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EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Hodges**

Respondent: **Anchor Trust**

Heard at: **East London Hearing Centre**

On: **25 and 26 October 2018, 10 December 2018**
(in chambers on 17 December 2018 & 7 January 2019)

Before: **Employment Judge Ross**
Members: **Mr. Quinn**
Ms. Alford

Representation

Claimant: Mr Stephens (Counsel)

Respondent: Mr Roberts (Counsel)

RESERVED JUDGMENT

1. The unanimous judgment of the Employment Tribunal is that the Tribunal has no jurisdiction to consider the complaint under section 47B Employment Rights Act 1996, which is struck out.

2. The judgment of the Majority of the Employment Tribunal is that the complaint of unfair dismissal is well-founded.

REASONS

1 By a Claim presented on 23 April 2018, the Claimant brought complaints of constructive unfair dismissal under section 98 and whistle-blowing detriment under section 47B of the Employment Rights Act 1996. This followed a period of Early Conciliation.

The hearing

2 The hearing was originally listed for two days. Given the number of factual and legal issues, and the number of witnesses (four live witnesses), it was incumbent on the parties to let the Tribunal know that this time estimate was inadequate (not least due to the amount of pre-reading and the application for Specific Disclosure). Neither party did so. The result was that the case went part-heard, with the Claimant's case concluding on 26 October, and with the Respondent's evidence being heard and submissions concluded, on 10 December 2018. There were two Chambers days, on 17 December 2018 and 7 January 2019, which was the result of the Tribunal being unable to reach a unanimous decision on the complaint of unfair dismissal.

3 Prior to the hearing, the Claimant had made an application for Specific Disclosure, dated 24 October 2018. Having heard argument, the application in respect of the outstanding matters was refused, for reasons given at the time.

4 At the commencement of the hearing, the Claimant applied for the Tribunal to hear the evidence of Lucy Crawte by telephone. This application was refused for reasons given at the time, including that it would not further the overriding objective to make such an order and nor would this be just and equitable. The Tribunal decided that the witness statement of Ms Crawte was admissible, albeit that it was served only on 22 October 2018, and that it would attach such weight to it as it saw fit.

5 The Respondent applied to postpone the hearing because, by lunchtime on the first day of the hearing, it was apparent that the case could not be concluded in two days. This application was refused for reasons given at the time.

The Issues

6 A list of issues was produced by the Respondent. This was agreed subject to the addition of two points, at the request of the Claimant. A final list of issues was produced before the third day of the hearing (incorporating these two points), which was then agreed by the parties. The agreed list of issues was as follows:

Constructive unfair dismissal

6.1 Did the following conduct take place:

6.1.1 Between 14 September and 23 October 2017, the Respondent failed to provide the Claimant with adequate leadership, advice and general support in order to return the Home to the necessary compliance standards within a short time. The Claimant complains about:

6.1.1.1 Nikki Ayliff failing to return the Claimant's calls on 14 September 2017 [paragraph 8 of the particulars of complaint within the ET1].

6.1.1.2 Nikki Ayliff not attending until 19 September 2017 [11].

6.1.1.3 Nikki Ayliff asking the Claimant to produce paperwork on 19 September 2017, contrary to a previous assurance. When the Claimant said she was not available to do so, Nikki Ayliff and Carolyn Baker rolled their eyes and subsequently determined that the home was failing and it was necessary to devise an action plan [14].

6.1.1.4 Not providing support and assistance in implementing the action plan [15-16].

6.1.1.5 Placing her under relentless pressure that amount to bullying.

6.1.1.6 Making her feel inadequate.

6.1.1.7 Repeatedly advising the Claimant of matters that had not been addressed and that the home would be rated "inadequate" [17].

6.1.1.8 Carolyn Baker instructing the Claimant to contact her each morning with a plan of duties and to report at 4pm on each day to confirm what had been achieved [17].

6.1.1.9 Nikki Ayliff accusing the Claimant of "not caring" [18].

6.1.1.10 Final straw: the events of 23 October 2017, namely: being instructed by Carolyn Baker at a budget meeting, in the presence of all present, to report to her at the beginning and end of every day "because she said so"; the requirement to attend that meeting placing extra pressure to submit the payroll – only have 30 minutes after that meeting to do so; the home being subjected to a surprise audit by Health and Safety that day on the instruction of Nikki Ayliff; the Claimant's resultant breakdown and attendance with her GP; and the failure of Maria Bamford to respond to her calls and messages.

6.1.2 Between 14 September and 23 October 2017, the Respondent required the Claimant to work excessive hours.

6.2 If so, was the Respondent in repudiatory breach of the implied term of trust and confidence?

6.3 If so, did the Claimant resign in response to the alleged breach(es)?

6.4 If not, did the reason for dismissal fall within s.98 ERA 1996?

6.5 If so, was the Claimant's dismissal fair in all the circumstances?

Whistleblowing detriment

6.6 Was the Claimant's claim brought outside the primary limitation period?

6.7 If the claim is out of time, was it reasonably practicable for the Claimant to submit the claim in time?

6.8 If so, did the Claimant make the disclosures in paragraph 7 of the ET1?

6.9 If so, did the Claimant's disclosures amount to qualifying disclosures for the purposes of s.43B of the ERA 1996:

6.9.1 Was there a disclosure of information?

6.9.2 If so, did the Claimant reasonably believe that the information tended to show:

6.9.2.1 That the Respondent had failed to comply with a legal obligation to which it was subject by (a) the home being short of staff; (b) compulsory staff training having not been arranged on time; (c) failing to investigate complaints from family members?

6.9.2.2 That the Respondent had had endangered or was likely to endanger the health and safety of fellow employees and/or the general public?

6.9.3 If so, did the Claimant reasonably believe the disclosures were in the public interest?

6.10 If so, was the Claimant subjected to the following detriment: being asked to report to Carolyn Baker on a daily basis?

6.11 If so, was the Claimant subject to this detriment on the grounds that she had made one or more protected disclosures?

The Law

Constructive Dismissal

7 Section 95(1)(c) ERA provides that there is a dismissal when the employee terminates the contract with or without notice, in circumstances such that she is entitled to terminate it without notice by reason of the employer's conduct.

8 The burden was on the employee to prove the following:

8.1 That there was a fundamental breach of contract on the part of the employer;

8.2 That the employer's breach caused the employee to resign;

8.3 The employee did not affirm the contract and lose the right to resign and claim constructive dismissal.

9 The propositions of law which can be derived from the authorities concerning constructive unfair dismissal are as follows:

9.1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: see *Western Excavation Limited v Sharp*.

9.2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: see *Malik v Bank of Credit and Commerce International* [1998] AC20 34h-35d and 45c-46e.

9.3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, Browne-Wilkinson J in *Woods v Wm Car services (Peterborough) Limited* [1981] ICR 666 at 672a; *Morrow v Safeway Stores* [2002] IRLR 9.

9.4. The test of whether there has been a breach of the implied term of trust and confidence is objective as Lord Nicholls said in *Malik* at page 35c. The conduct relied as constituting the breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.

9.5. A breach occurs when the proscribed conduct takes place: see *Malik*.

9.6. Reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach; but it is not a legal requirement: see *Bournemouth University v Buckland* [2010] ICR 908 at para 28.

9.7. In terms of causation, the Claimant must show that she resigned in response to this breach, not for some other reason. But the breach need only be an effective cause, not the sole or primary cause, of the resignation.

10 In *Kaur v Leeds Teaching Hospital NHS Trust* [2018] IRLR, the Court of Appeal approved the guidance given in *Waltham Forest LBC v Omilaju* (at paragraph

15-16). Reading those authorities, the following comprehensive guidance is given on the “last straw” doctrine:

10.1. The repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence: *Lewis v Motorworld Garages Ltd* [1986] ICR 157, per Neill LJ (p 167C).

10.2. In particular, in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (Glidewell LJ at p 169F).

10.3. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things is of general application.

10.4. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

10.5. The final straw need not be characterised as 'unreasonable' or 'blameworthy' conduct, even if it usually will be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy.

10.6. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality referred to.

10.7. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.

10.8. If an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign, soldiers on and affirms the contract, she cannot subsequently rely on these acts to justify a constructive dismissal unless she can point to a later act which enables her to do so. If the later act on which she seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

10.9. The issue of affirmation may arise in the context of a cumulative breach because in many such cases the employer's conduct will have crossed the *Malik* threshold at some earlier point than that at which the employee finally resigns; and, on ordinary principles, if he or she does not resign promptly at that point but "soldiers on" they will be held to have affirmed the contract. However, if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the *Malik* term.

10.10. Even when correctly used in the context of a cumulative breach, there are two theoretically distinct legal effects to which the "last straw" label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the *Malik* threshold: in such a case the breaking of the camel's back consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so.

10.11. The affirmation point discussed in *Omilaju* will not arise in every cumulative breach case:

> "*There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect).*" (per Underhill LJ).

11 We note that a breach of trust and confidence has two limbs:

11.1. the employer must have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee; and

11.2. that there be no reasonable or proper cause for the conduct.

Unfair dismissal

12 Where there is found to be a constructive dismissal, the Tribunal must go on to consider whether the dismissal is unfair within section 98 Employment Rights Act 1996.

13 The burden is on the employer to prove the reason or principal reason for dismissal is a potentially fair reason within section 98(2) ERA 1996.

14 If the employer has shown a potentially fair reason for dismissal, the Tribunal must consider the test of fairness within section 98(4) ERA 1996.

Protected disclosures: statutory definition:

15 We directed ourselves to the relevant statutory provisions of the ERA 1996.

16 For a qualifying disclosure to be protected, it must be made in accordance with any of Sections 43C – 43H: Section 43A ERA. These subsections set out various categories of person to whom a disclosure may validly be made, and the conditions attached to disclosures made to each of them.

17 Section 43B(1) includes, where relevant:

> "*In this Part, a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –*
>
> *(a) …..;*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;*
>
> *(c) …*
>
> *(d) That the health and safety of any individual has been, is being or is likely to be endangered.*"

The Right

18 Under section 47B:

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

19 The burden is on the employer to show the ground on which any act was done: section 48(2) ERA.

Jurisdictional points

20 Section 48(3) provides that an employment tribunal shall not consider a complaint under section 48 unless it is presented –

> "(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

21 The burden is on the Claimant to show that it was not reasonably practicable to present the Claim in time. Reasonably practicable does not mean "reasonable" nor "physically possible". It means "reasonably feasible": *Palmer v Southend on Sea BC* [1984] ICR 372.

22 In *Palmer*, May LJ explained that the test was an issue of fact for the Tribunal and gave examples of facts that may be relevant in certain cases: see p.385B-F. This concludes:

> "*Any list of possible relevant considerations, however, cannot be exhaustive and, as we have stressed, at the end of the day the matter is one of fact for the industrial tribunal taking all the circumstances of the given case into account*."

The Evidence

23 There was an agreed bundle of documents (pages 1-431). Additional pages were added to this on the third day of the hearing (pages 383 to 431).

24 The Tribunal read witness statements for and heard oral evidence from the following witnesses:

24.1. Charlotte Bishop (a team leader, then deputy manager at the Home);

24.2. The Claimant;

24.3. Nicola Ayliff, District Manager;

24.4. Maria Bamford, Head of Care Services (South).

25 The Tribunal also read a witness statement from Lucy Crawte, administrator.

Findings of Fact of the Majority of the Tribunal

Assessment of the witness evidence by the Majority

26 In reaching their findings of fact, the Majority of the Tribunal differed from the Minority because they assessed the evidence of the witnesses differently, after a review of the oral, written, and documentary evidence.

27 The Majority of the Tribunal found the evidence of the Claimant and her witness to be largely reliable witnesses. They preferred their evidence to that of the Respondent's witnesses where there was any conflict of fact or in the absence of reliable corroboration. The Majority made this assessment for several reasons. In particular:

27.1. The Majority of the Tribunal found the evidence of the Claimant to be compelling. In contrast, they found that the evidence of the Respondent's

witnesses did not persuade them. They preferred the evidence of the Claimant and Ms. Bishop over the Respondent's evidence and found it to be largely reliable based on witness statements, documents and cross-examination.

27.2. The Respondent had dismissed Ms. Baker, the main person complained of by the Claimant.

27.3. The Majority gave limited weight to the witness statement evidence of Ms. Crawte and only insofar as it corroborated the Claimant's evidence.

27.4. The Majority found it plausible that, at the DM inspection in September 2017, the DMs were whispering to each other, because they did not want the Claimant to hear what was being discussed.

Findings of Fact of the Majority

28 The Claimant was continuously employed by the Respondent or its predecessor from 5 July 2005. From 2011, she was the manager of Devonshire House ("the Home"), a residential care home. In that role, she had responsibility to oversee that the Home complied with the framework of relevant standards of compliance.

29 The Home can provide accommodation and care for up to 65 older persons. It has a dementia unit. The Claimant lived on site with her family, in an adjoining bungalow contractually tied to the job.

30 The Claimant continued in her role until the expiry of her notice, but was on "gardening leave" for the final part of her notice period.

Background

31 Each of the Respondent's care homes is subject to a monthly visit from the District Manager ("DM"). At these visits, the District Managers carry out an inspection of the home and a mini-audit looking at compliance issues within the home. However, no monthly visit took place in August 2017.

32 On 20 May 2016, the Home was subject to an Internal Inspection by the Respondent. It was rated overall as "inadequate" and non-compliant with regulations (and it was rated as "requires improvement" under the category of whether the service was well-led). The report is at p.82ff. At the end of the report, the high level characteristics of inadequate are described as: "*Severe harm has or is likely to occur, shortfalls in practice, ineffective or no action taken to put things right or improve*." This included (at p.83):

> "*The home had not completed mental capacity assessments or held best interests meetings in relation to applications for deprivation of liberty safeguards. The home stated they had been advised not to go back and complete those documents. It would benefit the home to use the MCA and*

Best Interest meetings to review currents DOLS applications and thereby evidence appropriate action taken in relation to the applications."

