EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4107911/2018

Hearing Held at Glasgow on 6, 7, 8 and 9 November 2018

Employment Judge: I McFatridge
Members: K Culloch
Mrs A Shanahan

Mr MD Rezaur Rahman	**Claimant** **In person**
Common Thread Limited	**Respondents** **Represented by:** **Mr Edward** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is

(One) The claimant's claims of unlawful discrimination on grounds of race and sexual orientation are not well founded and are dismissed.

(Two) The respondents unlawfully withheld wages from the claimant in the sum of Six Hundred and Fifty Pounds (£650). The respondents shall pay to the claimant the sum of Six Hundred and Fifty Pounds (£650).

REASONS

E.T. Z4 (WR)

1. The claimant submitted a claim to the Tribunal in which he complained that he had been unlawfully discriminated against on grounds of race and sexual orientation. He also claimed that he had suffered an unlawful deduction of wages. The respondents submitted a response in which they denied the claims. A Preliminary Hearing took place on 22 August 2018 and the Final Hearing took place over four days in November 2018. At the hearing the claimant gave evidence on his own behalf. Evidence was led on behalf of the respondents from Raymond Alexander, their Head of Care; Marianne McFarlane, their Therapeutic Services Co-ordinator; Darren Dow, Manager of one of the residential homes in which the claimant had worked and Thomas Moore, Manager of the other residential home in which the claimant had worked. The parties lodged a joint bundle of productions which was added to during the course of the hearing. The claimant objected to certain of the documents being lodged but his objections were essentially based on the fact they were being lodged late in the day and given that the documents were clearly relevant the Tribunal decided to accept them. On the basis of the evidence and the productions the Tribunal found the following factual matters relevant to the claim to be proved or agreed.

2. The respondents are an organisation based in Dumfries which offers support and creative solutions for children and young people who had been hurt by trauma, abuse and neglect. The respondents employ a total of around 160 people. It currently operates 14 children's homes at various locations. They operate to a care model which they have developed so as to provide a high quality service to the most disadvantaged and traumatised children and young people. Each home has a complement of 6.5 Therapeutic Care Workers who generally work 24 hour shifts living in at the Care Home. There is a rota whereby each therapeutic care worker works two shifts on and then has three days off. The expectation is that a care worker will work 10 x 24 hour shifts in the average 31 day month. In addition, each Home has a Manager who is not on the rota but works a standard 40 hour week. The Home will also usually have a Senior Therapeutic Care Worker who is one of the workers on rota and will often also have a Development Manager who is a Senior Therapeutic Care Worker who is being developed in the managerial role. The respondents were

founded in 2004. Most of their work is carried out on behalf of local authorities who refer young people to them.

3. As a care organisation the respondents are registered with the Care Inspectorate. Their registration covers care for children with emotional behavioural difficulties. They are inspected twice a year. One of the inspections is unannounced. The respondents have a very good record with the Care Inspectorate.

4. The respondents have a fairly rigorous recruitment process which involves a day of interviews at which various tests are carried out by various individuals. This involves candidates engaging in role play and a number of one to one sessions with the respondents' managers. The claimant attended one such recruitment day and during the course of this he was interviewed on a one to one basis by Marianne McFarlane, the respondents' Therapeutic Services Co-ordinator. Her main role is in facilitating assessments and producing therapeutic plans for young people in the respondents' care however she also has a training role. Her role also involves her providing support to managers. The respondents' management model is that if a Therapeutic Support Worker is having difficulty they should contact their manager and their manager then has a range of resources available with which to assist. One of these is that the manager can approach Ms McFarlane for advice.

5. Ms McFarlane is not always available for recruitment days but is involved in them from time to time and was involved in the claimant's recruitment day.

6. The purpose of her one to one meeting with the claimant and the other candidates was to discuss with each of them one of the more difficult features of the role namely the level of abuse which they could expect to receive from the young people who were being cared for by the respondents.

7. The respondents' therapeutic care model is based on a number of psychological theories. One of these is attachment theory. It is not possible

for me to do full justice to the theoretical underpinnings of the respondents' approach however the following is a bare summary.

8. The respondents' understanding is that most if not all of the children for whom they care have had difficulties in their lives which have led them to have difficulties in forming attachment to their primary carer. This attachment is a particularly important bond for any young person. Issues in forming attachment with the primary carer can then lead to difficulties in forming any relationship with any other adult.

9. This may be due to abuse or neglect in the early years. Attachment issues create a number of difficulties for a young person's relationship with any adult who is employed as a Therapeutic Support Worker.

10. One issue is that the child will usually try to test an adult in this situation by being verbally and/or physically aggressive towards them. They may be doing this in order to push that adult away since they do not wish to repeat the experience of forming an emotional attachment with an adult who will then abuse them or let them down in some way.

11. A young person who has spent time in a difficult threatening environment may develop hypervigilance. This means that the young person becomes very good at interpreting situations and relationships with a view to determining whether or not there is any threat. This can lead a child to closely observe any adult Therapeutic Care Worker with whom they come into contact. The young person may well at this stage be deliberately seeking out any weakness in the adult which can be used should a conflict situation arise.

12. Children who have been severely beaten by their carers in the past, of which the respondents have a number in their care, will often wish to push boundaries so that they can begin to form a belief that the Therapeutic Care Worker will not beat them or physically injure them in all situations.

13. This theoretical approach means that for the respondents it is important that all of their staff are in a position where abuse can be thrown at them by the young people in their care and whilst a worker will respond in a therapeutic way so as to change that behaviour, the worker will not have an emotional reaction to what is being said. It was clear from the evidence of all of the respondents' witnesses that this is a key feature of the respondents' approach.

14. Mr Dow identified a fairly standard progression where a new child will come into one of the respondents' homes. The child will start by being verbally abusive. He or she will seize on any physical features of the adult they are working with. It may be a big nose, maybe their size. The child will attempt to find out information about the adult worker's social situation and will tailor abuse accordingly. It is usual for children to call female members of staff prostitutes and male members of staff paedophiles. The child will often progress towards making direct threats of violence against the families of members of staff. It is usual for threats of rape to be made against male members of staff's wife and children. As one of the witnesses put it, the young person will attempt to find all of one's buttons and then press them. Thereafter it is not uncommon for the young person to become violent and physically aggressive. One of the witnesses indicated that during his career he had been subject to three attempted stabbings. He had also been spat on, urinated on and bitten.

15. Ms McFarlane's purpose in meeting the claimant and the other potential recruits for a one to one was to explain this to them in detail. She explained that the respondents' position was not that such behaviour be accepted but that the recruit would be taught techniques which would enable him or her to deal with this abuse in a therapeutically appropriate way which would, over time, result in the level of abuse being reduced and then ceasing.

16. One of her purposes in doing this was simply to gauge the potential recruit's reaction to what he or she was being told. Her position was that often she would notice a visible flinch when she went into detail regarding the type of

situation which could arise and this would be a contra-indicator to recruiting that person.

17. When Ms McFarlane met with the claimant she advised him that he would very likely face racial abuse based on the colour of his skin. The claimant replied that he had had that all his life and was used to it. They had a discussion regarding the matter. The claimant said that such abuse would not bother him. Ms McFarlane felt that the claimant had responded well in the one to one and that he would be able to maintain an appropriate therapeutic response to abuse from the young persons in his care rather than allowing it to get to him.

18. Following his recruitment the claimant attended a five day training course. Two of this was basic induction however three days were specialist training in what is known as SCM (Safety Crisis Management).

19. SCM is a series of techniques taught by an American company which has developed these over a number of years and is well known within the care industry. The claimant was taught the SCM course by accredited trainers who were employees of the respondents but had been trained directly by the American owners of the SCM system. It was a condition of the claimant's employment that he successfully complete the SCM training before he was allowed to work a shift with the respondents. Within the course there was both a written and practical examination which the claimant had to pass.

