



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs C A Hobbs

**Respondent:** Avon Care Homes Ltd

**Heard at:** Bristol **On:** 16<sup>th</sup> and 17<sup>th</sup> January 2020

**Before:** Employment Judge Christensen

## **Representation**

**Claimant:** Mr Hardy, a friend

**Respondent:** Mr R Chaudhry of Peninsula

# RESERVED JUDGMENT

The claim for constructive unfair dismissal succeeds; the claimant has been unfairly dismissed.

A Case Management Preliminary Hearing will be listed by telephone to give directions to the parties for the determination of remedy.

# REASONS

## **The claim and issues**

1. The claimant brings a claim for constructive unfair dismissal. It is based upon her resignation, without notice, on 8 April 2019. She had been employed as a secretary for the respondent since 11 November 2015.
2. The respondent operates a number of nursing and care homes. Its Managing Director is Mrs Christina Bila. The Regional Manager is Mrs Julia Rea.

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3. I heard evidence from the claimant, Mrs Bila and Mrs Rea. I also heard evidence from Mrs Paulett Mills who was interviewed by Mrs Rea, with the claimant present, for the role of Home Manager at Pondsmead Nursing Home on Wednesday 3 April 2019. Mrs Mills is black.
4. The claim of unfair dismissal is based upon a breach of the implied term of trust and confidence. The claimant's case being that she became aware, through discussions with Mrs Rea between 3 and 5 April and then with Mrs Bila on Monday 8 April, that Mrs Bila would not employ Mrs Mills because she was black. The claimant's case is that that made her position untenable as she could not work for an employer who conducted illegal discrimination, she therefore resigned.
5. The respondent's case is that there were no conversations between the claimant and Mrs Rea and the claimant, Mrs Rea and Mrs Bila and Mrs Bila and the claimant that referred to the fact that Mrs Mills was black; nor indeed regarding any resistance that Mrs Bila might have to employing her for this reason. The respondent's case is that the claimant has made up her evidence as part of a premeditated plan to secure financial gain from the respondent. Mrs Bila told me in evidence that she believed that Mrs Mills was a party to this premeditated plan as she has brought a claim against the respondent for race discrimination. The respondent's case is that the claimant engineered her own dismissal by withholding an email from the Harben Green, an employment agency, on 4 April 2019 indicating that Mrs Mills would accept £52000.
6. I make findings to determine whether a number of conversations took place as the claimant describes them or whether they took place as described by the respondent's witnesses. I make findings to determine whether other conversations took place at all. It is the respondent's case that some of the conversations referred to by the claimant never took place. That will, in essence, determine this case. It is agreed by the respondent that in the event that I make findings that favour the claimant's account, that establishes a repudiatory breach of the fundamental term of trust and confidence in the claimant's contract to which the claimant is entitled to respond by resigning. No issues arise in relation to causation and the claim will succeed. In the event that I make findings that favour the respondent's account the claim will fail as the claimant has not established a breach of a fundamental term in her contract which caused her to resign.

**Documents and bundle**

7. There were issues arising at the start of the case regarding the agreement of a bundle. There was some concern from the claimant regarding the sequencing of emails in the bundle prepared by the respondent and a concern from the claimant that some emails were missing. One of these related to the timing of a particular email. The issue was whether or not the claimant had seen an email from Ellis Sullivan of the recruitment agency on 4 April at 15.20 [document 68B] indicating Mrs Mills accepting the offer of £52000. The respondent's position is that she did. The claimant's position is that she did not see that email and that instead she saw a differently timed email with the same text on 4 April at 16.59 when it was forwarded to her by Mr Sullivan [document 68H]. The text of the email is the same in both the

15.20 and 16.59 version and it says this: *"Hi Caroline, thank you for asking the question, having just caught up with Paulett, she is very keen to join Avon Care Homes and having spoken to her about the 52K offer this is something she would be happy to accept. Can we get something booked in tomorrow as suggested yesterday?"*

