of the bed.

109. So, this is the care plan which we conclude was that which was in place on the day in question.

110. On the evidence we find as follows: At around 7 pm was assisting LC to eat because otherwise she might choke. The Claimant came along and abruptly asked her to assist with DS as she needed help and would be leaving at 8 pm. Of course the problem that PM had was that she first of all needed to finish dealing with LC. Having finished her care of LC, she went to find the Claimant in DS's room. Putting it at its simplest, despite that care plan the Claimant wanted PM (who is a small, slightly built woman) to hold up DS whilst she changed him standing upright, which of course was contrary to the care plan. PM had great difficulty doing this and was making that plain to the Claimant. The Claimant would not give her support. PM found DS to be too heavy and that meant that she ended up having to flop him down onto the bed because otherwise he would fall down. . The Claimant shouted at PM. The Claimant maintained in her evidence that she was not prepared to help PM because "*Purity had made Esther clean cupboards at Kings Bridge*".

111. PM made the point before us that she had never worked with the Claimant at Kings Bridge and had never asked her to clean the cupboards. In any event having said that, the Claimant left the room. PM in those circumstances, not being sure what to do, had the presence of mind to put DS in the correct sleeping position and put up the cot side rails and go off to find JB. When she got to Josie's office there was the Claimant, who was reporting that Purity had dropped DS and that he was in the wrong sleeping position. In other words, she was putting all the blame on Purity. So, the three of them went back to the room. The claimant then criticised Purity (PM) loudly for having put the cot side up. DS was put in the correct position and the three left the room.

112. Picking the matter up with JB and again it goes back to the insensitive remarks that the Claimant could make without perhaps thinking through their impact and which have a racial insensitivity about them, in a position where PM was finding it difficult to explain herself, doubtless because of the confrontational stance of the Claimant, the latter said: "*We are both from Africa, we speak the same language; I'm not German and she's not French*". Josie has that the Claimant started shouting in front of DS and then we get into the issue of JB pointing out that the care plan should have been followed and then the Claimant walking away.

113. It is correct to say that at the time, doubtless because JB saw the Claimant as "*like a law unto herself*", that none of this was recorded in the nursing notes. The only entry refers to "a misunderstanding". It does not seem

that the matter was at the time reported up the line, ie to Jane Wardle (JW) who was not on duty when this occurred.

114. It came to light in the context of the disciplinary investigation following the other incidents to which we shall now come. But suffice it to say that here was evidence which the employer was entitled in due course to reasonably conclude, showed not only inappropriate behaviour by the Claimant towards PM (and which was compounded by being in the presence of the service user) but ignoring of the care plan thereby putting the safety of not only DS but also PM at risk.

115. Before dealing with the next incidents, we make the observation that the investigating officer and thence in particular the disciplinary panel was entitled, in terms of assessing the weight of the allegations, to look at what could be described as similar fact evidence. Indeed the incidents are referred to in the Wilson (KW) investigation report. Thus:

116. On 19 April 2012, there was an issue of the Claimant having raised her voice at another team member. Inter alia, Jane Wardle (JW) stated in the letter to the Claimant at Bp 243 dated 19 April 2012:

> "*…*
>
> *I am confirming that a meeting took place on 19th April, where I spoke to you about another incident where you had raised your voice at another member of the team. Esther there has now been five occasions where team members have felt intimidated by you raising your voice at them. As I discussed in the meeting this is not acceptable and will not be tolerated. …*"

117. On 25 October 2012, an agency worker (namely Faith Gakanje, who is black African) raised a complaint (Bp245) about an incident that day. She referred to how the behaviour of the Claimant had "*affected me deeply and left me feeling intimidated, bullied, racially inferior and less valued to other staffs within the organisation. …*" She described the events and how she had asked the Claimant if she could borrow some keys to access a hair dryer – this was for the purposes of caring for a service user: "*… She turned to me in a very aggressive manner, stating I should not come to her for keys, as my changeover should have been given me a set of keys. She then went on to abuse me, stating while pointing to her skin that she and other black members of staff does not want me there and that as an agency supplied care worker she is not equal to that of other permanent black staff …*"

118. The Claimant was interviewed about this matter on 26 November 2012 (Bp 248a). The decision by JW pronounced on 31 December 2012, was that this being in fact a complaint of racial discrimination by Faith Gakanje:

> "*The allegations are partly founded. There is no evidence to support that you were racially discriminatory towards Faith. However, you and Faith were both heard shouting at each other in front of service users and you were heard telling Faith that the staff did not want her at Wynhill Lodge.*