33 The home was inspected by the Care Quality Commission on 6 and 17 October 2016. The Home was assessed as "Requires Improvement" overall (p.98). The report includes:

"There was a registered manager in post. A registered manager is a person who has registered with CQC to manage the service. Like registered providers they are "registered persons". Registered persons have legal responsibility for meeting the requirements in the Health and Social Care Act 2008 and associated Regulations about how the service is run."

34 Under the heading "*Is the Service safe?*", the report made a number of findings and rated the Home as "Requires Improvement" in this respect. Under "*Is the service effective?*", the report rated the Home as "Requires Improvement". The matters recorded included failures to evidence formal capacity assessments for some individuals (relevant to the Deprivation of Liberty Safeguards, referred to as "DOLS") and failures to update care records. (p.108) Also, there were three areas in the report which were assessed as "Good". These were: "Is the service caring?"; "Is the service responsive?"; "Is the service well-led?"

35 After the CQC report, there were DM reports produced by Judith McGugan, former District Manager, on 31 January 2017 and 28 June 2017. These raised similar concerns. For example, the report of January 2017 stated that the care plans were not always completed nor were they reviewed with family and residents. (p.97h).

36 The report of 31 January 2017 states that the Home had 334 hours to cover each week and that it was "*using agency to help cover these but staff are also covering where they can and agency is predicted to be 66 hours per week*". This meant a large shortfall in the staff cover needed because staff cover was not guaranteed, because it involved employees agreeing to work overtime which was optional.

37 The report of June 2017 stated that there were vacancies on night and day care shifts, including a full-time housekeeper that the Company recruitment team are supporting, and that agency workers are used to ensure safe staffing numbers. It records training is 81% compliance.

38 In the case of both of these reports, the areas of concern listed at the end of the report are all listed as "Red" (rather than a mixture of "Red", "Amber" and "Green").

39 The Claimant accepted in evidence that there would always be an action plan for a care home, and that it was a working document, because managing a care home was a never ending process.

40 On 21 July 2017, Ms. Ayliff was asked by Ms Bamford to oversee the Home, the former District Manager having left the Respondent's employment. At the same

time, she was temporarily supporting another home. District Managers cover a "district" which would by its very nature usually involve more than one home.

41 The Claimant was absent from 8 August to 14 September 2017, because, during a period of annual leave, she was involved in a car accident, suffering injury.

42 In the absence of the Home Manager, the deputy manager, Ms. Andrews, managed the Home, which was the position during the Claimant's absence over this period. Ms. Andrew had been in this role for one year as maternity cover, having had previous experience managing care homes, and did not request assistance from more senior managers over this period, nor was there evidence of them offering assistance, despite the fact that the report from the CQC had identified some problem areas.

43 Ms. Ayliff had not met the Claimant prior to her role as a District Manager being extended to cover the Home on a temporary basis. She met the Claimant briefly on 14 August 2017 when she attended the Home to carry out interviews for a new deputy manager. She did not carry out an inspection of the Home between being requested to cover the Home on 21 July 2017 and the internal inspection of 20 September 2017.

44 The Home's new District Manager was Caroline Baker, who commenced her role on 18 September 2017. The former District Manager, Judith McGugan, had left her post on 21 July 2017.

Events leading to the District Manager inspection in September 2017

45 The Majority of the Tribunal rejected one premise of the Claimant's case, which was that the level of compliance and state of the Home deteriorated during her absence from 8 August to 14 September 2017. This was inconsistent with numerous pieces of evidence:

45.1. The Claimant admitted that poor levels of completion of paperwork was raised as an issue before her sickness absence began in August 2017. This was further evidenced by, for example, the DM report from March 2017 (p.97o), in which Ms. McGugan advised that it was a priority that care plans were to be reviewed and updated (not all care plans were being updated with current needs, with food and fluid charts being updated retrospectively at times).

45.2. Moreover, Ms Bamford had a good relationship with the Claimant. This is evidenced by the manner and nature of their telephone calls and correspondence. For example, Ms Bamford called the Claimant to see how she was after her car accident, and told her to take as much recovery time as needed. In the context of such a relationship, it was unlikely that the Claimant would not have raised in writing the alleged concerns that she claimed to have raised by telephone with Ms. Ayliff on her return to work on 15 September 2017.

45.3. There is no written evidence that the Claimant asked for any support on her return from sickness absence. There was no copy of any email allegedly sent by the Claimant to Ms. Ayliff about her concerns following her return to work from sickness absence, despite the Claimant alleging that such an email existed.

45.4. The visit on 21 September 2017 was a pre-planned DM visit.

45.5. If the Claimant had required extra support on her return to work, she would have asked for it, from Ms Bamford.

46 On 26 July 2017, Jodie Campbell, Care and Dementia Advisor, visited the Home. She emailed feedback to the Claimant and her deputy manager, Ms. Andrews, and forwarded it to Maria Bamford. This feedback report (p.149-150) provided a list of nine general matters, including that the DOLS Tracker was not dated, so it was not clear when it was updated, and that certain documentation was not updated or in place. In addition, it reported several specific deficiencies in respect of certain individuals' Personal Plans.

47 This should have indicated to Ms. Ayliff that she attends and inspect the Home during August 2017, given that it was rated by the CQC as "Requires Improvement" and could have been re-inspected by the CQC at any point.

48 On 5 and 6 September 2017, another manager (Joanne Hird) carried out an internal inspection of the Home (for the Respondent's Governance and Safeguarding team). The overall rating provided was "Good" (p.175).

Level of support provided by the Respondent

49 The Claimant's evidence was that she felt well-supported by her line managers during her period of absence.

50 The Claimant returned to work on 14 September 2017. The Claimant attempted to contact Ms Ayliff by telephone on that date on about two occasions (not on many occasions, as alleged by the Claimant). A voice-mail message was left.

51 On 15 September 2017, Ms Ayliff returned the Claimant's call. The Claimant notified her of her return to work and updated her generally. There was a general discussion of a number of concerns at the Home, and the Claimant would have orally raised specific issues with her manager, including the lack of recruitment in her absence. The call did not raise concerns about "*neglect of the home*" as alleged in the ET1 paragraph 8. Had there been concerns of "*neglect*" as set out in paragraph 7 of the ET1, the Tribunal considered that these would have been committed to writing in an email on 14 September 2017. We found that, in this call, the Claimant did not raise concerns about residents' safety nor her legal responsibility. But she did raise several concerns about staffing levels and other matters of ability to care for the residents, hence the response from Ms. Ayliff.

52 Ms. Ayliff said, "*do what you can*". The majority found this response inadequate.

53 On 21 September 2017, Ms. Ayliff and Ms Baker visited the Home for a DM inspection. The purpose of such a visit is to audit the Home, and, if necessary, to provide an Action Plan to ensure that the Home remains compliant with regulatory requirements. There was no visit by Ms. Ayliff until this date, save for 14 August (interview for deputy manager role).

54 The Claimant told Ms. Ayliff in advance that if any documents were needed during the visit, she should ask for them in advance, as explained at Paragraph 32 of the witness statement of the Claimant, because the administrator would be on annual leave on the Monday during their scheduled visit. Ms. Ayliff did not assure the Claimant in advance of the visit that she would not need to produce paperwork during the visit. This was very unlikely, given the nature and statutory regulation by the CQC of the care home business, and the need to record evidence in writing; and Ms Ayliff would not know what she needed to see until she inspected. The Claimant accepted that paper evidence was important and that different types of audit were required.

55 It was accepted, however, that the Claimant's administrator was on leave at this inspection. When the Claimant said that she was not available to get the paperwork immediately due to her working with the residents, Ms. Ayliff and Ms. Baker exhibited dissatisfied facial expressions despite being warned in advance of the situation. The Claimant accepted that she was not verbally criticised, because she was subsequently able to produce the documents for them.

56 The report was emailed to the Claimant on 22 September. In the cover email (p.195), Ms. Ayliff stated:

> *"There are lots of areas and actions identified, these are also on the excellence plan, you will need to enter target dates and completion dates when you achieve the actions.*
>
> *Please let us know if you need any help and support."*

57 The report was not "*full of criticism*" of the Claimant, but it did raise numerous matters of concern to the District Managers about the Home.

58 The Claimant did not dispute the actions required set out at p.203-205. She did not challenge the report in any way when it was received. It was accepted by her in evidence that this form of internal reporting and formation of an action plan was a control mechanism designed to secure regulatory compliance.

59 The Majority considered that the Action Plan in the report was excessive, generalistic and caused the Claimant undue pressure, in terms of the number of actions and that the actions required were all marked "Red" (and not a selection of Red, Amber and Green") and were all allocated to the Claimant for urgent action.

60 The Claimant's evidence of her response to the report of 22 September is expressed at paragraph 44 of her witness statement:

> "*I was already well aware of the work that needed to be done as this had been pointed out to them on many occasions. I needed help and support to prioritise and carry out the work, not someone to generate a report to state what I already knew*."

61 The Claimant had more assistance with recruitment from her previous District Manager than Ms. Baker. Ms. Baker refused to undertake recruitment interviews, requiring the Claimant to do these as part of her job.

62 However, the Claimant was getting some support with recruitment at the Home. On 8 August 2017, Ms. Crawte had emailed Ms. Ayliff, asking if the Home could request agency staff. The email stated: "*We are really struggling to cover shifts internally*" (p.158B). The following day, the request for agency staff was repeated to Ms. Bamford. Ms. Ayliff replied on 9 August 2017, approving the request. This does not mean they were able to get agency staff easily and at short notice, approval to recruit agency staff did not mean it is necessarily possible or guaranteed to be the end result. The continuous difficulty in recruitment indicates a shortage of available suitable staff to be recruited.

63 Ms. Andrews and Ms. Ayliff discussed recruitment of care staff on or about 4 September 2017, evidenced by the email at p.164B. This explained that most shifts from a dismissed employee and a sick employee had been covered by existing staff doing overtime. The email explained the agency worker cover required over the following two weeks.

64 As evidenced by the email on 20 September 2017 (p.182), Ms. Ayliff followed up the recruitment issue, providing a list to the recruitment team of the hours required (in an urgent email). The Recruitment Team Leader suggested by way of explanation that applications had been low because the team had been given an incorrect number of hours; the Minority did not accept that this was the reasons why applications were low.

65 Further, the Claimant did not ask for support with recruitment or any other matter after receipt of the District Manager report of 22 September. In cross examination about her email of 14 October 2017 (p.227), the Claimant accepted that she had as much approval as necessary to cover posts with agency staff; but this did not mean that it was easily achievable or that agency staff are the answer to a problem with recruitment to permanent posts. Moreover, the Home received a managed recruitment service which meant that the Home had all its pre-screening and booking of interviews done for it by the Respondent's internal recruitment team of the two applicants referred to at paragraph 54 of the witness statement of the Claimant.

Allegation of relentless pressure amounting to bullying

66 The majority found that the Claimant was a caring professional who wanted to do right by her elderly and frail residents, some of whom had dementia. This

constituted a pressure for the Claimant. The pressure became relentless following her return to work on 14 September 2017.

67 From her return to work in September 2017, she did work extra hours in an attempt to discharge her responsibilities, but she did not have the number or competence of staff to implement the Action Plan in the District Managers' report.

68 The Claimant's evidence of lack of support commences at paragraph 48 of her witness statement. The Majority accepted the evidence at paragraphs 48-51 of her witness statement was evidence of lack of support by the Respondent.

69 The Claimant accepted that she did receive support from Jodie Campbell who trained the staff in care plan writing.

70 The Claimant found Ms. Baker to be unsupportive. Ms. Baker did not find the Claimant's achievements were ever sufficient, such as her steps to re-book training for staff on her return to work. Ms. Baker was not impressed at the increase in percentage and pointed out that it would be a concern to CQC if they inspected, because training was less than 90%. Ms. Baker made several disparaging remarks to the Claimant adding more pressure without taking into account the practicalities of delivering training which meant taking staff away from their substantive posts to attend training when the Home was already severely short-staffed.

71 Ms. Bishop corroborated the Claimant's evidence of lack of support. Ms Bishop had worked at the home from January 2015. She explained that under the Respondent's predecessor (Cavendish) the Home received visits from a senior manager about once a week, and they provided valuable practical support. Such visits were much less frequent after the Respondent acquired the Home, down from once a week to once a month. During the Claimant's absence in August-September 2017, she did not receive visits from the senior management team.

72 Ms. Bishop's evidence was that staffing of the Home was problematic, with the use of agency staff being limited and the Home frequently operating with lower than the necessary expected staff levels. This caused additional pressure for Ms Bishop to deliver safe care with an overstretched team. It also caused her to cancel face to face training arranged by the Claimant prior to her absence. The majority accepted this evidence.

73 After the Claimant's return to work, the team leaders met the Claimant to explain the shortfalls and difficulties occurring during her absence. The Claimant assured the team leaders that she would address these.

74 The majority found that the Claimant worked long hours in an attempt to bring the Home up to CQC required standards. She did receive support from some employees, such as Ms. Bishop. On one occasion, which was in October 2017, the Claimant worked late into the night, with other employees, to bring care plans up to date.

75 For Ms. Ayliff and Ms. Baker, the work done by the Claimant was never sufficient. They criticised notwithstanding progress made by the Claimant. Under the previous owner of the Home, the Claimant's line manager, Tania Thompson, had assisted the Claimant with audits and supervisions, as well as recruitments. Ms. Ayliff and Ms. Baker made it clear to the Claimant that she was the Home Manager and had to do this work on her own. This further intensified the pressure on the Claimant.