8. It was agreed that the evidence would start on the basis of it being understood that the two versions of the email existed in the bundle, what each party's position was and that the witnesses would be questioned accordingly.
9. Shortly after the claimant had started being cross examined, she expressed her concern that an email was still missing from the bundle. She explained to me that this was the email that she sent to the employment agency about Mrs Mills on 3 April on the instruction of Mrs Rea. It is referred to in a time line document created by the respondent at page 84 but was not in the bundle. The claimant told me that she had been given a copy of it by the solicitors acting for Mrs Mills who is pursuing her own claim against the respondent and that she thought it should be in the bundle for her case. She offered to provide a copy for the bundle. This is an email from the claimant to Mr Ellis at the recruitment agency on 3 April at 15.30 informing him that the respondent would offer Mrs Mills a salary of £52000 subject to a successful second interview with Mrs Bila and on the basis that Mrs Rea has not been able to discuss the matter with Mrs Bila. It says this: *"Hello Ellis, Julia Rea the Regional Manager was impressed by the interview with Paulett. The Managing Director of the company is not available but I know would like to meet Paulett, so would either Monday 8<sup>th</sup> or Tuesday 9<sup>th</sup> after 2pm be suitable for her. Paulett seemed keen on Avon Care Homes and her salary expectations were discussed. Julia has not been able to discuss the matter with our MD but would like to offer her 52k for a 40 hour week subject to a successful meeting on Monday"*
10. On both parties' accounts Mrs Rea had in fact communicated with Mrs Bila on the afternoon of 3 April about the interview with Mrs Mills. On both parties' accounts Mrs Rea told Mrs Bila how impressive Mrs Mills had been in interview and how suitable she was for the role. On the claimant's account this email was very carefully worded to be tentative, on instruction from Mrs Rea. On the claimant's account this was because Mrs Bila had not been present at the interview and would therefore not know that Mrs Mills was black; Mrs Rea had concerns that Mrs Bila would not employ Mrs Mills because she was black once she found this out. This is clearly an important email; I asked the respondent why it had not been disclosed to the claimant in these proceedings and why it was not in the bundle. Their representative was not able to assist me with this question but whilst we were discussing this matter his client handed him a copy of the relevant email. Arrangements were made for copies to be made and it was inserted in the bundle at page 64A.

### **Conflicting accounts and credibility**

11. I address the issue of whether, on a balance of probabilities, I believe the claimant's account or whether I believe the respondent's account. I do this by examining all the factors that exist that might tend to indicate whose account should be preferred. I have considered the consistencies and

inconsistencies in the witness statements and the evidence given orally at the tribunal hearing. I have also considered the documents that exist that relate to the relevant period to see if there are any consistencies or inconsistencies that will assist.

12. I consider the following features to be relevant to my determination that, on a balance of probabilities, I accept the claimant's account and reject the respondent's.

#### Claimant's credibility

13. I found the claimant to be a credible witness. She exhibited signs of what I considered to be very genuine and deep distress when being questioned about the events at work which she says led to her decision to resign and how stressful she found the situation by reference to her concerns about race discrimination. Although she had a friend representing her to assist with questioning, she gave her own closing submissions and again became distressed when presenting these to me. She had to pause as she found it quite hard to continue when saying this in submissions "*consequently I did not decide to blow the whistle on the discrimination I had witnessed lightly but I felt strongly that it was the right thing to do. I had hoped I could persuade Mrs Bila to behave in a more positive manner particularly if I pointed out it was illegal. However, after my telephone conversation on the 8<sup>th</sup> April it was obvious to me that Mrs Bila had no intention of taking my advice and abiding by the law*".
14. Of itself distress is not necessarily enough to be a determining factor however I consider it relevant. The claimant seemed a very straightforward person. I do not judge her to be someone who could manufacture such seemingly genuine levels of distress when explaining how she could not continue to work for an employer who she believed to be operating racially discriminatory work practices.
15. When Mrs Mills was questioned by the respondent about the conversation that she had with the claimant on 8 April, she confirmed that as an experienced care home manager she was familiar with the possibility that an employee from a care home might make up stories against their employer if they were disgruntled in some way. When the claimant telephoned Mrs Mills on 8 April to forewarn her of the events within the respondent since her interview on 3 April, Mrs Mills had an index of suspicion regarding the call in terms of whether she should believe the claimant. She was ultimately satisfied, from her conversation with the claimant, that the claimant was telling her the truth. She was influenced by the distress exhibited by the claimant on the phone and also by the fact that the claimant had herself resigned on that day because of what the claimant believed to be a racist culture within the respondent's business. I consider it relevant that Mrs Mills believed what the claimant told her at the time.

#### Mrs Mills credibility

16. I considered Mrs Mills to be understated and very clear in her evidence. I found her to be credible. I accept her account of her exchanges with the claimant and the steps she took to ensure that there was no proper basis to be concerned that the claimant may be manufacturing what she told her.

Principled person

17. I am satisfied that the claimant is a principled person in that, in November 2018, when she had concerns about working practices within the respondent she offered her resignation and considered moving to another job because of those concerns. This is consistent with her actions in April 2019. In November 2018 the claimant was concerned at a decision made by Mrs Rea relating to a safeguarding issue involving a resident at the home. One of the nurses at the home was understood to have a gambling habit and there was an allegation that he had borrowed money on more than one occasion from an elderly resident. The matter was investigated and that concluded with a final written warning to the nurse. The claimant expressed her concern to Mrs Rea at the time that, as a safeguarding issue, this was an unsatisfactory response and that the nurse should have been dismissed. The claimant told Mrs Rea that she wished to resign because of this and had secured an interview at Avon & Somerset police for another job. Mrs Rea wanted the claimant to stay in employment for the respondent and was concerned to ensure that she did not attend the interview. Conscious that the claimant did not have the full picture of the investigation into this matter she let the claimant read the investigation report as a way of satisfying the claimant that due process had been followed. This ultimately did satisfy the claimant and she agreed to withdraw her resignation and did not attend the interview with Avon & Somerset Police.

