EMPLOYMENT TRIBUNALS

Claimant: Miss E Corpuz

Respondents:
1. Hilbre Care Group
2. Hilbre Care Limited
3. Mrs Della McManus t/a Hilbre Care

Heard at: Liverpool **On:** 18-20 July 2018
1-3 April 2019
3 May 2019
(in Chambers)

Before: Employment Judge Horne
Mrs J L Pennie
Mr P Gates

REPRESENTATION:

Claimant: Mr S Redpath, counsel
Respondents: Mr W Lane, solicitor

JUDGMENT

The unanimous judgment of the tribunal is as follows:

1. Hilbre Care Limited is liable for a series of unlawful deductions from the claimant's wages by failing to pay her at the rate of £11.43 per hour for all the work that she did.

2. The claimant was unfairly constructively dismissed by Hilbre Care Limited.

3. Any compensatory award for unfair dismissal will be assessed on the basis that, had the claimant not been constructively dismissed, she would have remained employed by Hilbre Care Limited.

4. Neither respondent discriminated against the claimant because of nationality.

5. Neither respondent harassed the claimant in relation to her nationality.

CASE MANAGEMENT ORDER

1. There will be a hearing in order to determine the claimant's remedy. One day has been allocated to the hearing.

2. Within seven days of the date on which this judgment and order and sent to the parties, they must inform the tribunal of any dates to avoid when listing the remedy hearing.

3. If either party considers that further case management orders are required in relation to the remedy hearing, that party must inform the tribunal of their proposed case management orders within seven days of the date on which this order is sent to the parties.

REASONS

Complaints and Issues

1. By a claim form presented on 30 November 2017, the claimant raised the following complaints:

   1.1. Unlawful deduction from wages, contrary to section 13 of the Employment Rights Act 1996 ("ERA");

   1.2. Unfair constructive dismissal, contrary to sections 94, 95(1)(c) and 98 of ERA;

   1.3. Direct discrimination because of nationality, contrary to sections 13 and 39 of the Equality Act 2010 ("EqA"); and

   1.4. Harassment related to nationality, contrary to sections 26 and 40 of EqA.

<u>Which respondent liable?</u>

2. All these complaints were brought against the respondents in their capacity as the claimant's employer. Hilbre Care Group was nothing more than a trading name and could not have employed the claimant. That left two respondents who could potentially have been the claimant's employer: Mrs Della McManus t/a Hilbre Care Group or Hilbre Care Limited. The tribunal had to decide which of those two respondents employed the claimant at the relevant time.

3. One complicating factor in this case was the fact that, part-way through the claimant's employment, the business of running two of the care homes within the Group was taken over by Ryding Care Services Limited. The employment of a number of members of staff transferred to that company under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") at that time. At the outset of the hearing, however, the parties announced that it was common ground that the claimant's employment had not transferred to that company.

4. It was common ground that, at the outset of the claimant's employment, her employer was Mrs McManus as a sole trader. The respondents' contention was that, by the time the claimant resigned, her employment had transferred to Hilbre Care Limited. In his final submissions on the claimant's behalf, Mr Redpath told

us that this argument was not open to the respondents because of the concession that no TUPE transfer had taken place. We disagree. The limit of the respondents' concession was that there had been no transfer to Ryding Care Services Limited. The question of whether there had been a transfer to Hilbre Care Limited was still very much in issue. We considered whether the claimant might have been labouring under a misunderstanding of the issues in the case which might have affected the way in which her counsel approached the evidence during the course of the hearing. We concluded that, if there was any such misunderstanding, the claimant could not have been put to any disadvantage by it. The claimant relied on a large volume of documents related to the identity of her employer. Mr Redpath cross-examined Mrs McManus at length, not just on the question of who the employer was in general terms, but on who the employer was on key dates during the history of the claimant's employment.

Unlawful Deduction from Wages

5. The claimant's primary case was that she was contractually entitled to be paid at £11.43 per hour. On every occasion when she was not paid at that rate the respondents made a deduction from her wages. It was not contended by the respondents that they were authorised to make such deductions.

6. On the claimant's main case, the questions for the tribunal were:

   6.1. Was the claimant contractually entitled to £11.43 per hour?

   6.2. If originally entitled to £11.43 per hour, did the claimant expressly or by conduct agree to vary her rate of pay?

   6.3. Was the claimant entitled to an hourly rate for sleep-in shifts?

   6.4. At what rate was the claimant actually paid?

7. The respondents accepted that, if the claimant was entitled to be paid at £11.43 for her basic hours, she was entitled to be paid at the same rate for her annual leave.

8. When the tribunal came to deliberate on these issues, it occurred to the tribunal that there may be an additional issue about which the parties had not had a full opportunity to make representations. The issue was as follows:

   > "If the claimant, by her conduct in remaining employed by the respondent, impliedly varied her contract of employment so as to be employed in the role of Senior Carer at an hourly rate of £7.80 or £8.50, was such variation ineffective because the claimant's vulnerable immigration status meant that she was acting under duress?"

9. The tribunal informed the parties that this was an issue that the tribunal was proposing to address in its judgment. Following discussion, the parties agreed to provide brief submissions on this issue in writing. In due course both parties provided helpful written submissions which we gratefully read and took into account.

10. If the claimant failed on her primary case, the claimant would have advanced an alternative contention which would have raised further issues as to whether the claimant had been underpaid. As it was, we found it unnecessary to determine these issues.

Unfair Constructive Dismissal

11. It was common ground that the claimant resigned her employment by letter dated 10 July 2017.

12. The first issue for the tribunal was whether or not the respondents had fundamentally breached the claimant's contract entitling her to resign. The claimant relied on two alleged express terms and one implied term of her contract. The alleged express terms were:

    12.1. The express term that she would be paid at £11.43 per hour; it was alleged that in June 2017 the respondents breached that term by telling her that she was employed as a Senior Carer and paying her at less than £11.43 per hour.

    12.2. The express term that she was employed in the role of Trainee Manager; it is alleged that this term was breached on the same occasion by forcing her to sign a form saying that she was a Senior Carer and demoting her.

13. In relation to the express terms of the contract, the issues for the tribunal were:

    13.1. Were the alleged express terms part of the claimant's contract at the time of the alleged breach?

    13.2. Did the claimant resign in response to the breach?

    13.3. Did she affirm the contract before resigning?

14. The implied term on which the claimant relied is commonly known as the implied term of trust and confidence. The claimant contended that the respondents breached that term in the following ways:

    14.1. Failing to support the claimant’s application for a visa; and

    14.2. Threatening to withdraw that support.

15. In relation to the implied term, the issues were:

    15.1. Did the respondents conduct themselves as alleged?

    15.2. Did they have reasonable and proper cause?

    15.3. Was the conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence?

    15.4. Did the claimant resign in response to the breach?

    15.5. Did the claimant affirm the contract before resigning?

16. In the event that the claimant was found to have been constructively dismissed by breach of the implied term, the respondents sought to argue that the constructive dismissal was fair. In order to do so, the respondents would have to prove the sole or principal reason for fundamentally breaching the contract. It was their case that the sole or main reason was:

    16.1. The fact that continuing to employ the claimant would contravene an enactment, namely sections 15 and 21 of the Immigration, Asylum and National Act 2006; and

16.2. Alternatively, the respondents' genuine belief that the claimant's continued employment would be unlawful.

17. The issues for the tribunal at this stage were:

17.1. Could the respondents prove that either of these reasons was the sole or principal reason for the claimant's constructive dismissal?

17.2. Was that reason one of the potentially fair reasons listed in section 98(1) or 98(2) of ERA?

17.3. If so, did the respondents act reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant?

18. If there was an unfair constructive dismissal (regardless of the term allegedly breached), a further issue arose in relation to compensation. In an imaginary world in which the respondent had not constructively dismissed the claimant, would, or might, the claimant's employment have terminated in any event, owing to:

18.1. the claimant resigning in circumstances that would not have amounted to a constructive dismissal; or

18.2. the respondent fairly dismissing the claimant because of its belief that the claimant no longer had the right to work in the United Kingdom?