This behaviour is totally inappropriate. …"

119. That brings us to the 27 May 2015 (see Bp 319). JW was therein writing to the Claimant viz incidents at work on 11 May and 12 May 2015. The first related to Helen Child (yet another acting relief team leader):

"*… felt intimidated and bullied by your actions. It has also been stated that you were standing over Helen repeatedly saying "Helen hates me, Helen hates me". Joanne Scott felt she needed to intervene as she was also present in the office at the time. Joanne intervened by raising her voice at you. I met with you to discuss the incidents. …*"

120. The Claimant gave an explanation and this was that her rota had been altered to show that she had absented herself and she gave an explanation why that was wrong.

121. The second incident was about allocation to her of service users. The issue there (which brings in another comparator issue) was that Andy Roberts was not able to do the task hence Andy Harris, then acting as a team leader, had allocated the service user to the Claimant. Andy Roberts had a history of health problems, very much more serious than the Claimant's carpel tunnel syndrome or her two week absence with stress, to which we shall come. There was a risk assessment in place for him. Thus he was vulnerable. Therefore it engages in what happened over the service user and how the Claimant was expressing herself to the unfortunate Mr Roberts:

"*… Andy stood up without speaking and went to the care office. You followed him … both started raising voices. Andy Harris intervened. The whole incident left Andy Roberts shaken and he was sent home. …*"

122. JW added:

"*Esther this is not the first time I have met with you with regards to how you shout at other team members. We discussed the way you shout at people is intimidating and some see it as bullying. This kind of behaviour at work will not be tolerated. …*"

123. There was then a further episode circa 17 September (Bp 259 – 260) which involved Nicola Adcock - another acting team leader. The core point, regardless of the ins and outs of the issues relating to the service user as therein described, is that Nicola complained that the Claimant had shouted at her. The Claimant's response was:

"*… did not shout but she was upset, Nicola had asked her to work Louise as well when an agency worker looked liked she was doing nothing. Esther said Nicola was raising her voice and she was matching it. …*"

124. This is a theme of the Claimant always either alleging that the complainants are lying or that it is a slanging match with both equally to blame. But there is this weight of evidence which is now emerging. It is inter alia important to stress that on this occasion:

> *"Jane reminded Esther about keeping calm and taking deep breaths when discussing issues with others.*"

125. This of course was not the first incident relating to Nicola. There had been a previous one on 31 May 2013 (see Bp 333).

126. That then brings into the equation, as stressed by Mrs Hodgetts in her closing submissions, that before us the Claimant made plain that all the witnesses for the Respondent are liars. This is a conspiracy and that if she ever does raise her voice, it is explained by the cultural issue to which we have referred.

127. But we are with Mrs Hodgetts and particularly flowing from the Wilson investigation via Mr Masson's decision to proceed with disciplinary charges, thence through to the disciplinary hearing and Mr Johnson's decision to dismiss and finally as reinforced by the hearing and the decision of the appeals panel, that there is just too much of it. There is a pattern, and it showed itself to some extent before us because the Claimant is strident and combative and does make serious unfounded allegations, perhaps without stopping to think before she does so.

Incident 20 November 2015

128. That brings us back to the next set of events. Joanne Scott does not work at Wynhill - she is in payroll. There was a payroll issue of overpayment to the Claimant which flagged up on 20 November 2015. The point is made by way of explanation from JW that there were problems from time to time with the pay of the Claimant in particular because of the number of extra shifts she did and then confusion as to what was due when for example she cancelled at short notice.

129. Suffice it to say that Joanne Scott made a complaint on 20 November 2015 about the Claimant shouting at her during the telephone conversation over hours that the Claimant could claim, which query had been raised on 19 November. So, after investigation, Joanne was telephoning the Claimant back (Bp 315-316):

> "… *Joanne said that Esther was understandably upset to find out she was overpaid by 8 hours and was expected to pay this back however, Esther did not conduct herself in a professional manner during this 'phone call. Joanne said Esther was incoherent, aggressive and argumentative and was shouting over Joanne so that Joanne could not get a word in to mutually come to an agreement on how the monies would be repaid.*
>
> *…*
>
> *Joanne replied that she is a little hard of hearing and it all merged into one. Ester was* ***ranting*** (our emphasis) *and talking over her so it was difficult to understand. …*
>
> *After the phone conversation Joanne said it left her feeling stressed and*

worried. Joanne did not want to report Esther's reaction to her mistake during the phone call to anyone at first, but on reflection Joanne realised that Esther's behaviour could not continue and that she had to do something about it. …

Joanne stated that Esther always seems to be angry, and that whenever Esther asks to speak with her in regards to pay or leave Joanne feels as though she has done something wrong …

This was not a one off situation, Joanne stated that Esther often gets very angry and in Joanne's view is not sure that Esther quite knows how to get her point across in any other way.