20. On the course the claimant was taught a number of techniques and strategies. The course taught the claimant to analyse a situation and then decide which of multiple strategies were appropriate. These included non verbal strategies such as looking at the young person in a certain way or "positive ignoring" or distracting. Some involved touch or simply proximity. There were verbal strategies of encouragement. Another verbal strategy was to seek to engage in discussion with the young person. This is broken down into how to attend and attune to what the young person might be trying to express and how to engage in a non-threatening way. Thereafter one might require to adopt a directive strategy such as telling a young person to go to their room or to cease

what they are doing. At this stage matters can be difficult if the young person is no longer being rational and they may be becoming violent. At that stage one might require to adopt physical methods of restraint. These will only be adopted where necessary and generally the aim is that they be used sparingly. Instances of restraint require to be recorded.

21. A great deal of time on the course was spent in physically teaching recruits the various safe methods of restraint. This included restraints from a standing, sitting or prone position. They may involve more than one member of staff. The aim was to ensure that the young person was safely restrained and that neither the worker nor the young person were injured in the process.

22. After completing his induction and SCM training the claimant commenced working at a Home called Fleets. His manager was Darren Dow. Mr Dow had extensive experience in looking after young people and was fully conversant with the respondents' policies and approach. He was himself a certified trainer in SCM techniques.

23. The claimant developed a good relationship with Mr Dow. They conversed a great deal by text message since there would be many occasions when the claimant was on duty when Mr Dow was not scheduled to work. A transcript of the text messages between the claimant and Mr Dow over the period between 3 April 2017 and 24 January 2018 was lodged (pages 178-199). They were examined by the Tribunal. They demonstrate that the claimant had an extremely good rapport with Mr Dow and that Mr Dow behaved in an empathetic and helpful way towards the claimant. At no point in this correspondence did the claimant raise any issue regarding homophobic or racist abuse which he suffered from the young people in the respondents' care.

24. Such abuse did however occur and indeed this was not disputed by the respondents' witnesses. The Tribunal found that the claimant was subject to vile racist abuse from the young people in the respondents' care from the outset of his employment. He was referred to as a "black bastard, black cunt and Paki bastard" on an almost routine basis.

25. Mr Dow sought to assist the claimant through this in accordance with the respondents' policies. Mr Dow's experience suggested that if one did not react emotionally to this type of abuse but dealt with it using the techniques which had been taught in training then eventually the young person would become confident enough to allow themselves to develop a relationship with the worker and the incidence of such abuse would diminish and then cease.

26. Mr Dow was extremely alert for any sign of what he termed an "emotional reaction" by the claimant (or any other worker) to such abuse. If he saw signs of this or if the claimant had himself approached him to indicate that the abuse was specifically bothering him then the respondents had provided Mr Dow with a number of managerial resources with which to deal with it. This could involve temporarily transferring the claimant to another unit, it could involve providing him with management support or it could involve providing him with additional supervision. One specific type of supervision which the respondents offered was known as "creative supervision". This sought to provide support for workers employed in this type of role in a non-verbal way. It could be offered either to a group or to an individual.

27. Mr Dow saw no sign that the claimant was having an adverse emotional reaction to the abuse he was getting. Although the claimant's abuse had racist overtones it was little different from the abuse which other members of staff received in relation to non-protected characteristics. Generally speaking the claimant confirmed to Mr Dow that it was not something new for him to suffer such abuse and that it did not bother him. The claimant said on many occasions that he was not bothered by it.

28. On one occasion Mr Dow and the claimant were both in the kitchen of the Home and the claimant was cooking. A young person was in the kitchen and called the claimant "curry fingers". The claimant chose to ignore the remark applying one of the techniques which he had learned. Mr Dow's view was that whilst it would not be appropriate for the claimant to show any emotional reaction to the remark it was important that a marker be set down that such

remarks were unacceptable. He therefore challenged the young person. He challenged him verbally and the young person responded aggressively. Matters ended with the young person requiring to be physically restrained by Mr Dow using one of the SCM techniques. The young person was removed to his room. Mr Dow spoke to the claimant afterwards indicating that he felt that the claimant ought to have challenged this behaviour directly. The claimant once again said that such racist remarks did not bother him.

29. The claimant eventually developed a better relationship with the young person and towards the end of the young person's stay he and the claimant would cook together. The incidents of abuse including racist abuse markedly declined. Unfortunately, at that point the young person was transferred to another Home. Mr Dow felt it unfortunate that this happened. He said that usually a worker will have a difficult time with a young person until he has established a relationship with that person and thereafter the job becomes much easier. He felt it unfortunate that the claimant had missed out on having a period of time when he had a good relationship with the young person.

30. Two new male young persons then came into the Home. They also subjected the claimant to vile racist abuse on a regular basis.

31. The claimant is homosexual. He lives with a male partner. He had not disclosed this to any of the young people in the respondents' care although many of his colleagues were aware of this. On 16 July the claimant was off duty. He received a text from one of his colleagues who was on duty at the Home who indicated that she had inadvertently "outed" him as gay to one of the young people in the Home. She apologised. The claimant raised the matter informally with Mr Dow who investigated the matter. He established that two members of staff had been having a conversation in which a reference had been made to the claimant and the fact he had a male partner. This was unfortunately overheard by one of the young people resident in the Home. Mr Dow satisfied himself that this had not been done maliciously or intentionally and discussed it with the claimant.

32. Thereafter the claimant was subject to homophobic abuse. He was referred to as faggot on a number of occasions by the young people in the Home.

33. Over the next few weeks however the general level of abuse declined as the claimant's relationship with the young people improved. Mr Dow considered that paradoxically the disclosure of the claimant's sexual orientation had assisted this process. It was his view that one of the children in the Home who had a history of being subject to serious physical abuse displayed all the classic symptoms of hypervigilance. Mr Dow believed that this young person had resisted posing trust in the claimant because he was aware that there was something being held back. Once he knew what it was he was prepared to let his guard down sufficiently to allow a relationship to be formed.

34. The claimant had regular formal supervision sessions with Mr Dow as well as the various informal meetings which took place on a regular basis. Notes of these meetings were lodged. The notes of each meeting were input into the respondents' system after the meeting by Mr Dow. They were then shown to the claimant in each case who electronically signed them. There was an opportunity within each supervision for a member of staff to raise any specific issues that were bothering them. The claimant did not raise any issues regarding racial or homophobic abuse during any of these sessions. The first supervision meeting took place on 28 April 2017. At the supervision in April there was a brief discussion regarding training. The claimant had completed his induction training and had also completed some online training modules in dealing with issues such as health and safety, fire safety, first aid etc. It was noted that the claimant was progressing well but had not had opportunity for in-depth house training on paperwork

35. A further supervision hearing took place on 8 June. The note of this was lodged (page 75-78). The issue of racial or homophobic abuse was not raised. There was a general discussion regarding oppositional behaviour from one of the young persons. It was noted the claimant had completed various training modules.

36. A further supervision meeting took place on 1 August 2017. The note of this was lodged (page 80-83). The discussion section 13 on page 82 indicated the claimant was progressing and increasing in confidence. It was noted he had completed his online training. The claimant expressed a concern as regards certain of the other care workers. He did not raise any issue relating to racial or homophobic abuse. Although by this time the claimant was aware that one of his colleagues had disclosed his sexual orientation the claimant does not mention this to Mr Dow.

37. A further supervision session took place on 27 September 2017. The notes of this was lodged (pages 85-88). The discussion at section 13 on page 87 was generally positive. The claimant noted that he had passed his driving licence on 26 September. In the normal course the respondents required all new recruits to have a driving licence. The claimant did not have a driving licence and he was advised when he was recruited that he would require to pass his driving test within his six month probationary period. A driving licence was required for driving around young persons in the care of the respondents as well as transporting a care worker from Home to Home.

38. At the supervision the claimant indicated that he felt he would benefit from additional training in relationship building with younger children. Mr Dow agreed that this was something he would look into. The claimant did not raise any issue relating to racial and or homophobic abuse.