A premeditated plan

18. It is the respondent's case that the motivation for the claimant giving evidence that is not truthful is to secure a financial gain. I have considered this possibility and conclude that it seems inherently unlikely that the claimant has embarked upon a premeditated plan to bring a claim against the respondent to make a financial gain. I reach this conclusion for the following reasons.
19. As a plan it is not particularly well constructed. In part the claimant relies upon notes that she says she made contemporaneously during a face to face conversation with Mrs Rea on Friday 5 April and then during a conversation on the phone with Mrs Bila on Monday 8 April. These are an important part of her case as they are written documents that make reference to the question of employing black people and whether Mrs Bila is 'racist'. They are however undated and to an extent unclear – had they been created as part of a plan to falsely create a case against the respondent it seems more likely that they would have been clearer in what they record and would have been dated.
20. One of the post-it notes which are said by the claimant to have been created on Monday 5 April during her conversation with Mrs Bila states "*Avon Care Homes do not give jobs to people in a management position*" If that note had been manufactured by the claimant to create a false case against the respondent it seems more likely that she would have included the work *black* in the note but it is missing.
21. I also consider it relevant that they have the appearance of notes written in haste during a conversation which is internally consistent with the claimant's case.

Claimant happy at work and well thought of

22. Also militating against the possibility of a premediated plan, I consider it relevant that the claimant was largely happy at work and well thought of by her managers; there were no particularly noteworthy workplace issues. Mrs Bila said this in evidence about the claimant *"the claimant had a pay increase for consistent good work...Caroline was always flexible, she always did what I asked her to do. She took every task that she was given. She was a highly valued member of staff"*. Mrs Rea thought highly enough of the claimant in November 2018, that she let her read the confidential notes of an investigation to convince her to stay in her employment and not attend a job interview with Avon & Somerset police.
23. The claimant was not a perfect employee. Some work place issues had arisen but none of these illustrate any deep seated problem at work such that it seems proper to conclude that the claimant had a premeditated plan to manufacture evidence against the respondent to 'engineer a dismissal' as the respondent refers in its closing submissions. The employment relationship was fundamentally a contended and settled one of mutual satisfaction on both sides.
24. One example of some work place issues is that the claimant's manager Mrs Rea had cause to speak with the claimant and make a file note of a conversation she had with the claimant on 30 November 2018 regarding a posting that the claimant's husband had put on Facebook and that she did not appear well focused at work.
25. Another example took place in March 2019. Mrs Rea became aware that another employee had complained that the claimant was rude on the phone. Mrs Rea's evidence on this was that she had never known the claimant to be rude on the telephone and determined that she would simply observe her telephone manner to ensure that any problem was not repeated. Her index of concern on this was low as she had never had any concerns about the claimant being rude at work. These examples do not influence me to conclude that the claimant engineered the situation which ultimately caused her to resign. They seem instead like relatively low level day to day workplace issues that are properly managed by her manager.

Email of 3 April and oral evidence regarding events

26. I have given considered the varying accounts of events on 3 April and the email of 3 April timed at 15.30 from the claimant to the employment agency. This is the document inserted in the bundle at 64A during the currency of the claimant's evidence but not otherwise included in the bundle by the respondent. I am satisfied that the respondent withheld this document from the bundle prior to the hearing but did not provide any good reason for doing so. It is an important email.
27. The claimant's case is that that email was very carefully worded on advice from Mrs Rea, including that it incorrectly indicated that there had been no chance to speak to Mrs Bila about the candidate after her interview. The claimant's case is that this is because of the concerns that Mrs Rea had that

Mrs Bila would not offer Mrs Mills the job once she knew that Mrs Mills was black.

28. On any analysis it has always been clear that the events between 3 and 8 April and any conversations that did or did not take place lie at the heart of this case. Oral evidence of events is therefore important to determine the central conflict in this case.
29. In oral evidence Mrs Rea said that she had spoken with Mrs Bila after the interview on 3 April with Mrs Mills, her witness statement is however silent on this conversation.
30. Mrs Bila also gave oral evidence that she spoke to Mrs Rea on the telephone on 3 April about the interview with Mrs Mills earlier that day. Her witness statement is also silent on this conversation. Mrs Bila's oral evidence was that Mrs Rea conveyed to her that afternoon that she had been very impressed by Mrs Mills in interview, that she was personable and confident and had excelled in interview. Mrs Bila's oral evidence was that on that basis she told Mrs Rea that she could offer £52000. This is consistent with the email sent by the claimant later that afternoon in which the agency was told that the respondent would offer £52000 and in which it was stated, incorrectly, that Mrs Rea had not been able to speak with Mrs Bila about the candidate.
31. I consider it relevant that the witness statement of both Mrs Rea and Mrs Bila are silent regarding an important conversation between them on the afternoon of 3 April and neither was able to assist me with why that might be. This assists me in determining that they are less credible as witnesses.