…"

She then made reference to previous incidents as to which see Bp 317.

130. When interviewed about this one, the Claimant's stance was that she only raised her voice because Joanne had difficulty hearing her, otherwise she denied behaving in the way alleged.

131. So, here is another similar fact type incident which this time becomes the subject of one of the disciplinary charges. One final point to make, and this is item 11 in the Schedule of accusations: - "JW makes C communicate with some colleagues by email or through her rather than verbally. " Well, insofar as JW might have so decided and it was never directly put to her, self evidently on our findings that was a wise course action given the Claimant's ability to upset some, not all, of the workforce but primarily acting team leaders and given how difficult the Claimant was to manage.

30 December 2015

132. Something which flies in the face of the Claimant's assertion that JW was racist towards her is that the Claimant had booked leave for the Christmas period. At short notice, she asked to change back to working: it is lucrative because of the substantially enhanced premium rate plus awarding of additional leave. JW initially had difficulty accommodating her request because of inter alia booked agency staff but nevertheless she was able to do so and so the Claimant was given shifts for 29 and in particular 30 December. Why would JW do that if she was a racist in relation to the Claimant? The allegation falls at the first fence.

133. Of importance is that the Claimant was still scheduled to have leave on 28 December, which was a bank holiday. As it is and whether of her own initiative or at the request of a line manager (it certainly was not Jane Wardle), a nightshift became available and the Claimant agreed to work the same.

134. This brings in Sally Handley (SH). The Claimant asked, she says, if she would be paid not only for the annual leave day but also for the night shift. SH replied that she was not sure but did not think that the Claimant could have both payments, particularly given the premium rate etc to which we have already referred but would check. The Claimant's stance on this issue was always that

SH had said that she would be paid. During the hearing, she rowed back from that firm proposition to that she understood this would be the case.

135. As it is, SH raised the matter with JW and it seems circa 29 December the Claimant was informed that she could not be paid for both. What then happened is that at very short notice, the following day (30th), the Claimant cancelled her shift that day, and which obviously would cause difficulties for the Respondent. We work on the proposition that the Claimant may have cancelled that shift because of her dissatisfaction on the payment issue but we also now know from the agency records that she had an agency shift booked elsewhere in any event.

136. The Claimant says that JW shouted at her when told by the Claimant she was cancelling her shift. JW denies that. So we come back to the weight of the evidence and the corroborative effect, ie having made findings already as to the behaviour of the Claimant, it follows that absent some independent evidence; those findings corroborate the evidence of JW. There is no evidence to corroborate the Claimant. Thus we find that although she would obviously have been frustrated at what had happened, JW did not shout at the Claimant and indeed it is not her style.

137. Shortly thereafter at 12.19am[7] , the Claimant telephoned her doctor and she got the sicknote giving a fourteen day period of absence commencing from that day.

Incident 31 December 2015

138. That brings us to events on 31 December. It brings back in the evidence of JB at Bp 337 and as confirmed under oath to us and also the evidence thence of JW first given to KW (see Bp 324), then confirmed before the disciplinary hearing as did JB, and thence finally in her evidence before us.

139. In summary, the Claimant came in demanding that a piece of paper she was holding be copied. We now know that this was the sick note. JB was concerned at the Claimant's aggressive stance, and also not knowing what was in the paper, she made plain that she would need to have permission for it to be photocopied. At this, the Claimant strode off to the office of JW.

140. We stop there by saying that the Claimant had no need of course to bring in her sick note. Under the Respondent's sickness absence reporting provisions, she need only self cert for the first 7 days.

141. It is clear to us from the evidence that the Claimant was about a confrontation, relating to this issue of the pay. She engaged in what was described by JW as a rant. This was overheard by JB as she came towards the office obviously concerned about what might happen given the previous history of events. The Claimant denied that she shouted, or entered into a rant, when interviewed on this topic by KW and maintains her denial. It is back again to that JB and JW are liars. Suffice it to say that yet again that assertion goes to the weight of evidence. It weights in favour of the Respondent. JW was left mentally

[7] Medical notes bundle p14.

exhausted, as we have already said; head in hands and losing the will to cope with being able to manage the Claimant; she had reached the end of her tether. This was therefore reported up the management ladder and which inter alia lead to the decision on 19 January 2016 to place the Claimant on special leave.

