EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No. 4121906/2018

Final Hearing Held at Aberdeen on 11, 12 and 13 November 2019, deliberation days on 25 November 2019 and 17 December 2019

Employment Judge A Kemp
Tribunal Member K Pirie
Tribunal Member R Walker

Mr B Cochrane	**Claimant** **In person**
Meallmore Limited	**Respondent** **Represented by** **Mr R Bradley** **Advocate**

JUDGMENT

The unanimous decision of the Tribunal is that the Claim does not succeed and is dismissed.

REASONS

Introduction

1. This was a Final Hearing into the claims made by the claimant against the respondent, all of which were defended. There have been earlier preliminary hearings.

2. At the commencement of the hearing a number of preliminary matters were addressed. Firstly an email had been received from a witness for the respondent in respect of whom a witness order had been granted, Mrs Arlene Campbell, which attached a letter from her GP. It was not a soul and conscience certificate but referred to her condition, and medication, and asked that that be taken into account in considering whether she could be excused. The parties were asked for comment. Mr Bradley confirmed that he did wish to call the witness, and that he understood from enquiries made that she could be able to do so on the second day of the hearing. The claimant indicated that he also wished to have her evidence heard, but was concerned that she may not appear, and also raised the position of another witness, Ms Julie Ann Thomson. He had originally understood that she was to be called by the respondent, then on 29 October 2019 was informed by email specifically that she would not be, but then late on the day before this hearing he had been informed that she would be called. He had not had time to prepare for that, and his questions had been based on his understanding of there being two witnesses. On that basis he sought that the hearing be adjourned.

3. Mr Bradley also raised a further document he wished to be added to the bundle, being a Judgment in a claim made by the claimant against another employer named Inspire (Partnership Through Life) Limited. It was dated 8 October 2019 and had not been known to his instructing solicitors when preparing the Bundle. When the issue of its relevance was raised by the claimant, Mr Bradley referred to the schedule of loss of about £935,000 and argued that there were matters within the Reasons relevant to that issue.

4. The Tribunal retired to consider the matters, and after doing so concluded that the hearing should not be adjourned, so as to avoid delay and unnecessary expense in accordance with the overriding objective, that a message would be sent to Mrs Campbell to require her to attend, but that her evidence could, if necessary and with parties' consent, be interposed within that of any witness then giving evidence. That was agreed, and a message sent to ask her to attend for 9.45am on 12 November 2019. So far as Ms Thomson was concerned her evidence would not be heard until later on 12 November 2019, at the earliest, so that gave the claimant time to prepare questions overnight. The Tribunal also offered the claimant the facility to ask for an adjournment of up to an hour after her evidence in chief, to finalise his cross examination in light of that evidence, if he wished to have that. (In due course that happened, and the claimant confirmed after an adjournment for an hour that he was content to proceed with his cross examination.) The Tribunal considered it in accordance with the overriding objective to allow receipt of the Judgment referred to, and would address the propriety of any questions in relation to that when asked.

5. Before the hearing commenced the Judge explained the process of giving evidence to the claimant, cross-examination, re-examination, and submissions. He explained that if a document was relevant that should be referred to in evidence. No further questions arose and the evidence commenced with that of the claimant himself.

Issues

6. The respondent had prepared a draft list of issues, which the claimant confirmed was accepted. It was amended in respect of direct discrimination during submission by deleting reference to "principal" reason and substituting the words "a substantial". The issues as so amended are as follows:

1. Protected Disclosures

1. On 30th, 31st July or 1st August 2018 did the claimant disclose to the respondent via his mentor Louise Robertson any or all of the following

i. A failure to provide safety information or training
ii. A failure to provide suitable safety gloves
iii. Physical and mental abuse of residents
iv. Turning residents to their severe pain
v. New staff member working alone. Patients at risk.

2. If so and in so doing, did the claimant make "protected disclosures" within the meaning of the Employment Rights Act 1996 section 43A?

2. Unfair dismissal

1. Was the reason (or, if more than one, the principal reason) for the claimant's dismissal the fact that he made those protected disclosures?

3. Failure to comply with a duty to make reasonable adjustments

1. Did the respondent have a provision, criteria or practice of requiring staff such as the claimant to frequently perform various manual handing and moving and handling tasks which were physically demanding?
2. If so, did it put a disabled person at a substantial disadvantage in comparison with persons who are not disabled?
3. And if so, were any or all of the following a reasonable step to take so as to avoid that disadvantage?
   i. reassign some elements of the role
   ii. team the claimant up with colleagues
   iii. remove some tasks
   iv. look at ergonomics
   v. avoid awkward postures and tasks
   vi. allocate shorter shifts
4. Did the respondent fail to take any of those steps in relation to the claimant?
5. Did the respondent have a provision, criteria or practice of only providing medium size gloves for employees carrying out the work of a care assistant?
6. If so, did it put a disabled person at a substantial disadvantage in comparison with persons who are not disabled?
7. And if so, was it a reasonable step to take to provide large or extra large gloves so as to avoid the disadvantage?
8. Did the respondent fail to provide large or extra large gloves?

4. Indirect discrimination (sex)

1. Did the respondent use "call buzzers" which showed a pictogram of a female with long hair wearing a dress?

2. If so, was that use a provision, criteria or practice which the respondent applied to female and male members of staff?

3. And if so, did its use put male employees at a particular disadvantage when compared with female employees?

4. And if so, did its use discriminate against the claimant in that in the period of his employment in that it caused him embarrassment?

5. Did the respondent have a provision, criteria or practice of only providing medium size gloves for employees carrying out the work of a care assistant?

6. If so, was that provision, criteria or practice applied to female and male members of staff?

7. And if so, did it put male employees at a particular disadvantage when compared with female employees?

8. And if so, did it discriminate against the claimant in that in the period of his employment in that it put him at severe risk of infection?

5. Direct discrimination (disability)

1. Was the reason or a substantial reason for the claimant's dismissal because (i) he had a chronic back injury and (ii) the respondent (when it became aware of it) would not or could not cater for his continued employment?

2. If so, did the respondent treat the claimant less favourably than it treated or would have treated non-disabled employees?

6. Remedy

1. If the claimant was unfairly dismissed, to what compensation is he entitled?

2. If the claimant was unlawfully discriminated against in any or all of the ways alleged, to what compensation is he entitled?

Evidence

7. A bundle of documents had been prepared in accordance with the case management order, which included a Statement of Agreed Facts, to which

the Judgment referred to above was added before evidence was heard, and a further document being a Schedule of Loss by the claimant made in a claim against Moray Council was added during the claimant's evidence in cross examination. Mr Bradley made a request to be permitted to do so which the Tribunal accepted after hearing from the claimant in response. The claimant objected in light of its late production and questioned its relevance. The Tribunal considered that it was in accordance with the overriding objective to allow the document and questioning in relation to it. It had only been brought to the attention of the solicitors instructing Mr Bradley just before the lunch break on the first day, and was a document prepared by the claimant himself such that its terms were not a surprise to him. It had potential relevance to credibility and remedy in the Tribunal's opinion.

8. Not all of the documents in the bundle were spoken to.

9. The claimant gave evidence himself. By agreement, he referred to an aide memoire document when doing so, which he had earlier sent to Mr Bradley.

10. Evidence for the respondent was given by Mrs Arlene Campbell, Ms Louise Robertson (for whom a witness order had also been granted) and Ms Julie-Anne Thomson. The evidence of Mrs Campbell was interposed to that of the claimant, towards the end of his cross examination, in light of the email and report to which reference is made above, in order to reduce inconvenience to her in light of the terms of the GP report, with his consent.

Facts

11. The Tribunal found the following facts to have been established:

12. The claimant is Mr Barry Cochrane. His date of birth is 24 December 1970. He has a NEBOSH qualification in health and safety, broadly the equivalent of a degree, and from September 2017 he commenced a nursing degree at Robert Gordon University which was due to last for three years.

13. The respondent is Meallmore Limited. It operates 23 care homes in Scotland, one of which is the Bayview Care Home, Prospect Terrace, Cruden Bay. It provides care to elderly and/or infirm residents. There is provision for 30 residents at that care home.

14. At Bayview Care Home there were, at around the end of July 2018, 27 residents. They were all frail, all but one was elderly, and all had varying care needs. Some had conditions such as dementia. Some required assistance generally as and when required but were reasonably mobile, others required full care and to be moved by hoists or similar equipment. A degree of physical fitness was required in order to do so, and to respond in the event of any requirement to assist a resident at any time, either because of a request or because some form of incident had occurred.

15. Care plans were prepared for each resident individually, and kept both in electronic form and as printed out summary versions in the office. Separately forms were prepared to confirm basic details of each resident. The care industry has a requirement for full record keeping both for purposes related to regulation, and for inspection by families of residents.

16. On 10 July 2018 the claimant applied for a role with the respondent as a Care Assistant. He was interviewed for that by Ms Julie-Anne Thomson, the deputy manager of the care home, on 16 July 2018. Her handwritten notes, so far as disclosed, are a reasonably accurate record of the meeting. At the interview he was asked about his most recent job, and did not disclose that he was at that point employed by Inspire (Partnership for Life) Limited, although he was not a full time employee in light of his university course.