#### Discrepancies witness statement and oral evidence

32. There are other examples of the respondent's witnesses giving oral evidence on important conversations that are entirely absent from their witness statements. These also influence my determination of credibility.
33. Mrs Rea gave oral evidence that she told the claimant at about 5.00pm on Friday 5 April to set up an interview with Mrs Mills. Her witness statement indicates that a different conversation took place at 5.00pm; namely that the instruction to the claimant was to tell Mrs Bila on Monday morning that Mrs Mills had accepted £52000. Mrs Rea's oral evidence was that on Friday 5 April she and the claimant talked to each other as normal as their desks faced each other. Her witness statement states that she did not speak to the claimant on Friday 5 April. The claimant's case is that they spoke to each other at length on that date as Mrs Rea needed to instruct the claimant on how to manage the conversation with Mrs Bila on Monday about Mrs Mills. When I asked Mrs Rea about this seeming discrepancy she clarified that she had meant to indicate in her witness statement not that she hadn't spoken to the claimant on that day, but instead that she did not speak to the claimant about the matters that are recorded in the contemporaneous notes that the claimant said she made on 5 April (pages 86 & 87). She accepted that this distinction was not clear in her witness statement.
34. I also have considered the oral evidence given by Mrs Bila concerning her response to the claimant going home ill after her conversation with Mrs Bila on the morning of Monday 8 April and then Mrs Bila's reaction to the

claimant's letter of resignation later that same day. Mrs Bila's oral evidence was that when she discovered that the claimant had gone home ill on Monday after their telephone conversation, she texted the claimant to make sure she was all right. This is not mentioned in her witness statement. Mrs Bila accepted that this was an unusual thing for her to do as she would not normally text staff if they went home ill but could provide no reason for acting out of the ordinary. Mrs Bila gave oral evidence that she only became aware of the concerns that the claimant had about Mrs Mills (namely that she was going to be denied employment because she was black) when she read the claimant's resignation email letter with Mrs Rea on 8 April. The letter states:

*“Dear Julia I am informing you of my resignation with immediate effect. I am sorry that this is necessary as I have enjoyed working with you, but after a conversation with Mrs Bila today I am unable to continue working for a company that has illegal working practice with regard to Racial and colour prejudice held by the Managing Director. I am unwilling to lie to Recruitment agencies as that makes me complicit with these illegal practices. Because of the issues regarding my reasons for having to leave I will be unable to work my notice as I believe this would be inappropriate knowing the Office dynamic and your need to deal with the matters that I have brought up in this letter”*

35. Mrs Bila was asked on what basis she understood that the letter related to Mrs Mills as it makes no reference to her and doesn't explain the context for the concerns about racial prejudice in her resignation letter. The evidence Mrs Bila gave was that Mrs Rea told her that it related to Mrs Mills when they were standing together reading the email. However, on Mrs Rea's account there had never been a discussion between her and the claimant regarding Mrs Mills's race or skin colour or any concerns that the claimant had regarding racial prejudice against Mrs Mills. On Mrs Rea's account there had never been any reason to discuss this fact. It therefore seems inherently unlikely to conclude that in that moment of receiving the claimant's resignation letter, things suddenly become clear to Mrs Rea and she knew that that this related to concerns about racial prejudice held by Mrs Bila that related to Mrs Mills. It seems more likely that there had been previous discussion between the claimant with both Mrs Bila (earlier the same day by phone) and with Mrs Rea (between Wednesday and Friday the week before face to face) in which these concerns were ventilated. That is the basis of the claimant's case and would properly have put both Mrs Rea and Mrs Bila in a position to understand what the claimant was referring to in her resignation letter.

Withholding email of 4 April from Mrs Rea

36. Part of the respondent's case on a premeditated plan by the claimant is that the claimant deliberately withheld the email from Mrs Rea from the employment agency received on 4 April (received either at 15.20 or 16.59 or both) confirming that Mrs Mills would accept £52000.
37. The respondent's position is that the claimant deliberately withheld the email timed at 15.20 from Mrs Rea and then having forwarded the email timed at



16.59 to Mrs Rea the next morning deliberately didn't mention it to her for the rest of the day anticipating that Mrs Rea would not read it in her inbox.

38. It seems inherently unlikely that, if the claimant wished to withhold the email from Mrs Rea that she would have forwarded it to her at 09.33 on 5 April. Notwithstanding that Mrs Rea was a busy person the claimant cannot have known that she would not have read that email. Forwarding the email to Mrs Rea at 09.33 on 5 April is instead consistent with the claimant having seen it for the first time when she arrived into work on 5 April. It is also consistent with the claimant's account of she and Mrs Rea then having detailed discussions during that day regarding how best to proceed in the light of Mrs Mills having accepted the salary offer and the claimant making notes of what to say to Mrs Bila on Monday as Mrs Rea could not be in the office that day. This is consistent with them both being concerned that Mrs Mills was perfect for the job but also their concern that if Mrs Mills came for a second interview Mrs Bila would not offer her the job because she is black. That concern is consistent with the claimant's hesitation in setting up a second interview until had spoken to Mrs Bila on Monday 8 April about the concerns that she and Mrs Rea had about any possible racial prejudice.