39. Shortly after the claimant passed his driving test an incident occurred where the claimant was asked to drive to Luss around 78 miles away from the Home where he worked. The claimant expressed concern about this saying he was not confident driving such a long distance when he had just passed his test. An arrangement was made that the claimant would be dropped off by another member of staff and would therefore not have to drive.

40. Mr Dow sought to ascertain if there was any specific training which the claimant could receive which dealt with building relationships with younger children. He was told that there wasn't anything.

41. During his period at Fleets the claimant attended refresher SCM training conducted by Mr Dow on two occasions, one in June and one in September. In total, refresher training was offered on five occasions over this period. The claimant only attended two because these were the ones which coincided with his time on duty.

42. From around September onwards the claimant discussed with Mr Dow the possibility of transferring to a different Home. The claimant advised Mr Dow that the reason for this was that he wanted to move to a work location which was closer to where he lived so as to cut down on travel time.

43. On 23 October 2017 the claimant completed a transfer request form which was given to Mr Dow. The claimant stated that he was seeking transfer to a Home known as The Cottage which was closer to where he lived. In the section headed Reason for Transfer the claimant stated

> "Cottage will be easy to travel from my house. Also I would like to work different environment where I can improve my personal skill. I learnt so much from Fleet and has full support from my Line Manager."

Mr Dow completed the box below this stating

> "MD has spoken to myself about his reasons for moving teams. I have watched MD progress through his training and become an accomplished TSW. I have no reason to deny the request and wish MD the best in the new team."

44. At that time the claimant's position was that he had received full support from Mr Dow.

45. Around this time the claimant and other TSWs based at Fleets were all asked to assist the company by doing shifts at other homes. This was due to the fact that Fleets had a full complement of staff whereas some of the other Homes

were short staffed. The claimant found it disruptive to have to move to around various other Homes as indeed did the other staff involved. The claimant was not in any way singled out for treatment in relation to this. The claimant had his final supervision meeting with Mr Dow on 22 November 2017. The record of this was lodged (pages 95-97). During the supervision the claimant complained that he felt that other members of the team were against him and he also complained that he felt he was being deployed to other Homes more than other members of the team. Mr Dow called up the appropriate records on his laptop in front of the claimant and was able to demonstrate to the claimant's satisfaction that in fact the claimant was being deployed to other Homes to the same extent as he was. It is noted (page 95B) that the claimant stated that he had no further concerns other than future deployment.

46. The claimant's move to The Cottage was approved. The claimant specifically told Mr Dow that he would be happy to come back to Fleets to cover shifts if required and, since the Christmas rotas had already been done he was happy to go to Fleets over the Christmas period.

47. At some point in November/December 2017 the claimant obtained another job with a company specialising in adult social care. He began working shifts for this company at the same time as he was working with the respondents. There was some discussion between himself and Mr Dow about which job he would eventually wish to keep on.

48. Over the Christmas period a further disclosure of the claimant's sexuality was made to the young people working at The Cottage. The claimant was chatting with the other colleague on duty about Christmas. During the course of this conversation the colleague referred to the fact that the claimant was living with a male partner. This was overheard by one of the young people in residence. There was no intent on the part of the colleague to disclose the Claimant's sexual orientation. It was done inadvertently.

49. An incident took place on 14 January whilst the claimant was at The Cottage. One of the residents of this Home was a girl Y who the claimant had got to

know when she was earlier at Fleets. She was 16 and was permitted to travel by herself to visit relatives. She was meant to get public transport back. On 14 January she did not do so and overstayed. She was returned by the Police to the Residential Home where she was met by the claimant. In the presence of a Police Officer Y was racially abusive to the claimant. The Police Officer, without reference to the claimant, arrested Y and said she would be charged with racial abuse. She was removed to the police car. Shortly after this one of the policemen came back into the Home and told the claimant and his colleague that Y was saying that she would get the claimant back and that she would be making an allegation of sexual harassment against him.

50. The claimant was concerned about this. He was aware that if the allegation was made then even if the Police and his managers felt there was a possibility that the allegation was malicious it would still be thoroughly investigated. This would involve the Claimant being automatically suspended whilst this was going on and he was concerned about the possible implications for him. The claimant is not a UK national and he was concerned that such an allegation, even if it was unfounded and made maliciously, might impact upon his immigration status and his ability to stay in the UK.

51. A few days subsequent to this Y was again out of the Home and contacted the Home to advise that she had missed her public transport. The claimant was the only driver on duty since the other member of staff did not have a driving licence. He felt constrained to go to pick Y up himself. He felt aggrieved that he was expected to go and pick her up alone given that she had made the allegation.

52. In the event when the claimant arrived Y refused to get in the car with him and she was once again returned by the Police.

53. The manager of The Cottage was Mr Moore. He learned of the racist remark made by Y towards the claimant as it was in the incident report which was completed by the claimant's co-worker. He was unaware of any other incidents of racial abuse until well after the claimant's employment ceased. Following

the incident Mr Moore met with Y and tried to explore matters with her. She indicated to Mr Moore that she was uncomfortable with the claimant but was unable to articulate why. She confirmed that she did not wish to make any complaint against the claimant. Mr Moore formed the view that Y did not harbour any hostility to the claimant but that she sometimes felt intimidated by him. At no time did the claimant express to Mr Moore that he had any concerns about working with Y. He did not make any complaint of racial and or homophobic abuse.

54. Mr Moore at no time had the impression that the abuse the claimant received having a homophobic or racial nature was a particular issue for him. The claimant did not at any time say this to Mr Moore. Mr Moore's impression was that Y had known of the claimant's sexuality from her time at Fleets and could have passed this information on to the other residents at The Cottage even if the additional disclosure had not been made over Christmas.

55. Mr Moore had one supervision meeting with the claimant which took place on 26 January. The note of this was lodged (pages 203-207). There is a note of the areas discussed at Section 13 on page 205. There was a discussion around the fact the claimant had another job in adult disabilities and wished to continue with both jobs. He requested that Mr Moore investigate reducing his hours to eight shifts a month and wished to work fixed shifts. Mr Moore agreed to look into this. There was a discussion around team conflict which was not relevant to any of the matters before the Tribunal. In the section under the heading 'wellbeing' the claimant reported as feeling fine both in his health and emotionally. He raised a concern that he could be an anxious driver at times and found the condition of the cars a challenge. He referred to an intermittent clutch issue with one particular vehicle. This vehicle was in fact off the road for an unrelated matter by this stage and Mr Moore agreed that the clutch issue would be explored and fixed. There was a brief discussion regarding training and it was noted that the claimant had not completed his personal development folder. This was something which was the responsibility of the claimant. There was a discussion around young people and the claimant advised that he felt the responsibility for travelling should be with Y. He did not raise any issue

regarding Y's threat to make malicious allegations against him. Under 'Staff Team' the claimant is recorded as advising that he found them very helpful and that working with one member of the team in particular very positive.

56. At the outset of his employment the claimant had been given a summary of employment terms and a contract of employment. These documents were lodged (pages 52-59). The contract documents contained the following clause:

> "16
>
> 16.1 In the event that you are indebted to the company for any amount the company reserves the right at any time during or in any event on termination of your employment to deduct from your remuneration any monies owed to the company including but not limited to the following:
>
> 16.1.1 The amount of any overpayment of salary, wages, bonus or other benefit;
>
> 16.1.2 The amount of any overpayment of sick pay;
>
> 16.1.3 The amount of any overpayment of holiday pay;
>
> 16.1.4 Outstanding loans and advances;
>
> 16.1.5 Any loss or damage to company property caused by your wilful act, carelessness or negligence;
>
> 16.1.6 Any loss or damage suffered by the company as a result of you terminating your employment without giving or working the required period of notice as set out in paragraph 17 and 18 of the summary;
>
> 16.1.7 Any shortage or deficiency of stock or cash for which you were responsible.
>
> 16.2 In respect of paragraph 16.1.5 above the company shall recover from you by way of deduction the reasonable cost of repair or replacement of such property."