17. He was also asked questions from a pre-printed list, which was not before the Tribunal. One question was “Do you have any physical health issues?”. He shook his head, and Ms Thomson wrote down “No” on that list. Had the answer been in the affirmative, Ms Thomson would have sought further details from the claimant, and undertaken a risk assessment to ascertain whether he was able to carry out the work required, what he may not be able to do safely, and whether any

adjustments were required and reasonable to enable him to do so, before progressing his application.

18. There was a discussion about shifts. Ms Thomson explained that the standard shift for a care assistant was of 12.25 hours, commencing at either 7.45am or 7.45pm. The claimant did not then disclose that he had had adjustments agreed with Robert Gordon University for his course as a student nurse which included his having shifts of no more than 8 hours. The claimant did explain that he would be able to work shifts around his University course, and it was agreed that he would provide Ms Thomson with advance notice of when he would be available. At the end of the interview Ms Thomson indicated informally that he had been successful in his application, subject to a variety of checks and approvals as required for someone working with vulnerable people, and the completion of documentation.

19. By email dated 18 July 2018 the claimant was offered a role for 22.5 hours per week, paid at the level of £8.75 per hour, working on day shift. The email, from Ms Thomson, added that it was "hopefully in the view to get senior care assistant if a post becomes available". It did not set out the shifts that he would work.

20. On 18 or 19 July 2018 the claimant returned one page of a health check form to the respondent. It was received by one of the administration staff and placed in his file. It was not brought to the attention of either Mrs Campbell as manager or Ms Thomson her deputy. Neither was aware of it before the present Claim was presented, and neither had sought to validate the receipt and contents of the form, which was a prerequisite for employment.

21. The claimant had suffered a back injury in 2012, which is inoperable but for which he takes analgesia. He has been examined at hospital, and been advised on how to conduct himself so as to avoid so far as possible further injury to his back. He referred to his back injury on the said health check form, stating that it had been in 2012, and referring further to having dermatitis. When asked on it "Do you know of any reason why you should

not lift or assist in lifting heavy objects, people or equipment?" he had ticked the box for yes.

22. By letter of 19 July 2018 an offer of employment was made to the claimant for 22.5 hours per week at the rate of £8.75 per hour. It was subject to references and enhanced disclosure through the Protection of Vulnerable Groups scheme. It confirmed that all employees were subject to a 3 month probationary period.

23. The claimant acknowledged receipt of the letter of offer of employment and his acceptance of it by email on 20 July 2018.

24. On 26 July 2018 the claimant was informed by email from Mrs Arlene Campbell the manager of the home that he would work day shift on 30 July 2018, and night duty on 31 July 2018. Louise Robertson was to be his mentor. He was informed that he would work a night duty on 1 August 2018. It was the standard practice of the respondent to have a twelve week induction period, during which the first two shifts were spent on the basis primarily of observing staff in carrying out their duties, and getting to know the residents. It could involve limited work to assist residents, but not any work involving their being moved or positioned or which involved the use of equipment.

25. The home had 47 members of staff at that time, of whom 3 were male, including the claimant. The claimant was the only member of care staff who was male. Another male employee was employed as a nurse.

26. On 29 July 2018 the claimant emailed Inspire (Partnership for Life) Limited and resigned from their employment.

27. The claimant commenced work for the respondent on 30 July 2018. No written contract of employment or statement of terms and conditions of employment was provided to him, save the letter of offer. The respondent's practice was to have a 12 week induction period for new care assistants. The first two shifts were induction shifts, during which the new employee watched or shadowed another member of staff, and save for assisting residents to a minor extent in matters such as assisting with meals the new employee was not expected to carry out care work. The

practice was that if those two induction shifts went well the employee could be considered for including in the care team as a member of the shift thereafter.

28. The claimant worked on that day on day shift, commencing at 7.45am and working to 8pm. He was not on the normal complement of staff, such that he was considered to be supernumerary, and not required to attend to any particular role, as it was an induction shift. He was not considered to be one of the care assistants on duty.

29. He was assigned a mentor, Ms Louise Robertson, a senior care worker, to work with him initially. She was however very busy on that shift. She assigned him to work with another care assistant Olga Daubariene. The claimant was assisting with the residents to a limited extent from time to time. To do so he was required to wear gloves provided by the respondent. The gloves provided were only labelled as medium and were too small for him. He requested Ms Robertson that he be provided with larger gloves which fitted him but none were then available. The respondent generally had stocks of gloves of all sizes, including large and extra large, for their staff but they had run out of those that were large or extra large.

30. The claimant noticed that the call button to allow a resident to call for help had on it an image of a female. He did not mention the issue of such an image to Ms Robertson during one of their intermittent discussions that day. He considered that the issue of the call button was a minor one.

31. That style of buzzer is used in care homes across Scotland. The respondent had not received any complaint about it, and the claimant did not do so.

32. At around 5pm that day he had a meeting with Mrs Campbell who asked him how he was getting on. He stated that the shift was going well. He was complimentary about the care home and its staff. He was very complimentary of Mrs Campbell herself, stating how well she had done to achieve her position. The level of compliments to her made her feel somewhat uncomfortable, but she said nothing at the time.

33. The claimant was scheduled to work a night shift as an induction shift commencing at 7.45pm on Tuesday 31 July 2018. By agreement it was to finish earlier than the normal end time of 8am, by ending at 6.30am. That had been confirmed to him by the email dated 26 July 2018.

34. On that night shift he spent most of his time with Ms Robertson during the shift, but there were occasions when Ms Robertson and Ms Ferrier worked together to assist a resident.

35. Louise Robertson was also working that night shift, as was Melanie Ferrier a care assistant, and Cathy Powell a nurse. The intention had been that Ms Robertson, as the moving and positioning (also referred to as moving and handling) trainer for the respondent would give him part of the training for moving and positioning during a quiet part of the night shift, after the residents were settled in bed.

36. He told Ms Robertson during that night shift that he had suffered a back injury. He did not state that he was in pain with his back, nor did he allege that Ms Ferrier had abused or otherwise acted improperly towards any resident. He told her about the medication that he was receiving, including analgesia in the form of dihydrocodeine, and co-codamol. That was a combination of prescriptions that Ms Robertson thought was not provided. She was concerned by it.

37. She was also concerned that his level of understanding of the role was not what she would expect of a student nurse who had completed about one year of training, such that she wondered if he was genuinely a student nurse. She was further concerned that he had a NEBOSH qualification but sought a position as a care worker on national living wage.

38. She told him that she would not undertake the training with him that evening in light of his disclosure of a back injury but would confer with a colleague Wendy Adams about what best to do.

39. The claimant and Ms Robertson spoke together thereafter at the time when the intention had been that she train him. During the course of doing so the claimant made a number of remarks to Ms Robertson that she found to be inappropriate. He asked her whether she had a boyfriend. He made

reference to another relationship himself in addition to that he had with his wife. He did not mention to her having children. He stated that he had pursued an earlier employer, Arnold Clark Limited, to a Tribunal in respect of health and safety matters, on which he had not been successful. She stated to him on a number of occasions that the discussion should be about work not personal matters. He persisted nevertheless.

40. She suggested that he read care plan summaries which were printed documents, at a time when she was to assist Ms Ferrier. She told him to do so in the lounge. He expressed a view to the effect that there was no benefit of him being there and he asked to leave the shift early. She did not agree to that. Reading such summaries would allow a new member of staff to gain knowledge of the circumstances and needs of residents. The claimant did not do so.

41. During that shift the claimant was permitted to assist a resident, CD, who had operated her buzzer. She wished to get up. She was able to do most of what was required herself, and was reasonably mobile with a Zimmer, but liked to have someone hand her items, such as her clothing. The claimant did so alone. It took about an hour for him to do so.

42. At about 5am Ms Robertson was not able to find the claimant and thought that he had left the premises before completing the shift, which was due to end at 6.30. She was not aware of when he had done so.

43. Ms Robertson reported her concerns in relation to that conversation to Ms Thomson at about 8am on 1 August 2018. Ms Thomson was commencing a shift at 7.45am working as a carer, and they met during the handover period. Those concerns were his remarks to her that she considered personal and inappropriate, the comment about the claim against a former employer, his reference to a back injury and medication she thought was not prescribed together, and what she thought was not displaying the competence of a one year student nurse. Ms Thomson was shocked by what Ms Robertson told her, as the description given to her was not, she thought, the same as it would be for the person she had interviewed. She laughed at some of what was said by Ms Robertson because she was shocked by it. The claimant did not allege when

speaking to her that Ms Ferrier had abused or otherwise acted inappropriately towards any resident.

44. Ms Thomson spoke to Mrs Arlene Campbell when the latter arrived at work, and told her what Ms Robertson had relayed to her. She also stated that the claimant had not told her, Ms Thomson, about any back condition at the interview she had held with him when he had applied for the post.

45. Ms Robertson met Mrs Campbell and Ms Thomson at shortly after 9am that day, 1 August 2018. She explained that she had not conducted the manual and positioning training as he had said that he had a back injury, and noted her concerns that he had said that he was taking dihydrocodeine and co-codamol, which was a combination of medication she thought would not be prescribed. The claimant's General Practitioner had prescribed those medications.