#### Claimant's search history

39. Another factor that satisfies me that I should prefer the claimant's account to that of the respondent is that her search history at work on Friday 8 April includes a search on 'Equality and Discrimination understanding the basics' and 'Racism in Employment UK'. These were included in the bundle by the respondent who had examined the claimant's internet search history at work. The claimant's case is that by Friday she was starting to panic as Mrs Mills had accepted the lower salary offer to that which she had asked for, she was an ideal candidate for the job but she and Mrs Rea were concerned that if called to a second interview she would not secure the job because she is black. I regard those searches as being compatible with her rising sense of panic and wishing to inform herself on the law in this area and internally consistent with the totality of evidence.
40. I have considered the alternative possibility that they could be consistent with the respondent's position of being part of a premeditated plan but this seems inherently much less likely. If the claimant was in the business of setting up such a plan to falsely pursue a claim against her employer, then it seems likely that she would have done her research on how race discrimination works prior to that date and not leave it to the day on which she realises she is going to have to set up a second interview. I also find it inherently implausible that Mrs Mills was, as Mrs Bila asserts, part of that plan; such a notion seems fanciful as there is no proper basis to assert it. The claimant and Mrs Mills were not previously known to each other and for the claimant to have constructed a plan in concert with Mrs Mills, as asserted by the respondent, she can only have started to make that plan after she met Mrs Mills at the interview on 3 April. Such a notion seems inherently implausible, there is no evidence to support it and I do not consider it should guide me in my approach to the conflicts between the parties.

#### Delay in setting up an interview

41. By the time she read the letter of 4 April from the recruitment agency confirming the acceptance by Mrs Mills of the salary offer, the claimant knew that the next proper step was a second interview with Mrs Bila and that she should set one up. Her case is that, after her conversations with Mrs Rea on 5 April, her conscience would not countenance setting one up until she had spoken with Mrs Bila on Monday. On the claimant's case, she and Mrs Rea had agreed, on Friday 5 April, what she would say to Mrs Bila on the Monday 8 April. On the claimant's case she made notes on Friday 5 April of what Mrs Rea told her to say to Mrs Bila on Monday 8 April and made some notes of what Mrs Bila then said to her on Monday; these appear in the bundle. It is inherently implausible that the claimant would have waited so long after receipt of confirmation of the acceptance of the salary offer of £52000 to offer a second interview to such a good candidate, without some good reason. I cannot identify any good reason other than the one set out by the claimant.

Credibility of respondent's witnesses

42. I found Mrs Bila to be a witness who was on occasion evasive in that she avoided answering simple questions and would on occasion obfuscate in her answers. In this sense I found her less credible. Further, she and Mrs Rea gave additional oral evidence in cross examination on several occasions relating to key events and conversations between 3 and 8 April that were not included in their witness statements. In this sense I found them both to be less credible. I accept that witnesses do sometimes remember things when being cross examined that do not appear in their witness statement. However, I consider that it is more unusual for both witnesses to omit such key evidence and most particularly when they are professionally represented as this respondent is. There can never have been any doubt from the way in which the claim was brought in the ET1 that conversations between those dates were important. I consider that it does not assist their credibility for both of the respondent's witnesses' statements to be silent on the detail of key conversations between 3 April and 8 April but then to have recall in live evidence. I found them to be less credible than the claimant in relation to the key events.

Financial gain

43. Part of the respondent's position is that the claimant stood to gain financially by fabricating the story that provides the narrative to her claim. I have considered this possibility but do not consider it could create any good reason for the claimant to have fabricated her story. Successful claimants in unfair dismissal cases are only awarded compensation that reflects losses that they have suffered as a result of an unfair dismissal and assuming they have mitigated their losses. There is in that sense no financial gain. I also consider it relevant that the claimant was valued by her managers at work and she was herself settled and contented in her work. Her family were reliant upon her income and the loss of her job created financial hardship. She had no other job to go to when she resigned. She immediately started a job search after her resignation.

Email of 3 April to agency

44. I also reflect on the language used in the email of Wednesday 3 April sent to the recruitment agency by the claimant at 3.30pm. On the account given by

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Mrs Bila and Mrs Rea orally (although not in their witness statement) they both confirm that in the conversation on the afternoon of 3 April, Mrs Rea was very enthusiastic about Mrs Mills and that on that basis Mrs Bila told Mrs Rea to offer her £52000 and to set up a second interview. On their account there was nothing said in that conversation to alert Mrs Bila to the fact that Mrs Mills was black; this was a wholly irrelevant factor. On the claimant's account Mrs Rea planned to use very carefully chosen language in that conversation to endeavour to alert Mrs Bila to the reality of the fact that Mrs Mills was black but without saying so in terms. On the claimant's account because of Mrs Rea's concerns that Mrs Bila may not employ her once she realised she was black, she instructed the claimant to say something tentative when she contacted the recruitment agency.