On the last page there is space for the document to be signed on behalf of the company and it bears to be signed by Christine Donaldson, an HR officer with the company on 20 January 2017. There is a section which states "Signed by employee:". This section is blank. Below that there is a section which states "Print name:". The claimant has printed his name in this. The claimant wrote

this himself but it is in block capitals and is not his signature. Under the section for date is written the date 28 March 2017.

57. A further document was lodged on page 60 which is signed by the claimant. This states

> "I hereby confirm that I have read and understood all the company's policies and procedures and realised it is my responsibility to keep up to date with them."

58. In February 2017 the claimant had entered into a training agreement with the respondents where he undertook to repay the company costs of training which he was about to receive or an appropriate percentage of this should he leave their employment within 12 months. This was signed by the claimant (page 99).

59. As noted above as part of his duties the claimant was required to drive various vehicles belonging to the respondents. It was the respondents' practice to advise employees that if they had an accident whilst driving the vehicle and it was their fault then the company would seek to recover the cost of the insurance excess for the repair from them using the general right which they believed they had in terms of Section 16 of the contract. The amount of this excess varied depending on the individual driving record of each driver and in particular how long they had held their licence. Employees were told how much the excess was. Other employees had in the past suffered a deduction when they had had an accident with a vehicle and it had been deemed their fault. At no time was the claimant specifically advised of this clause nor was his attention drawn to the general power contained within Section 16. He was not advised what the amount of the excess was although other individuals were. As it happens, since the claimant was a new driver, the excess on the insurance policy was £650.

60. As part of the general management process, Home managers were from time to time asked to complete a vehicle audit by the respondents' Resources

Manager. Mr Moore had completed such a document on 14 February 2018. This document was lodged (page 144). It is probably as well to set this out in full.

"SA14 SNK – White Dacia Sandero Stepway
Mileage: 96361
Damage: Crack to drivers side front bumper, black trim on drivers side bent out of shape, wheel trims on passenger side missing. 2 internal vent fan open/closers missing, passenger side grip handle cover missing.
Mechanical: Car runs fine however has recently had a Dashboard fault light come on. Not yet booked in for investigation.
NG17 BNF – Blue Dacia Sandero
Mileage: 9779
Damage: None
Mechanical: None
PY66 HNF – White Dacia Sandero
Mileage: unknown due to car in garage
Damage: Car accident, damage to drivers side (Wing, Doors, rear wing, Wing mirror).
Mechanical: Electrics fault light on after car accident.
Car is currently in the garage due to be finished either Wed 14th or Thurs 15th."

61. On the evening of 14 February 2018 the claimant required to use the car for a work related purpose and took it out. The following day the claimant left the Home when his shift finished around 8pm. At around 9.30am he received a text message from one of his colleagues asking him if he had damaged the vehicle the night before. He responded in a text message indicating that he "might have" hit a gate.

62. Mr Moore was on duty at the Home on the morning of 15 February. He was aware that the vehicle in question was parked close by. When one of the claimant's colleagues went out to use the car to take the children to school she immediately came back and reported to Mr Moore that the vehicle was

damaged. Mr Moore then contacted the claimant and there was an exchange of texts. A transcript of this exchange was lodged (pages 118-119). Mr Moore texted first stating

> "Hi MD. If you have bumped the car you are required to do a form on the intranet where the car check forms are. Please do this ASAP. Given that there is no other record of it anywhere else.
> Give me a phone if you aren't sure.
> Ok I think it get caught by the gate when I was trying to get out last night, sorry I should have check in this morning, I will fill the form as soon as I can".

63. At some point that day the claimant spoke to Mr Moore by telephone and Mr Moore advised the claimant that they would discuss the matter and he would show the damage to the claimant.

64. In the event Mr Moore never showed the damage to the claimant. At some point he took photographs of the vehicle which were lodged (pages 140-142). He also arranged for the vehicle to be inspected by a local garage who produced a document entitled "Invoice" which was lodged (page 119a). Although stated to be an invoice the heading under Labour states "+- 3 h depending on repaired panels". It brings out a total cost of repair of £1811.80. the quote is for a new front bumper, 5 panel resprays, 1 basecoat of paint, 1 primer, sandpaper and lubricants and 13.75 hours' labour. As noted above the labour figure has against it "+- 3 h depending on repaired panels". On 2 March 2018 the respondents paid this garage the sum of £1811.80 through their internet banking. An internet banking page showing this payment was lodged (page 119b).

65. The claimant was on holiday for a period after 14 February. On 5 March 2018 he wrote to the respondents. This letter was lodged (pages 120-122).

66. It is as well to set out the letter in full

"Dear Sir/Madam

I write this letter to inform you that I will not be able to carry on working as a full time employee with Common Thread.

It is not my intention to leave my employment in the company. But I do need some time off to recover.

I appreciate that the company initially gave me six months to pass my driving test when I started work with them. I passed my driving test just short of the six months. But the day after I passed my driving test, I was told to drive to Luss which is a distance of 78 miles each way!! Following that I have been told to drive to almost every place that Common Thread has connections. Having had no chance to condition myself to driving conditions on these roads some of which are very busy roads have a great volume of traffic on them. These are not places where a new and inexperienced driver should be told to go. I am and was, expected to drive some of these places during some bad weather with young persons in the car. During that particular drive, the young person started to kick off and create havoc while in the car, causing me to lose my concentration and drive straight into a bus lane. I was picked up on camera and it cost me a fine. Common Thread have not even offered to cover all or even part of my fine. I don't believe it is right that we should be asked to carry these young persons without an escort in the car as well.

One day while working at Fleets, I was severely, racially abused, but not only that I discovered that my sexuality had been disclosed to this young person by another member of staff! After that it seemed that I was a target for this young person and it became a daily practice for them to racially abuse me and continued remarks about my sexuality. I thought at the time that if I had reported it to management there was not much they could do about it. But in the end, the abuse became so bad that it was and still is, playing on my mind.

After careful consideration, I asked for and had a transfer to the Cottage. But again the driving became almost constant. I ended up driving by day and some long drives by night and on many occasions in very bad driving conditions. Because we are told we have a duty of care to these young persons. But what about Common Threads duty of care towards its staff?

Fairly recently, a young female person passed a racist remark towards me in front of a police officer. The officer charged her without any hesitation. She then told the police officer that she will make allegations towards myself. The police told a team member what had happened and cautioned them that I was at risk of these allegations. But even after being told about the risk of allegation from this young person I was still left to go and collect her at 11:00pm on my own and again from a strange place. This again made me feel helpless and insecure. Again where was Common Threads duty of care towards its employees?

I have been in the employ of Common Thread for approximately twelve months. I am feeling insecure, paranoid that something, or an allegation could easily be made against myself. I feel mentally completely stressed out and I feel that I have lost confidence in my ability to carry on.

Due to the above reasons, at this moment in time, I feel that I will not be able to continue working 48 hour shifts and so I respectfully ask you to consider giving me to start with, a month's leave of absence? I will also be contacting my G.P. and asking him to arrange some sort of counselling for me as I feel so traumatised. I feel that I am also losing my confidence to drive.

If after approximately a month, I feel I can come back to work, would you please consider giving me some part time work or shorter shifts? I do not want to give up the job completely, as I feel it might destroy what confidence I have.

I hope you will understand my reasons for asking for this time off and grant me the leave I ask for. Hopefully the time I request will help me to recover from the stressful situation I find myself in and also help me to recover some of my confidence. Thank you."

67. Subsequent to this e-mail the respondents' HR department rang the claimant and advised him to go for counselling. The claimant felt that counselling was not the point and what he was looking for was a safe space within the company. He felt that the respondents' HR department failed to engage with this. On or about 13 March the claimant arranged an appointment with the counselling. Before the first appointment could take place the claimant e-mailed the

respondents on 13 March, the e-mail was lodged (page 123). The claimant stated

"Dear Christine,

Thank you for your email. I did try to explain to you earlier I am not physically sick. But I feel severely mentally stressed. Due to the strenuous driving you made me do and all starting within one day of passing my driving test. While I am aware I have to drive at some time during my working day and sometimes in very bad driving conditions I did not expect to have to do the amount of driving that you have expected of me. In fact, I do not think you should have expected me to drive the distances you gave me to drive the day after I passed my test which was almost three hours each way and to a place I had never been before in my life. I consider that to be very unfair. Due to that and a lot of other driving instances Common Thread forced upon me, my driving confidence has been almost totally destroyed.