76 The Claimant and Ms. Bishop complained of conduct by Ms. Baker and Ms. Ayliff which they found to be so unreasonable as to be unacceptable. On one visit, Ms. Ayliff and Ms. Baker rang an emergency buzzer on the first floor of the building. This was to test how quickly an emergency could be attended to there, in the absence of staff and residents on that floor. Ms. Bishop and other staff ran through the building to respond. Ms. Ayliff and Ms. Baker were amused that they had caused such running and shortness of breath. This incident did not directly involve the Claimant. This did however demonstrate the attitude of the Respondent's management team towards the staff at the Home.

77 On another occasion, Ms. Baker had not notified the Claimant of her visit. On seeing Ms. Baker at the Home, the Claimant said hello, and that she did not know that Ms. Baker was visiting that day. The gist of the response was that Ms. Baker did not need to let her know when she was visiting, and she could visit when she pleased. The Claimant was upset by the tone and manner in which it was said, which was as if there was a relationship of master and servant. This became a regular feature of the attitude of Ms. Baker on each visit.

78 Further, on her visits, Ms. Baker would require evidence of what the Claimant and her staff had done or achieved since her previous visit. If there was an unannounced visit, this would have an impact on an already short-staffed Home.

79 On another occasion, Ms. Baker required the Claimant to re-do certain documents by using a different font. There was nothing wrong in such a management instruction in most cases, but here, the Home had a background of a shortfall of over 300 hours of staff which meant that the Claimant was not often in the Office, but was, rather, working on the floor giving physical and immediate care to the residents of the Home to cover for vacancies. The Majority of the Tribunal felt the request for a change of font to be trivial in context of the overall and more urgent requirements of delivering safe and essential care.

October 2017: District Manager Inspections and Report

80 Ms. Ayliff and Ms. Baker inspected the Home again on 11 and 16 October 2017. Two inspections, just five days apart, was excessive (and had followed another one in September 2017) and had the consequence of adding extra pressure on the Claimant.

81 On 16 October, during the inspection of the dementia unit (the Ryder wing) by Ms. Ayliff and Ms Baker, the Claimant was with them in the lounge of the Ryder wing. The Majority of the Tribunal found that, in raised voices, Ms. Ayliff and

Ms. Baker spoke to the Claimant accusing her of not checking the cupboards, alleging that the electrical fuse cupboard was open, alleging that she did not care, and that she had put residents at risk. This reprimand took place in a public area, in front of residents, staff and relatives. This distressed the Claimant who found the accusation of not caring particularly hurtful in the light of her level of commitment. Also, the fact that this criticism was not said privately compounded the Claimant's distress.

82 Ms. Ayliff stated that the conversation would continue in the office. They went to the office where feedback on the Home was to be given. It was agreed that Karen Goater, the newly appointed Deputy Manager, should be present because she had been working closely with the Claimant to bring the Home up to compliance.

83 In the office, Ms. Ayliff produced a vinegar bottle found at the back of the kitchen cupboard in the Ryder wing, which had mould growing on it. It was admitted by Ms. Ayliff that she described the home as "*minging*" and that she would not put her mother in the Home. The gist of the words used by Ms. Ayliff was that the Claimant did not care about the residents, and that the residents in the dementia unit were forgotten about.

84 The Claimant became very and tearful after these comments. Ms. Ayliff offered to give her some time to recover, and provided a tissue. Ms. Ayliff was upset to find the Home so dirty three weeks after her initial DM visit in September. There was still no housekeeper in place at this point and cleaning was being carried out by care staff when possible. This was not taken into account by Ms. Ayliff.

85 When the Claimant had recovered, the meeting went through the report and the actions identified in this DM visit with Ms. Goater and the Claimant.

86 The DM report for October 2017 was sent to the Claimant on 20 October 2017 (pp269-283).

87 This report concluded with an Action Plan, with 17 areas of concern, each of which was again rated as "Red". A number of the actions from the September DM visit had not been actioned; some had been actioned.

88 The report included the following observations:

88.1. Training was at 85%. The minimum for compliance was 95%. As the training was below 90%, it was a normal part of an action plan.

> "*The home is using high levels of agency to backfill their vacant posts*,"

88.2 The BCP required updating (not updated since 2015), and there was no updated PEEPS summary in place (not updated since 2017 and it was not in the BCP).

In the dementia unit, the following was observed:

88.3. Food and drink in the fridge was unlabelled.

88.4. The fuse box in the kitchen was uncovered, which allowed residents access to the fuses. (Although the Majority found that it was behind a locked door and only Ms. Bishop had a key; residents could not access it).

> "*The kitchen was dirty with inappropriate items stored in it, we located personal documentation of a member of staff, vinegar which had mould growing in the bottle, dirty shelves, cleaning products and nail varnish and remover*…"

In the garden area for the dementia unit:

88.5. It had a general feeling of being "*unloved*".

88.6. There was a large amount of litter outside the doors, the outside building was covered in cobwebs, and the windows were dirty.

> "…*there was a noticeable difference between this garden area and the rest of the home*."

89. It was not suggested by the Claimant, nor put to Ms. Ayliff, that any of the observations recorded in the report were inaccurate. Ms. Ayliff's evidence was that she was shocked to find parts of the Home were still very dirty. The Claimant's explanation was the failure of the Respondent to recruit a suitable housekeeper for the number of hours (37.5) required over the relevant period, which caused a dip in the cleaning quality, such tasks being done by care staff rather than a housekeeper; the Majority accepted this and found that there was no evidence to support the view of the Minority on this issue. Also, the carpets were old and stained (in the dementia unit) and had been cleaned a number of times but badly needed replacing which added to the impression of a home in need of attention. The Home had a level of training compliance below the Respondent's target figure, both prior to the Claimant's sickness absence and after her return to work on 14 September 2017. Insofar as the period after her return, this is evidenced by p.134 showing training compliance on 15 September was 80%, which went down to 76.9% the following week due to training cancellation; and the Majority found this reduction compatible with the reducing level of permanent staff who would have been in receipt of the training.

90. As for "Compliance Observations", there were a number of matters of concern recorded (pp274-276).

91. The Claimant alleged that she was told by Ms. Baker on several occasions of matters which had not been addressed, and that the Home would be rated "inadequate". Given the circumstances identified by the District Managers, it was likely that the Claimant was told this. The Majority found this did not reflect a balanced assessment because there had been some improvements effected by the Claimant.

92. The Majority found that the Claimant made to feel inadequate and harassed because of the number of inspections, the attitude of Ms. Baker, and the words and tone used by Ms. Baker and Ms. Ayliff.

Recruitment attempts

93. On 14 October 2017, the Claimant emailed Ms. Ayliff with her recruitment concerns and that the Home was desperate for staff. The email is at p.227. It includes:

> "*You may have noticed that I have requested high volume of agency staff this month, unfortunately we have not seen any recruitment move for about 3 months, and I am concerned we are hitting the unsafe bracket, staff that have left have not been replaced, and I've also had current leavers with no notice, …*"

This corroborates the evidence of the Claimant that permission to recruit does not necessarily amount to an ability to recruit.

94. This caused an internal recruiter, Ms. Howsen, consternation. On 20 October 2017, she complained that the Claimant had been sent posters on 13 October, but had not responded; and Ms. Howsen had arranged interviews for 2 candidates on 16 and then 17 and then 25 October, but the Claimant had not accepted the invitations, despite stating that she was desperate for staff. The Majority accepted the Claimant's evidence that one candidate was not able to drive and had previously been discounted by the Claimant as not suitable; and the Claimant had not seen one email invitation because it was short notice and she was working on the floor of the Home when the email came in and she did not see it in time. Moreover, this email was sent after months of inactivity by Human Resources and appeared to be an attempt by the recruitment team to cover itself against criticism. The Majority concluded that if the Recruitment Team had been doing their job correctly, there would have been no need, or very little need, for agency staff.

Conference call, 20 October 2017

95. On 20 October 2017, there was a further meeting, by telephone, with Ms. Bamford, Ms. Ayliff, Ms. Baker and the Claimant. In advance of this meeting, Ms Ayliff emailed Ms. Baker and Ms. Bamford a list of top level concerns ahead of the call. This list is at p.257-259. The Majority of the Tribunal found that this should have been copied to the Claimant. This was unreasonable conduct by Ms. Baker, because the Claimant would not know what the others on the conference call would have before them. The majority considered that this was an attempt to make the claimant responsible for all or any failures no matter how trivial.

96. Ms. Bamford led the meeting, and explained that she had arranged it to discuss the compliance issues within the Home, and to discuss what was needed to move the Home forward. The Claimant did not complain about Ms. Baker or

Ms. Ayliff. She appeared positive, acknowledging that although there was a lot to do, she knew what was required.

97. During the call, the Claimant referred to working until midnight with other members of staff at the weekend to work on completing care plans. She was told that this was not required or expected. But pressure was applied to make sure these were done and sarcastic comments by Ms. Baker suggested that she knew that the Claimant would be working all weekend. Had Ms. Baker not wanted or expected her to work overtime to complete them she could have said so at the time rather than wait until it had been done.

98. After this meeting, Ms. Baker emailed the other participants with an Action Plan on how they intended to improve compliance at the Home (see p.279-283). This email is summarised at paragraph 17 of the statement of Ms. Bamford. The Action Plan prepared by Ms. Baker after the telephone conference on 20 October 2017 (at p.279-283) identified which employee was to carry out which tasks (and this Plan identified, for example, Team Leaders, Lucy Crawte, and Jodie Campbell, as being responsible, in practical terms, for carrying out certain tasks). The Majority noted that this is the way the first two DM report Action Plans should have been put together.

99. Following this conference call, Ms. Bamford spoke to Ms. Baker. She asked her to stay close to the Claimant to ensure that actions were being progressed. Ms. Bamford believed that the Home needed extra support and attention to ensure that what was needed was being done. Ms. Bamford had not intended the monitoring to be as intense as Ms. Baker had implemented by the requirement of twice daily phone-calls set out below. This was the unilateral decision of Ms. Baker and more than micro-management, not monitoring as she had been asked to do.

Events of 23 October 2017: the alleged "last straw" events

100. On 23 October 2017, a budget meeting took place at Canterbury House (another care home), in the presence of a finance officer, Ms. Baker, the Claimant and Ms. Crawte. During the meeting, Ms. Baker questioned what was said by the Claimant and staffing levels, including difficulties over recruitment. Ms. Baker then informed the Claimant that she should report to her each day with an action plan each morning and then report to her at 4pm to explain what she had or had not achieved. No other Home Manager was required to provide such reports.

101. The Majority of the Tribunal found that this requirement, to call morning and evening, was significantly more than micro-management. It did amount to bullying. It was degrading and humiliating for the Claimant, caused unnecessary extra work and even more pressure when they were already aware the Claimant was struggling to manage the Home due to the inadequate staffing levels and the large number of high priority (Red) actions in the numerous Action Plans given to the Claimant to deal with.

102. The Majority did not find that the other events alleged to amount to all or part of a last straw were sufficient to do so.

103. The requirement to attend the Budget meeting was not sufficient to amount to a last straw nor to form part of a last straw. This requirement did not add pressure over and above the requirements of the Claimant's job, which was to attend such meetings. The meeting was a scheduled one, and the requirement to prepare Payroll was standard and the deadline for Payroll was known in advance.

104. On the Claimant's return to the Home, Dave Bartrum (Health and Safety Officer) arrived at the Home. He explained that Ms. Ayliff had requested him to carry out a full audit and check Health and Safety files. He was referred by the Claimant to Richard, the handyman, for assistance.

105. The Claimant perceived this to be part of a "last straw" event, but the Tribunal found that this Audit had been requested in advance of the 23 October 2017, by Ms Ayliff who had not informed the Claimant of this (but she should have done), and that it had been intended to support the Claimant to bring the Home up to compliance standard in Health and Safety matters, because these were identified in both the September and October District Manager reports. The audit by Mr. Bartrum was a practical and sensible step by the Respondent. Mr. Bartrum was supportive, evidenced by his email to the Claimant and NA at 1423 on the same date (p.289-290), which ends: "*I'm here to support all of the above outstanding actions, I'm next free on Tues 7 and 8 November to complete a training day, …*"

106. There was no dispute that Ms Bamford had not returned the Claimant's phone calls straight away on 23 October 2017. The Tribunal accepted her explanation for this: she was on annual leave and driving to Norfolk; her husband, who was recovering from medical treatment, became unwell and she had to stop. She called the Claimant back when she stopped the car.

107. When Ms. Bamford spoke to the Claimant, the Claimant was really upset. The Claimant stated that she was under too much pressure, her GP had signed her off work, and that she was resigning. Ms. Bamford explained that she was on leave, and advised the Claimant to take some time out, and then meet when she returned.

108. The Claimant emailed her resignation letter to Ms. Bamford, giving three months' notice. The letter (p.297) referred to "*victimisation and bullying from senior management*". It specifically referred to Ms. Baker requiring the Claimant to report to her each morning with a plan of what she was going to do that day, and then to contact her again at 4pm to report on what she had done that day. She complained that this was demoralising, and asked whether it was normal treatment.

109. Having resigned, the Claimant met Ms. Bamford on 31 October 2017, when the latter returned to work. At this meeting (the notes of which are at 304a-c), the Claimant did not dispute the level of compliance found at the Home as

evidenced in the DM reports of September and October 2017, but did complain about Ms. Ayliff and Ms. Baker, both of their feedback from the DM visits, both their comments at the October 2017 visits, and the attitude, tone and content of Ms. Baker's in general on other occasions.