45. It was agreed by the claimant and Mrs Rea, that this would indicate that although the first interview had gone well, that they had been unable to discuss the candidate with Mrs Bila and that matters were therefore dependent upon a successful meeting with Mrs Bila. This would enable Mrs Bila to reject Mrs Mills.
46. It is this in the email that stands out "*Julia has not been able to discuss the matter with our MD....*". On everybody's account this is inaccurate as the claimant, Mrs Rea and Mrs Bila all gave evidence that Julia Rea had discussed the matter with Mrs Bila just before the claimant sent that email even though there are differences on *what* was discussed. I have considered what this inaccuracy could mean – why would the claimant include this inaccurate statement in the email? It seems unlikely to be consistent with the respondent's contention that the claimant was creating a premediated plan as that difference in language is so subtle and seems to go to nothing in particular in terms of a premediated plan. However, when one considers that particular language in the context of the claimant's overall narrative it makes sense for her to have said that in the email. It is consistent with Mrs Rea instructing the claimant to create some degree of tentativeness in the decision to proceed regarding the position with Mrs Mills, given Mrs Rea's concerns about how Mrs Bila would react when she found out that Mrs Mills was black.

Inaccuracies in the claimant's evidence

47. There are also some inaccuracies within the claimant's evidence that I have considered.
48. Her witness statement indicates that that Mrs Rea texted Mrs Bila on 3 April after the interview (para 4). My findings indicate that she is wrong on this and that instead there was a telephone conversation between Mrs Bila and Mrs Rea
49. Her witness statement provides that Harben Green emailed on 4 April to say that Mrs Mill's salary expectation was £55000 (para 7). My findings indicate that the email from Harben Green confirming this was in fact sent on 3 April (document 65) at 17.12.
50. The claimant's central narrative is otherwise internally consistent, and I do not consider these inaccuracies to detract from that important feature or my assessment of credibility.

**Findings of fact**

51. Having indicated the basis upon which I have determined that, on a balance of probabilities, I prefer the claimant's evidence to that of the respondent I now make relevant findings of fact.
52. I heard evidence from the claimant and from Mrs Mills who was a candidate for the position of Care Home Manger in one of the respondent's care homes. For the respondent I heard evidence from Mrs Rea, Regional Manager and from Mrs Bila the Managing Director.
53. The respondent is a Care Provider and employs approximately 300 people. The claimant was employed as a secretary from 11 November 2015 and until her resignation on 8 April 2019. The claimant was considered by both Mrs Rea and Mrs Bila as a loyal and hard-working member of staff. As part of her duties, she assisted the Regional Manager, Mrs Rea with the recruitment process. This included sifting application forms, arranging interviews and attending interviews to take notes. The claimant also liaised with the recruitment agencies used by the respondent to recruit new members of staff.
54. The claimant liaised with recruitment agents when assisting Mrs Rea in recruitment exercises. One of these was Ellis Sullivan, an Executive Search Consultant at Harben Green.
55. The claimant was largely contented in her work and was well thought of by her managers. She was considered a loyal, dedicated and flexible member of staff. Mrs Bila thought highly of the claimant and was content to offer her a pay rise to reflect this. Mrs Rea and the claimant worked in close physical proximity to each other with facing desks in the same office; they got on well together and had a friendly working relationship and at times socialised out of work.
56. In November 2018 the claimant started a search for alternative work because she had been unsettled by a safeguarding incident. The claimant offered her resignation to Mrs Rea in November 2018 after she became concerned about the way in which an investigation into a safeguarding issue had been handled. This related to a nurse, understood to have a gambling habit, who had borrowed money on more than one occasion from an elderly resident. The claimant thought that the nurse should have been dismissed and was unhappy that the respondent had issued the nurse with a Final Written Warning instead. The claimant is a principled person who had concluded that she did not wish to be employed within an organisation involved in care of the elderly that did not properly address safeguarding concerns. Because of her unhappiness at this time the claimant applied for alternative work with Avon & Somerset Police and was offered an interview. In an attempt to make her stay in her employment with the respondent and not attend the interview, Mrs Rea let the claimant read the safeguarding investigation report which satisfied the claimant that due process had been followed. She withdrew her resignation and continued working for the respondent.
57. On 30 November 2018 the claimant's manager, Mrs Rea, had an informal conversation with the claimant regarding some inappropriate comments that

the claimant's husband had made on his face book page about some of the claimant's colleagues. At the same time, Mrs Rea pointed out to the claimant that she had noticed that the claimant appeared not to be well focused at work. The claimant apologised and reassured Mrs Rea that she would ensure she was focused at work. Mrs Rea was aware that the claimant was under financial pressure at home as her husband had lost a contract and believed that this might be contributing to her lack of focus at work.