Direct discrimination because of nationality

19. The claimant is a national of the Philippines. She alleged one ongoing act of less favourable treatment. The alleged less favourable treatment was set out in a case management order sent to the parties on 27 July 2018. The relevant paragraph stated that the alleged less favourable treatment was "the failure to pay the claimant at £11.43 per hour". During final submissions, it appeared that the allegation of less favourable treatment was actually subtly different. The claimant was not complaining about the actual rate of pay, but rather that it was less than the amount that was stated in her contract. Whichever way she cast her allegation of less favourable treatment, it was her case that the reason for that treatment was because she was of Filipino nationality. The tribunal had to decide:

19.1. Was the claimant paid at less than her contractual hourly rate?

19.2. If so, was it because she was Filipino?

19.3. Or was it for some other reasons, such as being employed as a Senior Carer?

Harassment

20. The claimant alleged a continuing course of unwanted conduct, namely the failure to pay the claimant at £11.43 per hour (or failure to pay her according to the terms of her contract). That conduct was said to be related to her nationality in precisely the same way as for direct discrimination, namely that she was underpaid because she was Filipino nationality. The tribunal had to determine whether or not that was the reason.

21. In addition, the tribunal had to decide:

21.1. Whether the hourly rate of less than £11.43 was unwanted; and

21.2. Whether it had the purpose or effect described in section 26 of EqA.

22. At the start of the hearing, the claimant's counsel was asked whether there were any possible findings of fact that could support a conclusion that the complaint of harassment was well-founded, but that the direct discrimination complaint was not well-founded. The tribunal never received an answer to that question, despite having reminded the parties of it in its written case management order.

Evidence

23. A large number of documents were put before the tribunal at various stages and in differing formats. First, we were given a joint bundle running to 195 pages. Part-way through the hearing, the claimant provided a supplemental bundle of 274 pages consisting of Home Office guidance and documents relevant to the identity of her employer. When the hearing resumed part-heard, the claimant introduced a further lever-arch file, almost exclusively occupied by two further versions of the Home Office guidance. Following a dispute about whether they should be admitted into evidence, we agreed to consider them. As it turned out, the claimant did not draw our attention to any of the pages in this file except for one Co-operative Bank paying in slip.

24. The respondent also introduced further documents. At the start of the part-heard hearing, the respondent sought to rely on holiday request forms that had not previously been disclosed. Having heard the parties' arguments, we decided to admit these forms into evidence.

25. All of our contentious decisions about the admissibility of documents were followed by brief oral reasons. Written reasons for these decisions will not be provided unless a party makes a separate request in writing within 14 days of the date on which this Judgment is sent to the parties.

26. The claimant gave oral evidence on her own behalf and was recalled to answer questions about newly-disclosed documents. She also called Mr Dorel Cosma and Mr David Jones as witnesses. We began to hear oral evidence from Mr Roseller Soriano remotely via a Skype connection. This exercise was beset with problems of one kind or another. In the end the parties agreed that neither of them would rely on his witness statement or on anything he told us over the video link.

27. In addition, the claimant relied on the written witness statement of Ms Rebecca Call, who did not attend to give oral evidence. Because her evidence had not been tested in cross examination, we were unable to put significant weight on the contents of her statement.

28. The respondents called four witnesses. These were Mrs McManus, Ms Macalipay, Mrs Williams and Ms Ryding. All of these witnesses confirmed the truth of their written statements and answered questions.

29. This is a convenient opportunity for us to record our impressions of some of the witnesses from whom we heard:

29.1. The claimant gave evidence in an apparently believable manner. We did, however, approach some parts of her evidence with care. In particular:

29.1.1. We were cautious about her evidence in relation to her reasons for resigning. It appeared to us that those reasons, as set out in her

written claim and witness statement, could not have been present in her mind at the time she actually made her decision to resign.

29.1.2. At times the claimant was visibly tearful, especially when describing her fear of losing her right to work in the United Kingdom. We took her upset to be genuine, but had to remind ourselves not to be swayed by the claimant's emotions when attempting to find the facts of the case.

29.1.3. The claimant's witness statement described some remarks made by managers about Filipino workers. None of this evidence was put to any of the respondents' witnesses and we were unable to accept it.

29.2. Mr Cosma and Mr Jones were straightforward witnesses whose evidence we had little difficulty in accepting.

29.3. We found Mrs McManus to be an unsatisfactory witness, for a number of reasons:

29.3.1. In her oral evidence she told us that the claimant had not been competent in her role as a Senior Carer. That assertion was inconsistent with the claimant's supervision records.

29.3.2. Her witness statement stated that her business "became a limited company in July 2016". But in her supplemental witness statement, Mrs McManus gave evidence that Hilbre Care Limited started owning and operating the business in August 2014. The company was in fact incorporated on 30 October 2012 and was held out to employees and outside agencies as running the business from early 2015 onwards.

29.3.3. On 14 September 2015, Hilbre Care Limited's Board of Directors approved the company's accounts which were then signed by Mrs McManus. Those accounts showed that in the financial year ending in 2015, the company was dormant with unchanged assets of £100. Those accounts were submitted to Companies House. Yet, during the same financial year, Mrs McManus was holding out Hilbre Care Limited to the Care Quality Commission as the registered provider for the care homes. She was also telling the Home Office at that time that Hilbre Care Limited was the claimant's employer for UK visa purposes. She must have been lying to at least one of these agencies.

29.3.4. We also thought that one part of Mrs McManus' evidence, if true, would have involved an astonishing coincidence. See paragraph 56 below.

29.4. Mrs Williams gave evidence in an apparently believable manner, but, again, we had to be careful when comparing what she was telling us with what Mrs McManus was telling the Home Office.

29.5. Ms Macalipay gave apparently straightforward evidence about what the claimant's day-to-day duties were.

29.6. We saw no obvious difficulties with the evidence of Ms Ryding. We were able to rely substantially on what she told us.

Facts

30. For many years, Mrs McManus has been in the business of running Care Homes. She owns a number of properties from which various residential care services are provided. These include Hilbre House, Hilbre Court, Hilbre Lodge, Hilbre Care Hotel and Hilbre Manor. For much of the time, her businesses have been supported by Mrs McManus' assistant, Mrs Williams, based at Hilbre House.

31. Historically, Mrs McManus owned the entire business as a sole trader. At some point Ms McManus took the decision to scale down her personal involvement in the running of the business. Hilbre Care Limited was incorporated on 30 October 2012. From about 2014 onwards, Mrs McManus started holding out Hilbre Care Limited to various agencies as being responsible for the business. From 9 January 2015, employees' payslips bore the name of Hilbre Care Limited. On 2 February 2015, the Care Quality Commission ("CQC") issued a Certificate of Registration showing Hilbre Care Limited as the registered provider for four of the properties. By 2 September 2014, the induction checklist for new employees bore the name Hilbre Care Limited. By no later than 25 March 2015, holiday request forms were printed in the name of "Hilbre Care Limited". Throughout the transition from sole trader to limited company, the business remained substantially the same. There is no evidence of any significant change in the identity of the residents or their source of funding. Other than the part-transfer of the business to Ryding Care Services Limited (see below), there were no significant changes in staffing.

32. The respondents' management structure was not entirely clear. As is common in the sector, each home had a number of Carers and Senior Carers. Each home had a registered manager as required by the CQC. There was also a layer of middle management, with various roles being described as "manager". These roles included End of Life Manager and Infection Control Manager. The role holders were British and worked part-time. They were paid at £10 per hour. Mrs McManus would have preferred managers to work full-time but found it difficult to recruit full-time workers at that rate of pay. Managers worked daytime hours and were not rostered to work shifts as Carers and Senior Carers were.