142. In accordance with the Respondent protocols, because the Claimant had put in a sicknote referring to stress, it automatically requires an occupational health referral. JW had prepared this on 5 January 2016 (see Bp 263 – 268).

16th January 2016

143. That then brings us to the next chapter of events culminating on 16 January. The Claimant of course had a fourteen day period of certified sickness. As per the rotas, she was then scheduled to have leave on 15 and 16 January, which obviously would give her further time if she needed it to recuperate. The GP issued no further sick note at this time and thus was not proposing a phased return. Thus, in accordance with the Respondent's procedures (about which we heard extensively) and given the shortness of the absence, there would be no requirement for the Respondent to incept a phased return. It is an entirely different situation from the comparator: Andy Roberts[8]

144. As it is and despite her behaviour towards JW, on 31 December the Claimant at the local Asda seeing as she did JW (and incidentally it goes to perhaps complete insensitivity on her behalf to understanding the impact of her behaviour on others) she asked JW if in fact she could work rather than have the day off and therefore could she have a late allocation of a shift. Despite her obvious reluctance to engage with the Claimant, JW organised that she could have a shift commencing at 6.45 am on 16 January.

145. This brings back in JB and her first contemporaneous report of what happened dated 18 January 2016 (Bp 269). In summary, the Claimant arrived a bit late at 6.55am. Following handover and allocation to the Claimant of service user SB, the Claimant announced that she would be leaving at 1 pm. There are other issues about what was happening that morning but they are not directly relevant to this issue, other than the Claimant was supporting a service user who needs one to one and has behavioural issues.

146. JB was concerned as to whether or not the Claimant had got permission despite the latter saying that she had, and so when JW rang later that morning JB asked what the position was. JW confirmed that there had been no permission given. JB confirmed this to the Claimant who:

> *" …then told me in a raised, stern tone in her voice in front of service users that she had been off with work related stress and she was going whether Jane agreed this or not, she stated that she didn't care, she was going.*
>
> *Esther) continued to state that she was going and that Andy Roberts had been off sick and could have a phased return and so she was too. I tried*

[8] The second is Donna riley but she again had long standing health problems requiring inter alia workplace adjustments. Also note a specific head of complaint for instance alleging direct dace discrimination is not in the Schedule of allegations.

to explain to Esther but she wouldn't listen. As I tried to explain to her, she raised her voice further. Esther then glared at me swung her head and asked me if she had two heads (this was done in front of service users), other staff were in the vicinity and heard Esther.

…

On Esther leaving at 1pm, she asked me who was going to take over SB as the 1-1, I stated that this was going to make the shift difficult as it was lunch time and there is nobody to support SB as his plan states – No comment from Ester (sic)

…"

147. In the interview with her by KW, the Claimant's position was that she denied that she might have raised her voice but otherwise justified her departure because of the lack of a phased return in comparison with Andy Roberts and that she felt unwell.

148. This brings back in the agency records. After repeated professionally correct cross examination on the issue and evasive answers[9] from the Claimant, she finally admitted that she had left at 1 pm in order to get to an already booked agency shift. So, what we have here is similar fact behaviour on not just the shouting issues but also ignoring management orders and also not telling the truth, viz going off to work on an agency shift. Those are clearly serious issues.

149. In those circumstances, we therefore come to the meetings (to which we have referred) on 19 January 2016. One final point, on 5 February (Bp278-9) Ian Masson (IM) met with the Claimant and her union representative. He could not have been more reasonable. Rather than suspend the Claimant (who of course at this stage was not sick) or continue her on special leave (which could in the circumstances objectively be seen as in reality a suspension) he proposed that she work at another establishment which was close to her home. She refused. She then suggested via her trade union representative another establishment, Helmsley Road, which it seems was more suited as it would be dealing with the younger service user. It was agreed that IM would raise with the manager of that establishment the proposal including the shift pattern, as the Claimant was suggesting that there were some shifts she could no longer work.

150. This he did and got agreement to the Claimant so working. But by now the Claimant had obtained on 8 February a further sick note for stress. She was never to return to work.