58. In March 2019, Mrs Rea became aware that a colleague in another care home had made a complaint about the claimant's telephone manner. Mrs Rea had never witnessed the claimant being rude and had a low index of concern about this matter. She determined that she would keep a close eye on the claimant's telephone manner.

### **Wednesday 3 April**

59. Following a referral from Mr Sullivan at Harben Green, Mrs Rea interviewed Mrs Paulett Mills for the position of Home Manager at Pondsmead Nursing Home on Wednesday 3 April. The claimant was present to take notes. The interview had originally been set up for 1 April when Mrs Bila could be present, however it had to be rearranged to 3 April when Mrs Bila was not able to be present as she was in Madrid on holiday. Mrs Mills is black. Mrs Rea conducted the interview without Mrs Bila present.
60. The final decision on the appointment of any Home Manager lay with Mrs Bila who would arrange to meet a candidate after their formal interview if she was not able to be at the interview. When Mrs Bila was away from the UK and when she was not able to speak face to face with Mrs Rea, she would telephone her in the morning and the afternoon to ensure that everything was in order. She kept a close eye on the running of her homes.
61. Mrs Rea was very impressed by Mrs Mills in interview, she considered her to ideal for the post of Pondsmead Home Manager with excellent clinical skills and was confident and personable. Mrs Mills explained in interview that her salary aspiration was £55000. Mrs Mills felt the interview had gone very well.
62. Following the interview Mrs Rea had a discussion with the claimant and shared her view that Mrs Mills was perfect for the position of Home Manager. Mrs Rea expressed the view that Mrs Mills would be able to get the home an 'outstanding' CQC report. Mrs Rea and the claimant then discussed the problem of how to broach the subject of Mrs Mills being black with Mrs Bila and it was agreed that Mrs Rea would tell Mrs Bila that she had beautiful dark skin.
63. Mrs Bila and Mrs Rea spoke later that afternoon on the phone. Mrs Rea told Mrs Bila how well Mrs Mills had interviewed and how she excelled as a candidate. She told Mrs Bila that Mrs Mills salary aspiration was £55000. Mrs Bila told Mrs Rea to offer Mrs Mills a salary of £52000 and that she would be available to meet her any day the following week upon her return from Madrid.
64. Mrs Rea then instructed the claimant to email Harben Green to try and secure Mrs Mills with a salary offer of £52000 and the claimant was instructed to

ensure that the offer was tentative. This the claimant did at 15.30 on the afternoon of 3 April. This is document 64A in the bundle and it states *"Hello Ellis – Julia Rea the Regional Manager was impressed by the interview with Paulett. The Managing Director of the company is not available but I know would like to meet Paulett so would either Monday 8<sup>th</sup> or Tuesday 9<sup>th</sup> after 2pm be suitable for her. Paulett seemed keen on Avon Care Homes and her salary expectations were discussed. Julia had not been able to discuss the matter with our MD but would like to offer her 52k for a 40 hour week subject to a successful meeting on Monday"*

65. There seems no proper reason for the claimant to have incorrectly represented to Harben Green that Mrs Rea had not been able to discuss matters with Mrs Bila, given that it is the oral evidence of both that that they had discussed Mrs Mills that afternoon and that Mrs Bila had confirmed that Mrs Mills was to be offered £52000. I find that the claimant included this phrase in her email to comply with Mrs Rea's instruction, given the concerns that Mrs Rea had regarding how Mrs Bila would respond once she became aware that she was black.
66. Harben Green responded on 3 April at 17.12 regarding Mrs Mills' salary expectations *"her salary requirements would be a minimum of 55k for accepting a role, is this something you could meet?"*

#### **Thursday 4 April**

67. Mrs Bila called the office as usual on Thursday 4 April at or around 10.00 and 15.00 and spoke with Mrs Rea and the claimant. In one of her conversations it became clear to Mrs Bila that Mrs Mills was black, she spoke with the claimant and told her that she was cross at Mrs Rea for not being clear enough the day before regarding Mrs Mills' ethnicity.
68. On instruction from Mrs Rea, the claimant then emailed Harben Green at 15.02 on 4 April to say that the respondent could not meet her salary expectations *"We have discussed matters with the MD and informed her of Paulett's salary expectations and I am afraid that we would be unable to meet them"*
69. Harben Green emailed the claimant on 4 April to tell her that Mrs Mills would accept the offer of £52000. There is one email timed at 15.20 which the claimant asserts she never received. The respondent asserts that the claimant received it, read it and deliberately withheld it from Mrs Rea to engineer her dismissal. The claimant asserts that she did not receive that email.
70. There is a second email timed at 16.59 on which the subject line is 'forwarded email'. Both emails have the same content.
71. I am satisfied that the claimant did not deliberately fail to action the email timed at 15.20 to engineer her claim of constructive dismissal. Whatever the explanation for the claimant saying that she did not receive the email timed at 15.20 is, it is not that. I reach this conclusion because the claimant did forward the later timed email (16.59) to Mrs Rea at 09.33 on 5 April. That

action is not consistent with an attempt to deliberately withhold it from Mrs Rea.