46. Ms Robertson repeated to Mrs Campbell her concerns that the claimant had made inappropriate comments to her asking about her personal relationship, and commenting about his own relationships, commenting about the claim he had made against a former employer, and her concerns at the level of understanding she did not feel was consistent with a one year experienced student nurse. She was not distressed by his doing so, but his comments had made her feel uncomfortable, she told Mrs Campbell.

47. Later that morning and following that meeting, Mrs Campbell sent the claimant two emails, the first at 10.08am to ask him to give her a call and inform him that the scheduled shift on 1 August 2018 would not take place and that she was arranging a moving and handling training day, and the second four minutes later to state that the training day which she had arranged after sending the first message, would be 8 August 2018 from 2pm – 8pm.

48. The claimant acknowledged receipt on the same day and confirmed that he would attend the course. He also referred to "a minor note" requesting a box of large or extra large gloves as the medium ones were splitting. He

made no mention of having any other safety or similar concerns or of having made any disclosures.

49. Mrs Campbell had reported to her from other staff members in the period 1 – 3 August 2018 that the claimant had made inconsistent remarks saying to some that he had children and to others that he did not, and making comments in respect of his claim against Arnold Clark Limited. She was concerned by what she had herself experienced on 30 July 2018, what Ms Robertson had reported to her from the night shift commencing on 31 July 2018, that Ms Thomson had reported to her that the claimant had not disclosed any existing health issues when questioned about this at initial interview, and the further remarks reported to her by other staff. She sought advice from her line manager Louise Marshall, and from the respondent's employment lawyers.

50. On 3 August 2018 the respondent ordered a box of large gloves, which was received by them on 6 August 2018.

51. On 6 August 2018 Mrs Campbell wrote to the claimant to inform him that he had been dismissed. She had not conducted any form of disciplinary meeting with him before reaching her decision. She did not provide any reasons for her decision in the letter, nor had she conducted any formal investigation into the issues that were brought to her attention. She did not commit the reasons to writing, nor did she take or have taken any written record of the matters on which she relied, in particular the statement given orally to her by Ms Robertson. She did not conduct any search of his file, and was not aware of the health check form or its contents. She was aware from Ms Robertson that he had had a back injury and from Ms Thomson that he had not disclosed existing health issues at initial interview, but she undertook no investigation into that.

52. She made that decision as she had concerns that the claimant was not trustworthy. She was concerned that he had made remarks to her which had made her feel uncomfortable, and that that impression had been supported by the remarks Ms Robertson had informed her of. That impression was further supported, she considered, by remarks reported to her by other staff members. She also felt that the failure to disclose the

back injury, despite opportunities to do so at interview, or at the meeting with her at the end of the first shift he undertook, showed a lack of trustworthiness. She was concerned that the claimant may make similar remarks to residents in a manner that caused them to feel uncomfortable, that there was a lack of consideration for confidentiality and that she may not have sufficient trust in the claimant in the event of any complaint against him by a resident for any reason, in circumstances where he would work alone with them from time to time.

53. Under the respondent's disciplinary policy clause 8.1 "The company may bypass any of the provisions outlined in this policy during the first two years of their employment." Mrs Campbell did not consider it appropriate or necessary to conduct any investigation further in light of the very short service of the claimant.

54. The claimant responded to that decision by email on 8 August 2018, the day on which the letter was received by him, by asking if he had done anything wrong. He did not claim that he had made any protected disclosures or that that might be a reason for his dismissal. He did not refer to his back injury or that he was a disabled person.

55. There was no reply initially, and on 15 August 2018 the claimant sent Mrs Campbell an email stating that he would like to appeal. Mrs Campbell wrote to state that no appeal would be provided to him by letter dated 17 April 2018. She did so as she thought and had advice that that was not necessary in light of his very short service.

56. The respondent received the Claim Form from the respondent at the end of October 2018. By then both Ms Robertson and Mrs Campbell had left their employment. Ms Thomson undertook an investigation at that stage, concluded in early November 2018, and completed one investigation report which included comments from a member of staff on day shift on 30 July 2018, Sandra Garden, and a nurse on night shift on the following day, Sharon Powell. It was disclosed in the present proceedings.

57. At about the same time the respondent's Area Manager Louise Marshall spoke to Ms Robertson and Ms Ferrier, and produced a separate

document recording their position in relation to the allegations in the Claim Form which was sent to the respondent's employment lawyers. It was not disclosed in the present proceedings.

58. The claimant is a disabled person under the terms of the Equality Act 2010 and was so during the period of his employment with the respondent.

59. The claimant had been on a full-time course at Robert Gordon University but decided not to pursue a career in nursing and left that course after the dismissal by the respondent. He has since then made about 50 applications for roles in the health and safety field, without success. The first such application was made by him on 31 August 2018.

60. The claimant pursued a claim against Moray Council when not interviewed for a position. In a schedule of loss in that claim dated 24 July 2019 he stated

> "The claimant is 48 years old and wants to continue his career in Health and Safety (H&S). While training as a Nurse he had encountered difficulties with some aspects of the job (physical tasks, long hours etc) and his Doctor's guidance (attached with addressee redacted) is to leave that field. He therefore opted to revert to working in H&S again where he can perform the work tasks".

61. The report referred to is that produced in the bundle in the present claim. He pursued a claim for 3.5 years of lost earnings. He disclosed that he had an adjustment by Robert Gordon University which included "the avoidance of 12 hour shifts", which was in fact to shifts not exceeding eight hours. He disclosed that he had decided to pursue a career in health and safety.

62. Had the role with the respondent continued he would have worked for at most two eight hour shifts per week and be paid £8.75 per hour for doing so for the period until 31 August 2018. At or about that time the claimant decided to return to his former role in health and safety, and not pursue a career in nursing.

63. On 19 May 2019 the claimant's GP wrote a report which concluded "I suspect Mr Cochrane will likely need to retrain into another field and will have to continue to taking medication in some form or other, in order to facilitate continuing to work."

Respondent's submission

64. By agreement of the parties Mr Bradley gave his submission first. Both parties made helpful and detailed submissions, for which the Tribunal was grateful.

65. Mr Bradley spoke to a written skeleton he had prepared. The following is a basic summary. He invited the Tribunal to accept the evidence of the respondent's witnesses and dismiss the claim. In respect of the claim under section 103A of the Employment Rights Act 1996 he stated that with the exception of the disclosure in relation to gloves no protected disclosure had been made. That in relation to gloves was not protected as it was not reasonably believed to be in the public interest.

66. In relation to automatic unfair dismissal the burden was on the claimant – ***Ross v Eddie Stobart Ltd UKEAT/0068/13.*** There was no evidence to support the allegation. There was no evidence to link any disclosures with the reason to dismiss. That reason was not the disclosures. Reference was made to ***Abernethy v Mott, Hay and Anderson [1974] ICR 323.***

67. In relation to the claim for reasonable adjustments there was no evidence to allow a finding that any of the suggested steps was a reasonable step to avoid the disadvantage. There was no evidence that shorter shifts had been brought to the respondent's attention. There was no provision, criterion or practice (PCP) in relation to only supplying medium gloves, or that that put disabled persons at a disadvantage.

68. In relation to the claim of indirect discrimination on the ground of sex, there was no evidence that either the buzzer style, or not having large gloves, was a particular disadvantage. The buzzer did not cause embarrassment in any event. There was no evidence to allow a finding of the PCP relied on.

69. In relation to the claim of direct discrimination on grounds of disability he accepted that the claim could be made if there was a substantial reason, but the evidence was that the reason was the issue of lack of trust. In the event that the onus of proof did shift to the respondent, and he accepted that there were potential issues in the lack of documentation, the provision of an investigation report after the claim was intimated but not a fuller document with details from Ms Robertson and Ms Ferrier, and the full pages of the interview questions, together with the lack of written evidence on the reasons for the dismissal, then the evidence of Mrs Campbell should be accepted such that the onus was discharged.

70. On remedy he argued that there could be no claim for career loss as made, that the claimant had worked only for eight days, that he had decided to cease working in the care sector as was clear from his Schedule of Loss in the Moray Council case, and that he had made a health and safety role application on 31 August 2018 from his Schedule in this case, such that any loss should cease by that date. He argued that an award for injury to feelings was at the lower end of the lower band of the ***Vento*** scale. He argued that the conditions required for a stigma damages award as set out in ***Abbey National plc v Chagger [2010] ICR 397*** was not met.

71. In reply to the submission by the claimant he stated that he had seen the second page of the interview form, albeit not produced in evidence, and it had been omitted from the bundle of documents through inadvertence.

Claimant's submission

72. The claimant made a detailed and impressive oral submission and the following again is a basic summary. He argued that the respondent's evidence was not credible. He highlighted a number of discrepancies between the ET3 and the evidence, including the position of resident CD, and that no one had known of his back injury despite the health check form submitted on 18 or 19 July 2018. He noted the absence of reasons given in the letter of dismissal.

73. Had the health check form been properly considered, there should have been a risk assessment and discussion with him about what reasonable

adjustments could have been made. They included having shorter shifts, which he confirmed latterly as 8 hours, and duties that he was able to undertake without exacerbating his back injury. That could have been other tasks than moving and positioning residents, including care plans, risk assessments and similar.