33. For the whole of the time with which this claim is concerned, there has been strict regulation of employers seeking to recruit workers from outside the European Union. Non-EU nationals must have the right to work. One of the ways in which this right is bestowed on workers from overseas is by the granting of a "Tier 2" visa. It is unnecessary to set out the full statutory requirements of the Tier 2 scheme. In a nutshell, employers may sponsor a skilled worker by obtaining a Certificate of Sponsorship for a particular role for a defined period. The employer must satisfy the Home Office that it has been unable to recruit local workers to the role. Only certain defined categories of role are covered within the scheme. Certificates will not be issued unless the employer commits to paying the role holder a prescribed minimum salary. Once the Certificate of Sponsorship has been granted, it remains valid for a period of a few weeks to enable the employer to recruit an individual Tier 2 migrant to the role. If the recruitment is successful, the employee will be issued with a Tier 2 visa. If that visa expires, the employee must apply for a new visa which will require a new Certificate of Sponsorship. If, during the period of the visa, the employee ceases to be employed by the sponsoring employer, they have a period of six weeks in which to find a new sponsor, following which they lose the right to remain in the United Kingdom. A

worker who has been in the United Kingdom for five years on a Tier 2 visa will gain the right to apply for indefinite leave to remain.

34. For approximately 18 years, Mrs McManus and/or her company have recruited employees from outside the European Union. Mrs McManus held a sponsorship licence and was registered with the Home Office as a highly trusted sponsor. According to the certificate, the date of registration was 15 August 2014.

35. In April 2014, the respondent prepared a written job description for the role of Trainee Manager. It was headed "Hilbre Care Limited" and provided that the role holder would report to the director of that company. Amongst the responsibilities set out in the job description were "the employment and rostering of sufficient staff with the appropriate skills in agreement with the owner". The role holder's principal accountabilities included "Maintains good working relationship with the multidisciplinary team" and "Ensures all residents at the Court are registered for a DOLS (Deputy of Liberty Standard) in accordance with the Mental Capacity Act…"

36. On 9 June 2014, Hilbre Care Limited obtained a Certificate of Sponsorship from the Home Office. The certificate was for the role of "Health and Social Care Manager". It stated that gross salary for the role would be £21,700.

37. The claimant is a national of the Philippines. She has a nursing qualification from the Philippines and a BSc in Professional Practice and Health and Social Care from the University of Winchester in the United Kingdom. After leaving Winchester University, the claimant worked in a number of hospitals and a Care Home in the United Kingdom.

38. In June 2014, the claimant saw an advertisement for the role of Health and Social Care Manager with "Hilbre Care Group". According to the advertisement, the role holder would be required to promote policies and procedures with particular emphasis on risk management. The successful candidate would use leadership skills to ensure services were delivered in accordance with the CQC's regulatory standards, and would liaise with medical professionals to ensure that service users received the best treatment. The role holder was required to manage staff recruitment, training and appraisals and to plan and budget in order to take the business forward.

39. On 10 June 2014, the claimant met Mrs McManus in London for an interview. We prefer the claimant's account of what happened at this interview to that given by Mrs McManus. We find that, during this interview, Mrs McManus told the claimant that she was looking for Filipinos like her to work hard and stay for an extended period of time at Hilbre. Mrs McManus promised to sponsor the claimant so that she could acquire a work permit visa until she was eligible to apply for "residency" in the United Kingdom. The word "residency" would have been understood by all concerned to mean indefinite leave to remain in the United Kingdom. Contrary to Mrs McManus' evidence, she did not tell the claimant that she would initially be employed as a Senior Carer.

40. We find that Mrs McManus' promise would have been reasonably understood to mean that she was not just going to sponsor the claimant for the duration of her existing visa, but for long enough to enable the claimant to be eligible to apply for indefinite leave.

41. A letter was written to the claimant's previous employer requesting a reference. The letter was written in the name of Hilbre Care Limited.

42. The claimant started working for Mrs McManus on 1 September 2014. The following day she was given an induction by Debbie Allison and Angela Griffiths. They populated the induction form which the claimant then initialled. On the template form there was a space next to the word “post”. In that space, somebody – not the claimant – wrote the word “carer”. This form is evidence to us that managers regarded the claimant as being employed as a Carer and not a manager at that time. It is unclear whether or not, at the induction, the claimant was given a written job description. The claimant has no recollection of having been given the job description for either the Trainee Manager or the Senior Carer position. On balance we find that the claimant probably was given a job description, but we cannot determine which it was.

43. On 3 September 2014, Mrs McManus signed a written statement of terms of the claimant's employment. Shortly afterwards, the document was given to the claimant. It was headed, “Employment Contract”. The employer was named as “Hilbre Care Group”. The claimant’s job title was described as “Trainee Care Home Manager”. Under the heading “Salary” the document stated, “The employer shall pay the employee an hourly rate of £11.43 as agreed by mutual agreement.” According to the document, the claimant's hours were “40 over seven days inclusive of the occasional night shift, although the management may ask the employee to do extra hours if the business requires”. Paragraph 5 of the statement was headed “Probation” and provided for an initial 12-week probationary period.

44. The statement of terms made no express mention of sleep-in shifts and did not give any indication of how the claimant might be paid for them. There was nothing in the document to suggest that the claimant might be paid at less than £11.43 per hour for any of the work that she did.

45. On 5 September 2014 the claimant signed the statement of terms. Just preceding her signature was the following declaration:

> “I understand that this contract contains the terms and conditions of my employment and I agree to be bound by those terms and conditions…”

46. In her oral evidence, Mrs McManus told us that she doubted the authenticity of the statement of terms. She told us that such a document would only have been sent to the claimant after three months on completion of her probationary period. We reject this evidence. First, the document appears to bear Mrs McManus’ signature next to a very clear date. Second, Mrs McManus’ evidence is inconsistent with her assertion that the claimant failed her probationary period. Had Mrs McManus waited three months before issuing a contract, she would have known that the claimant had failed her probation, and would scarcely have wanted to issue her with a statement of terms that confirmed that her role was Trainee Manager. Indeed, we wonder why there was any reference to a probationary period at all if the statement of terms was only intended to be issued once the probationary period had been completed. Moreover, Mrs McManus’ evidence does not explain why, if the claimant has manufactured a statement of terms, the respondents do not have a copy of the genuine version that it gave to the claimant. The respondents would have had a powerful reason to want to

keep a copy of such a document, because they would have needed to produce it for inspection by the Home Office.

47. The claimant immediately started doing the day-to-day work of a Senior Carer. She was placed on a rota with routine night shifts and sleep-in shifts. She did not take on the role of a manager. She was not given the responsibilities set out in either the April 2014 Trainee Manager job description or in the detailed description of the role in the Certificate of Sponsorship. She reported to a number of managers throughout her employment but did not report to the registered manager Mrs McManus. She did not draw up any staff rotas. She had no involvement in staff recruitment, supervision or training and did no budgeting. Although she did from time to time speak to general practitioners and other health professionals, those conversations were essentially reactive. Whilst the claimant may have "collaborated with the DOLS team" as she put it in her witness statement, she did not have responsibility for ensuring that all residents were registered for a DOLS standard.

48. On 19 September 2014, the claimant received her first pay slip. At around the same time, she received a direct transfer of wages into her bank account from Mrs McManus' business bank account. She noticed that she was not being paid at £11.43 per hour. Soon afterwards, she met with Mrs Williams and asked her why she was not being paid at that rate. Mrs Williams told the claimant that she would need to take the issue up with Mrs McManus. The claimant was scared to raise it with Mrs McManus and did not do so. This can only have been because the claimant believed that Mrs McManus was deliberately paying her less than the amount stated in her contract. If the claimant had thought the discrepancy was due to an innocent administrative error, she would not have been afraid to bring the error to Mrs McManus' attention. As it was, she was fearful that if she complained about her pay to Mrs McManus, she might lose her job and her right to remain in the United Kingdom.

49. Part of the claimant's work included night shifts during which she was permitted to sleep. She was paid a separate allowance for those shifts that was substantially less than £11.43 per hour. There was no express agreement between the claimant and the respondents about what the rate for those shifts should be.

50. In December 2014, the claimant was told that she had passed her probation.

51. From April 2015 the claimant started to complete holiday request forms for annual leave. Parts of the form were completed by the claimant in her own handwriting. Other parts were completed by the relevant manager afterwards. These later-filled sections included the claimant's job title, in which they wrote, "Senior Carer".