Then to add to the above, I was told by the police, that one of the young persons I had to drive, had verbally and racially abused me in my absence, but made the abuse in front of a police officer. All this was directed at myself in the cottage and as you are aware, she was then cautioned by the police and arrested. I was also told and warned by the police that this young person had threatened in the presence of the police officer, that she intended to make other false allegations against my person. I believe that the police made you or some other member of staff aware of it as well. But still, I was sent on my own by Common Thread to pick up this young girl from her mother's house at 11.00pm at night and drive her back to the cottage! Surely, that appears to me to be a failure on Common Thread's part of showing a duty of care towards their staff?

I now feel that I am completely mentally stressed out due to all the driving I was made to do and in addition, the severe racial abuse I get most days from some of the young persons I have to look after.

Due to the above, I do not feel that I am capable of continuing to carry on working for Common Thread. So please accept this letter as my notice to quit my employment with Common Thread due to ill health. I do not

expect to be well enough to work my notice of one month. Therefore you can take this letter as notice to quit with immediate effect. Thank you."

68. Following this the claimant was contacted by the counselling service to advise that they had been told by Common Thread that the claimant was no longer an employee of theirs and they were no longer in a position to provide counselling.

69. The claimant received his pay slip and wages on 16 March. The claimant noted that the respondents had deducted a total of £841.72 in respect of stoppages. £650 of this he discovered was in respect of the excess on the car insurance policy. The balance was in respect of training fees which the claimant accepted that he was due to repay. The claimant sent an e-mail to the respondents on 16 March 2018 remonstrating about this. He said in his e-mail,

> "Next, you have charged me the sum of £650 pounds for or towards insurance costs. Insurance costs for what? The fact that I was told there was a small scratch on the side of the company car, does not mean that I am responsible for it. Every Tom, Dick and Harry drives that car and any member of the staff could have done that damage when driving it. It is fact, I have never filled in any insurance claim form or even actually admitted to causing the damage. Therefore, if you have no proof to accuse me that I caused the damage, you have no right to deduct any money off me. In fact, the point that you accuse me of the damage and try to make me pay for it without any proof is tantamount to libel and injurious to my good name.
>
> ….
>
> In conclusion you have taken these various stoppages without any explanation or proof of your right to do so. Therefore, by doing so, you are confirming the allegations and accusations you make against me. In fact, the company has not even had the decency to write to me to acknowledge the fact that they have accepted my written explanation and notice to quit my employment due to my ill health, which is mainly caused by the pressures put on to me by Common Thread. …"

70. At some point in late March early April the respondents telephoned the claimant's new place of work. The claimant's new employer contacted the claimant and asked him to come and see them. They said they had received a phone call from the respondents who had told them that the claimant was having problems in his employment with them. The claimant was extremely angry and felt that the respondents were trying to stop him working elsewhere. He felt they had absolutely no right to telephone his new employers in this way.

71. On 7 April 2018 the claimant wrote a lengthy letter of grievance to the respondents (pages 130-134). The claimant complained of numerous matters. He stated that it was almost a daily routine that he received racial abuse from the young persons in his care. He claimed to have reported the racial abuse to his manager and not to have been supported. He complained about his sexuality being disclosed. He complained about driving and the instruction he was given to drive to Luss. He complained about being deployed to various houses. He complained about the incident with the young person Y. He complained about having been told to go and pick Y up. He said that the threats of false allegations being made against him built up in his mind and caused him stress. He complained about the deduction from his wages. He stated that he was sure he had not caused the damage to the car as Common Thread had accused him of doing. He noted there was no corroborating evidence and asked why they had not mentioned anything about the damage until after he had handed in his notice. He submitted that Common Thread had not shown him any proof or evidence that he had caused damage to the car or what they claimed. He complained about the telephone call to his new employer.

72. The respondents' Austin Gracie was delegated to deal with the claimant's grievance. There were a series of text messages between Mr Gracie and the claimant which were lodged (pages 135-137). The claimant agreed to meet with Mr Gracie at 9.30am on Thursday 19 April. During the course of the text messages Mr Gracie asked the claimant to advise who would be accompanying him since he made the point that it had to be either a Trade Union representative or work colleague. The claimant confirmed the date but

did not respond to that particular point. He asked Mr Gracie to respond to him by e-mail.

73. Mr Gracie did not respond to the claimant by e-mail or text. Mr Gracie did however unilaterally decide that he would not proceed with the grievance meeting. The claimant turned up for the grievance meeting and found that Mr Gracie was not there.

74. Despite this Mr Gracie then proceeded to deal with the claimant's grievance. Prior to doing this he spoke with other members of the respondents' staff. He produced a document which was lodged (pages 151-154). He did not uphold the grievance. He wrote to the claimant on 2 May 2018 confirming this and setting out his findings at length. The letter was lodged (pages 155-160. None of the points made by the claimant were upheld. On page 159 he states

> "9. You have questioned why £650 was deducted from your wage due to damage to a company car.
> *The company has the authority to make deductions from wages where damage is done to property such as a company car. This is confirmed in para. 21.12 of the Common Thread Handbook which states that if an employee causes damage to a company vehicle then the company will seek costs incurred from the driver: 'The Company reserves the right to hold any employee involved in an accident liable to pay the insurance excess or the cost of repair, whichever is the lesser amount.' This grievance point is not upheld."*

75. It has to be recorded that if this handbook exists it was not lodged at the Tribunal as a documentary production in relation to this case.

76. The claimant was advised of his right of appeal.

77. The claimant submitted an appeal on 3 May 2018. The document was lodged (pages 162-165). Within this document the claimant referred to three incident numbers where he alleged Police had charged children for being racist and

violent towards him. They were crime numbers CR/023851/17, CR/023852/17 and CR/044154/17. For reasons discussed below, the Tribunal received no information as to which incidents these matters related to.

78. The claimant was invited to a grievance appeal meeting which took place on 22 May 2018. It was conducted by Ray Alexander, a member of the respondents' Senior Management Team. A minute of the meeting was lodged (pages 166-171). During the course of the meeting the claimant was shown photographs of the alleged damage to the vehicle. The claimant considered these to be extremely unclear and did not engage with Mr Alexander in relation to them. He maintained his denial of having caused all the damage. On 30 May 2018 Mr Alexander wrote to the claimant confirming that his grievance had not been upheld.

Matters Arising from the Evidence

79. The claimant indicated immediately prior to the commencement of the case that English was not his first language and requested that he be given additional time to answer questions. The Employment Judge asked the claimant if he wished the services of an interpreter and the claimant declined this. In the event the respondents' Advocate was clearly careful to give time to the claimant to answer questions and indeed to further explain any questions which he did not understand. The Tribunal were satisfied in the circumstances that the fact that English was not the claimant's first language did not in any way disadvantage him.

80. The claimant had been represented by solicitors up until the day before the hearing when they resigned agency. On the first day of the hearing the claimant raised the point that a substantial number of documents which he had thought would be in the joint bundle were not there. It would appear that the respondents keep extensive records of what goes on within their residential care homes on a daily basis. There is a day sheet for each young person in their care which lists interactions in a tabulated form and records any incidents which have taken place. Only five such reports were lodged. It has to be said

that none of the five related to days on which there had been incidents relating to that young person. In particular, the sheet for young person Y for 14 February was not lodged although the one for 15 February was. The Tribunal's view was that it would have assisted us greatly if these documents had been lodged. The claimant also indicated that he had been looking for information from the respondents regarding the incidents to which he had given three crime reference numbers. These were listed in his grievance as CR/023851/17, CR/023852/17 and CR/044154/17. The claimant's position was that these were specific instances of racial abuse which had ended up with a young person being charged by the Police. The respondents' position was that one of these related to the incident on 14 February which has already been referred to. They had no information regarding the other two. It was their position that it would have been up to the claimant to specify these incidents in his ET1 and that in the absence of this it was not open to the Tribunal to hear evidence regarding the matter since there was no fair notice.