74. He had been flattering of Mrs Campbell at the meeting with her on 30 July 2018. He had said nothing inappropriate to Ms Robertson. He was getting to know a fellow worker, as was she. They had a discussion. It was not flirtatious and not the sort of issue that would interest management. He suggested that these conversations were in no way inappropriate.

75. What was of interest was his back injury, which he described as severe, which had stopped the moving and positioning training. That was because of his disability. It was that which led to the decision to dismiss him, including a concern at the shifts he could work. There was evidence of Ms Thomson and Mrs Campbell laughing when informed of what Ms Robertson said he had disclosed on personal and related issues, which indicated that it was not taken seriously. That was the real position, the allegations made about inappropriate comments were not the reason for the dismissal.

76. The suggestion that he was asked at interview if he had any health condition was wrong. His position was that it was not lawful to do so. It was not on the form produced, and he did not accept that there was a second page to it. He argued that the respondent's witnesses were not credible. He had been taken off night shift on 2 August 2018 not to arrange training but because of his back injury. The issue of inappropriate remarks was a smokescreen. Only Ms Robertson was involved in that. She was wrong on issues such as his being a student nurse, which he was, and the medication she thought would not be prescribed, which was prescribed.

77. There was a risk of contamination by not using the correct gloves. It was obvious that men required large or extra large gloves, and women would wear small or medium gloves in almost all cases. No evidence was required for that. It was a reasonable adjustment to provide. That also

arose under the indirect discrimination claim. A gender neutral buzzer was provided in other workplaces.

78. On remedy he confirmed that he had applied for 47 jobs before the schedule of loss was prepared and seven since then. He had not yet been successful but had had six interviews, and the issue had been why he left the last employment. He also referred to ***Chagger*** and in particular paragraphs 4 and 74.

79. Having heard the evidence he thought that his disability was the principal reason for dismissal.

Law

(a) Statute

80. The provision on protected disclosures, also referred to as whistleblowing, are within the Employment Rights Act 1996. They are construed as a UK provision. The provisions on disability discrimination are within the Equality Act 2010, and are construed purposively against the background of the EU Framework Directive. Section 4 of the Equality Act 2010 ("the 2010 Act") provides that disability is a protected characteristic. The 2010 Act re-enacts large parts of the predecessor statute, the Disability Discrimination Act 1995, but there are some changes.

(i) Protected disclosure

81. Section 103A of the Employment Rights Act 1996 provides:

> "**103A Protected disclosure**
> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

82. What is a protected disclosure is set out in section 43A, which is where a qualifying disclosure is made in a manner that is compliant with the Act. Disclosure to the employer is compliant. The disclosure is qualifying if it meets the terms of section 43B which provide:

"**43B Disclosures qualifying for protection**

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

(ii) Reasonable adjustments

83. Sections 20 and 21 of the Equality Act 2010 state:

"20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage……"

"**21 Failure to comply with duty**

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person…."

(iii) Indirect discrimination

84. Section 19 of the Equality Act 2010 states:

"**19 Indirect discrimination**

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if —

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

……

disability;…."

(iv) Direct discrimination

85. Section 13 of the Equality Act 2010 states:

"**13 Direct discrimination**

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."

(v) Other provisions

86. Section 39 of the Act provides:

> **"39 Employees and applicants**
>
> …….
>
> (2) An employer (A) must not discriminate against an employee of A's (B)—
>
> ……. (c) by dismissing B;
>
> …."

87. Section 136 provides:

> **"136 Burden of proof**
>
> If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

88. Section 212 defines "substantial" as meaning "not minor or trivial".

(vi) Remedy

89. Section 124 of the 2010 Act provides

> "**124 Remedies: general**
>
> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2) The tribunal may—
>
> (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
>
> (b) order the respondent to pay compensation to the complainant;
>
> (c) make an appropriate recommendation.
>
> (3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect [on the complainant] of any matter to which the proceedings relate ….

(4) Subsection (5) applies if the tribunal—

(a) finds that a contravention is established by virtue of section 19, but

(b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.

(5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).

(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119."

The remedy for automatic unfair dismissal is that within sections 118 – 126 of the Employment Rights Act 1996.

(b) Case law

(i) Reason

90. In ***Abernethy v Mott Hay and Anderson [1974] ICR 323***, the following guidance was given by Lord Justice Cairns:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

(ii) Indirect discrimination

91. Lady Hale in the Supreme Court gave the following guidance in ***R (On the application of E) v Governing Body of JFS [2010] IRLR 136***

"The basic difference between direct and indirect discrimination is plain……Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins."

(iii) Provision, criterion or practice

92. The provision, criterion or practice applied by the employer requires to be specified. It is not defined in the Act. In case law in relation to the predecessor provisions of the 2010 Act the courts made clear that it should be widely construed. In ***Hampson v Department of Education and Science*** it was held that any test or yardstick applied by the employer was included in the definition, for example.

93. The Equality and Human Rights Commission Code on Employment at paragraph 4. 5 states as follows:

> "The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision."

(iv) Reasonable adjustments

94. Guidance on a claim as to reasonable adjustments was provided by the EAT in ***Royal Bank of Scotland v Ashton [2011] ICR 632*** in ***Newham Sixth Form College v Sanders [2014] EWCA Civ 734,*** and ***Smith v Churchill's Stair Lifts plc [2006] ICR 524*** both at the Court of Appeal. These cases were in relation to the predecessor provision in the Disability Act 1995. Their application to the 2010 Act was confirmed by the EAT in ***Muzi-Mabaso v HMRC UKEAT/0353/14***. The reasonableness of a step for these purposes is assessed objectively, as confirmed in ***Smith.*** The need to focus on the practical result of the step proposed was referred to in ***Royal Bank***.

95. Mr Justice Laws in Saunders added:

> "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment

> of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP."

96. The nature of the duty under sections 20 and 21 was explained by the EAT in ***Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43*** as follows:

> "The Equality Act 2010 now defines two forms of prohibited conduct which are unique to the protected characteristic of disability. ……The second is the duty to make adjustments: sections 20–21 of the Act. …… Sections 20–21 are focused on affirmative action: if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage."

97. The EAT emphasised the importance of Tribunals confining themselves to findings about proposed adjustments which are identified as being in issue in the case before them in ***Newcastle City Council v Spires UKEAT/0034/10.*** The importance of identifying the step that the respondent is said not to have taken which amounts to the reasonable adjustment required in law of it was stressed in ***HM Prison Service v Johnson [2007] IRLR 951***. Setting out what the step or steps that comprise the reasonable adjustments are, before the evidence is heard, was referred to in ***Secretary of State v Prospere EAT 0412/14***. ***General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43*** highlighted the importance of identifying precisely what constituted the step which could remove the substantial disadvantage complained of.

98. The adjustment proposed can nevertheless be one contended for, for the first time, before the ET, as was the case in ***The Home Office (UK Visas and Immigration) v Kuranchie UKEAT/0202/16.*** Information of which the employer was unaware at the time of a decision might be taken into account by a tribunal, even if it also emerges for the first time at a hearing – ***HM Land Registry v Wakefield [2009] All ER (D) 205***.

(v) Direct discrimination

99. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572.*** In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan***, the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15***.

100. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377***.

101. General guidance, including an overview of the relevant authorities, was provided by the EAT in ***Ladele v London Borough of Islington [2009] IRLR 154*** which was later approved by the EAT and Court of Appeal in ***McFarlane v Relate Avon Ltd [2010] IRLR 872).***

Less Favourable Treatment

102. In ***Glasgow City Council v Zafar [1998] IRLR 36***, also a House of Lords case, it was held that it is not enough for the Claimant to point to unreasonable behaviour. She must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

Comparator

103. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285,*** a House of Lords authority, Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

104. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences between that person and the claimant. Guidance was given in ***Balamoody v Nursing and Midwifery Council [2002] ICR 646***, in the Court of Appeal.

105. The EHRC Code of Practice on Employment provides, at paragraph 3.28:

> "Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'"

Substantial, not only or main, reason

106. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a "substantial reason" for the decision. In ***O'Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause.

107. In ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673,*** heard in the Court of Appeal an employee who was disabled was made redundant. The disability was as a result of a back injury. The employee worked in financial services. The scoring was based around the size of the client base. He claimed that his client base was smaller and that that was because of his disability, but the evidence was that there would have been

a redundancy for any employee with a smaller client base. The Tribunal held that there had been direct discrimination but the EAT and Court of Appeal disagreed. Lord Justice Elias said this in summarising the law:

> "5
> Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant's disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: see the observations of Lord Nicholls in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** paragraphs 8–12. That is how the tribunal approached the issue of direct discrimination in this case.
> 6
> In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason

(vi) Burden of proof

108. There is a two-stage process in applying the burden of proof provisions in discrimination cases, which may be relevant to the issue of whether the respondents applied a PCP to the claimant, as explained in the authorities

of ***Igen v Wong [2005] IRLR 258***, and ***Madarassy v Nomura International Plc [2007] IRLR 246,*** both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondents at the second stage. If the second stage is reached and the respondents' explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached.