110. On 17 December 2017, the Claimant raised a grievance about Ms. Ayliff and Ms. Baker (at p.331-335). A grievance meeting took place on 19 December 2017. The Claimant did complain about what Ms. Baker had said, and her tone, attitude and that she was horrible in her mannerisms. In respect of Ms. Ayliff, the Claimant stated that she had always come across as supportive, but was horrible on the DM visit of October 2017. The Claimant did not dispute the feedback, but the way it was delivered. The Claimant said this was the only interaction with Ms. Ayliff which had concerned her.

111. The outcome of the grievance was that Ms. Bamford upheld the grievance in respect of the allegation of bullying by Ms. Baker (but not Ms. Ayliff). The grievance decision (p.347) stated that "*appropriate actions*" had been taken against Ms. Baker. The Majority of the Tribunal found that the Respondent should have offered the Claimant the opportunity to withdraw her resignation, in order to provide a remedy to the Claimant in this situation. By this stage, Ms. Baker was no longer employed by the Respondent, because she had been dismissed due to failing her probation, evidenced by the letter at p.346A. The Respondent considered that this therefore closed the matter relating to Ms. Baker.

112. Ms. Baker was found by the Respondent to have failed her probation and was dismissed. The reasons for her dismissal are set out in the dismissal letter.

Did the Claimant work excessive hours from 14 September to 23 October 2017?

113. The Majority of the Tribunal found the Claimant's evidence to be partially embellished in respect of the number of additional hours worked, but the Respondent did not dispute that the Claimant had worked above her contracted hours from her return to work in September 2017. The District Managers gave her such work, in the form of the Action Plans, which made it impossible for her to work only her contracted hours. The Respondent knew that the Claimant was working longer hours than her contractual hours. This was not required by the Respondent, but the voluntary extra work that the Claimant was expected to do meant that it was inevitable that she worked longer hours, which was part of the course of conduct, which, coupled with the last straw event, amounted to repudiatory breach of contract. It was also an unreasonable expectation because the Claimant had not long returned from an extended sickness absence. The Majority found that there was no evidence to support the finding of the Minority (in the final sentence of paragraph 172) that the Claimant took time off during work for personal reasons.

114. The Majority did not find the Claimant's reaction to the actions of the Respondent was caused by oversensitivity, but rather the Respondent's Management team were unreasonable in their demands and the manner in which those demands were delivered. The Majority accept that the Action Plans

were designed to keep residents safe, by raising issues identified during inspection and to ensure compliance but the large number of action plans and the high priority awarded to each of the numerous actions in each plan could not reasonably be achieved by any one person working a standard number of hours. It could be achieved more easily and quickly if the required number of staff had been engaged, rather by competent permanent staff rather than agency or staff doing overtime. This would have released the Claimant from duties with the residents covering staff absences to allow her to work on her substantive priorities of raising compliance and appropriate supporting documentary evidence.

Findings of fact of the Minority

115. The Minority, Employment Judge Ross, has reached different findings of fact and different conclusions from the Majority.

Assessment of the witness evidence

116. In reaching his findings of fact, Employment Judge Ross differed from the Majority on several factual issues, mainly because he assessed the evidence of the witnesses differently, after a review of the oral, written, and documentary evidence. The reliability of a witness can only be judged once all the evidence is weighed.

117. Employment Judge Ross found the Claimant not to be a reliable witness, probably due to the upset that she felt at the time of her resignation, combined with her sensitivity to criticism as manager of the Home, her perception that she had been criticised unfairly by the Respondent's managers, and the passage of time affecting her recollection adversely. He made this assessment for several reasons. In particular:

    117.1 The Claimant was unable to recollect certain matters accurately. For example, she did not recall the date of the first inspection visit by Ms. Ayliff and Ms. Baker accurately when preparing her witness statement.

    117.2 The Claimant gave some evidence that was inherently unlikely or implausible, such as her claim that Ms. Ayliff and Ms. Baker were saying things to each other during their first inspection of the Home, which she could not overhear, despite being only about the equivalent distance of one desk away from them. There was no reason for them to whisper to each other.

    117.3 The Claimant's evidence was not consistent with the contemporaneous documentary evidence. For example, the Claimant had not challenged the District Manager report of 22 September 2017. This report did not state that insufficient hours were being covered so that standards were affected. The email of p.158B of 8 August 2017 from Lucy Crawte does not state that hours are not being covered, but that it is a struggle to cover them. In a further example, the Claimant stated that the DMs were

giggling during their visit on about 11 October 2017, when the Claimant became upset; but there is no mention of this in the notes of her grievance interview (which she had had the chance to correct: see p.342).

117.4 The Claimant did not allege that she was working excessive hours at the material time (from her return to work in September 2017 until her resignation). This allegation receives only one line in the grievance letter of 17 December, at p.333. Employment Judge Ross found this absence of complaint to be inconsistent with the case advanced at this hearing. There was no explanation for such inconsistency.

117.5 The Claimant's witness statement contained surprising omissions. For example, in oral evidence, the Claimant stated that the electrical fuses in the dementia unit were behind a locked door. This was not stated either in the Claimant's witness statement nor at any earlier time by her. It was no less inconsistent because this allegation was made in the statement of Ms. Bishop. It led the Minority to conclude that this part of the Claimant's oral evidence, and other parts, were unlikely to be accurate.

117.6 The cross-examination of the Respondent's witnesses proceeded on a ground not raised by the Claimant in her evidence and not pleaded. This was that Ms. Ayliff was at fault for not visiting the Home over August 2017; and that the District Managers had wanted to blame the Claimant to avoid getting blame from the Area Manager. This is also inconsistent with the allegation at paragraph 28 of the Details of Claim: "*It is the Claimant's case that the actions of her managers, following her complaint that the neglect of the home was jeopardising the safety of residents, were calculated to destroy the implied duty of trust and confidence between employer and employee*…". These inconsistencies as to the nature of the Claimant's case further pointed to the Claimant being an unreliable witness.

118. Where the facts put forward by the Claimant were challenged by the Respondent, Employment Judge Ross was reluctant to accept the Claimant's evidence in the absence of reliable corroboration.

119. Employment Judge Ross did not find Ms. Bishop to be a reliable witness for the Claimant. In particular:

119.1 Ms. Bishop gave evidence for the Claimant, which suggested that the Home had only failed to meet compliance standards during the six week absence of the Claimant over 8 August to 14 September 2017. In fact, in cross-examination, it was pointed out that a number of the actions required by the District Managers in the report of 22 September 2017 had existed for months or years. For example, the Dependency Tracker (a tool to assess the hours of care likely to be required) had not been reviewed since 2016. I found that Ms Bishop could offer no satisfactory answer to these points, and occasionally could not comment at all.

119.2 Ms. Bishop's evidence to the Tribunal – in which she refused to accept any criticism of the Claimant – was inconsistent with her response to Jodie Campbell on 23 October 2017, evidenced by the email at p.294. In answer to a question from Employment Judge Ross, Ms. Bishop admitted that she had told Ms. Campbell that she was unhappy at the Home, but claimed in her oral evidence that this referred to when the Claimant was absent sick. Employment Judge Ross rejected this explanation because Ms. Campbell's email does not say this and her visit was in October 2017 (not when the Claimant was absent sick). Ms. Bishop did not in her evidence, nor apparently before Jodie Campbell, dispute what Ms. Campbell was told by staff (although she denied in cross-examination that she had said the Claimant took time off for personal reasons).

119.3 Ms. Bishop claimed in paragraph 22 of her witness statement that the Claimant had found the cupboard locked when she checked it; but the Claimant makes no mention of this in her statement. I found Ms. Bishop's account of the events at this incident implausible. I found it very unlikely that Ms. Ayliff or Ms. Baker would raise their voices to the Claimant when they were carrying out an inspection in the part of the Home where the Public might be, and when they would subsequently be discussing their findings with her in any event.

119.4 Ms. Bishop's evidence was not consistent with the documentation. Quite apart from the documentation such as the Dependency Tracker and the incomplete DOLS documentation showing that there were failings prior to the Claimant being absent from 8 August until 14 September 2017, she claimed that the listening sessions involved picking on "*random staff*" and that there were not group sessions. This is inconsistent with the record of those sessions and nor could I understand why whoever spoke to Ms. Bishop (and she could not specify who) would ask her different questions to those asked of others.

120. In the end, Employment Judge Ross decided that Ms Bishop was loyal to the Claimant, as her manager. Moreover, shortly after being appointed Deputy Manager, she had resigned due to what she perceived to be lack of support. The Minority of the Tribunal found that these two matters combined to adversely affect the reliability of her evidence.

121. Employment Judge Ross attached very little weight to the witness statement evidence of Ms. Crawte, given the nature of this case, where there were a number of strongly contested factual disputes and a number of relevant documents, and given the absence of cross-examination.

122. In contrast, Employment Judge Ross found the Respondent's witnesses to be generally reliable witnesses. Where there was any conflict of fact, he preferred the evidence of Ms. Ayliff and Ms. Bamford to that of the Claimant or Ms. Bishop. The oral evidence of the Respondent's witnesses was more precise and was generally corroborated by documentary evidence.

Findings of fact of the Minority

123. The Claimant was continuously employed by the Respondent or its predecessor from 5 July 2005. From 2011, she was the manager of Devonshire House ("the Home"), a residential care home. In that role, she had responsibility to oversee that the Home complied with the framework of relevant standards of compliance.

124. The Home can provide accommodation and care for up to 65 older persons. It has a dementia unit. The Claimant lived on site with her family, in an adjoining bungalow.

125. The Claimant continued in her role until the expiry of her notice, but was on "gardening leave" for the final part of her notice period.

Background

126. Each of the Respondent's care homes is subject to a monthly visit from the District manager ("DM visit"). At these visits, the District Managers carry out a mini-audit looking at compliance issues within the home.

127. On 20 May 2016, the Home was subject to a Internal Inspection by the Respondent. It was rated overall as "inadequate" and non-compliant with regulations (and it was rated as "requires improvement" under the category of whether the service was well-led). The report is at p.82ff. At the end of the report, the high level characteristics of inadequate are described as: "*Severe harm has or is likely to occur, shortfalls in practice, ineffective or no action taken to put things right or improve.*" This included (at p.83):

> "*The home had not completed mental capacity assessments or held best interests meetings in relation to applications for deprivation of liberty safeguards. The home stated they had been advised not to go back and complete those documents. It would benefit the home to use the MCA and Best Interest meetings to review currents DOLS applications and thereby evidence appropriate action taken in relation to the applications*."

128. The home was inspected by the Care Quality Commission on 6 and 17 October 2016. The Home was assessed as "Requires Improvement" overall (p.98). The report includes:

> *"There was a registered manager in post. A registered manager is a person who has registered with CQC to manage the service. Like registered providers they are "registered persons". Registered persons have legal responsibility for meeting the requirements in the Health and Social Care Act 2008 and associated Regulations about how the service is run."*

129. Under the heading "*Is the Service safe?*", the report made a number of findings and rated the Home as "Requires Improvement" in this respect. Under "*Is the service effective?*", the report rated the Home as "Requires Improvement". The matters recorded included failures to evidence formal capacity assessments for

some individuals (relevant to the Deprivation of Liberty Safeguards, referred to as "DOLS") and failures to update care records (p.108). Also, there were three areas in the report which were assessed as "Good". These were: "Is the service caring?"; "Is the service responsive?"; "Is the service well-led?"

130. After the CQC report, there were DM reports produced by Judith McGugan, former District Manager, on 31 January 2017 and 28 June 2017. These raised similar concerns. For example, the report of January 2017 stated that the care plans were not always completed nor were they reviewed with family and residents. (p.97h).

131. The report of 31 January 2017 states that the Home had 334 hours to cover each week and that it was "*using agency to help cover these but staff are also covering where they can and agency is predicted to be 66 hours per week*".

132. In the case of both of these reports, the areas of concern listed at the end of the report are all listed as "Red" (The optional ratings were: "Red", "Amber" or "Green").

133. The Claimant accepted in evidence that there would always be an action plan for a care home, and that it was a working document, because managing a care home was a never-ending process.

134. On 21 July 2017, Ms. Ayliff was asked by Ms Bamford to oversee the Home, the former District Manager having left the Respondent's employment. At the same time, she was temporarily supporting another home.

135. The Claimant was absent from 8 August to 14 September 2017, because, during a period of annual leave, she was involved in a car accident, suffering injury.

136. In the absence of the Home Manager, the deputy manager, Ms. Andrews, managed the Home, which was the position during the Claimant's absence over this period. Ms. Andrew had been in this role for one year as maternity cover, having had previous experience managing care homes, and did not request assistance from more senior managers over this period.

137. Ms. Ayliff had not met the Claimant prior to her role as a District Manager being extended to cover the Home on a temporary basis. She met the Claimant briefly on 14 August 2017 when she attended the Home to carry out interviews for a new deputy manager. She did not carry out an inspection of the Home between being requested to cover the Home on 21 July 2017 and the internal inspection of 20 September 2017.

138. The Home's new District Manager was Caroline Baker, who commenced her role on 18 September 2017. The former District Manager, Judith McGugan, had left her post on 21 July 2017.

Events leading to the District Manager inspection in September 2017

139. The Minority of the Tribunal rejected one premise of the Claimant's case, which was that the level of compliance and state of the Home deteriorated during her absence from 8 August to 14 September 2017. This was inconsistent with numerous pieces of evidence:

139.1. The Claimant admitted that poor levels of completion of paperwork was raised as an issue before her sickness absence began in August 2017. This was further evidenced by, for example, the DM report from March 2017 (p.97o), in which Ms. McGugan advised that it was a priority that care plans were to be reviewed and updated (not all care plans were being updated with current needs, with food and fluid charts being updated retrospectively at times).

139.2. Moreover, Ms Bamford had a good relationship with the Claimant. This is evidenced by the manner and nature of their telephone calls and correspondence. For example, Ms Bamford called the Claimant to see how she was after her car accident, and told her to take as much recovery time as needed. In the context of such a relationship, it was unlikely that the Claimant would not have raised in writing the alleged concerns that she claimed to have raised by telephone with Ms. Ayliff on her return to work on 15 September 2017.