81. Given that the claimant had been represented up to the day before the hearing the Tribunal accepted that it would have been up to the claimant and those representing him to set out any allegations to which these crime references related in full. Since they had not done so it did not appear to the Tribunal to be a line of evidence which we could allow.

82. The claimant then gave evidence on his own behalf. We considered that he was a credible witness who was genuinely attempting to assist the Tribunal by telling his story as he saw it. It did appear to us however that he was not an accurate historian in a number of respects. He had little idea of dates and sometimes it was difficult to pin down exactly what he was saying about a particular incident and what he was saying by way of general comment. It was the claimant's position that he had not received his full induction training. He accepted that he had received what he said was four days' initial training, three of which was in SCM. In his evidence in chief he categorised SCM as being all about physical techniques for restraining young people however during cross examination he accepted that de-escalation techniques were also taught during this.

83. The claimant maintained his denial that he had caused the damage to the vehicle and persisted in his position that although he may have scratched the gate the respondents were not in any position to demonstrate that he had caused the damage to the vehicle which related to the cost of repair claimed.

84. At the end of the day so far as the allegations of racist abuse and or homophobic abuse were concerned all we could take from the claimant's evidence was that he had been subject to racial and homophobic abuse on an extremely regular basis. It was his position that he had dealt with this in line with his training and that some of that training involved trying to ignore it. He accepted that when he had been asked about this by his various managers he had usually said that this was something he could put up with. We felt he was being honest in his evidence when he said that he had genuinely thought that he could put up with it but that over time the continued abuse wore him down. With regard to training and the respondents' general ethos, we preferred the evidence of Mr Dow, Mr Moore and Ms McFarlane. More will be said about them below but at the end of the day it appeared to us that the respondents do in fact have a very well worked out and comprehensive method of dealing with personal abuse including abuse based on a protected characteristic by the young people in their care. It appeared to us that the claimant was also aware of this at some level. With regard to the deduction of wages we accepted the claimant's evidence that he had been entirely unaware that a deduction would be made until such time as he received his pay slip. We accepted his evidence that he had not been told about the excess in advance. This contrasted with the situation for Mr Moore who confirmed that he had been specifically told about this and had been made aware of the level of excess which would apply to him if he had an accident with a company vehicle. The claimant's evidence was that he had printed his name on the contract of employment. His explanation for not signing was that at that stage he had not finally made up his mind to accept every clause. We did not feel that this was wholly correct and believed that the claimant was trying to take advantage of the fact that, for whatever reason, this contract had not been signed by him. In the respondents' grievance response they referred to a company handbook containing some

more information about the right to deduct an insurance excess however this document was not lodged or referred to in the hearing.

85. We accepted that Mr Alexander was also a credible witness although his evidence was also unreliable in relation to a substantial number of matters where, when pressed, he accepted that he simply did not know what had happened in the claimant's case. We felt that he was giving evidence of a very general nature and he was really unable to go into specifics as to what had happened in the Claimant's case in respect of a number of matters. The claimant had made it clear in the case management process leading up to the hearing that it was no part of his case that the grievance or grievance appeal procedure formed part of his claim. For this reason it has been dealt with fairly shortly in the findings of fact above. The Tribunal did not feel that we were in a position to say much more than this. We accepted Mr Alexander's evidence to the effect that he had shown the photographs of the damaged car to the claimant during the course of the appeal hearing. This appears to be the first time the claimant had seen these. We also accepted Mr Alexander's evidence that the claimant did not wish to engage with him on the point. That having been said, the photographs are singularly uninformative. The copies lodged on the first day of the hearing were so poor that all one could really establish was that they were photographs of a car. Coloured photographs were then lodged on the second day of the hearing but are even less clear as to what damage had occurred. Mr Alexander's own evidence on the point was of no greater assistance since all he had seen was the photographs. It was his impression that there was a dent which cannot be seen in the photographs and was not mentioned by any of those who had seen the damage to the car.

86. Ms McFarlane, Mr Dow and Mr Moore were generally much more impressive witnesses and the Tribunal had no hesitation in accepting their evidence as both credible and reliable. Mr Dow and Mr Moore in particular gave clear cogent evidence as to not only the theoretical approach which the respondents espouse in relation to the care of young people in their charge but also its practical application. We have set this out in full in our findings in fact. We found their evidence to be particularly helpful and at the end of it we had not

only a good appreciation of their take on things but a degree of admiration for the enthusiastic and skilled way they both do a very difficult and sensitive job. Mr Dow was able to give evidence in relation to the training the claimant received, and we preferred his evidence to that of the claimant. As well as being expressed more cogently it was also in accordance with the contemporary documents. We have to say that we were somewhat surprised that the respondents did not document their training process more fully. The respondents also do not appear to have an anti-discrimination or diversity policy. If they do it was not lodged. Though it would appear that the claimant was required to sit a written and practical exam before passing the SCM course there was no documentation lodged in relation to this and indeed there was no sign of even the most basic written training record. With regard to Mr Gracie's grievance meeting, we did not hear evidence from Mr Gracie although a document was lodged in which he alleged that he had a telephone conversation with the claimant when he cancelled the meeting which was due to take place on Thursday morning. The position was that unless the claimant gave him the name of an acceptable person accompanying him he was not prepared to go to the meeting. The Tribunal accepted the claimant's contrary evidence regarding this. It was clear from the exchange of text messages that the claimant had specifically asked that Mr Gracie respond by e-mail so that there would be a record. The respondents appear to have accepted that the claimant did turn up for the meeting which they claimed to have cancelled and the Tribunal thought it was unlikely that the claimant would have done this if Mr Gracie had told him that the meeting was not going ahead.

Issues

87. The claimant claimed that he suffered direct discrimination and harassment in relation to the protected characteristic of race. The claimant also claimed that he had suffered direct discrimination and harassment on the basis of his protected characteristic of sexual orientation. During case management of the claim the claimant's representatives had confirmed that no part of the claim related to the way he had been dealt with following his resignation and in particular it was not part of his claim that the way the grievance process had

been dealt with was tainted by discrimination. The claimant also claimed that he had suffered an unlawful deduction of wages. He did not challenge the deduction from his final pay which had been made in respect of training costs. He did challenge the deduction in respect of the £650 excess. In his further and better particulars he stated

> "The claimant accepts that there was a contractual basis for the deduction. The claimant does not accept that he damaged the car or that the company suffered a loss of £650. The respondents are called upon to provide evidence of the damage and proof that they sustained the loss of £650 …"

88. In their ET3 and further particulars the respondents deny that the abuse claimed by the claimant took place although it has to be said that this line was not pursued in cross examination of the claimant. The respondents' final position appeared to be that if abuse had taken place it had been carried out by third parties (i.e. the young people in the respondents' care) in circumstances where the respondents could not be held liable for this. With regard to the claim of unlawful deduction of wages the respondents' position was that they were authorised to make this deduction in terms of paragraph 16 of the contract of employment.

89. In any event it was the respondents' position that many of the claimant's claims were time barred and in particular the claimant could not rely on anything which had taken place more than three months before the claimant applied for early conciliation to ACAS.

Discussion and Decision

90. The claimant's claims were made under Section 13 and Section 26 of the Equality Act. In both claims the claimant relied on the protected characteristics of race and sexual orientation.

91. Both parties made full submissions. Rather than attempt to repeat these they will be referred to where appropriate in the discussion below.