109. More recently, in ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and that the onus did remain with the claimant at the first stage. As the Court of Appeal then confirmed in ***Efobi v Royal Mail Group [2019] EWCA Civ 19*** unless the Supreme Court reverses that decision the law remains as stated in ***Ayodele***.

Observations on the evidence

110. This was a case in which the Tribunal had some concerns over a number of aspects of the evidence given by both parties. The Tribunal had some sympathy for the claimant who was not provided with any reason for what was a summary dismissal which came in the absence of any prior process of which he was aware. He could hardly be criticised for speculating as to what the reason was in that situation.

111. On the other hand, the Tribunal were aware that this was not a case where the claimant had the service to claim unfair dismissal. It was aware that employers can dismiss an employee without any process or prior notice, and the fairness of that cannot be challenged. It was however one factor in the assessment of evidence that the absence of any written reasons, and any written record of the material on which the decision was based, provided fertile ground on which discrimination could take place, whether consciously or sub-consciously.

112. In respect of the **claimant**, there were a number of areas of concern over credibility and reliability. The claimant had not disclosed to Ms Thomson

at interview, as he accepted, that his most recent employer was Inspire (Partnership for Life) Limited, though he was still employed by them and resigned on 29 July 2018. The Tribunal accepted the evidence of Ms Thomson that he had also not disclosed any health issue at that same meeting, although the document which set out a standard question and his response in the negative was not before the Tribunal. The Tribunal was told by Mr Bradley that that was by inadvertence, but there was no evidence on that, and its omission was surprising. Nevertheless for reasons referred to below, Ms Thomson's evidence was accepted, and preferred to that of the claimant who denied that he had been asked such a question. He said in evidence that he believed that such a question could not be asked. He is wrong in that. In the context of a care home, where residents may require to be moved for their own safety, it is permissible to ascertain at interview if the applicant has the capability to undertake the role safely, and then investigate that further depending on the answers given. The claimant was not candid when he did not disclose at that time, later when informed of the shifts allocated, or when Mrs Campbell asked him about the first shift, either the back injury itself, or that Robert Gordon University had made adjustments for that which included not working beyond an 8 hour shift.

113. When asked in cross examination whether he had discussed his claim against Arnold Clark he said that he could not recall. From the evidence it is clear that he had done so, and his failure to recall that was hard to believe. In cross examination he did not dispute that he had commented on a relationship he had had when discussing matters with Ms Robertson, but in his Schedule of Loss that is portrayed as not only untrue but manufactured, with an allegation of the respondent "devising this story".

114. The claimant had a tendency to exaggerate matters. Some examples are a suggestion from Ms Thomson that he might be considered for a promotion in her email to him, which he said was a "pledge", clearly contradicted by other evidence, his suggestion that he had told Ms Robertson that he had a severe back injury, but the Tribunal accepted her evidence that he had only said that it was a back injury, his argument that she had accepted that it was severe in cross examination by him was

not correct, and the terms of his schedule of loss, which sought about £935,000 for whole career loss when he had been employed for eight days, had reverted to seeking a health and safety career in respect of which he had attended interviews, and where there was no proper basis to argue that he would never work again, as a man aged 48 who had operated his own consultancy business.

115. The claimant's evidence in his Schedule of Loss in the present claim was also not consistent with his Schedule of Loss in his claim against Moray Council, where he stated that he had decided to leave nursing and return to a career in health and safety after difficulties in the physical demands of nursing and his GP's advice to retrain, and sought loss for 3.5 years.

116. It also emerged from that document that he had agreed adjustments at Robert Gordon University to work no more than 12 hours in a shift, in fact he gave evidence that the limit agreed was of 8 hours, but he did not disclose that to the respondent despite being offered three shifts, two of 12.25 hours and one of over 10 hours, on three consecutive days by the email of 26 July 2018. He attended to commence the first two shifts, without any comment on such adjustments having already been made on the basis of a medical assessment.

117. He alleged that he had witnessed acts of physical and mental abuse of residents when at work, but did not raise any formal issue about that at the time in writing, and when informed about a week later that he had been dismissed did not refer to his doing so at all. That was very surprising if he had done so, as he claimed. In his Schedule of Loss he said that he had witnessed some "very traumatic events (physical abuse of residents) while working for the respondents – distressing enough for him to decide to leave the care industry completely". But that is not what he said in the Schedule of Loss for the Moray Council claim, in which an entirely different rationale was given. In an email to Mrs Campbell he had chosen to mention only a minor issue as to glove size. The Tribunal concluded that Ms Robertson's evidence that he had not made such disclosures was to be preferred and that he had not disclosed to her any such matters, and did not accept his evidence that he had witnessed either physical or mental abuse of residents of any kind.

118. Overall he gave his evidence in a manner that the Tribunal did not consider was credible and reliable in material respects.

119. He also did not appear to consider that some of the comments that he made to Ms Robertson could be considered inappropriate. He said that he was getting to know a colleague, and that they had a chat, seemingly considering that what he asked and told her was normal. He asked her if she was in a relationship, and commented about his own relationship position, as well as making comments about a claim he had made against a former employer. His remarks were not appropriate for a new employee with a female worker alone with him in such a setting, and his failing to understand that was a source of some concern. He also failed it appeared to appreciate the need for care and sensitivity in that social care setting. He appeared to have a substantial level of confidence in his own knowledge and ability. When it was suggested that he read care plan summaries by Ms Robertson, his position was to the effect that there was no point in his staying. That was at best naïve. It was standard practice to provide such summaries to new care staff, including experienced staff, so that they could begin to get to know the residents and their needs. In submission he argued that no one had said that he was "really bad" so the reason for dismissal was his back injury. The evidence however was of some staff being made to feel uncomfortable, which the claimant appeared not to have awareness about.

120. On the other hand, the evidence of the **respondent's witnesses**, and from the documents, was also a source of concern. There was no written record of the material on which the decision to dismiss was reached, as referred to further below. The second page of the health check form was not produced. An investigation report undertaken after dismissal was produced, but not a second document recording the evidence given at that stage by Ms Robertson and Ms Ferrier who had been present on the night shift of 31 July to 1 August 2018.

121. **Mrs Campbell** had a BSc in Health Studies, and was a registered general nurse with a Diploma in Nursing Studies. She was now the General Manager of a care home. She had previously been the manager of Bayview Care Home for the respondent.

122. She said that she had been uncomfortable during a conversation with the claimant on 30 July 2018, but no written record of that was produced. No written record was made of any of the material used to decide the dismissal. The letter of dismissal came out of the blue, but started as if confirming what had been disclosed verbally. It did not give any reason for the dismissal at all. At the very least, these were unusual circumstances in which discrimination might be alleged, and found, to have taken place whether consciously or not.

123. Mrs Campbell's evidence was not entirely consistent with that of the other witnesses for the respondent. For example she gave evidence that Ms Robertson spoke to her at the end of the night shift on 1 August 2018, and had been upset, although not crying, but such as she had difficulty forming her words. The evidence of Ms Robertson herself had been that she had been uncomfortable with what had happened, but was not distressed to such an extent, and that was also Ms Thomson's evidence.

124. Mrs Campbell had left the respondent not long after the dismissal, and had no incentive not to be truthful, save in relation to her professional reputation. She attended by witness order, and after the GP report referred to above. Her evidence was clearly given as to the reason that she dismissed the claimant. She was adamant that it was because of her lack of trust of the claimant, and that had she not been aware of any back injury the decision would have been the same. She was consistent in stating that, and explained that the nature of the care home was such that having trust in staff was essential. Her loss of trust was caused by a number of matters, being the comments made to Ms Robertson about personal relationships, persistent comments about his claim against a former employer, inconsistent comments as to whether or not he had children, and the failure to disclose his condition at interview. She was consistent in giving her evidence on that issue both in examination in chief, and in answer to questions from the claimant and the Tribunal.

125. The Tribunal was alive to the possibility that the evidence that she would have dismissed in the absence of knowledge of any back injury was somewhat self-serving, but concluded on balance that it was to be accepted. She spoke of the need for great care when dealing with such

vulnerable residents, and the absolute need to trust her staff when they may be working alone with them. She had had an uncomfortable feeling about the claimant initially on 30 July 2018 when she met him, confirmed by the comments of Ms Robertson as to her feeling uncomfortable from his remarks, and the further matters of which she became aware thereafter.

126. Some of the questions she was asked she said in answer something to the effect that she could not remember, and as noted above not one written word of record of the material she relied on for the decision or the reasons for that decision was kept. The Tribunal considered that that arose from a form of complacency given the very short service. Whilst Mrs Campbell had not been able to recollect many points of detail the Tribunal accepted that when she said so she was being truthful. It noted that she had left the respondent's employment after the dismissal to start a new role, and not recollecting details with the passage of time since then, of about 15 months, was they considered understandable.

127. Each of Ms Thomson and Ms Robertson told her that the claimant had a back injury. She was not aware of the extent of that, but was clear that someone with a back injury may be able to carry out care work where that was assessed, and was safe both for the employee and the residents. It was consistent with that position that she cancelled the shift that was set for 2 August 2018, and made arrangements for further moving and positioning training to be held. The comment as to the back injury was a detail of background, and was not, the Tribunal concluded, a significant factor in the decision that she made to dismiss.