139.3. There is no written evidence that the Claimant asked for any support on her return from sickness absence. There was no copy of any email allegedly sent by the Claimant to Ms. Ayliff about her concerns following her return to work from sickness absence, despite the Claimant alleging that such an email existed. Given that the Claimant had taken legal advice before her employment ended, it is inconsistent that she did not have a copy of this alleged email if it existed.

139.4. The visit on 21 September 2017 was a pre-planned DM visit.

139.5. If the Claimant had required extra support on her return to work, she would have asked for it, from Ms Bamford.

140. On 26 July 2017, Jodie Campbell, Care and Dementia Advisor, visited the Home. She emailed feedback to the Claimant and her deputy manager, Ms. Andrews, and forwarded it to Maria Bamford. This feedback report (p.149-150) provided a list of nine general matters, including that the DOLS Tracker was not dated, so it was not clear when it was updated, and that certain documentation was not updated or in place. In addition, it reported several specific deficiencies in respect of certain individuals' Personal Plans.

141. In respect of Paragraph 47 above, Employment Judge Ross found that it was not necessary for Ms. Ayliff to attend and inspect the Home prior to 21 September 2017, even though the Respondent's standard procedure was that each care home would receive a DM visit each month.

142. Moreover, Ms. Andrews, who was in temporary charge of the Home in the Claimant's absence, had previously managed care homes and she had been Deputy Manager of the Home for about one year when the Claimant became absent sick in August 2017. When this was put to the Claimant in cross-examination, the exchange was as follows:

> *"Q. Normal for R to expect Dep manager to cover for 6 weeks?*
> *Yes, with phone call to check how getting on.*
> *I not know if phoned her or not.*
>
> *Q. Felt well supported by managers then?*
> *Yes, when first went off sick."*

143. In that context, there was no reason for the District Manager to believe that Ms. Andrews could not manage the Home in the absence of the Claimant. She had done so during periods of annual leave. In the absence of any evidence of a request for support (the Claimant did not suggest that there was such a request), there was no need for Ms. Ayliff to visit the Home in August 2017.

144. The Claimant admitted in cross-examination that she had no reason to think that Ms. Andrews could not manage the Home alone for a short time.

145. As the Claimant accepted in cross-examination, the Respondent's District Manager would not, in these circumstances, have any reason to think that support was required for Ms. Andrews, nor to provide support to the deputy manager unless it was specifically requested.

146. The reliable evidence about the level of training compliance at the Home also tends to contradict the Claimant's case that the level of compliance in the Home reduced over her absence. On 4 August 2017, Ms Bamford emailed the Claimant about training compliance to explain that the Respondent would struggle to put on extra training courses for the Home if there were "*no shows*". The data sent to the Claimant (pp152-158) showed that the Home had a number of "no shows". This occurred before the Claimant went on annual leave and became absent sick in August 2017.

147. From the evidence, Employment Judge Ross concluded that the Home had a level of training compliance below the Respondent's target figure, both prior to the Claimant's sickness absence and after her return to work on 14 September 2017. Insofar as the period after her return, this is evidenced by p.134 showing training compliance on 15 September was 80%, which went down to 76.9% the following week due to training cancellation.

148. On 5 and 6 September 2017, another manager (Joanne Hird) carried out an internal inspection of the Home (for the Respondent's Governance and Safeguarding team). The overall rating provided was "Good" (p.175).

Level of support provided by the Respondent

149. The Claimant's evidence was that she felt well-supported by her line managers during her period of absence.

150. The Claimant returned to work on 14 September 2017. The Claimant attempted to contact Ms Ayliff by telephone on that date on about two occasions (not on many occasions, as alleged by the Claimant). A voice-mail message was left.

151. On 15 September 2017, Ms Ayliff returned the Claimant's call. The Claimant notified her of her return to work and updated her generally. There was a general discussion of a number of issues at the Home, and the Claimant would have orally raised specific issues with her manager, including the lack of recruitment in her absence. The call did not raise concerns about "*neglect of the home*" as alleged in the ET1 paragraph 8. Had there been concerns of "*neglect*" as set out in paragraph 7 of the ET1, Employment Judge Ross considered that these would have been committed to writing in an email on 14 September 2017. We found that, in this call, the Claimant did not raise concerns about residents' safety nor her legal responsibility.

152. In respect of the finding at paragraph 52 above, the gist of what was said by Ms. Ayliff was "*do what you can*". Contrary to her evidence at paragraph 33 of her witness statement, the Claimant was not "*surprised and saddened*" by this response. Her evidence would make little sense given the facts: this telephone conversation took place on Friday 15 September, when Ms. Ayliff was due to visit with Ms. Baker on 21 September anyway; there is no documentary evidence to show that the Claimant was upset by the lack of an urgent visit or that she complained about this; and the Claimant believed (when preparing her statement) that the visit took place on Monday 18 September in any event (which would be the next working day for Ms. Ayliff).

153. On 21 September 2017, Ms. Ayliff and Ms Baker visited the Home for a DM inspection. The purpose of such a visit is to audit the Home, and to provide an Action Plan to ensure that the Home remains compliant with regulatory requirements.

154. There was no evidence that the DM visit of 21 September 2017 was arranged because the Claimant requested support. Employment Judge Ross found that this was a planned DM monthly visit.

155. The Claimant told Ms. Ayliff in advance that if any documents were needed during the visit, she should ask for them in advance, as explained at Paragraph 32 of the witness statement of the Claimant, because the administrator would be on annual leave during their scheduled visit. Ms. Ayliff did not assure the Claimant in advance of the visit that she would not need to produce paperwork during the visit. This was very unlikely, given the nature and statutory regulation by the CQC of the care home business, and the need to record evidence in writing; and Ms Ayliff would not know what she needed to see until she inspected. The Claimant accepted that paper evidence was important and that different types of audit were required.

156. In respect of the facts found by the Majority at Paragraph 55 above, and the incident these refer to, Employment Judge Ross found that the Claimant's administrator was on leave at the time of the inspection on 21 September 2017. On learning that the Claimant was not available to get paperwork immediately, Ms. Ayliff and Ms. Baker did not roll their eyes or make facial expressions. There was no reason for them to do so. The Claimant accepted in evidence that she was not criticised because she was able to produce the documents for them.

157. The report was emailed to the Claimant on 22 September. In the cover email (p.195), Ms. Ayliff stated:

> *"There are lots of areas and actions identified, these are also on the excellence plan, you will need to enter target dates and completion dates when you achieve the actions.*
>
> *Please let us know if you need any help and support."*

158. The report was not "*full of criticism*" of the Claimant, but it did raise numerous matters of concern to the District Managers about the Home.

159. The Claimant did not dispute the actions required set out at p.203-205. She did not challenge the report in any way when it was received. It was accepted by her in evidence that this form of internal reporting and formation of an action plan was a control mechanism designed to secure regulatory compliance.

160. Employment Judge Ross found that the internal inspection of 5 and 6 September 2017 was out of step with the other reports and inspections over 2016 and 2017; the other inspections and reports contained consistent general themes and persistent failings (such as lack of compliance documents) as well as similar specific failings (such as failure to review and keep up to date the DOLS tracker).

161. Further, the inspection report arising from the inspection on 5 and 6 September 2017 was not consistent with the Claimant's case, which was that the level of compliance at the Home had gone down in the Claimant's absence. Given all the oral and written evidence, the conclusions of this inspection report were unreliable (although some familiar shortcomings at the Home were observed by the author). Employment Judge Ross accepted Ms. Bamford's evidence about this inspection report.

Alleged lack of support and assistance in implementing Action Plan

162. The Claimant did not complain about the DM visit report received on 22 September 2017. She did not state that it was inaccurate in any way, nor did she complain that the actions set out at pp 203-205 were unachievable.

163. From comparing the DM report of 22 September 2017 with earlier DM reports, it is apparent that an Action Plan was a usual feature of them.

164. Employment Judge Ross disagreed with the Majority of the Tribunal about the nature and effect of the DM visit Action Plan of 22 September 2017. He found that the Action Plan was neither excessive in length, nor generalistic. On the contrary, in cross-examination, the Claimant did not contend that the Action Plan was excessive nor did she challenge any part of it; in cross-examination, the Claimant said that she had no criticism of how Ms. Ayliff and Ms. Baker behaved up to 22 September 2017, other than the allegation that they had rolled their eyes during the DM visit. Employment Judge Ross found that the DM inspection and Action Plan process was a control mechanism, a tool, intended to be a step to secure regulatory compliance. The Action Plan was thus specifically to address shortcomings in meeting CQC compliance standards. The number of actions was determined by the number of failings, as honestly assessed by Ms. Ayliff and Ms Baker.

165. The Minority of the Tribunal did not accept that any pressure felt by the Claimant after receipt of the DM Action Plan of 22 September 2017 was undue pressure. The receipt of such an Action Plan, where failings and shortcomings had been identified by the DM during their visit, was part and parcel of the Claimant's responsibilities as Home manager.

166. The Claimant did not dispute the content of the Action Plan of September 2017 at pp.203-205; she accepted that these actions were required. The Claimant's evidence of her response to the DM report of 22 September is expressed at paragraph 44 of her witness statement:

> "*I was already well aware of the work that needed to be done as this had been pointed out to them on many occasions. I needed help and support to prioritise and carry out the work, not someone to generate a report to state what I already knew*."

167. The Claimant, as Home Manager, was always working through an Action Plan. This is apparent from the reports prepared prior to September 2017. For example, the February 2017 DM report has an Action Plan (p.97i-k). Moreover, the actions on each of those Action Plans prior to September 2017 are categorised as "*Red*". There was no evidence of anything unusual or unreasonable about the actions on the September and October 2017 DM visit report Action Plans being categorised as "*Red*". Moreover, the Action Plan of September 2017 did not specify who was to carry out each action.

168. In cross-examination, the Claimant had no criticism of the Action Plans attached to the DM visit reports of September and October 2017. Moreover, she accepted that oversight of the Home rested with the registered manager. Employment Judge Ross accepted that she could not, acting alone, physically ensure every aspect of compliance was met; but also found that she was responsible for a system of management, delegation and allocation of resources within the Home to ensure that the Home did comply with CQC compliance requirements.

169. In respect of the DM visits of September 2017 and October 2017, the Claimant admitted that the DMs were doing what they should be doing, in carrying out a mini-audit examining compliance issues. Moreover, she admitted that Ms. Ayliff

and Ms. Baker were carrying out the DM visit on 21 September 2017 with fresh eyes, neither having worked at the Home before.

170. Further, the Claimant accepted that the DM visit reports did not contain complaints about her but just stated facts, such as recording the high level of agency staff and the entry at p.198 in respect of housekeeping (which included the following: "…*the home was not clean in all areas; there was a visible difference between the areas where the suites were to the area where people living with dementia lived*.").

171. When giving oral evidence, the Claimant confirmed she did not criticise the DM reports of September and October 2017. She confirmed that she had no criticism of Ms. Ayliff or Ms. Baker at all by 22 September 2017 (when she received the first of these reports) save her allegation that Ms. Ayliff and Ms. Baker had rolled their eyes at her.

172. The Claimant claimed that she did ask for support, because the Action Plan only told her what she knew. Employment Judge Ross found it unlikely that the Claimant did request support from managers, other than assistance with recruitment, because there was no email or record of any conversation to this effect, nor could the Claimant particularise any conversation about such a request for support. The Claimant stated that there "*may have been a few emails*" but there was no evidence of any such email, and she could not say if there was a written complaint. If she did ask for support which was not forthcoming, it is likely that the Claimant would have complained to Ms Bamford or Ms. Ayliff in writing; and there is no such complaint in the bundle.

173. Save for a request for recruitment assistance (which Employment Judge Ross finds was made by the Claimant only on 14 October 2017, p.227), there was no written request for support prior to resignation. Given her case was that she was not provided with support and assistance to comply with the Action Plans attached to the DM reports of 22 September and October 2017, Employment Judge Ross found that inconsistent with both the Claimant's level of experience as a Home manager, the context of the regulated framework in which the Home existed and the importance of ensuring compliance with CQC standards, and the Claimant's allegations about the state of the Home on her return to work on 14 September 2017.

174. There is evidence that support was offered and provided to the Claimant in any event:

174.1. On 22 September 2017, when enclosing the DM visit report, Ms. Ayliff offered the Claimant "*help and support*" if needed. (p.195)

174.2. On 22 September 2017, having reviewed two files relating to staff members during her visit (and having found unsuitable references, incomplete interview notes, and very little information on them), Ms. Ayliff arranged a file audit by HR of staff files at the Home (see p.211);

174.3. Ms. Ayliff and the recruitment team provided assistance with recruitment of staff, as explained in the evidence of the Respondent's witnesses.

174.4. A conference call was set up by Ms. Bamford for 20 October 2017 to discuss the findings of the recent DM inspections. This led to the detailed Action Plan sent to the Claimant on 20 October 2017, setting which of the Respondent's staff were to do which tasks.

174.5. Ms. Campbell supported staff in care plan writing, and was to provide training to Team Leaders and to assist with rota management (see p.281).

174.6. After the DM visit on 21 September 2017, Ms. Ayliff arranged for Mr. Barthrum, Health and Safety Adviser, to visit the Home to draw up an action plan as to what needed to be done to ensure that the Home could evidence a safe environment for residents (evidenced by the email at p.293). A visit took place and works were agreed (evidenced by the email at p.292). After the DM visit on 11 October, Ms. Ayliff requested that Mr. Barthrum visited again to check the risk assessments and the Home's Health and Safety checks. Mr. Barthrum did so: see the record of his visit in his email of 23 October 2017, with his offer of training and support for staff, at p.290.