92. The Tribunal agreed with the respondents' representative that so far as the race discrimination claim was concerned what was being alleged was a lack of action by the respondents rather than that the respondents themselves had been responsible through their agents or employees for any act of race discrimination. The issue which the Tribunal required to determine was essentially whether or not the respondents' failure to act amounted to less favourable treatment of the claimant on grounds of race or whether the respondent's treatment of the claimant amounted to harassment in terms of s26 of the Equality Act The claimant did not specify a particular comparator for his direct discrimination claim however the Tribunal's understanding was that he was relying on a hypothetical comparator who would be someone with the same characteristics as the claimant's save that they were a white British person.

93. As noted above the respondents' representative did not cross examine the claimant and put to him that the incidents of racist abuse which he claimed had not occurred. The Tribunal considered this to be realistic. The Tribunal was satisfied on the basis of the evidence that the claimant had been subject to vile racist abuse by several different young people who he was required to work with. The Tribunal did however accept that these young people were not employees or otherwise agents of the respondents.

94. That having been said there was no doubt that as part of his duties the claimant was required to come into close contact with these young people and it was clearly anticipated by the respondents that the claimant would likely be subject to racist abuse by them. It is clear from the evidence of Ms McFarlane that this was the case.

95. We were referred by the respondents' agent to the recent case of ***Unite the Union v Nailard [2018] EWCA civ 1203***. In this case the Court of Appeal considered the current state of the law relating to the liability of an employer

for discrimination (direct discrimination and harassment) carried out by third parties. Within that case there is a full exposition of the background legislation and in the interests of brevity, it is not repeated here. What is noteworthy is that as well as considering the legislation the Appeal Court also considered the European law dimension and whether the underlying EU Directive required an interpretation of the UK legislation in a certain way. The conclusion of the Court of Appeal was that they approved the reasoning of the EAT and in particular the paragraphs which they have quoted at paragraph 78 of the Court of Appeal judgment. Given that the Court of Appeal have set these paragraphs out in full it is probably as well that they be reproduced here.

> "100. In our judgment section 26 requires the ET to focus upon the conduct of the individual or individuals concerned and ask whether their conduct is associated with the protected characteristic - for example, sex as in this case. It is not enough that an individual has failed to deal with sexual harassment by a third party unless there is something about his own conduct which is related to sex. We reach this conclusion for the following principal reasons.
>
> 101. Firstly, this approach seems to us to accord with the natural meaning of the words in the European and domestic legislation. The first task is to identify the conduct (in which, as in *Conteh*, we would include a settled course of inaction); the next to ask is whether that conduct is related to the protected characteristic. It is not sufficient to ask whether some other, prior, conduct by someone else is related to the protected characteristic.
>
> 102. Secondly, this approach caters for the kind of case which Langstaff J identified in paragraphs 31 and 32 of *Conteh*. If inaction is due to illness or incompetence or some real non-discriminatory constraint upon action one would not naturally say that it was 'related to sex'; but if inaction or a cold shoulder is really indicative of silently taking sides with the perpetrator - even without encouraging the perpetrator - one might well say that it is related to sex. The focus will be on the person against whom the allegation of harassment is made and his conduct or inaction; it will only be if his conduct is related to sex that he will be liable under section

> 26. So long as the ET focuses upon the conduct of the alleged perpetrator himself it will be a matter of fact whether the conduct is related to the protected characteristic.
>
> 103. Thirdly, there is, as far as we can see, no other mechanism in any Directive, or in UK domestic law (other than the provisions now repealed in section 40) for distinguishing those cases where liability ought to be imposed in relation to third party harassment and those where it ought not to be. In the *EOC* case and in *Norouzi* there was discussion of steps or practices which an employer might be required to undertake in order to prevent or mitigate the effect of third party harassment; but there is no basis - no legal test - for such measures to be found in the primary instruments of legislation.
>
> 104. In our judgment the ET did not apply the correct approach. The error is at its clearest in paragraph 4.16 where the ET says that the decision to transfer the Claimant was related to sex 'because of the background of harassment related to sex'. This does not follow: as we have seen, it will depend on an assessment of the conduct of Mr Kavanagh rather than that of the perpetrators. Similarly in paragraph 109 the ET thought that because the complaints were plainly related to sex the inaction of the decision makers must also be related to sex. Again this does not follow."

96. The Court of Appeal goes on to firmly state that in paragraph 99

> "It follows from the foregoing that the repeal in 2013 of sub-sections (2)-(4) of section 40 means that the 2010 Act, for better or for worse, no longer contains any provision making employers liable for failing to protect employees against third party harassment as such, though they may of course remain liable if the proscribed factor forms part of the motivation for their inaction; in substance the position remains as analysed in *Conteh*."

97. It was therefore clear to the Tribunal that in considering both the issue of whether or not the respondents were guilty of direct discrimination and whether

or not they were guilty of harassment we required to look at the conduct of the respondents and not the conduct of the third parties.

98. The Tribunal felt a degree of unease at this however at the end of the day we agreed with the position of the Court of Appeal as stated at Section 101 that the issue of third party liability is a policy decision for Parliament.

99. Looking at the issue of what the respondents did or omitted to do, the Tribunal's view was that despite the failure of the respondents to do what most employers would have done and submit to the Tribunal copies of their diversity policy and/ or their anti-discrimination policy, the respondents did in fact have a cogent well-worked-out strategy for dealing with race discrimination as experienced by the claimant. We accepted on the basis of the evidence that the claimant had been trained in this. The fact that it was a policy and process which applied equally to abuse which was not based on a protected characteristic as to abuse based on a protected characteristic did not in our view detract from the fact that the respondents had a clear and effective theoretical and practical approach to the issue.

100. As mentioned above, it was clear that the claimant had been trained in this approach. It was also clear to us that not only was this a theoretical approach mentioned at training but that both of the managers who gave evidence Mr Dow and Mr Moore utilised this approach on a daily basis. We also accepted the evidence of the respondents' witnesses that given the particularly vulnerable and difficult client group with whom they were dealing the approach they adopted had, in their view, the best chance of achieving the desired result; that the abuse cease.

101. It was clear to us that a key part of this approach was that an employee in the situation of the claimant was expected to deal with matters in accordance with his or her training. We accepted that this is basically what the claimant did. We were also clear that a part of the process was that if an employee in the position of the claimant found that they were unable to deal with matters in accordance with their training or if they were in the words of Mr Dow

"developing an emotional reaction to what was being said", then the appropriate step was for them to raise this with their manager. Not only that but we accepted on the basis of the evidence that managers were pro-active in trying to identify situations where an employee was having difficulty coping with the level of abuse received and then intervening. We were satisfied on the basis of the evidence of Mr Dow and Mr Moore that the respondents provided their managers with a range of interventions including supervision, creative supervision and eventually moving an employee where such a problem was identified.

102. The Tribunal appreciated that much of the motivation for this was to do with ensuring that the therapeutic model which the respondents used was not impaired as it would be if an employee reacted to abuse emotionally rather than in terms of their training. That having been said, it was clear to us that the respondents' genuinely believed that this was also the best way of ensuring that the abuse would cease.

103. It therefore follows from the above that the Tribunal's view was that the approach of the respondents to the abuse which the claimant undoubtedly received was in no way tainted by race.

104. The approach of the EAT in Unite was also to some extent echoed in the case of ***Sheffield City Council v Norouzi [2011] IRLR 897***. This was a case based on the Race Relations Act 1976 and is not directly incomparable since in that case a key part of the argument was that Sheffield City Council were an emanation of the state and accordingly the EU Race Discrimination Directive had direct effect. That case involved a residential social worker at a small Home for troubled children brought a claim on the basis that one of the children was regularly offensive to the claimant on racial grounds. The comment was made in that case that

> "There are environments including prisons, homes for troubled children and even some schools where employees may be subjected to a level of harassment on a prescribed ground which cannot easily be prevented or

> eradicated. In such cases the employer should not too readily be held liable for conduct by third parties which is in truth a hazard of the job and if it is to be held liable on the basis that insufficient steps were taken to protect the employee in question a Tribunal must be prepared to focus on what precisely could have been done but was not done."