52. On 7 May 2015, Mrs Williams on behalf of Hilbre Care Limited wrote to the American Embassy in support of the claimant's intended application for a visa to enter the United States. The letter referred to the claimant as a "Deputy Care Home Manager at Hilbre Care Limited". She wrote a similar letter on 12 November 2015.

53. On 27 July 2015, the United Kingdom Visa Inspectorate ("UKVI") carried out an unannounced inspection at the respondents' premises. The inspectors examined records relating to 13 sponsored migrants. Four of these, according to the

respondents' records, were employed as Trainee Managers. One such employee was the claimant. Two of the others were Filipino nationals. The fourth was a national of Sri Lanka. All four of the "Trainee Managers" had Certificates of Sponsorship showing that they were paid at the rate of £11.43 per hour. According to their payslips, however, they were only actually being paid at the rate of £6.50. The inspectors asked Mrs McManus about these discrepancies and others. The gist of Mrs McManus' explanation at the time was that she had not properly understood the Home Office guidance.

54. Following the inspection, the UKVI decided to suspend the licence of Hilbre Care Limited to act as a sponsor. Dialogue remained open and Mrs McManus provided further information to the UKVI which eventually satisfied them. We do not know what information exactly was provided, but we do know that by letter dated 9 December 2015, UKVI informed Mrs McManus that the sponsor licence of Hilbre Care Limited had been reinstated.

55. In the meantime, the claimant continued to receive regular pay slips. Up to November 2015, her payslips showed that she was continuing to be paid at £6.50 per hour. Then, on about 13 November 2015, a curious thing happened. She was paid at the hourly rate of £11.43 for that month's work and her pay slip recorded that fact. The following month, four days after Hilbre Care Limited's sponsorship licence had been reinstated, the claimant's rate of pay was reduced to £8.50.

56. In her oral evidence, Mrs McManus was asked about the fluctuation in the claimant's pay. Her explanation was that, on 13 November 2015, the claimant had accidentally been overpaid as a result of an error by her accountants. She did not explain what had caused her accountants to make that mistake. Nor could she explain why her accountants had accidentally made the claimant's payslip look as if she was being paid the amount required to be paid under the Certificate of Sponsorship. Nor was there any explanation of the extraordinarily convenient timing of the error. If we were to believe Mrs McManus, this error, which was only made on only one occasion, just happened to fall at a time when Mrs McManus was submitting information to UKVI with a view to having her sponsorship licence restored. To our minds this was a coincidence too far. Much more likely in our view was that Mrs McManus was not telling us the truth.

57. Mrs McManus and Mrs Williams were undoubtedly bruised by the experience of the UKVI inspection. Leaving aside the question of whether Mrs McManus had brought these difficulties on herself, we accept her evidence that at some time in 2016 she decided that sponsoring Tier 2 migrants was more trouble than it was worth. Whilst she was content for Hilbre Care Limited to retain its sponsorship licence and to continue employing Tier 2 employees on their existing visas, she decided not apply for any new Certificates of Sponsorship. We are not entirely sure when she reached this decision, but it is common ground that at some point in 2016 the claimant was informed of Mrs McManus' intention. This left the claimant in a difficult position. It meant that, when her visa expired on 13 July 2017, she would not be able to remain employed within the Hilbre Care business. She would need to find a new Tier 2 sponsor/employer, or acquire the right to remain in the UK in some other way. Otherwise she would have to return to the Philippines.

58. In January 2016, the claimant spoke to Mr David Jones, an official of the Unison trade union. She told him that she was being paid less than the amount apparently due to her under the terms of her contract. The claimant and Mr Jones met in a café on 8 February 2016. Mr Jones advised the claimant to seek an answer in writing from her employer as to why she had not been paid her correct wages. His advice was that the next step should be a meeting with himself and a representative from the respondents.

59. On 16 June 2016, Mrs McManus ceased to be a director of Hilbre Care Limited. Her daughter was appointed as director in her place. At about the same time, Mrs McManus stopped paying the claimant's wages from her own business bank account and started paying them from the bank account in the name of Hilbre Care Limited. The company then filed a further return to Companies House signed by Mrs McManus' daughter on 29 November 2016. The financial statements purported to show that Hilbre Care Limited had been dormant in the year ended 31 March 2016 and had unchanged assets of £100.00.

60. On 5 July 2016, the claimant spoke to Mrs McManus and asked her for a meeting to discuss her wages. Mrs McManus told the claimant that she did not want anything put in writing. The meeting never took place.

61. In parallel with these developments, and as part of Mrs McManus' gradual move towards retirement, she allowed Ms Joanne Ryding, one of her managers, effectively to take over part of the business. Ryding Care Services Limited was incorporated and, in July 2016, that company acquired the business of operating Hilbre Lodge and Hilbre Court. The company rented the two properties from Mrs McManus and paid her a consultancy fee so that she would remain as Registered Manager. Most of the employees who worked at those homes had their employment transferred under TUPE to Ms Ryding's company. The exception were the Tier 2 migrant workers. They could not lawfully be employed by Ryding Care Services Limited. They therefore remained employed by their existing employer who provided their services to work in Ms Ryding's two Care Homes. One of these employees was the claimant, who at that time was working at Hilbre Court.

62. On 31 January 2017, the claimant met with Ms Ryding for a supervision meeting. This was the correct reporting line for a Senior Carer, but not for a Trainee Manager who would report to the director and Registered Manager, both of whom were Mrs McManus.

63. On 31 October 2016, Mrs McManus' daughter wrote a letter on behalf of Hilbre Care Limited, again confirming that the claimant was employed as a Deputy Care Home Manager.

64. On 31 January 2017, Mrs Williams a further letter on behalf of Hilbre Care Limited confirming that the claimant was employed as a Deputy Care Home Manager. By this time, both the claimant and Mrs Williams knew that the claimant was not employed as a Deputy Care Home Manager. The claimant had never been informed that her role had progressed beyond trainee.

65. During 2017, the claimant became increasingly concerned about the future of her immigration status. Her visa was due to expire on 13 July 2017. We accept her evidence that from time to time she asked Mrs McManus whether the business would continue to sponsor her. Although there is no evidence of any specific

request at any specific time, we find it unlikely that the claimant would simply have allowed the matter to drift. When it became clear that the respondents were not going to sponsor her, the claimant paid £2,000 for a fast-tracker marriage visa so as to enable her to continue living and working in the UK. It is unlikely that she would have volunteered to pay this money without first checking whether her employer would secure her immigration status for free. It also accords with the claimant's evidence that from time to time she was given vague reassurances that her sponsorship would be renewed.

66. On 14 June 2017, at the claimant's request, Ms Ryding signed a letter in support of an intended application for a further visa for the claimant. The letter spoke in glowing terms of the claimant's employment as a "Trainee Manager". It was written on behalf of Hilbre Care Limited. The letter also commented on the claimant's relationship with her partner. This part of the letter would have been unnecessary unless the claimant had been intending as at 14 June 2017 to apply for a marriage visa.

67. On 15 June 2017, the claimant spoke with Mrs McManus. By this time she had realised that the respondents were not going to sponsor her for a renewed Tier 2 visa. She informed Mrs McManus that she had decided to leave her employment. The same day, Mrs McManus wrote a further letter in support of the claimant's marriage visa application. Again, the letter was written in the name of Hilbre Care Limited and described the claimant's post as "Trainee Manager". It stated that the claimant was "exceeding talented and always willing to go the extra mile".

68. On 20 June 2017, the claimant was approached by a member of senior staff to whom we will refer as "Ms A". We accept the claimant's evidence that, during this conversation, Ms A presented the claimant with pre-written supervision record forms relating to the supervisions that had taken place on 31 January 2017, 11 April 2017 and 20 June 2017 (the day of the claimant's conversation with Ms A). The supervision records all spoke positively about the claimant's performance in her role. There was no hint of the concerns about her abilities to fulfil the duties of a Senior Carer that Mrs McManus describes to us in her oral evidence. Ms A asked the claimant to sign these documents, which the claimant did. The 20 June 2017 document began by stating that the claimant "continues with her duties as Senior Care Assistant". Although the claimant knew full well that she was not doing the duties of a manager, it had never been spelled out to the claimant until that moment that that was her role title was actually Senior Carer.