175. On the issue of recruitment, the Claimant was getting some support with recruitment at the Home. On 8 August 2017, Ms. Crawte had emailed Ms. Ayliff, asking if the Home could request agency staff. The email stated: "*We are really struggling to cover shifts internally*" (p.158B). The following day, the request for agency staff was repeated to Ms. Bamford. Ms. Ayliff replied on 9 August 2017, approving the request.

176. Ms. Andrews and Ms. Ayliff discussed recruitment of care staff on or about 4 September 2017, evidenced by the email at p.164B. This explained that most shifts from a dismissed employee and a sick employee had been covered by existing staff doing overtime. The email explained the agency worker cover required over the following two weeks.

177. As evidenced by the email on 20 September 2017 (p.182), Ms. Ayliff followed up the recruitment issue, providing a list to the recruitment team of the hours required (in an urgent email). The Recruitment Team Leader explained that applications had been low because the team had been given an incorrect number of hours.

178. Further, the Claimant did not ask for support with recruitment or any other matter after receipt of the District Manager report of 22 September. In cross examination about her email of 14 October 2017 (p.227), the Claimant accepted that she had as much approval as necessary to cover posts with agency staff. Moreover, the Home received a managed recruitment service which meant that the Home had all its pre-screening and booking of interviews done for it by the Respondent's internal recruitment team of the two applicants referred to at paragraph 54 of the witness statement of the Claimant.

179. On the factual issue as to why the interviews arranged by the recruitment team did not take place, Employment Judge Ross rejected the Claimant's evidence as not credible. He rejected the Claimant's explanation as to why no recruitment interviews took place despite assistance of the managed recruitment service. The Claimant accepted that the interview with a candidate on 16 September had to be cancelled, but blamed the fact that she had not been pre-screened and that the Claimant may not have picked up the invitation due to her work on the floor of the Home. Employment Judge Ross rejected those explanations; part of the purpose of the managed service was to pre-screen and the Claimant had never raised this complaint before. He noted that the email of Ms. Howsen attaches "*pre-screens*" (see p.263). Moreover, it is unlikely that an experienced Care Home manager had so little grasp of her diary or contact with her computer that she did not see the invitation.

180. In respect of the proposed interview of another applicant, the Claimant declined the invitation in her diary, the Claimant was unable to explain why her interview was cancelled, stating only that she "…*may have had something else*" to do.

181. Insofar at the Claimant contended that one candidate was unsuitable, because she could not drive and had been rejected, there is no evidence to explain when the recruitment team were told this, and if not, why not. Moreover, if as alleged by the Claimant, the need to recruit was very urgent, it was inconsistent not to at least hold an interview with such a candidate to see whether it was possible for her to work at least some shifts.

182. Employment Judge Ross does not agree with the finding of the Majority of the Tribunal that the email of Ms. Howsen of 20 October (p.262) was an attempt to cover the recruitment team's failings. This was not part of the Claimant's case; and it was not part of the allegations within the list of issues.

183. Moreover, the thrust of all the evidence was that it was the responsibility of the Home Manager to ensure that the Home had sufficient staff on the rota. This was not the responsibility of the recruitment team, which is providing assistance and support. There is no evidence that it failed to provide adequate support.

184. Furthermore, Ms. Ayliff had had to sort out the rotas so they were accurate and reflected the hours needed. A fair inference drawn from this is that the Claimant did not have a handle on the correct allocation of staff hours, or the recruitment required, until this was done.

185. For all these reasons, Employment Judge Ross found the Claimant's evidence on the issue of recruitment and staffing levels unreliable.

186. Further, the state of the Home – particularly the dirty and neglected state of the dementia unit – was not the result of the need to recruit a housekeeper to cover 37.5 hours. The state of this unit cannot be explained away so readily. The housekeeper shifts could be covered by other staff or agency staff. The allocation of staff was the responsibility of the Claimant. The state of the dementia unit witnessed during the DM visits was the result of the lack of

necessary allocation of staff and/or proper cleaning to those areas over a significant period of time, not merely a lack of recruitment in the period from 8 August to 14 September 2017. Some of the most vulnerable residents in the Home would be living in that unit.

Allegation of relentless pressure amounting to bullying

187. The Minority found that the evidence pointed to the Home not being fully compliant with CQC standards. Whether the Claimant was a caring professional or not is not in issue; the evidence observed by the Respondent's DMs pointed to various failings, including the dementia wing being in a less clean and safe condition as the other part of the Home occupied by those without dementia, who were more often visited by families.

188. The findings of the DM visits were doubtless a pressure for the Claimant. This pressure was part of the responsibilities of the manager of the Home. In this case, it was neither excessive, relentless nor unreasonable. Regular inspections and this form of mini-audit could be described as an occupational hazard for care home managers within the Respondent organisation. Such visits were a control mechanism, which was necessary in a care home business in order to ensure the safety of vulnerable residents and to ensure compliance with CQC standards.

189. The Claimant's evidence of lack of support commences at paragraph 48 of her witness statement. The fact that the contents of paragraphs 47-50 of her witness statement do not feature in her grievance leads me to conclude that these complaints did not form unreasonable or excessive pressure on the Claimant.

190. The Claimant accepted that she did receive some support, including from Jodie Campbell who trained staff in care plan writing.

191. Employment Judge Ross accepted that the Claimant perceived Ms. Baker to be unsupportive, but questioned whether in fact Ms. Baker failed to support the Claimant. The Claimant gave few, if any, particulars as to what Ms. Baker was requested to support with, and failed to deliver on.

192. The Minority accepted that Ms. Baker was not impressed at the increase in percentage in respect of training; and that she pointed out that it would be a concern to CQC if they inspected, because training was less than 90%. Whilst this may not have been particularly wise management of a care home manager, this comment was made in the context of a care home business where, on the evidence I heard, the CQC would be looking for training to be in the region of 90-95%.

193. Ms. Bishop claimed that the Claimant had had a lack of support, but provided relatively few particulars. Employment Judge Ross accepted that, during the Claimant's absence in August-September 2017, Ms. Bishop did not see any senior managers at the Home, but this was not surprising given the presence of an experienced Deputy Manager and the lack of any request for a DM to attend.

194. Staffing of the Home may have become more problematic during the absence of the Claimant. However, the balance of the documentary and reliable oral evidence demonstrated that the use of agency staff was not limited by the Respondent; permission to engage agency staff was granted when requested. Problems in recruitment of agency workers were caused because, at first, the Home had not informed the recruitment team of the correct number of hours required. Further, by 20 October, the Claimant had not completed the Dependency review tracker, a tool to enable the number of care hours to be calculated more accurately. These failings were not due to Ms. Bamford, Ms. Ayliff or Ms. Baker; these matters were the responsibility of the Claimant, as manager of the Home, or whichever member of her staff had been delegated to do this.

195. There was no written complaint from the Claimant about recruitment until the email on 14 October 2017 about staffing levels. This email did not state that the Home frequently operated with lower than expected staff levels, which is inconsistent with the Claimant's case to the Tribunal. It referred to the Claimant having "*concerns relating to recruitment*" and being in "*desperate need of day staff and team leaders*". It includes:

> "…*we have not seen any recruitment move for about 3 months, and I am concerned we are hitting the unsafe bracket*,…"

196. It referred to the high volume of agency staff requested; but it did not state that levels of staff had fallen below safe or necessary levels.

197. Employment Judge Ross accepted that the need to use agency staff would add to the pressures of the jobs of Ms Bishop and the Claimant, because some induction of staff, or updating of agency staff who had worked there before, would be required, and that may have caused cancellation of some face-to-face training arranged by the Claimant prior to her absence. But there was no reliable evidence that this form of pressure was more than could be expected as part of her responsibility in her role as Home manager.

198. In any event, this form of pressure was relieved in part by the provision of a managed recruitment service (which carried out pre-screening of candidates and arranged interviews) and the support of Ms. Ayliff in granting authority for the recruitment of agency workers. The Claimant gave no evidence of what hours, specifically, were not covered by agency workers or existing staff (doing extra shifts). The documentary evidence corroborated the Respondent's case that most hours required were covered; Ms. Campbell was informed that some care staff were working excessive hours (p.294).

199. Moreover, Employment Judge Ross rejected the evidence of the Claimant which purported to explain why recruitment interviews did not take place. There was no good reason why the interviews could not have taken place or, at least, been re-arranged, if the level of permanent staff did amount to a relentless or unusual pressure on the Claimant.

200. The Minority of the Tribunal found that the Claimant did not work excessive hours between 14 September and 23 October 2017. It is accepted that on one occasion, which was in October 2017, the Claimant worked late into the night, to bring papers up to date. But the documentary evidence showed that the Claimant worked after 2100 on only two occasions; and, in any event, the Claimant never complained to the Respondent that she needed her duties reducing, nor that she needed further support with her duties as Manager. When she raised working late in the meeting on 20 October 2017, Ms. Bamford told her that this was not necessary or expected of her.

201. The Claimant exaggerated the hours of work done by her after her return to work. In particular, the list of hours worked compiled by the Claimant (at p.288) could not be taken at face value, given the evidence reported to Ms. Campbell at her visit on 23 October that the Claimant took regular time off during time when she was clocked in for work for personal reasons (such as hair appointments): see p.316.

202. Employment Judge Ross did not accept that the lengthy Action Plans attached to the DM reports of September and October 2017 required the Claimant to work more than her contractual normal working hours. The Action Plans were designed to keep residents safe, by ensuring compliance. There was, however, a need for the Claimant to prioritise matters, as Ms. Ayliff explained. On balance, this task of prioritising was part of the role of the Home Manager.

203. For example, in respect of staff training, Employment Judge Ross found that it had to be the responsibility of the Home's registered manager to ensure the level of training was sufficient to satisfy the compliance standard. It would be very difficult for a DM not based at the Home to enforce the training required. While the Claimant could not physically force employees to attend, she could set the expectation that attendance was required and set out consequences for non-attendance, such as the costs implications and potential disciplinary action. Moreover, the practical responsibility to improve training compliance could be delegated to a Deputy Manager; but the legal responsibility was bound to remain with the registered manager. The Claimant was the registered manager of the Home.

204. Apart from the meeting during the visit on 11 October 2017, there is no evidence that Ms. Ayliff criticised the Claimant at all; on the contrary, in the grievance meeting, the Claimant explained that she had always come across as supportive and that she had resigned because of Ms. Baker. Further, as I have found, Ms. Ayliff provided support to the Claimant, including practical support by giving permission for agency staff as required, arranging inspections by the health and safety officer, and arranging a staff file audit by HR.

205. Ms. Ayliff and Ms. Baker did make it clear in their DM reports and Action Plans that the Claimant was the Home Manager and was responsible for ensuring compliance. The DM reports cannot be viewed as personal criticism of the Home manager; they are part of a control mechanism, to try to ensure compliance with CQC requirements and maintain the safety of vulnerable

residents. The reports did not threaten the Claimant with any management action.

206. Further, it is demonstrably not correct that the Claimant was expected by Ms Ayliff and Ms. Baker to do the work in the Action Plans on her own: the Action Plan prepared by Ms. Baker after the telephone conference on 20 October 2017 (at p.279-283) identified which employee was to carry out which tasks (and this Plan identified, for example, Team Leaders, Lucy Crawte, and Jodie Campbell, as being responsible, in practical terms, for carrying out certain tasks).

207. The Claimant and Ms. Bishop complained of conduct by Ms. Baker and Ms. Ayliff which they found to be so unreasonable as to be unacceptable. On one visit, Ms. Ayliff and Ms. Baker rang a call bell on the first floor of the building. This was to test how quickly an emergency could be attended to there, in the absence of staff on that floor. Ms. Bishop and other staff ran through the building to respond (the Claimant was not present in this incident). Ms. Ayliff and Ms. Baker were neither amused nor laughing that they had caused such running and shortness of breath. Employment Judge Ross preferred the evidence of Ms. Ayliff about this.

208. In any event, given the context in which this test took place, Employment Judge Ross finds that this was a reasonable step for Ms. Ayliff and Ms. Baker to take. Ms. Ayliff's evidence is corroborated by the DM report of October 2017 (at p.274, "*Is the Service Effective?*"). Ms. Ayliff and Ms. Baker had gone to the first floor, where residents live with dementia, and where no staff were situated; they pressed the call bell to test response times, because there were no staff on that floor. There was then a staff deployment conversation about the area not being safe. This was in the context of service users who were frail enough to be at risk of falls.

209. Although Ms. Ayliff did not witness it, Ms. Baker could be direct and abrupt in her responses to the Claimant. This was perceived by the Claimant as rudeness. On one occasion, Ms. Baker had not notified the Claimant of her visit to the Home. On seeing Ms. Baker at the Home, the Claimant said "hello", and that she did not know that Ms. Baker was visiting that day. The gist of the response was that Ms. Baker did not need to let her know when she was visiting. Although her words may have been impolite, this happened on one occasion (see p.341) and Ms. Baker's response was factually correct: the grievance documents show that the Claimant did not dispute that Ms. Baker could enter the Home unannounced (see p.343).

210. Employment Judge Ross found it unlikely that Ms. Baker criticised the Claimant without reasonable cause on every visit to the Home. Had she done so, it is likely that this would have been a feature of a complaint to Ms. Bamford, given the Claimant's good relationship with her; in the grievance meeting, the Claimant accepted that she was comfortable talking to Ms. Bamford (p.338).

211. In fact, having studied the grievance filed after the Claimant had resigned, there is no mention of unjustified criticism at every visit by Ms. Baker. In the grievance

meeting, the Claimant complains that after she had worked hard to finish a task which was her responsibility, Ms. Baker would then raise some other responsibility with her, such as care plans. The Claimant perceived this to be bullying. In the context in which such issues were raised, a care home, Employment Judge Ross did not find this to amounted to bullying, even if it was unlikely to be the most effective form of management of this Claimant.