128. She did not investigate that further, including by looking at his file in which there was at least the first page of the health check form. To have made a decision to dismiss without any kind of process, or written record, was a concern for the Tribunal, as was her not accurately describing the demeanour of Ms Robertson when describing what had happened, but it ultimately came to the conclusion below, and that the evidence from Mrs Campbell should broadly be accepted. It concluded that her failure to investigate the back injury she was informed about was because it was not a significant factor in her decision to dismiss.

129. **Ms Robertson**, who was a senior care assistant and aged 36, who had also left the respondent's employment and appeared by witness order, could not remember the shift on 30 July 2018 when the claimant started. She had been very busy that day. She thought that the claimant had not worked alone with any resident, and had only been observing. Ms Thomson carried out an investigation after the claim was made, and heard from a nurse called Cathy Powell that the claimant had done that. That investigation was produced to the Tribunal, but it emerged that there was a further document prepared with detailed commentary from Ms Robertson and Ms Ferrier, both of whom had been working on the night shift on 31 July 2018, which was not disclosed. The document that was disclosed was to the effect that the claimant had been allowed to assist one resident, and Ms Thomson in her evidence confirmed that Ms Powell who spoke to her said that the claimant had been alone when doing so. It appeared to the Tribunal to be more likely that the claimant had worked alone with the resident CD, and that Ms Robertson was wrong in her evidence that he had not.

130. Ms Robertson said that she had disclosed matters to Mrs Campbell at about 9am on 1 August 2018, which the Tribunal concluded was more likely to be correct than the subsequent day, spoken to by Miss Thomson as noted below. It was consistent with Mrs Campbell's evidence, consistent with Ms Robertson staying back after her shift to relay what had happened, and with the emails Mrs Campbell sent shortly after 10am on 1 August 2018, following that meeting.

131. Ms Robertson had a concern over the medication the claimant told her he took, but that was confirmed by the later GP report. She was also concerned as to whether the claimant was genuinely a student nurse, but the Tribunal accepted that he was. There were therefore areas of her evidence which were not correct.

132. Ms Robertson was very clear in her evidence that the claimant had not told her that he had back pain during the shift, only that he had a back injury, and that he had not made any disclosures of abuse of residents, the risk of lone working, or the risk of safety training not being given. She

was clear as to the comments he had made which she thought inappropriate.

133. She accepted that he had disclosed the lack of large gloves. She had left the respondent, and had no incentive not to be truthful.

134. Overall the Tribunal considered that Ms Robertson was trying to give honest evidence, and was in general terms reliable. Whilst there were a number of discrepancies in the evidence, on the material issues of whether disclosures were made, and whether inappropriate comments were made, her evidence was accepted, indeed the claimant did not seriously dispute that he had done so, and argued that that was normal when getting to know a colleague.

135. The final witness was **Ms Thomson**. She gave evidence in a very clear, candid and convincing manner. The Tribunal considered that her evidence was credible and generally reliable. She had initially responded well to the claimant at interview, and given Ms Robertson a form of glowing tribute about him. She was surprised to hear what was said by Ms Robertson, such that she was shocked, and that explained why she had laughed. She had not taken the decision to dismiss, nor been involved in that. The Tribunal accepted her evidence that the claimant had not disclosed to her any health condition, and she too had not been aware of the health check form sent to the respondent two or three days afterwards. She confirmed that Ms Robertson had been made uncomfortable by the claimant's comments to her.

136. Although relatively young at 29, she was now the care home manager, and studying for level 4 SVQ in health and social care. She also carried out care duties. She had not been aware of the health check form sent in by the claimant, but had not sought to check that it had been received or that its contents were in order. She had investigated the issues arising from the Claim Form, preparing her document as presented. She described CD as someone who could largely care for herself, and she contradicted the description given by the claimant as someone who required a reasonably high level of assistance in getting dressed.

137. Latterly in her evidence she suggested that the meeting involving Mrs Campbell, Ms Robertson and her had been on 2 August 2018, but that appeared to the Tribunal not to be likely for the reasons given above.

138. There were grounds for concern over the evidence given by both parties in light of that. There were however two general matters to take into account. The first was that the claimant had a clear financial incentive by his pursuit of the claim, in which he sought a very large sum in compensation, but the respondent's witnesses did not, indeed two had left the employment of the respondent fairly shortly after his own dismissal.

139. The second is that the real focus, particularly for the claim of direct discrimination but for others as well, is on the evidence for the respondent. The Tribunal could easily understand why someone in the claimant's position, told that he was dismissed out of the blue and with no reasons provided, may suspect that there had been discrimination of some kind. The issue for us however was to analyse the evidence against the statutory tests.

Discussion

140. The Tribunal can deal with some issues relatively shortly.

(i) Protected disclosures

141. The Tribunal concluded unanimously and without difficulty that the claimant had not made the alleged disclosures to Ms Robertson, save in respect of gloves. Her evidence on that was clear. She did not make any mention of such matters when reporting to Ms Thomson, nor the day later to Mrs Campbell and Ms Thomson. The claimant did not raise the issues in writing at the time, nor did he refer to disclosures when informed of his dismissal. The evidence overall was clearly to the effect that such disclosures had not been made.

142. In any event Mrs Campbell was clear that she was not aware of them, and as such they could not be a basis for her decision. The Tribunal accepted her evidence on that. It was supported by the evidence of Ms Thomson and Ms Robertson, neither of whom had been told by the claimant of the

allegations of residents being abused or treated inappropriately in any way, who were therefore not in a position to pass such allegations on to Mrs Campbell.

143. The claimant's evidence as to residents being abused or otherwise treated inappropriately was not accepted by the Tribunal. It had not been mentioned when he emailed about the gloves, which he referred to as a "minor point", and it was, in the Tribunal's unanimous view, inconceivable that someone who allegedly had witnessed the acts he later claimed would have mentioned such a minor point as gloves without mentioning such alleged abuse, and that matter was fortified by his failure to mention it later, particularly at the time of dismissal itself.

144. Finally, the claimant argued latterly that the principal reason for his dismissal was his disability. He had the substantial disadvantage initially in not having any reason given to him. It is however a matter that follows an argument that the principal reason for dismissal was disability that the principal reason for dismissal cannot also have been the making of a disclosure.

145. In so far as gloves are concerned, on which Ms Robertson accepted that she had been made aware of the lack of large gloves by the claimant when mentoring him, the evidence was clear that gloves were generally provided, of all sizes, that the respondent had run out of large gloves, and ordered them almost immediately the issue was known about. The Tribunal did not consider that against that background it could be a reasonable belief that the lack of large gloves for a few days was a matter of public interest, even if the claimant held such a belief subjectively on which he gave very little evidence. It affected the claimant, and that only for a short period of time. It was being rectified, and was rectified by 6 August 2018. The issue ought to have been addressed before it did arise, but that could not reasonably be regarded as a matter of public interest. It could not therefore be a qualifying disclosure, and therefore not a protected one.

146. The claim of unfair dismissal under section 103A must therefore fail, and is dismissed.

(ii) Reasonable adjustments

147. It was admitted that the claimant was a disabled person. He told them by 19 July 2018 that he had a back injury that affected his ability to lift, and that that had occurred in 2012. The respondent was put on notice at that stage, but took no steps to investigate that.

148. The Tribunal did however have limited evidence to address the issue of what the PCP was, or were, and what steps were reasonable. The issue of the extent of the claimant's disability had not been addressed by the respondent at the time. Although the health check form was received by the administration staff, it was left in the file and not looked at either initially, or prior to consideration of dismissal.

149. The claimant's GP had provided a report later, in May 2019, that advised that he pursue a different career. He did in fact decide to do so, and was seeking health and safety positions by 31 August 2018. He could not do more than an eight hour shift as agreed with Robert Gordon University but did not disclose that to the respondent at the time. He instead kept that from them.

150. There was evidence to the effect that there was a certain level of physical work required in the role of care assistant in order to care for a resident by moving and positioning them. The Tribunal concluded that the PCP referred to in the issues had been applied to the claimant. There was however very limited evidence of what effect that PCP had on the claimant, and what the substantial disadvantage was. There was evidence of his requiring from RGU shifts not exceeding eight hours, and modification of work involving manual handling, to paraphrase. Clearly if someone had a back injury, carrying out work which involved putting strain on the back was potentially a risk. But that issue was not explored in evidence in any detail, and it had not been addressed by the respondent at all as the issue had not been raised by the claimant save in the health check form which no one read. The Tribunal concluded that the claimant had been placed at a substantial disadvantage, but the detail of that was not before the Tribunal.

151. The Tribunal unanimously concluded from the limited evidence it had that the claimant was not able to undertake the level of work required of a care assistant in light of his back condition even with what may otherwise be considered reasonable adjustments. That role requires the person to be able to care for someone who either may not be mobile at all, or only mobile with assistance. There may be a need to respond to a request for assistance at any time, and any circumstances. Someone with an injury such as that of the claimant would not be able to do so, or not do so save at risk to his own safety.