69. On 10 July 2017, the claimant wrote to Mrs McManus and Ms Riding, resigning her employment. The opening paragraph of the letter read:

> "My visa runs out on 13 July 2017. When I first came to work for you I informed you of this. Since then I have on several occasions reminded you that my visa was running out. You gave me verbal reassurances that you would renew my visa and that it would not be a problem."

70. The letter did not mention any issues with her pay or any offensive, insulting, intimidating or otherwise unpleasant environment that had been created for whilst working for the respondents. She did not mention any disquiet at having been asked to sign the appraisal documents retrospectively, or at having been informed that her role title was Senior Carer. In our view this is because she had

known for a long time that she was not doing the duties of a manager or a trainee manager.

71. On 11 October 2017, the claimant submitted a formal grievance to Ms Riding. Amongst other things, her grievance complained of the respondents' failure to pay the claimant at the hourly rate of £11.43. Mrs McManus replied by letter dated 16 October 2017. The letter did not suggest that the claimant had been initially employed as a senior carer. Rather, it asserted that the claimant's initial job role had been Care Home Manager and that the rate of £11.43 per hour reflected the responsibilities of that role. Mrs McManus' position as stated in the letter was that the claimant had been allowed to "stay on as a Senior Carer" following her failure to impress them during her probationary period.

72. We are now in a position to make a finding about the claimant's reasons for resigning. She did not resign because of her pay or her role title or because of the appraisal documents. Her reason for resigning was because the respondent had not supported her to renew her visa despite assurances that they would do so.

73. Having considered all the facts, we are also able to make a positive finding about the respondents' motivations concerning the claimant's pay. First, the reason why the claimant was paid less than £11.43 per hour. This was nothing to do with the claimant's nationality. British managers were only paid at £10 per hour. The reason for her rate of pay was because Mrs McManus never truly considered the claimant to be a manager or a trainee manager. The claimant was only doing the duties of a Senior Carer and that is all Mrs McManus ever intended that she should do.

74. We now turn to Mrs McManus' reason for not paying the claimant the amount stated on her contract. Again, we were able to make a positive finding without recourse to the burden of proof provisions. Mrs McManus entered into a contract to pay £11.43 per hour which, privately, she had no intention of honouring. Her motivation was to recruit workers who were well qualified, required by law to work full-time, and over whom she would have a very high degree of control, because of the severe consequences for their immigration status if they left or lost their jobs. In this respect, she treated the claimant the same as she would have treated (and actually did treat) anybody who required a Tier 2 visa to work in the United Kingdom. It did not matter to her that the claimant was Filipino. She treated a Sri Lankan national just the same.

75. On 29 March 2018, Mrs McManus, who by this time had been re-appointed as a director, signed Hilbre Care Limited's financial statements for the year ended 30 June 2017. One of the financial statements indicated that the company had traded during that year and had made a loss of £56,269.00. Accompanying notes indicated the company had had an average 20 employees during the financial year, but had had no employees the previous year (ended 2016).

Relevant law

<u>Deduction from wages</u>

76. Section 13 of ERA provides, so far as is relevant:

> "(1) An employer shall not make a deduction from wages of a worker employed by him...

…

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion, the amount of the deficiency shall be treated for the purposes of this part as a deduction made by the employer from the worker's wage on that occasion.

…

77. Section 23(4A) of ERA prevents an employment tribunal from considering a complaint of unlawful deduction from wages, so far as it relates to any deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

Interpretation of written contracts

78. Where express terms of a contract are wholly in writing, then deciding on what they mean is simply a matter of interpreting the document containing them. Ascertaining the meaning of contractual terms is an objective exercise and does not depend on the private subjective intentions of the parties. The contract must be interpreted in line with the meaning it would convey to "a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract": *Investors Compensation Scheme Ltd v. West Bromwich Building Society (No 1)* [1998] 1 WLR 896, HL, applied in the employment context in *Spectrum Agencies v Benjamin* EAT 0220/09.

Sham

79. The tribunal must endeavour to ascertain the true agreement between the parties. This must be gleaned from all the surrounding circumstances. It open to a tribunal to find that the parties did not truly intend to be bound by a provision in a written agreement: *Autoclenz v. Belcher* [2011] UKSC 41. In coming to this view, Lord Clarke approved an earlier statement of the law by Elias J in a different case:

> "57. The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He said this (p 697G)
>
> 'Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham it will want to say so.'
>
> 58. In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic

> possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.
>
> 59. … Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance…"

80. An important factor in Lord Clarke's reasoning was that employers were likely to have considerably more bargaining power than workers, whose relative weakness might cause them to sign agreement of unrealistic terms designed to mask the true nature of the relationship. "So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part…"

Variation of contracts

81. In order for a contract to be made or varied, the parties must intend to create or alter their legal relations. The test of whether there was such an intention is objective: *Barbudev v. Eurocom Cable Management Bulgaria EOOD* [2012] EWCA Civ 548 at paragraph 30.

82. In *Sheet Metal Components Ltd v. Plumridge* [1974] ICR 373, Sir John Donaldson observed at page 376E:

> "…the courts have rightly been slow to find that there has been a consensual variation where an employee has been faced with the alternative of dismissal and where the variation has been adverse to his interests."

83. An employee continuing to work under protest whilst being compelled to accept a wage that is less than she is contractually entitled to will not amount to implied acceptance of the purported variation: *Rigby v. Ferodo Ltd* [1988] ICR 29, HL.

84. It is not necessary for an employee to embark on systematic or vociferous complaints in order to prevent an agreement from being foisted on him unilaterally by his employer. As long as he has made it clear that he is not agreeing to the reduction in wages he cannot, by continuing to work, be bound by an agreement to accept a reduction: *Arthur H Wilton Ltd v. Peebles* EAT 835/93 *per* Mummery P.

Duress

85. Economic duress is recognised as a ground for avoiding a contract, but only if the duress is such that the will of the contractor is overborne. His consent must be vitiated. There must be no real alternative. If there is a real alternative, even if it is highly unattractive, there is no basis for avoiding the contract: see *Hennessy v. Craigmyle & Co Ltd* [1986] ICR 469.

86. Economic duress is a vitiating factor to be treated like others: *Halpern v. Halpern* [2008] QB 195, CA at paragraph 76.

Constructive dismissal

87. Section 95 of the Employment Rights Act 1996 ("ERA") relevantly provides:

> 95 Circumstances in which an employee is dismissed
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and… only if)—
>
> … (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. …

88. An employee seeking to establish that he has been constructively dismissed must prove:

88.1. that the employer fundamentally breached the contract of employment; and

88.2. that he resigned in response to the breach.

(*Western Excavating (ECC) Ltd v. Sharp* [1978] IRLR 27).

89. An employee may lose the right to treat himself as constructively dismissed if he affirms the contract before resigning.

90. It is an implied term of the contract of employment that the employer will 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: *Malik v. BCCI plc* [1997] IRLR 462, as clarified in *Baldwin v Brighton & Hove CC* [2007] IRLR 232.

91. The serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT (Langstaff J) in *Pearce-v-Receptek* [2013] ALL ER (D) 364.

> 12. ...It has always to be borne in mind that such a breach [of the implied term] is necessarily repudiatory, and it ought to be borne in mind that for conduct to be repudiatory, it has to be truly serious. The modern test in respect of constructive dismissal or repudiatory conduct is that stated by the Court of Appeal, not in an employment context, in the case of *Eminence Property Developments Limited v Heaney* [2010] EWCA Civ 1168:
>
> "So far as concerns of repudiatory conduct, the legal test is simply stated ... It is whether, looking at all the circumstances objectively, that is, from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
>
> 13. That has been followed since in Cooper v Oates [2010] EWCA Civ 1346, but is not just a test of commercial application. In the employment case of *Tullet Prebon Plc v BGC Brokers LP* [2011] EWCA Civ 131, Aikens LJ took the same approach and adopted the expression, "Abandon and altogether refuse to perform the contract". In evaluating whether the implied term of trust and confidence has been broken, a court will wish to have regard to the fact that, since it is repudiatory, it must in essence be

such a breach as to indicate an intention to abandon and altogether refuse to perform the contract.