105. In that case the Council were held liable since it was found that there were things which they could have done to prevent the abuse but did not. The Tribunal did not accept that this was the case here. As discussed, the Tribunal's view was that in this case the respondents actually had a very well worked out system for dealing with such abuse which was applied. It would have been possible for the matter to have been escalated along the respondents' processes had there been any need to however on the basis of the evidence it appeared clear to us that, whatever the claimant said after the termination of his employment, there was no need for this to be done whilst he was employed. The claimant himself applied the training he had been given which was specifically designed to reduce the abuse. The claimant did not seek to escalate matters by involving his manager. The respondents' management were alert to the issue and did not consider that they needed to escalate matters further along the process.

106. With regard to the homophobic abuse we consider the same argument applies in respect of the general name calling and verbal abuse which we accept the Claimant received.

107. So far as the homophobic abuse is concerned there was a separate element in that we understood the claimant to be claiming that the fact that the respondents' employees had disclosed his sexuality to service users was itself an act of discrimination. The Tribunal did not accept this. We were referred by the respondents to the case of ***Land Registry v Grant*. [2011] ICR 1390** We accepted the respondents' position that this was authority for the proposition that mere disclosure is not enough but one has to look at the motivation behind it. There is no doubt that on occasions "outing" someone as homosexual may amount to direct discrimination and or harassment. In this

case however we were satisfied on the evidence that in each case the disclosure was made accidentally and with absolutely no malicious intent or improper motive. We therefore accepted the respondents' position.

108. Given that our findings were that there were no acts or omissions of the respondents or anyone whose behaviour they were responsible for then the claimant's claim of race discrimination and discrimination on the basis of sexual orientation must fail.

109. We should say that we could quite see the power in the claimant's arguments to the effect that he was clearly subject to quite appalling verbal abuse on the basis of his race and sexuality over a period of months and his concern that this did not appear to be something which in the current circumstances the Tribunal can address. We also felt that the Respondents dealt with the Claimant's grievance was not a model of good employment practice and we could quite see why the Claimant felt sufficiently aggrieved to raise these proceedings. Tying matters back to the statute, however, we did not find that the respondents had treated the Claimant less favourably because of his race or sexual orientation. We did not find that the Respondents had engaged in unwanted conduct relating to his protected characteristics which had the purpose or effect stipulated in s26(1)(b) of the Equality Act.

Unlawful Deduction of Wages

110. Section 13 of the Employment Rights Act 1996 states

> "**13 Right not to suffer unauthorised deductions**
>
> (1) An employer shall not make a deduction from wages of a worker employed by him unless –
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section 'relevant provision', in relation to a worker's contract, means a provision of the contract comprised –

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion."

111. The respondents sought to rely on the provisions of the contract of employment contained in paragraph 16 set out above. They did not specify whether they were relying on this in terms of Section 13(1)(a) or Section 13(1)(b).

112. With regard to any reliance on Section 13(1)(a) the difficulty is that there was no evidence before the Tribunal that the respondents had given the claimant a copy of the contract of employment. The terms of Section 13(2)(a) were therefore not met. So far as Section 13(1)(b) is concerned the Tribunal were not satisfied that a contract where the claimant had printed his name but not signed it amounted to the claimant "signifying in writing" his agreement of consent to the making of the deduction.

113. With regard to Section 13(2)(b) the Tribunal did feel that the claimant fell partly within the terms of this. The respondents had drawn the claimant's attention to the contract. At some stage they had placed it in front of him and he had printed his name. It appeared to us that if paragraph 16 did indeed authorise the deduction in question then the existence of paragraph 16 had been drawn to the attention of the claimant. We were not however satisfied that the effect or the combined effect of paragraph 16 with other provisions had been drawn to the claimant's attention. So far as we can see, where an employer is relying on the terms of s13 (2) (b) the employer has to do more than bring the existence of a paragraph in the contract to an employee's attention. The employer must

also notify the Employee in writing of the effect or combined effect of the provision.

114. In evidence Mr Moore stated that when he started driving company vehicles he had been specifically advised that if he had an accident he would require to pay the insurance excess. There was absolutely no evidence that the claimant had been told this. Mr Moore also gave evidence to the effect that the insurance excess varied from driver to driver. New drivers such as the claimant would have a higher excess than more experienced drivers. Mr Moore indicated that the amount of the excess applicable to him had also been drawn to his attention although he could not remember what it was. It would also appear from the grievance outcome letter from Mr Gracie that Mr Gracie at least was under the impression that there was another document i.e. not paragraph 16 of the contract which authorised a deduction. No such document was provided to the Tribunal and there was no evidence before us that this document had ever been drawn to the claimant's attention.

115. It therefore appeared to the Tribunal that the precise terms of Section 13 were not met in this case. The claimant had been made aware of paragraph 16 which in general terms stated that the respondents had the right to make a deduction of wages in respect of any monies owed to the company. He was not told that the effect of this combined with paragraph 16.2 was that if he damaged a company vehicle he would be responsible for paying the amount of the insurance excess. He was not told what the amount of this excess would be. The Tribunal's view was that the claimant was unaware of the possibility of such a charge since he had had quite a lot of correspondence with the respondents about the issue of driving and we thought it likely that if he had been aware that he was due to pay the excess then he would have raised this in his correspondence.

116. Even if we were wrong in this, the Tribunal's view was that we were not convinced that paragraph 16 did have the effect of authorising the particular deduction in this case. The Tribunal bore in mind the words of his Honour Judge Pugsley in ***Yorkshire Maintenance Company Ltd v Farr***

(EAT0084/09). He cautioned employers against acting as "judge and jury" when requiring an employee to repay certain costs and expenses. He went on to say that such terms should be subject to a considerable degree of scrutiny because of the vast disparity in economic power between employer and employee.

117. In this case paragraph 16 would appear to deal with a situation where the existence of a debt has been established. Paragraph 16 also goes on to give the company the right to recover any loss or damage to company property caused by wilful act, carelessness or negligence and states that amount shall be the "reasonable cost of repair or replacement of such property". It appeared to the Tribunal that before the existence of a debt owed to the company can be established the respondents have to go through a preliminary process of establishing that loss or damage to company property has been caused by the claimant's wilful act, carelessness or negligence and ascertaining the reasonable cost of repair or replacement of such property. The Tribunal were struck by the fact that there was absolutely no procedure whatsoever carried out in this case. The claimant was not advised of the existence of the alleged debt to the respondents until he received his final pay slip by which time the deduction had already been made. The claimant's position was that whilst he readily accepted that he may have "caught the gate", he did not accept that he was responsible for all of the damage to the vehicle. It is also noted that one of the other vehicles owned by the claimant appears to have remained on the road despite having a crack in the bumper. The damage to the vehicle listed in the repair invoice appears to relate to the front, rear and side of the vehicle. It is not clear how they can all come from a single collision with a gate. The claimant was never given the opportunity to look at the vehicle. The photographs which he was shown at the grievance appeal were the same ones shown to the Tribunal and, even after the Tribunal asked for better copies the copies provided were absolutely hopeless in providing any indication as to the damage allegedly done. In all the circumstances the Tribunal's view was that even if the respondents had complied with Section 13 by bringing to the claimant's attention not only the existence of paragraph 16 but the effect, or

combined effect of the Section this would not have been sufficient to authorise the deduction from wages in the present case.

118. The respondents' representative took us to the section in the claimant's further and better particulars where the claimant stated that "The claimant accepts that there was a contractual basis for the deduction." With respect the Tribunal considered that this was not the test we had to apply. The test which the Tribunal had to apply was whether the deduction was authorised in terms of Section 13. Not whether it was authorised by contract. For the reasons given above we decided that it was not. Accordingly, the deduction was unauthorised and the claimant is entitled to repayment of the sum deducted.

Employment Judge: I McFatridge
Date of Judgment: 28 November 2018
Entered in register: 29 November 2018
and copied to parties