152. But in any event in light of the dismissal for other reasons, in relation to the issue of trustworthiness, the Tribunal concluded unanimously that there was not sufficient time to address the issues of the reasonable steps required, and that was so particularly as the claimant had not disclosed either the health condition at interview, or that he had an adjustment at University to have not longer than eight hour shifts. When attending for the two shifts that he did undertake the expectation was that he would not do any moving or positioning work at all, such that the level of physical effort required of him would be very little. When the issue was identified he did not carry out the training or further work, and matters were then overtaken by the dismissal. Had he not been dismissed, the training arranged for 8 August 2018 would have taken place, which would have been on issues of theory, but also to discuss what his medical condition was, and then lead to further investigation of that before he undertook work that might impact on his back. Whilst the lack of direct attention to this matter by the respondent was a concern, with what appeared to be a very limited initial induction process when he started on 30 July 2018, the lack of time caused by the supervening dismissal meant that, taking a practical view of matters, no step could reasonably have been taken in the period up to that dismissal.

153. In respect of the gloves, the respondent had taken steps to obtain large gloves, and did so promptly after the issue was brought to their attention. There was no PCP as to only providing medium gloves.

154. The Tribunal did not consider that had the respondent taken any of the steps proposed by the claimant that that would have made any material

difference. What is required of an employer is the taking of reasonable steps. The difficulty is that the claimant was not able to perform the physical level of activity required of the role, and he did not contend as a step the creation of an entirely different role for him. Modifying it as he sought to argue for in the list of issues was not reasonable.

155. The claim under sections 20 and 21 of the 2010 Act are accordingly dismissed.

(iii) Indirect discrimination

156. Two matters are founded upon. So far as the buzzers are concerned, there was no evidence of a particular disadvantage, nor that it in fact caused the claimant a disadvantage. In his own evidence he was “not really offended by it, it was a niggle”. In any event, it was difficult to fit the provision of buzzers to the residents, for their use not the use of staff, as a PCP. A PCP is essentially an issue of conduct, as the Code makes clear. It is construed widely, but it has limits. Whilst the format of the buzzer was not gender neutral, the Tribunal unanimously concluded that that of itself did not render that a PCP.

157. In so far as the gloves are concerned, the evidence was clear that the respondent did not have a PCP of only supplying medium gloves. They had just run out of large gloves, they were ordered on 3 August 2018 and arrived on 6 August 2018.

158. In both respects, even if there had been a PCP, the issue was a very minor one indeed. The claimant used words implying such himself – both as “niggle” and “minor point”. As to what can constitute a 'disadvantage', the case law on what constitutes a 'detriment' is of some assistance. In cases involving working conditions, a change in job duties which does not involve either loss of status or pay may be enough to constitute a 'detriment', provided the change is reasonably seen as such by the complainant: ***Shamoon***. A mere allegation by an employer that an employee has harassed a third party may constitute a detriment, even if the employer ultimately takes no further formal action; ***Olasehinde v Panther Securities UKEAT/0554/07***

159. It has been held by the EAT in ***Pendleton v Derbyshire County Council [2016] IRLR 580*** that 'disadvantage' does not have to meet any particular threshold, with the following comment made:

> "I do not read 'particular disadvantage' for these purposes as requiring any particular level or threshold of disadvantage; it seems to me that the term is apt to cover any disadvantage"

160. The facts of that case were however entirely different, involving a teacher who elected to stay with her husband in light of her religious beliefs notwithstanding that he had downloaded indecent images of children and voyeurism, and had been imprisoned. She was dismissed when she decided to remain with him consistent with her marriage vows, which she regarded as sacrosanct.

161. That case did not address what was meant by the word "disadvantage", which was not surprising given the circumstance that applied in it, but that issue does arise in this case. The Tribunal considered that the word "disadvantage" did require to be given some meaning. Its ordinary and natural meaning is where there is something that could reasonably be regarded as unfavourable in some way. The Tribunal did not regard the two matters founded on by the claimant to amount to that.

162. In any event, even if there is in effect no threshold, indirect discrimination can be objectively justified. The use of a female form logo on a buzzer, in circumstances where that is widely in use in care homes and where there had been no objection or issue raised by any person, where the vast majority of care staff are female, and where the residents were almost all elderly and infirm, was objectively justified. The legitimate aim was the provision of a buzzer for such residents in a form that they would understand, with some of them having dementia. It was proportionate in the circumstances where there had not been any evidence of a prior issue raised about it.

163. The claims of indirect discrimination are accordingly dismissed.

(iv) Direct Discrimination

164. The claim of direct discrimination on the ground that the claimant was a disabled person was one on which the Tribunal spent the majority of its time in deliberation.

165. There were a number of aspects of the evidence that supported the claimant in his argument. They were:

(i) The absence of any written records of the material on which the decision made was based

(ii) The absence of any investigation into the allegations or of putting them to the claimant

(iii) The failure to give any reason for dismissal in the letter of dismissal

(iv) The failure to note and act on the health care form submitted by the claimant on 18 or 19 July 2018

(v) Inconsistencies between the case as pled by the respondent, and the evidence given by their witnesses

(vi) Inconsistencies within the evidence given orally by the respondent's witnesses, in particular the evidence of Mrs Campbell of upset by Ms Robertson such that she had difficulty forming her words, and Ms Robertson and Ms Thomson stating that she was not upset to that extent, but had been uncomfortable.

(vii) The failure to produce the second page of the health check pro forma, and the production of a post-claim investigation report by Miss Thomson but not a document prepared at about the same time by Ms Marshall the Area Manager, with evidence from the two witnesses present on the night shift commencing on 31 July 2018, Ms Robertson and Ms Ferrier

(viii) The knowledge on the part of Mrs Campbell that the claimant had had a back injury, as related to her by Ms Thomson and Ms Robertson, such that she was aware or ought to have been aware that the claimant was, or could be, a disabled person.

(ix) The number of occasions where Mrs Campbell was not able to answer a question as she said that she could not remember, or words to that effect.

166. The Tribunal unanimously concluded from those matters that the claimant had established a prima facie case. The terms of section 136 of the 2010 Act were therefore engaged, and the onus shifted to the respondent to prove that the claimant's disability was not a substantial reason for the dismissal.

167. It found the decision on that matter a very difficult one. It was conscious that it could, and where appropriate should, draw inferences from the primary facts that it found. The Tribunal discussed that matter at length, both initially with one member calling in by telephone, and then more fully on 17 December 2019 when all three of the Tribunal members were present.

168. The Tribunal had regard to the manner in which Mrs Campbell gave evidence, her demeanour when doing so, and her obvious wish to give honest evidence. She was a nurse of over 20 years' experience, who sought to protect both the residents in her care, and the care home itself. The Tribunal was satisfied that the ground for her decision was her concern over trustworthiness in the context of the need to trust a member of staff who would be working alone with vulnerable adults, some of them very vulnerable indeed. She was concerned that such a person may also speak to residents in a manner he had spoken to staff, which she thought was inappropriate.

169. It accepted her evidence that the decision was reached from a combination of factors, commencing with her own sense of unease when the claimant complimented her excessively, his comments about relationships to Ms Robertson, his failure to highlight his back condition at interview when asked, his persistent comments to other staff about a claim he had pursued against a former employer, his inconsistent comments to other staff either that he did, or did not, have children, and her conclusion from that that in the very short time of his employment he had become a talking point for staff such that she had concerns over whether he could be trusted in the special circumstances of a care home. Her evidence was summarised when she said that she had a "gut feeling" that she did not trust him, and that there were too many alarm bells ringing about him.

170. The Tribunal had regard to a question asked by a member of the Tribunal, as to what the position would have been had Mrs Campbell not known of the back injury, to which she replied she would have dismissed him, as the issue for her was one of trust. As noted above, there was a clear risk that that answer was not self-serving and not credible or reliable. The Tribunal concluded however that that answer was credible, and reliable, and they accepted it. They concluded that a hypothetical comparator, being someone who had acted as had the claimant, and in the same circumstances, but who was not disabled would have been dismissed.

171. Mrs Campbell was aware that he had only very short service, such that both there was a discretion not to apply the disciplinary policy, and no risk of a claim of unfair dismissal. The Tribunal concluded that she had proceeded on that basis, and that there was a risk in her mind if she did not dismiss given her concern over trustworthiness. There was evidence of a lack of professionalism, indeed acting that was at times simply inept particularly in the absence of any written record, and a letter of dismissal failing to specify the reason for that dismissal using phrasing that implied it confirmed a decision given orally, which was not the case. It was, however, honestly inept, and neither consciously nor sub-consciously the result of discriminatory prejudice.

172. The Tribunal considered that it was of significance that Mrs Campbell did not immediately move to dismiss on learning of the back injury on 1 August 2018 when told that by Ms Thomson. Rather, she first cancelled that day's shift, which was to have been a night shift, and very shortly afterwards arranged a training day for the following week. That was not likely to be consistent with someone having a mindset that a person who had sustained a back injury could simply not be employed.

173. Mrs Campbell did not examine the file to find the health care form, but she had very little information about the back injury, and was clear in her evidence that someone with such a condition might be able to work as a care worker dependent on the assessment of risk both for that person, and the residents. That position was supported by Miss Thomson. That evidence was accepted by the Tribunal.