Matters thereafter

151. We have dealt with the whole chapter of events in terms of the Wilson investigation, thence the raising of the race issues by the Claimant and her trade union, thence the first investigation by IM and finally the investigation by Janine Vardy.

[9] Or the stock response: "It's my private life".

152. We now return to 8 December 2016 and the invitation to the disciplinary hearing. The Claimant cannot have her cake and eat it. She cannot complain of the delay. The whole thrust of the raising of the first protected act via the trade union on 21 March in the context of an obviously adverse disciplinary investigation report was inter alia to engineer a halt to the disciplinary process and it had that effect.

153. We have already referred to the last disciplinary charge being the Claimant's reaction to being told that she was now under disciplinary investigation at the second meeting on 19 January 2016. It is important to stress that JW was simply carrying out the instructions of IM as her line manager; and that this was of course before any protected act, thus victimisation cannot engage as a matter of law.

154. As to the disciplinary hearing, there is the issue of the Claimant's written statement of her case (Bp581). Suffice it to say that it was at one stage suggested by the Claimant that the Respondent's disciplinary panel acted unfairly in not considering the same. That has now been retracted as an accusation. What actually happened is that under the disciplinary procedures, the Claimant was supposed to have provided her statement of case some days before the disciplinary hearing obviously in order that it could be considered by the disciplinary panel along with the case to answer so to speak, ie the Wilson investigation and the prosecution of case statement by IM. As it is, the Claimant had not provided that statement of case. However, it seems that either late on the first or certainly at the start of the second day it was provided. Mr Johnson and his panel agreed to entertain the same and they adjourned to read it. That is absolutely clear from the minutes. So, to suggest that the statement of case was not taken into consideration, which was the original allegation, simply was wrong.

155. It is clear from the minutes of the disciplinary hearing (Bp557-9 and 580-6) and also hearing the evidence of Mr Johnson, that the panel thoroughly considered the case and the explanation so to speak and reached a conclusion on the evidence that first of all it was satisfied on the weight of it that the accusations were made out. That conclusion obviously fits with the evidence as we have found it to be. What it means is that therefore this was clearly gross misconduct, both in terms of repeated unacceptable behaviour to colleagues and managers but also in terms of the serious issues in relation to the care of DS on 29 October 2015. It thus obviously follows that a finding that she had breached the disciplinary code by way of misconduct was made out.

156. As to this being gross misconduct, this brings in breach of contract. Taking the evidence as a whole, this was repudiatory behaviour by the Claimant. It was repeated; and there was no insight, no acceptance of being at fault, coupled with the repeated accusation that she was the victim of a conspiracy including concerted race discrimination, when the evidence of the Wilson, Masson and finally Vardy investigations provided clear evidence that this was an unjustified assertion.

157. It therefore follows that the decision to dismiss her without notice for what was serious misconduct does not constitute a breach of contract.

158. That leaves us with the appeal. Cllr Place never said (as is suggested in the closing submissions of Mr Ihebuzor) that the appeals panel just did what HR told them. She was a very impressive witness with a great deal of experience and clearly independent minded. What she said is that the panel always came with an open mind; that their remit was to review the previous decision and the evidence in relation thereto; and if they found that there was something unfair about it, they would make such a decision although as to what then to do was something they normally referred back to the County Council.

159. Insofar as the Claimant might seek to rely upon the dicta of Taylor ***v OCS Group Ltd (2006) IRLR 613 CA***, there was no new evidence put before the appeal panel by the Claimant. It was a reiteration of the previous arguments. Mr the Rev Babalola was allowed to address the panel, the trade union no longer acting. The allegation that he was not allowed to do so advanced by the Claimant has been abandoned.

160. That panel reached a conclusion which was again within the range of reasonable responses. Furthermore It was absolutely clear, listening to Cllr Place, that race had nothing to do with it. It was no part of the decision to uphold the decision to dismiss. There is no evidence to the contrary

161. The final point in that respect which needs to be made is that Mr Ihebuzor never put to Mr Johnson or Cllr Place that either decision was motivated improperly by race such as to mean that the Claimant was the victim of section 13 direct race discrimination. The issue of race was never put to either of them at all.

Last point: use of the MAP

162. This brings us back to the management for attendance procedure because it is seen as a standalone issue of race discrimination by the Claimant. Here we are dealing with events post the Claimant going off long-term sick on 5 February 2016. We have already referred to the lack of evidence in terms of anything serious in the medical notes that eventually and reluctantly the Claimant provided in unredacted format.