92. Where a fundamental breach of contract has played a part in the decision to resign, the claim of constructive dismissal will not be defeated merely because the employee also had other reasons for resigning: *Wright-v-North Ayrshire Council* [2014] IRLR 4 at paragraph 16. See also *Abbey Cars (West Horndon) Ltd v Ford* UKEAT 0472/07 at paragraph 34 and 35.

93. An employee is entitled to a reasonable period of time in which to resign before being taken to have affirmed the contract: *Air Canada v. Lee* [1978] ICR 1202, EAT. The length of that period is not fixed. Relevant factors include the consequences to the employee of losing their job and their prospects of finding alternative work: *Chindove v. William Morrison Supermarkets* EAT/0201/13.

Fairness of a constructive dismissal and remedy for unfair dismissal

94. Section 98 of ERA provides, so far as is relevant:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
> (a) the reason (or, if more than one, the principal reason) for the dismissal and
> (b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it…(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or a restriction imposed by or under an enactment.
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

95. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA. Where the dismissal is constructive, the reason for dismissal is the reason for which the employer breached the contract of employment: *Berriman v. Delabole Slate Ltd* [1985] ICR 546, CA.

96. An employer may rely on section 98(1)(d) where the employee cannot lawfully work in the United Kingdom.

97. At the time that is relevant to this claim, section 15(1) of the Immigration, Asylum and Nationality Act 2006 provided:

> (1) It is contrary to this section to employ an adult subject to immigration control if…
>
> (b) his leave to… remain in the United Kingdom…(ii) has ceased to have effect (whether by reason of … passage of time or otherwise)…

98. An employer's genuine but mistaken belief that an employee lacks the right to work in the United Kingdom is capable of being some other substantial reason (SOSR) within the meaning of section 98(1)(b): *Hounslow London Borough Council v. Klusova* [2008] ICR 396.

99. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

100. The tribunal must consider the fairness of the whole procedure in the round, including the appeal: *Taylor v. OCS Ltd* [2006] IRLR 613.

101. Where an employer has failed to follow procedures, one question the tribunal must *not* ask itself in determining fairness is what would have happened if a fair procedure had been carried out. However, that question is relevant in determining any compensatory award under section 123(1) of ERA: *Polkey v. A E Dayton Services Ltd* [1988] ICR 142. The tribunal is required to speculate as to what would, or might, have happened had the employer acted fairly, unless the evidence in this regard is so scant it can effectively be disregarded: *Software 2000 Ltd v. Andrews* [2007] IRLR 568.

102. A tribunal deciding on the amount of a compensatory award may have regard to the possibility that, had the claimant not been dismissed, the claimant would or might have resigned in any event in circumstances that would not amount to an unfair dismissal. An intended cessation of the relationship of employment by resignation, which would have occurred in any event, was capable of stopping what otherwise would have been a continuing loss following an unfair dismissal: *Fanstone v. Ros t/a Cherry Tree Day Nursery* [2008] All ER (D) 46.

<u>Harassment</u>

103. Section 26 of EqA relevantly provides:

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

(*a*) the perception of B;

(*b*) the other circumstances of the case;

(*c*) whether it is reasonable for the conduct to have that effect.

104. Subsection (5) names disability among the relevant protected characteristics.

105. In deciding whether conduct had the proscribed effect, tribunals should consider the context, including whether or not the perpetrator intended to cause offence. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct related to other protected characteristics), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase: *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336.

106. In *Pemberton v. Inwood* [2018] EWCA Civ 564, Underhill LJ gave the following guidance in relation to section 26:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."

Direct discrimination

107. Section 13(1) of EqA provides:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats, or would treat, others.

108. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

109. Less favourable treatment is "because" of the protected characteristic if either it is inherently discriminatory (the classic example being the facts of *James v. Eastleigh Borough Council,* where free swimming was offered for women over the age of 60) or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind: *Nagarajan v London Regional Transport* [1999] IRLR 572.

110. Tribunals dealing with complaints of direct discrimination must be careful to identify the person or persons ("the decision-makers") who decided upon the less favourable treatment. If another person influenced the decision by supplying information to the decision-makers with improper motivation, the decision itself will not be held to be discriminatory if the decision-makers were innocent. If the claimant wishes to allege that that other person supplied the information for a discriminatory reason, the claimant must make a separate allegation against the person who provided the information: *CLFIS (UK) Ltd v. Reynolds* [2015] EWCA Civ 439.

111. A criterion that is not the protected characteristic itself, may nevertheless be discriminatory if it is a "proxy" for the characteristic or is "indissociable" from it: *Lee v. Ashers Baking Company Ltd* [2018] UKSC 49. There must, however, be a perfect correspondence between the reason for the treatment and the characteristic for which the reason is said to be the proxy (see *Lee* at para 25). Where treatment is for a reason (such as precarious immigration status) that is not of itself a protected characteristic, but is linked to a protected characteristic (such as nationality), there is no direct discrimination unless the reason perfectly corresponds to the characteristic: *Taiwo v. Olaigbe* [2016] UKSC 31.

112. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

113. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

> (1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
>
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
>
> (5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful

> discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
>
> (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
>
> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].
>
> (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
>
> (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
>
> (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
>
> (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
>
> (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

114. The initial burden of proof is on the claimant: *Ayodele v. Citylink Ltd* [2017] EWCA Civ 1913, *Royal Mail Group Ltd v. Efobi* [2019] EWCA Civ 18.

115. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in *Igen v. Wong,* but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage. Tribunals proceeding in this manner must be careful not to overlook the possibility of subconscious motivation: *Geller v. Yeshrun Hebrew Congregation* [2016] UKEAT 0190/15.

116. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts

necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Transfer of undertakings

117. Regulation 2 of TUPE relevantly defines a "relevant transfer" as "a transfer…to which these Regulations apply in accordance with regulation 3".

118. Regulation 3(1) of TUPE provides, so far as is relevant:

> (1) These Regulations apply to-
>
> (a) a transfer of an undertaking, business or part of an undertaking or business … to another person where there is a transfer of an economic entity which retains its identity;…

119. Regulation 4 makes provision for the effect of a relevant transfer on contracts of employment. Relevantly it reads:

> (1) …a relevant transfer shall not operate so as to terminate the contract of employment employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.
>
> (2) Without prejudice to paragraph (1)… on the completion of a relevant transfer-
>
> (a) All the transferor's … liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and
>
> (b) Any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contact or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.
>
> …

120. In *Cheesman v. R Brewer Contracts Ltd* [2001] IRLR 144, the Employment Appeal Tribunal reviewed key decisions of what is now the Court of Justice of the European Union and distilled from them a number of factors for determining whether there was an undertaking and whether it had transferred. Whilst the case was decided under the predecessor regulations to TUPE, the factors have been treated as being relevant to the test under regulation 3(1)(a) of whether there has been a transfer of an economic entity.

121. The factors for determining the existence of an undertaking are:

> "(i) As to whether there is an undertaking … an organised grouping of persons and assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objective …

(ii) … such an undertaking … must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible;

(iii) in certain sectors, such as cleaning and surveillance, the assets are often reduced to their most basic and the activities are essentially based on manpower;

(iv) an organised grouping of wage-earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity;

(v) an activity of itself is not an entity; the identity of an entity emerges from other factors, such as its workforce, management style, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it."