174. The dismissal followed reports from other staff of what the claimant had said. That timescale they considered also supported the conclusion that the issue of the back injury was only one of background, and that it was solely the issue of trust that led to dismissal.

175. The Tribunal considered that the comments made by the claimant as to relationships, his claim against a former employer, and about having or not having children and the failure to refer to his back injury and the adjustments made by Robert Gordon University either at interview, when informed of the shifts he would work, or when speaking to Mrs Campbell after his first shift did, or at the very least could, lead to a concern over his trustworthiness, and did in fact do so for Mrs Campbell.

176. The Tribunal concluded that the failure to disclose the back injury was a factor in the decision to dismiss, but the back injury itself was a matter of background, and not a substantial reason for the dismissal, or a material part of the decision making process. It concluded that the sole reason for the dismissal was that the claimant, who had just started work, was believed by Mrs Campbell not to be trustworthy in a role that involved lone working with vulnerable adults within a care home.

177. The Tribunal did not consider that it was appropriate to draw the inference of direct discrimination, although it had the primary facts from which it could have done so and would have done so had the evidence of Mrs Campbell not been considered sufficiently credible and reliable to be accepted.

178. As a result, the claim of direct discrimination fails, and is dismissed.

(v) Comments on remedy had there been direct discrimination

179. In the event that the Tribunal had found that the claimant had been dismissed unlawfully under section 13, contrary to that finding, it would have awarded a limited sum. It addresses the issue in light of the difficulty it found in coming to a conclusion on the claim of direct discrimination, and lest it be wrong in the conclusion it reached.

180. The claim made, for about £935,000, was hopelessly unrealistic. There was clear inconsistency between what was argued for and the terms of the claimant's GP report, as well as with the Schedule of Loss in the claim against Moray Council. This was not a case where stigma damages could possibly arise. The claimant had been employed for only eight days and worked on two shifts, one of which was at the very least less time than normal by agreement, if not one he curtailed more fully. The circumstances which applied in ***Chagger*** were wholly absent in this case. The conditions for such an award set out in the decision of the court, which were for the exceptional case only, did not apply to the present claim.

181. There was no medical evidence to support the claim to injury to feelings. The claimant accepted that there was no change to medication at or around the time of dismissal. There was no direct evidence of his suffering from depression in the GP report. There was evidence of his being prescribed amitriptyline which was at least partly an anti-depressant, but it was accepted that the dosage for that was increased a few weeks before the present hearing. The claimant had however been informed of a dismissal entirely out of the blue, and that will obviously have caused him a degree of distress and upset. His service with the respondent had been very short, at only eight days in total. He was subject to a three month probationary period, with an induction period of 12 weeks. Against that background the Tribunal concluded that the award for injury to feelings was at the lower end of the lower band, and that the sum of £1,000 would have been appropriate.

182. On the issue of loss sustained, the Tribunal considered that the claimant would have decided to leave the care sector and return to nursing somewhat later than the respondent argued, had there not been a dismissal when it did occur, but that in the intervening period he would only have worked two shifts per week of eight hours each shift, and that the claimant would not have passed the probationary period, but would have been dismissed by the end of the 12 week induction period. He did not have the skills to undertake much work beyond that of a care assistant, and the most likely position at the very best for him is that he would have worked in such a role with some form of accommodation for his condition

for the same shift pattern that was agreed at University for the course he was then taking, but later left.

183. On that basis, the loss of earnings would have been assessed at 12 weeks x 16 hours x £8.75 per hour, a total of £1,680. The Tribunal wold also have awarded interest at 4% on the sums for injury to feelings and loss of earnings, in the sum of £134.

184. Had the claim succeeded under section 13 of the 2010 Act the award would have been the sum of £2,814. Even if there had been a finding as to the buzzer and gloves amounting to indirect discrimination, the Tribunal would not have awarded any higher sum for injury to feelings in light of the lack of any evidence of this being other than a minor matter in each case.

185. The Tribunal did consider the issue of contribution. The claimant had failed to disclose at interview that he had a back condition. The Tribunal accepted that he had done so as he believed that such a question could not properly be asked at that stage, although that view is not correct. He did not disclose then or later that an adjustment to 8 hour shifts had been made by Robert Gordon University. He made inappropriate comments to Ms Robertson. Contribution in a discrimination claim is not a simple concept, and in all the circumstances the Tribunal decided that it would not have made any reduction to such an award had the claim succeeded.

Conclusion

186. The Tribunal answers the issues as follows, with all decisions unanimous:

1. **Protected Disclosures**

1. On 30th, 31st July or 1st August 2018 did the claimant disclose to the respondent via his mentor Louise Robertson any or all of the following?

   i. A failure to provide safety information or training
   ii. A failure to provide suitable safety gloves
   iii. Physical and mental abuse of residents
   iv. Turning residents to their severe pain
   v. New staff member working alone. Patients at risk

Only (ii), otherwise no.

2. If so and in so doing, did the claimant make “protected disclosures” within the meaning of the Employment Rights Act 1996 section 43A? No

2. **Unfair dismissal**

1. Was the reason (or, if more than one, the principal reason) for the claimant’s dismissal the fact that he made those protected disclosures? No

3. **Failure to comply with a duty to make reasonable adjustments**

1. Did the respondent have a provision, criteria or practice of requiring staff such as the claimant to frequently perform various manual handling and moving and handling tasks which were physically demanding? Yes

2. If so, did it put a disabled person at a substantial disadvantage in comparison with persons who are not disabled? Yes

3. And if so, were any or all of the following a reasonable step to take so as to avoid that disadvantage?

i. reassign some elements of the role
ii. team the claimant up with colleagues
iii. remove some tasks
iv. look at ergonomics
v. avoid awkward postures and tasks
vi. allocate shorter shifts

No

4. Did the respondent fail to take any of those steps in relation to the claimant?
Not applicable

5. Did the respondent have a provision, criteria or practice of only providing medium size gloves for employees carrying out the work of a care assistant? No

6. If so, did it put a disabled person at a substantial disadvantage in comparison with persons who are not disabled? Not applicable

7. And if so, was it a reasonable step to take to provide large or extra large gloves so as to avoid the disadvantage? Not applicable

8. Did the respondent fail to provide large or extra large gloves? Not applicable

4. **Indirect discrimination (sex)**

1. Did the respondent use “call buzzers” which showed a pictogram of a female with long hair wearing a dress? Yes

2. If so, was that use a provision, criteria or practice which the respondent applied to female and male members of staff? No

3. And if so, did its use put male employees at a particular disadvantage when compared with female employees? No

4. And if so, did its use discriminate against the claimant in that in the period of his employment in that it caused him embarrassment? No

5. Did the respondent have a provision, criteria or practice of only providing medium size gloves for employees carrying out the work of a care assistant? No

6. If so, was that provision, criteria or practice applied to female and male members of staff? Not applicable

7. And if so, did it put male employees at a particular disadvantage when compared with female employees? Not applicable

8. And if so, did it discriminate against the claimant in that in the period of his employment in that it put him at severe risk of infection? Not applicable

5. **Direct discrimination (disability)**

1. Was the reason or a substantial reason for the claimant’s dismissal because (i) he had a chronic back injury and (ii) the respondent (when it became aware of it) would not or could not cater for his continued employment? No

2. If so, did the respondent treat the claimant less favourably than it treated or would have treated non-disabled employees? Not applicable

6. **Remedy**

1. If the claimant was unfairly dismissed, to what compensation is he entitled? Not applicable

2. If the claimant was unlawfully discriminated against in any or all of the ways alleged, to what compensation is he entitled? Not applicable, but had there been an award the sum specified above.

187. In light of the conclusions reached above, the claims made are dismissed. In so doing, however, the Tribunal considers it important to comment on the concerns it had with how matters had been handled by the respondent.

188. The complete failure to take action on the health check form on receipt of it was not what ought to have happened.

189. The absence of written records of any kind to document the basis on which there was a decision to dismiss a member of staff, in a sector where written records are vitally important, was not what ought to have happened.

190. The failure to set out a reason for dismissal in a letter to an employee which was sent in the absence of any prior notice or investigation was not what ought to have happened. Whilst an employee with under two years' service cannot claim unfair dismissal, quite apart from the issues that might arise under the law of discrimination, for an organisation with a number of care homes to act in such a manner is not indicative of consideration for an employee. Had there been clear evidence of unarguable gross misconduct matters may have been different to some extent, but the evidence here was not to that standard on any possible view.

191. The Tribunal was also somewhat surprised that in such a highly regulated sector as that of care the claimant as a new employee started work without all of the documentation required for him to do so being checked, and without a full induction on the first day to explain what his role would be, what rules applied to it, what policies and procedures there were, and what

he would be doing during induction shifts, which was then documented in some way. It appears to have been assumed that as a student nurse who had completed about the first year of study that he would know sufficient simply to shadow other staff, helping out where he could such that he would interact with residents, but the Tribunal does question whether that is appropriate.

192. The Tribunal would not wish therefore that the dismissal of the claim be taken to imply its approval to how all that happened took place.

Employment Judge: **Alexander Kemp**
Date of Judgment: **19 December 2019**
Date sent to parties: **20 December 2019**