163. There is a theme to the OH reports, the first of which was published on 25 February 2016 at Bp 283. The underlying issue is the Claimant's perception of the treatment of her by management and for that we can of course read JW. Second we bring back the rejected offer to work at Helmsley Road:

> "*… I understand from Esther that she been offered to work at Helmsley Road short breaks whilst the investigation continues, but she states that she remains stressed and unfit to do this at present.*
>
> *…*"

164. However, no reference there to the Claimant otherwise being fit to work for such as agencies and which she was doing. The inference is that the Claimant did not disclose this. It would fit with her reliance on "my private life."

165. The second occupational health report was 31 August 2016 (Bp 409-10). The author was of the opinion that the Claimant was fit for an alternative role, however the stumbling block was the Claimant's perception:

> "*… believes is caused by her being treated differently and unfairly by her Manager and Team Leader colleagues, citing Racial Discrimination. She states that because of this there are accusations made against her which are more to do with her allegation than any wrongdoing on her part. …*"

166. Inter alia now stated was:

> *"She is currently signed off work by her GP with Stress – Esther states that he has put she is fit to work elsewhere but not at permanent place of work. …*"

167. Again, otherwise it is back to the impasse point. The Claimant will not return to work if it means working inter alia under JW. There was a welfare visit to the Claimant on 2 November 2016 (Bp 412 – 416). This is minuted at Bp 415. The Claimant had Mr Talty, her trade union representative, present.

168. Of course with the by now lengthy period of absence, it meant that this matter would proceed down the MAP path to the second formal hearing stage. The decision to do that was again as per 19 January 2016 taken in the first instance by Natalie Flavell (NF) as her team leader acting on the advice of HR.

169. That stage 2 meeting took place on 12 January 2017 (Bp 588 – 595). Mr Talty again represented the Claimant. It was chaired by Mark Walker, Group Manager Trading Standards. In other words not otherwise a player at all in the events that we are dealing with. The panel heard evidence from inter alia IM. The Claimant was now asked if she was undertaking agency work elsewhere, the implication being that as she was in receipt of occupational sick pay throughout the period we are dealing with (for the first 6 months of course full pay and then going to half pay) that this would be in breach of the relevant sickness pay provisions unless previously disclosed and approved. We are well aware from our experience as an employment jury, that an employee who has the benefit of a sick pay scheme is obliged to act honourably in respect thereof. In other words, they must not work elsewhere and of course receive the benefit of occupational sick pay. Therefore, they must be open with their employer if they are so working and have got consent. The Respondent having got its suspicions that she was agency working[10], the Claimant was asked several times whether or not this was the case (see in particular bottom of Bp 591 to top of 592). The questions are from Amanda Peto, Team Manager Mental Health who was one of the 3 person panel:

> "*AP – When you were with the agency, where did you work?*
>
> *EB – This is confidential, it is my own life.*
>
> *MW – You have one more opportunity have you been working for another agency?*

[10] Of course now justified by the evidence of agency working before us.

EB – It is personal.

MW – So you are not prepared to answer? You say you were suffering from stress working with Notts County Council?

EB – Caused by discrimination, workload, pay issues.

…

BI – How soon will you be ready to come back to work?

EB – It depends if they are fair to me.

…"

170. In this context of such an extensive prolonged absence and given the answers that the Claimant was giving, the panel and thus the Respondent would not have been acting unreasonably if it had dismissed the Claimant under the management for attendance procedures or added an additional charge to the disciplinary. As it is, the panel's decision published on 16 January 2017 (Bp 594 – 595) was to issue a final written warning:

"… o*n the grounds of your incapability to fulfil the contractual duties of your role. …*"

And set a review date for circa 11 March 2017 to review whether she had returned to work: If so consider an appropriate phased return and if not, the outcome could be dismissal.

171. Also repeated was:

"*In recognition of the difficulties it may cause you returning to work at Wynhill Lodge, management have offered you the opportunity to work as a Care Worker at either Leivers Court or Helmsley Road facilities. The panel felt that either of these roles are entirely appropriate for you to take up, and it did not accept the reasons you gave for not taking one or the other up prior to the hearing. …*"

172. That decision was not appealed. Of course it was overtaken by events. The point we make is that if it is being said that this decision is unreasonable and thus motivated by issues of race, it is an untenable proposition.

Conclusion.

1737. All claims are dismissed.

Employment Judge P Britton
Date: 28 September 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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