212. On her visits, Ms. Baker would require evidence of what the Claimant and her staff had done or achieved since her previous visit. Seen it context, where this Home had been classed as "requires improvement" by CQC and where the September and October DM visits had raised several matters of real concern to the DMs, this was entirely understandable and reasonable management direction.

213. On another occasion, Ms. Baker required the Claimant to re-do certain documents. Employment Judge Ross considered that there was nothing wrong in such a management instruction in this case; and that, if this was an unreasonable request, the Claimant would have objected to it at the time.

214. There was no evidence of any attempt to performance manage or discipline the Claimant. The focus of the DM visit reports was on improving the standards of compliance at the Home.

215. Employment Judge Ross did not find, as a matter of fact, that there was bullying of the Claimant, nor that she was subjected to relentless pressure.

216. The steps taken by the Respondent's managers, including Ms. Baker, must be viewed in their proper context. This context includes the evidence that this Care Home was subject to a framework of compliance standards, based on regulations, and enforced by the CQC: see, for example, the Action Plan review of 27 February 2017 at 97k. The Home had to be in a position to reach the level of compliance required by the CQC. The CQC could re-inspect the Home at any time because it had been categorised as "Requires Improvement" at their last inspection.

217. Moreover, what lay behind the compliance standards was the aim of keeping vulnerable residents safe and, where possible, healthy.

October 2017: District Manager Inspections and Report

218. Ms. Ayliff and Ms. Baker inspected the Home again on 11 and 16 October 2017. This was part of the normal system of monthly inspections which existed for all of the Respondent's Care Homes.

219. On 16 October 2017, an inspection of the dementia unit (the Ryder wing) was carried out by Ms. Ayliff and Ms Baker. The Claimant was with them in the lounge of the Ryder wing.

220. Employment Judge Ross accepted Ms. Ayliff's evidence that the DMs did not raise their voices to the Claimant, nor did they criticise her in public. Ms. Ayliff

was an experienced DM, and, from hearing and seeing her give evidence, would not have done this not least because a feedback session would take place.

221. At the end of their visit, they gave feedback in the office on what they had found. It was agreed that Karen Goater, the newly appointed Deputy Manager, should be present because she had been working closely with the Claimant to bring the Home up to compliance. This was a reasonable and sensible piece of management; it did not add pressure to the Claimant.

222. This feedback included that there was a noticeable difference between the dementia unit and the rest of the Home. The DMs identified an electrical cupboard in the Ryder Unit which was unlocked; it had had work done to it, but was not finished.

223. In the office, Ms. Ayliff produced a vinegar bottle found at the back of the kitchen cupboard in the Ryder wing, which had mould growing on it. It was admitted by Ms. Ayliff that she described the home as "*minging*" and that she would not put her mother in the Home. The gist of the words used by Ms. Ayliff was that there was a difference in cleanliness between the Ryder unit and the rest of the Home.

224. The Claimant became upset after these comments. Ms. Ayliff offered to give her some time to recover, and provided a tissue.

225. Ms. Ayliff was upset to find the Home so dirty three weeks after her initial DM visit in September, which is probably why she used the language used by her on this occasion. Ms. Ayliff was particularly concerned that there was little change in the condition of the Home between the September and the October 2017 DM visits.

226. When the Claimant had recovered, the meeting went through the report and the actions identified in this DM visit with Ms. Goater and the Claimant.

227. The DM report for October 2017 was sent to the Claimant on 20 October 2017 (pp269-283).

228. This report concluded with an Action Plan, with 17 areas of concern, each of which was rated as "*Red*". A number of the actions from the September DM visit had not been actioned.

229. The report included the following observations:

229.1. Training was at 85%. The minimum for compliance was 95%. As the training was below 90%, it was a normal part of an action plan.

> "*The home is using high levels of agency to backfill their vacant posts*,"

229.2. The BCP required updating (not updated since 2015), and there was no updated PEEPS summary in place (not updated since 2017 and it was not in the BCP).

In the dementia unit, the following was observed:

229.3. Food and drink in the fridge was unlabelled.

229.4. The fuse box in the kitchen was uncovered, which allowed residents access to the fuses.

> "*The kitchen was dirty with inappropriate items stored in it, we located personal documentation of a member of staff, vinegar which had mould growing in the bottle, dirty shelves, cleaning products and nail varnish and remover*…"

In the garden area for the dementia unit:

229.5. It had a general feeling of being "*unloved*".

229.6. There was a large amount of litter outside the doors, the outside building was covered in cobwebs, and the windows were dirty.

> "…*there was a noticeable difference between this garden area and the rest of the home*."

230. It was not suggested by the Claimant, nor put to Ms. Ayliff, that any of the observations recorded in the report were inaccurate. Ms. Ayliff's evidence was that she was shocked to find parts of the Home were still very dirty. The Home had a level of training compliance below the Respondent's target figure, both prior to the Claimant's sickness absence and after her return to work on 14 September 2017. Insofar as the period after her return, this is evidenced by p.134 showing training compliance on 15 September was 80%, which went down to 76.9% the following week due to training cancellation.

231. As for "Compliance Observations", there were a number of matters of concern recorded (pp274-276).

232. The Claimant alleged that she was told by Ms. Baker on several occasions of matters which had not been addressed, and that the Home would be rated "inadequate". Given the failings identified by the District Managers, it was likely that the Claimant was told this.

233. The Claimant did feel inadequate. This was mainly because of the outcome of the DM visits and the inspections by Ms. Campbell, but the words used by Ms. Baker and Ms. Ayliff at the 11 October 2017 feedback contributed to this.

234. After the second of the October 2017 DM visits, on 18 October 2017, Ms Bamford received an email from Jodie Campbell (at p.230) relating to a Care and Dementia Advisor visit made that day. She had reviewed five care plans,

and found that there was no improvement in the quality of them; she found that although the residents' needs had changed, the care plans did not reflect the changes. Ms. Campbell concluded that the care plans had not been looked at, despite being signed as reviewed. This review from Ms. Campbell demonstrated a persistent failing in respect of the review of care plans at the Home: see, for example, the DM visit report from March 2017.

235. In the light of the DM reports of 21 September 2017 and October 2017, Ms. Bamford arranged a telephone conference with the Claimant, Ms Baker and Ms Ayliff. It is striking that the Claimant's witness statement and evidence-in-chief failed to mention the telephone conference of 20 October 2017. This omission is significant because this conference is inconsistent with the thrust of the Claimant's case that she was not provided with adequate support.

Conference call, 20 October 2017

236. On 19 October 2017, Ms. Ayliff emailed the Claimant the results of the HR audit, which she had arranged for the Claimant (p.231-255).

237. At the second DM visit of October 2017, Ms. Ayliff and Ms. Baker carried out a working time audit, as explained in paragraph 59 of the statement of Ms. Ayliff. This was done to support the Claimant, because the rotas were "*all over the place*" (to quote Ms. Ayliff): the rotas were not accurate in terms of shifts required and vacancies, and included employees who had left the Home. The rotas did not reflect what the HR report had shown earlier.

238. Ms. Ayliff was questioned as to why were all the hours not filled if permission to use agency staff had been granted. She explained that staff level depended on the Labour Management Tool ("LMT") and level of dependency needed. Her evidence was that the hours, or most of them, were filled with overtime or agency worker hours, but at times the Home could not get all the hours covered. The LMT's purpose was as a tool to see what labour force was required; it was worked out on occupancy and numbers but the actual number of hours depended on the level of dependency.

239. The Respondent had already placed the Home on auto-approval on its system when requesting agency workers.

240. On 20 October 2017, there was a further meeting, by telephone, with Ms. Bamford, Ms. Ayliff, Ms. Baker and the Claimant. In advance of this meeting, Ms. Ayliff emailed Ms. Baker and Ms. Bamford a list of top level concerns ahead of the call. This list is at p.257-259. It was not part of the Claimant's case that this should have been copied to her, but in any event, the Claimant knew the contents of the DM visit reports from September and October 2017.

241. The Conference call was arranged by Ms. Bamford so that it was clear to the Claimant that the correct support was deployed before Ms. Bamford went on leave. The result of the conference call was a detailed Action Plan prepared by Ms. Baker: see p.279-283.

242. If the requests of or actions required by Ms. Baker or Ms Ayliff were unjustified, the Claimant could have objected. The Claimant made no written complaint at the time. There was no real evidence of an oral request or complaint either. The email accompanying the Action Plan of 20 October states that the Claimant is confident and happy to take it forward (p.279); the Claimant did not respond to say that this statement is incorrect, nor to question the Action Plan.

243. Ms. Ayliff also emailed the Claimant a template care plan review tracker on 20 October to help her organise care plan reviews in the Home. (pp 265-268)

Events of 23 October 2017: the alleged "last straw" events

244. On 23 October 2017, a Budget meeting took place at Canterbury House (another care home), in the presence of a finance officer, Ms. Baker, the Claimant and Ms. Crawte. During the meeting, Ms. Baker questioned what was said by the Claimant and staffing levels, including difficulties over recruitment. Ms. Baker then informed the Claimant that she should report to her each day with an action plan each morning and then report to her at 4pm to explain what she had or had not achieved. No other Home Manager was required to provide twice daily reports.

245. The Minority of the Tribunal found that, although this requirement (to call morning and evening) may well amount to micro-management, it was an instruction given with good reason, namely to get a daily update on the progress made following the recent agreed Action Plan. There is no evidence that this requirement was made without good reason, or to make the Claimant feel uncomfortable. Moreover, the proper context in which this instruction was given cannot be ignored. The Minority has set out above the nature of the regulatory framework.

246. Furthermore, Ms. Baker had, by this stage, been instructed by Ms. Bamford to keep close to the Claimant. Ms. Bamford had not intended Ms. Baker to direct that the Claimant be required to telephone in morning and evening, but this was how Ms. Baker had interpreted the instruction to monitor the Claimant and the progress of the Home.

247. This instruction by Ms. Baker to phone her twice daily did not amount to bullying. The Claimant, an experienced care home manager, was sensitive after what she perceived as personal criticism at the DM visit feedback meeting on 11 October 2018. She was then embarrassed by this instruction.

248. Like the Majority, the Minority did not find that the other events, alleged to amount to all (or part) of a last straw, were sufficient to do so. The Minority of the Tribunal made the same findings of fact at the Majority at paragraphs 103 to 108 above.

249. The Claimant's attendance on her GP was not part of any last straw, sufficient to breach the implied term of trust and confidence. This evidence was of very

marginal relevance; and there was no actual medical evidence to explain the causation of the Claimant's symptoms.

250. Having resigned, the Claimant met Ms. Bamford on 31 October 2017, when the latter returned to work. At this meeting (the notes of which are at p.304a-c), the Claimant did not dispute the level of compliance found at the Home as evidenced in the DM reports of September and October 2017, but did complain about Ms. Ayliff and Ms. Baker, both of their feedback from the DM visits, both their comments at the October 2017 visits, and Ms. Baker's mannerisms in general. Her complaint was that they had only come to the Home to point out what was wrong with it; but she did not complain about what was said, but how it was said.

251. On 17 December 2017, the Claimant raised a grievance about Ms. Ayliff and Ms. Baker (at p.331-335). A grievance meeting took place on 19 December 2017. The Claimant did complain about what Ms. Baker had said, and her tone, attitude and that she was horrible in her mannerisms. In respect of Ms. Ayliff, the Claimant stated that she had always come across as supportive, but was horrible on the DM visit of October 2017. The Claimant did not dispute the feedback, but the way it was delivered. The Claimant said this was the only interaction with Ms. Ayliff which had concerned her.

252. The outcome of the grievance was that Ms. Bamford upheld the grievance in respect of the allegation of bullying by Ms. Baker (but not Ms. Ayliff). The grievance decision (p.347) stated that "*appropriate actions*" had been taken against Ms. Baker. By this stage, Ms. Baker was no longer employed by the Respondent, because she had been dismissed due to failing her probation, evidenced by the letter at p.346A.

253. Ms. Baker was found by the Respondent to have failed her probation and was dismissed. The reasons for her dismissal are set out in the dismissal letter.

Did C work excessive hours from 14 September to 23 October 2017?

254. Despite the Claimant's evidence, the Minority of the Tribunal found that the Respondent did not require the Claimant to work excessive hours between 14 September and 23 October 2017. On certain occasions, such as the weekend prior to the telephone conference of 20 October 2017, she did work long hours; but this was not at the instruction or direction of the Respondent. Indeed, Ms. Bamford assured her that this was not necessary.

Submissions

255. Mr. Roberts, for the Respondent, provided written submissions, which the Tribunal read, and which he expanded upon in argument. Mr. Stephens provided an extract from Harvey on Employment Law, and a statutory instrument, and made oral submissions.

Conclusions - Complaint under Section 47 ERA 1996

256. This part of the Tribunal's conclusions was a unanimous decision.

257. The detriment is alleged to have occurred on 23 October 2017, in the budget meeting on that date. The time limit for presenting the complaint expired on 22 January 2018. The Early Conciliation period is irrelevant; this began after the time limit expired.

258. The Claim was presented on 23 April 2018. Accordingly, the complaint under section 47 ERA was presented over 3 months out of time.

259. The Tribunal unanimously decided that it was reasonably practicable for the Claimant to present this complaint in time for the following reasons.

260. The Claimant had taken legal advice by 17 December 2017. She was aware of her right to bring a whistleblowing complaint by that point, evidenced by her email at p.332.

261. On the face of the witness statement evidence, which gave no reason for the Claimant's delay in presentation of the complaint, the Claimant's knowledge of her legal rights in good time to present the complaint was a factor weighing heavily against the Claimant.