122. As to whether the undertaking has transferred:

"(i) … the decisive criteria for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated … by the fact that its operation is actually continued or resumed; …

(iii) in considering whether the conditions for … a transfer are met, it is necessary to consider all the factors characterising the transaction in question, but each as a single factor and none is to be considered in isolation;

(iv) amongst the matters … for consideration, are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they are suspended;

(v) account has to be taken … of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on;

(vi) where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction … cannot logically depend on the transfer of such assets;

(vii) even where the assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer; …

(x) the absence of any contractual link between the transferor and transferee may be evidence that there has been no relevant transfer, but it is certainly not conclusive as there is no need for any direct contractual relationship;

(xi) when no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer."

Adjudicating on claims

123. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.

124. In *Chandhok v. Tirkey* UKEAT0190/14, Langstaff P observed:

> 17. ….Care must be taken to avoid such undue formalism as prevents a tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. ...
>
> 18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

Conclusions

Which respondent liable?

125. In our view, by the time the claimant's employment ended, her employer was Hilbre Care Limited.

126. Although the claimant was initially employed by Mrs McManus, her employment subsequently transferred to Hilbre Care Limited under regulation 4 of TUPE. There was a relevant transfer within the meaning of regulation 3(1)(a), namely the transfer of Mrs McManus' business of operating care homes to Hilbre Care Limited.

127. Mrs McManus had a business of running care homes. The business easily met the *Cheesman* test for the existence of an undertaking.

128. The business retained its identity in the hands of Hilbre Care Limited. It had essentially the same management team, even if one allows for the departure of Ms Ryding. The company's care homes operated from the same premises as they always had, albeit that the property continued to be owned by Mrs McManus. The goodwill, namely the residents and their source of funding, passed to the company, and staffing was largely unchanged (see paragraph 31).

129. Although it is difficult to pinpoint the precise moment of the transfer, the most likely time it occurred was in about June 2016. From that time, the claimant's wages were being paid directly by Hilbre Care Limited. It also coincides with the start of Hilbre Care Limited's first reported trading year.

130. Under regulation 4 of TUPE, all Mrs McManus' liabilities in her capacity as employer transferred to Hilbre Care Limited and, if the claimant was constructively dismissed, Hilbre Care Limited was her employer at that time.

Direct discrimination because of nationality

131. In our view, the complaint of direct discrimination cannot survive our findings at paragraphs 73 and 74. Because the allegation was advanced on two subtly different bases, we address each one separately.

Less favourable treatment by paying less than £11.43 per hour

132. There is room for argument about who is the appropriate comparator here. Clearly it should be someone who was not national of the Philippines who was employed as a trainee manager. But should it be someone who actually had the duties and responsibilities of a trainee manager, or someone who (regardless of their contractual role title) performed the role of Senior Carer? We would tend to the view that it should be the latter, because a difference in the nature of the role that the employee actually performed is a material difference in the circumstances of the claimant and that of the comparator. On that analysis, the claim could not succeed because Senior Carers were paid less than £11.43 per hour. But even if the former comparator were more appropriate, the complaint would still have to fail. British managers were only paid £10.00 per hour. That fact strongly suggests that, had the claimant been British, her hourly rate would have been the same. Conceptually it might be possible to argue that nationals of other countries besides the United Kingdom and the Philippines would have been paid at a higher rate, but there are no facts from which we could draw such a conclusion.

Less favourable treatment by paying less than the claimant's contractual entitlement

133. The claimant was treated less favourably than some other employees, in that they were paid their full contractual entitlement and she was not. But the difference in treatment was not because of her nationality. It was because she needed a Tier 2 visa to work in the United Kingdom. Her immigration status was not a proxy for her nationality, nor was it indissociable from it. The requirement of perfect correspondence between the reason for the treatment and the protected characteristic is not satisfied. Nationals of other countries (such as Sri Lanka) were treated no more favourably.

134. We have considered the claimant's argument that citizens of some countries, such as Australia, would have been treated better than the claimant was treated

even if they were working under the Tier 2 visa scheme. In our view there are two essential problems with that argument.

134.1. The first is that represents a change to her case that she has advanced throughout the lifetime of the claim. Until the time came for oral closing submissions, the claimant never sought to argue that her protected characteristic of race was anything other than Filipino nationality. She would have to amend her claim to say that her protected characteristic was the membership of a subset of particular nationalities from within the large group of countries whose citizens need a visa to work in the United Kingdom. We would refuse that amendment, coming as it does at such a late stage in the hearing.

134.2. The second problem is that, in any event, there are no facts that would enable the tribunal to conclude that Australians, or any other particular non-EU nationals, would have been treated any better than the claimant was treated.

Harassment

135. Our approach to the harassment complaint started with a reminder to ourselves of the basis upon which the complaint is advanced. The unwanted conduct must be related to the protected characteristic. The only alleged connection between the failure to pay the claimant £11.43 per hour and her Filipino nationality was that (according to the claimant) her nationality was the *reason* why she was treated in that way. The claimant was given every opportunity to suggest a different, or wider, connection than that: see paragraph 22. No such argument was advanced. Having dismissed the complaint of direct discrimination on the ground that the protected characteristic was not the reason for the less favourable treatment, we must also find that the unwanted conduct was not related to that characteristic. To do otherwise would be to adjudicate on the claim on a different basis to the one that was advanced before us.

136. Had the claimant established the requisite connection between conduct and nationality, we would have needed to consider the remaining issues under the complaint of harassment. We discussed the possibility of stating our conclusions on those issues in case our conclusion in the previous paragraph is held to be wrong. In particular we addressed the questions of whether the claimant had perceived the underpayment to create an offensive or intimidating environment for her and whether those perceptions would have been reasonable. Unfortunately were not able to come to a unanimous view on those questions and would require further time to deliberate on them if the matter were remitted to us. As it is, the harassment complaint must be dismissed for the reason we have given.

Deduction from wages

Wages originally properly payable

137. In our view, the correct starting point is to establish the claimant's contractual entitlement at the outset of her employment and then to examine whether or not her contract was varied.

138. It is clear that on 5 September 2014 the parties concluded a written agreement. By her signature, the claimant did not merely acknowledge receipt of

the statement of terms, but accepted that she would be bound by them. The contract contained an express term unambiguously providing for the claimant's hourly rate of pay to be £11.43.

139. The term relating to pay was not a sham. Our reasons for coming to this conclusion are as follows:

139.1. The £11.43 per hour term was not inherently unrealistic or impractical. By contrast to, say, a sham substitution clause, it was perfectly feasible for the respondents to pay £11.43 per hour if they chose to do so.

139.2. Unlike most cases where sham is argued, the party now seeking to avoid the term is the one who proposed the term in the first place and who had by far the stronger bargaining position. They can be presumed to have intended to be bound by it.

139.3. As we have found, Mrs McManus always subjectively and privately intended to pay the claimant less than the agreed amount. But that does not alter the meaning of the contract. There is only a sham if the circumstances objectively show there was a *shared* intention not to be bound by the term.

139.4. The claimant intended that she should be entitled to £11.43 per hour, which is why, when her pay fell short of that rate, she almost immediately queried it and later sought the help of her trade union.

139.5. One factor we have taken into account is the fact that the claimant's actual work was that of a Senior Carer and not of a manager or Trainee Manager. But that does not demonstrate that the parties did not intend for the £11.43 hourly rate to be binding. The hourly rate was agreed at 11.43 before the claimant started work. Before she arrived, she did not know that she would only be working as a Senior Carer. Objectively, there was nothing to suggest to her that she would not actually be working as a Trainee Manager. We have rejected Mrs McManus' evidence that she told the claimant in her interview that she would be a Senior Carer.

140. Unless the contract was varied, the term relating to hourly pay remained binding and wages were properly payable at £11.43 per hour.

Variation

141. We have reached the view that the parties did not agree to a variation of the term, for the following reasons:

141.1. There was no express agreement to alter the claimant's rate of pay. At no point did the claimant say to the respondents that she would agree to be paid less than £11.43.

141.2. The claimant cannot be taken to have agreed to a reduction in pay simply by remaining in employment. She told the respondents from time to time that she was being underpaid. It may be that she could have raised the issue more vociferously or systematically, but that does not mean that she was impliedly accepting the change.

141.3. We have taken into account, as a relevant factor, that with the reduced pay came reduced responsibilities. The claimant was not having to do the job of a manager. But just because a purported variation of a contract might carry with it some compensations does not mean that the employee will

agree to it simply by remaining in employment. Having a less important or demanding role might be seen by some to be a benefit, but might equally be seen to be a deskilling demotion.

141.4. The claimant was in an extremely vulnerable position. If she left her job with the respondents, or made trouble and was dismissed, she would have only a few weeks to find another job with a Tier 2 employer, and if she was unsuccessful, she would have to leave the United Kingdom. Any objective observer would think that the claimant, by remaining in employment, was doing what she needed to do to stay in the country, and not indicating to her employer that she was prepared to accept a pay cut.

142. In case we are wrong in our analysis, and the parties did purport to vary the contractual rate of pay, we would find that the claimant was entitled to avoid the varied term and insist on being paid at the original rate. This is because the purported variation was vitiated by economic duress. The claimant's will was effectively overborne by the respondents altering her pay when she was effectively powerless to refuse. Her only alternative was to resign and to hope to find a Tier 2 job within a few weeks or risk having to return to the Philippines. This alternative was not simply "unattractive" (in the language of *Hennessey*); it was no real alternative at all.

143. Wages therefore remained properly payable throughout her employment at £11.43 and a deduction was made from the claimant's wages on every occasion when she was paid at a lower rate.

Limit of arrears

144. There was undoubtedly a series of deductions throughout the claimant's employment, with the exception of the one occasion in December 2015 on which the claimant was paid at the correct rate. The claim is therefore well founded for the period of 2 years ending with the date of presentation of the claim.

Sleep-in shifts

145. The claimant's contract cannot be read as establishing a different rate of pay for work done at different times of the day or night. Nor can it be read objectively as providing for a set allowance – as opposed to an hourly rate – for sleep-in shifts. There was no express oral agreement about sleep-in pay. We therefore find that the objective intention of the parties was that the claimant should receive her contractual hourly rate of £11.43.

<u>Constructive dismissal</u>

Breach of express terms

146. It follows from our findings in respect of the hourly rate of pay that the respondents breached that express term of the contract by failing to pay her at £11.43 per hour. That breach did not form any part of the claimant's decision to resign: see paragraph 72.

147. Were it necessary to do so, we would find that the claimant's contract included an express term about her role title and duties. That term was breached almost immediately when the claimant was placed into the role of a Senior Carer. The claimant did not resign in response to this breach either: paragraph 72. We did not reach a conclusion about whether the claimant had affirmed the contract

in respect of this breach, but we did consider that the claimant must have known about the breach, at the very latest, by September 2015 when she had been working consistently as a Senior Carer for a year without being trained up to be a manager.

Breach of implied term

148. In our view, Hilbre Care Limited's conduct in failing to support the claimant's application for a Tier 2 visa was likely to damage very seriously the relationship of trust and confidence. The context of the respondent's inactivity is all-important here. Mrs McManus had promised the claimant in her interview not just to employer her on an initial Certificate of Sponsorship, but to continue sponsoring her until she was eligible for "residency" (that is, indefinite leave to remain). Although the claimant was informed in 2016 of a decision in principle not to apply for new Certificates of Sponsorship, she was given vague reassurances from time to time in 2017 that the respondent would support her visa application when her existing visa expired. Any independent observer would be aware of the claimant's precarious immigration status and the consequences for her of failing to sponsor a new visa. Not renewing her sponsorship was breaking Mrs McManus' promise (which would itself undermine the claimant's trust) and was also indicating that they were not interested in helping her to remain employed. To our minds, it demonstrated an intention to abandon and altogether refuse to perform the contract.

149. When the situation is viewed objectively, Hilbre Care Limited did not have reasonable and proper cause for failing to continue sponsoring the claimant. We acknowledge that generally it is for an employer to decide, in principle, whether or not to employ workers under the Tier 2 scheme. It can be quite legitimate for an employer to decide, as the respondents did in early 2016, that they have had enough of dealing with UKVI and complying with its strict regulatory regime. But the respondents needed reasonable and proper cause, not just to make that decision in principle, but to apply that decision to the claimant. Any reasonable employer would have taken into account that she had started work with them on a promise of continued sponsorship. They would also need to take account of the reassurances given to the claimant during 2017 and the legitimate expectations that those reassurances would engender. To fail to sponsor the claimant in those circumstances was in our view unreasonable.

150. The breach of the implied term of trust and confidence occurred on or about 15 June 2017 when the claimant finally realised that the respondent would not sponsor her. That was the claimant's sole reason for resigning.

Affirmation

151. The claimant did not affirm the contract. She announced her intention to resign the same day. By remaining in employment until her formal resignation on 10 July 2017, the claimant was not indicating to any reasonable observer that she was prepared to let bygones be bygones. She had little choice but to remain in employment whilst she tried to obtain a spouse visa.

<u>Unfair dismissal</u>

152. In our view Hilbre Care Limited has not proved that the sole or main reason for constructively dismissing the claimant was either of the reasons that it has

advanced. The difficulty with the respondent's case is that the two asserted reasons were not their reasons for breaching the contract. In order for Hilbre Care Limited to succeed on this point, it would effectively have to say "I failed to support your visa application because I could not legally employ you without a visa." That does not make sense. The fact that Hilbre Care Limited could not lawfully employ the claimant without a visa would, one might think, be a reason for supporting her application, rather than failing to support it. It makes no difference to the analysis if one examines the respondent's reason as one of genuine but mistaken belief. Assuming that Mrs McManus genuinely believed that the claimant needed a visa, that would not be a reason for failing to help her get one.

153. The constructive dismissal was therefore unfair.

154. If our conclusion about the reason for dismissal is wrong, we would still take the view that the claimant was unfairly dismissed. This is because Hilbre Care Limited acted unreasonably in treating the potentially fair reasons as being sufficient to constructively dismiss the claimant. We reach this view because:

154.1. The claimant had been promised continued sponsorship during her interview.

154.2. It cannot be reasonable to treat an employee's need for a visa as a sufficient reason for not helping her to get it.

154.3. Even if a reasonable employer could make such a decision, Hilbre Care Limited did not take anything like adequate steps to consult the claimant before reaching it. Whilst they told the claimant in 2016 of their decision, they did not seek her views beforehand. They then led the claimant with vague reassurances to believe that they might continue to sponsor her after all.

<u>Causation of loss</u>

155. Our assessment of the claimant's remedy for unfair dismissal is limited (at this stage) to attempting to reconstruct an imaginary world in which the claimant had not been constructively dismissed. Would, or might the claimant, have suffered the same loss in any event? We answer that question by reference to the two ways in which the respondents say the claimant's employment would have terminated.

Resignation in any event?

156. Here we are being invited to speculate on the possibility that the claimant would or might have resigned in circumstances that did not amount to a constructive unfair dismissal. In that scenario there would have had to have been no breach of the implied term of trust and confidence. Since the breach that we found consisted of failing to support the claimant's visa application, we must assume, for the purposes of this exercise, that the respondent had sponsored the claimant for a new visa. In those circumstances we are sure that the claimant would have remained employed by Hilbre Care Limited unless and until she had a better-paid job to go to. There is no evidence that she might have left for a worse-paid job, or no job at all. If there is any such evidence, it is so scant it can effectively be disregarded. There is therefore no quantifiable chance of this happening. If she resigned in order to get a better-paid job, she would not have

suffered any loss. It would therefore be wrong to reduce her compensation on that account.

Fair dismissal in any event?

157. Again, we must imagine what would or might have happened if the respondent had not fundamentally breached the contract. It would in those circumstances have sponsored the claimant for a new visa. There is no reason to suppose that the visa would not have been granted. The claimant would have had the right to work in the United Kingdom beyond July 2017 and up to the point where she qualified for indefinite leave to remain. There would be no potentially fair reason for dismissing the claimant on account of her immigration status. She would not have been fairly dismissed. Indeed there is not even a quantifiable chance that this might have happened to her.

_____

Employment Judge Horne

7 June 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

18 June 2019

FOR THE TRIBUNAL OFFICE