262. For the first time, in cross-examination, the Claimant relied on her health as the reason for not bringing her claim in time. She stated that it was not until February 2018 that she felt better. The Tribunal rejected this explanation as unlikely to be reliable evidence when set against the other evidence including:

262.1. The Claimant's failure to mention this in her witness statement.

262.2. The Claimant's medical notes state that in December 2017, she felt "*so much better now*" that she had resigned. She did not seek any further medical help for her mental health after that date.

262.3. The Claimant was able to draft a detailed grievance and to instruct solicitors in December 2017.

262.4. The Claimant had proposed to return to work for her notice period, from about 18 December 2017.

263. Further, even if it was not reasonably practicable for the Claimant to present her complaint in time, we concluded that this complaint was not presented within such further time as was reasonable in the circumstances of this case. Indeed, the Claimant adduced no evidence to explain the period of delay from February 2018 to 23 April 2018; and, according to her ET1, on 13 April 2018, she had commenced a new job. The Tribunal concluded that the further delay of about two months to 23 April 2018 was not reasonable. This led us to conclude that the Claimant's argument in respect of jurisdiction failed under section 48(3)(b) ERA in any event.

Conclusions: Complaint of Constructive Unfair dismissal

264. Applying the law set out above to the findings of fact made, the Majority and the Minority of the Tribunal reached the following conclusions on the issues between the parties.

Majority decision

Issue 1:

265. The assessment of the evidence on key issues of fact and applying the law to factual issues 1a(i) – 1b produces the following conclusions:

265.1. Ms. Ayliff did fail to return the Claimant's calls on 14 September 2017, but did return them on 15 September 2017.

265.2. Ms. Ayliff did not attend the Home until 21 September 2017.

265.3. Ms. Ayliff probably did ask the Claimant to produce paperwork at the DM visit in September 2017. This was after the Claimant had told Ms. Ayliff that her administrator was away, and there may be a delay in the provision of paperwork. Ms. Ayliff and Ms. Baker made dissatisfied facial expressions at the Claimant. They did determine that there were a number of failures of compliance at the Home, which they reflected in the Action Plan drawn up as a result of that visit.

265.4. The Respondent did not provide sufficient support and assistance to the Claimant to enable her to implement the action plan.

265.5. The Claimant was placed under relentless pressure that amounted to bullying.

265.6. The Claimant was made to feel inadequate, degraded and humiliated, for the reasons set out in the findings of fact at paragraphs 81-83 and 100-101 above.

265.7. The Respondent's managers did repeatedly advise the Claimant that the Home would be rated "inadequate" and that the Claimant would be blamed.

265.8. At the Budget meeting on 23 October 2017, Ms. Baker did instruct the Claimant to contact her each morning with a plan and to report at 4pm each day to confirm what she had done that day.

265.9. Ms. Ayliff did accuse the Claimant of not caring.

265.10. The Respondent did not dispute that the Claimant had worked above her contracted hours from her return to work in September 2017. The District Managers gave her such work, in the form of the Action Plans,

that it made it impossible for her to work only her contracted hours. The Respondent knew that the Claimant was working longer hours than her contractual hours and after a return from extended sickness absence. This was not required by the Respondent, but the voluntary extra work that the Claimant was expected to do meant that it was inevitable that she worked longer hours, which was part of the course of conduct, which, coupled with the last straw event, amounted to repudiatory breach of contract.

Issue 2: If so, was the Respondent in breach of the implied term of trust and confidence?

266. The Majority found that the Respondent had acted in breach of the implied term of trust and confidence. It concluded that the Respondent had, without reasonable and proper cause, acted in such a way that it was likely to seriously damage or destroy the degree of trust and confidence that this employee was reasonably entitled to have in her employer.

267. The Majority concluded that there was a series of acts or incidents which cumulatively amounted to a repudiatory breach of the implied term of trust and confidence. In particular:

267.1. Ms. Ayliff should have attended the Home during August 2017, in the absence of the Claimant, to review what steps were required.

267.2. Ms. Baker and Ms. Ayliff did not provide the Claimant with sufficient support to enable her to implement the Action Plan.

267.3. The Claimant was placed under relentless pressure amounting to bullying. In particular:

267.3.1. The Claimant was humiliated in public by Ms. Ayliff and Ms. Baker raising their voices to her during their visit in October 2017 (about electrical fuses in a cupboard);

267.3.2. Ms. Baker's tone, amounting to condescending, in saying that she could attend the Home whenever she wished to, without informing the Claimant;

267.3.3. The Action Plans were full of "Red" actions, rather than a selection of Red, Amber or Green ones, which the Majority found to be an exaggerated response designed to put all responsibility on the Claimant;

267.3.4. Ms. Baker and Ms. Ayliff had gone to a room on the first floor, rang a call bell, and then laughed at the Claimant's colleagues when they arrived;

267.3.5. Ms. Baker had instructed the Claimant to re-do certain documents which was unreasonable and unnecessary in this

case, where there was a Home with 300 plus missing staff hours.

267.4. The Claimant was made to feel inadequate by what was said to her by Ms. Baker (that she would be rated "inadequate") and by the number and manner of inspections at the Home by various sections of the Respondent.

267.5. The Action Plans created meant that, by implication, the Claimant had to work long hours.

267.6. The Majority noted that the action taken by the Claimant in her resigning meant that the accommodation provided by the Respondent and enjoyed by her family was terminated. This was despite the Claimant proving her grievance against Ms. Baker; the Respondent never suggested that the Claimant withdraw her resignation, the consequential effect of which would have meant that the family accommodation would have continued.

268. The Majority considered that they had applied equal weight to the compliance needs of the Respondent's Care Home and the Claimant's evidence on all related matters, as demonstrated by the areas where they accepted the Respondent's evidence and not the Claimant's. The Majority were in no doubt that the instruction by Ms. Baker that the Claimant contact her each morning with a plan of action and then each day at 4pm with an update on what had been achieved was the "last straw" in this sequence of events.

Issue 3: Causation

269. The Majority concluded that the Claimant resigned in response to the breach of the implied term of trust and confidence. The breach crystallised on 23 October 2017 and she resigned on this date, after the morning budget meeting and the requirement to report to Ms. Baker each morning and evening.

Issues 4-5: Was the constructive dismissal fair?

270. The first question was whether the Respondent had shown that the reason for dismissal was a potentially fair reason. The Respondent had failed to show the reason for dismissal was a potentially fair reason within section 98 ERA 1996.

271. The reason for the constructive dismissal was the treatment of the Claimant by the District Manager Ms. Baker coupled with what Ms. Ayliff said to her at the DM visit in October 2017. This treatment did not take into account the bigger picture, specifically the degree of pressure that the Claimant was under, in view of her lack of a full complement of staff and her recent absence. Further, a reason for dismissal was the poor performance of the new District Manager, Ms. Baker.

272. Accordingly, the dismissal was unfair.

Minority decision

273. Employment Judge Ross reached different conclusions from the Majority for the following summary reasons:

273.1. The assessment of the evidence on key issues of fact differed to that of the Majority of the Tribunal.

273.2. When assessing whether there had been a breach of the implied term of trust and confidence as alleged, he attached greater weight than the Majority had done to the context in which the events relied upon by the Claimant occurred – particularly the system for, and enforcement of, a regulated framework for care homes, and the Respondent's need to secure compliance with such a framework in order to ensure the safety and well-being of the residents, some of whom were very vulnerable.

273.3. Applying the law, there was no breach of the implied term of trust and confidence. Whether there is a breach of contract is an objective question, not a subjective one.

Issue 1:

274. Applying the findings of fact of the Minority of the Tribunal to factual issues 1a(i) – 1b produces the following conclusions:

274.1. Ms. Ayliff did fail to return the Claimant's calls on 14 September 2017, but did return them on 15 September 2017.

274.2. Ms. Ayliff did not attend the Home until 21 September 2017.

274.3. Ms. Ayliff probably did ask the Claimant to produce paperwork at the DM visit in September 2017. This was after the Claimant had told Ms. Ayliff that her administrator was away, and there may be a delay in the provision of paperwork. Ms. Ayliff and Ms. Baker did not make facial expressions at the Claimant; there was no reason for them to do so. They did determine that there were a number of failures of compliance at the Home, which they reflected in the Action Plan drawn up as a result of that visit. They did not pick on or criticise the Claimant. They did not decide arbitrarily to draw up an action plan; drawing up an action plan was part of the Respondent's procedure after a DM visit.

274.4. The Respondent provided sufficient support and assistance to the Claimant to enable her to implement the Action Plan. This support is evidenced in part by the assistance provided to the Claimant by Ms. Ayliff, the workforce assessment carried out by Ms. Ayliff and Ms. Baker to sort out the rotas, the assistance provided by Ms. Campbell, the conference call meeting arranged by Ms. Bamford on 20 October 2017, the detailed Action Plan created after the conference call, the authority to engage agency staff as required, and the support

provided by the recruitment team. Employment Judge Ross repeats the relevant findings of fact above, particularly those at paragraphs 162-186.

274.5. The Claimant was not placed under any pressure which did not arise from the responsibilities of her role as manager of the Home. The Minority does not underestimate the pressure that comes with such a role and the need to constantly review, evidence, and record developments, such as to care plans. The Claimant felt under pressure probably because she found her role as manager of the Home to be a challenging one, and by 2017 she was finding it difficult to discharge the responsibilities of this role. The Claimant was not bullied by the Respondent. The reasons for this conclusion are set out in the findings of fact at paragraphs 187-253 above.

274.6. The Claimant was informed of matters which did not reach CQC or the Respondent's standards. This was done in accordance with the Respondent's procedure and with good cause. Given these failings in the Home, the Claimant was advised that the Home was likely to be rated "inadequate" if the CQC were to inspect. Given the findings of the DM inspections of Ms. Ayliff and Ms. Baker, and the visits by Ms. Campbell, this warning was a reasonable management step, made with proper cause. The Claimant has not alleged that she felt degraded or humiliated; but, in any event, if the Claimant had this perception, it was not due to any fault or breach of her employment contract by her managers.

274.7. At the Budget meeting on 23 October 2017, Ms. Baker did instruct the Claimant to contact her each morning with a plan and to report at 4pm each day to confirm what she had done that day.

274.8. Ms. Ayliff was cross-examined on the basis that she had accused the Claimant of not caring about dementia residents and had accused her of discrimination. I accepted Ms. Ayliff's response and found that the gist of the words used by Ms. Ayliff was that there was a difference in cleanliness between the dementia unit and the rest of the Home.

274.9. The Respondent did not require the Claimant to work more than her contracted hours and nor was this made inevitable by the Action Plans. The actions required by the Plans were part of her duties and responsibilities. The Claimant was not threatened with disciplinary or performance management, nor given deadlines for completion of the actions.

274.10. The Respondent did not require the Claimant to work excessive hours between 14 September and 23 October 2017.

Issue 2: If so, was the Respondent in breach of the implied term of trust and confidence?

275. The Minority of the Tribunal found that the Respondent had not acted in breach of the implied term of trust and confidence. It concluded that the Respondent's DMs had acted with reasonable and proper cause, and not acted in such a way that it was likely to seriously damage or destroy the degree of trust and confidence that this employee was reasonably entitled to have in her employer.

276. The reasons for this conclusion are largely set out in the findings under Issue 1. In addition, the Minority reached this conclusion for the following reasons:

276.1. The fact that Ms. Ayliff did not return the Claimant's calls until 15 September 2017 was not capable of forming part of a course of conduct amounting to breach of the implied term of trust and confidence. She responded within one working day; and, in the absence of any written communication stating a response was urgently required, Employment Judge Ross concluded that this was a reasonable and proper response time in the circumstances.

276.2. There was no need or request for Ms. Ayliff to make a DM visit to the Home in August 2017. The reasons for this are set out at paragraphs 136, and 141 - 144 above.

276.3. Although the Claimant relied on an allegation of bullying, essentially by Ms. Baker, the Claimant made no complaint about Ms. Baker, her tone or acts, prior to her decision to resign. In those circumstances, it is difficult to understand what steps her employer could have taken to address such actions. Ms. Baker was new to the organisation (from 18 September 2017), so the Respondent would have had no evidence of prior behaviour to concern them, and Ms. Ayliff witnessed nothing untoward by Ms. Baker.

276.4. Although Ms. Bamford found in the grievance decision that Ms. Baker had bullied the Claimant, this conclusion was reached without hearing Ms. Baker on the grievance; and from the evidence, although Ms. Baker may have been impolite at times and abrupt on other occasions, concluded she did not bully the Claimant but she did adopt more direct management than the Claimant had been used to. From the evidence given by Ms. Bamford, it appeared that she upheld this part of the grievance because she had heard from the Claimant, but she gave no reasoned decision as to what aspects of the case against Ms. Baker were upheld, nor why. Employment Judge Ross took into account that Ms. Baker was dismissed by the Respondent, and the reasons for which she was found to have failed her probation period.

276.5. The Respondent's witnesses did not know that the Claimant was working beyond her contractual hours after her return to work on 14 September 2017. The Action Plans did not make this inevitable.

Indeed, on learning that the Claimant had worked late to update care plans, the Claimant was informed that there was no need to do so.

277. The Minority concluded that the instruction by Ms. Baker that the Claimant contact her each morning with a plan of action and then each day at 4pm with an update on what had been achieved was not capable of being the "last straw" in any event. It was a reasonable management instruction, in the context of the circumstances in which it was delivered, albeit Ms. Baker could have delivered it with more explanation as to why she was requesting this.

Remaining Issues

278. Given the above conclusions, the Minority does not need to reach conclusions on the remaining issues.

Remedy Hearing

279. The provisional date for the remedy hearing is confirmed and will take place on 4 March 2019, with a time estimate of one day.

Employment Judge Ross

14 February 2019