72. I find therefore that on a balance of probabilities the claimant received both emails into her inbox. She did not open and read the first one and only reacted when she opened and read the second one when she arrived for work on the Friday morning and realised that Mrs Mills had accepted the lower salary offer. There are many reasons that someone might not absorb the contents of all emails in their inbox and I conclude that for some reason the claimant had not realised that she had received the email timed at 15.20. The claimant finishes work at 17.00 and did not see the second email, timed at 16.59, arrive in her inbox before she left for work.

### **Friday 5 April**

73. When the claimant arrived for work on 5 April she opened and read the email sent by Harben Green at 16.59 the day before. She forwarded it to Mrs Rea at 09.33. She and Mrs Rea then had several discussions that day regarding how to progress matters, given that Mrs Mills had now accepted the offer of £52000. The claimant and Mrs Rea were now concerned that Mrs Bila would not offer Mrs Mills a second interview because of her racial prejudice and were uncertain what to do.
74. Mrs Rea was in the office on 5 April preparing to induct a new home manager on Monday 8 April. She was putting together a folio of policies and documents for the new home manager. Mrs Rea was not going to be available to speak to Mrs Bila when she called on the morning of Monday 8 April as she would be away inducting the new home manager. Mrs Bila was due back from her holiday in Madrid on that day. It was therefore understood that the claimant would need to speak to Mrs Bila when she called on Monday morning.
75. After discussion, Mrs Rea instructed the claimant what to say to Mrs Bila on Monday morning. The claimant made notes of what she should say to Mrs Bila, she was effectively given a script by Mrs Rea. These appear at pages 86 and 87 in the bundle. *"I know you think that your residents have in the past not liked being cared for by black people and I know that you are reluctant to employ Paulett and it has affected your decision but I am really struggling with this decision. I know you are not racist but this opinion by the residents is unfortunately influencing you and it is making the employment process that I am using is getting the company in difficulties with the law regarding equality and racism. Paulette has accepted 52k Julia offered her 52K pending an interview with you. How do we proceed with this? Paulette wanted 55 but has accepted 52 this morning (mon) so I wonder how we are going to proceed. Julia was so excited about her experience and her vision....[parts not readable]....with her reputation she could fill the home"*
76. That satisfies me that the claimant and Mrs Rea agreed that the claimant would tell Mrs Bila on Monday that Mrs Mills had accepted the offer of £52000 that morning and that in light of that she and Mrs Rea needed guidance on how to proceed given her known reluctance to employ a black home manager.

77. The claimant was now very concerned and did an internet search at 13.34 on Racism in Employment UK and at 13.36 on 'Equality and discrimination understanding the basics'. She was starting to experience a sense of rising panic regarding the situation as she was concerned not to be complicit in discriminatory work practices. The claimant spent that weekend in a stressed and upset state worrying about what was going to happen on Monday morning.
78. The claimant was not instructed by Mrs Rea on 5 April to arrange a second interview with Mrs Mills. Instead Mrs Rea instructed the claimant to endeavour, on Monday morning, to get Mrs Bila to agree to a second interview on the basis of the 'script' she had given to the claimant.

### **Monday 8 April**

79. Mrs Bila called the claimant at about 10.00am. The claimant followed the script that she had agreed with Mrs Rea. Mrs Bila told the claimant that she did not want Mrs Mills because she was black. The claimant told Mrs Bila that what she was proposing was illegal. The claimant jotted down some notes of her conversation with Mrs Bila on some sticky-backed post it notes – they are hastily written but record the essence of what Mrs Bila conveyed to the claimant
- To have black people in charge of a home like that is not going to work I don't have to explain to anyone
  - Not for public knowledge
  - Its my business. Its my priority. Avon Care Homes do not give jobs to people in a management positions
  - She told me to say manager is staying now then changed to I will see her
  - I will interview her and then say I don't like her I am not having her as a manager.
  - 2.00pm Wednesday
80. I am satisfied that these hastily written notes reflect what Mrs Bila told the claimant in that telephone call. From that the claimant understood that she was being instructed to set up an interview for Mrs Mills on the basis that Mrs Bila had predetermined that she would be rejected because she did not want to employ a black home manager. She had hoped, after her conversation with Mrs Rea on Friday 5 April, that she may be able to persuade Mrs Bila to behave in a more positive manner if she explained to her that what she was proposing was illegal.
81. When the claimant realised that this was not possible, she determined that she could no longer remain employed by the respondent. She could not countenance setting up an interview on that basis with Harben Green for Mrs Mills, knowing that Mrs Bila would not employ her because she was black. The claimant was deeply offended and upset at being asked to be complicit in such discriminatory work practices, she cleared her desk and left the office.



She realised she could not continue in her employment and she resigned in response to the events that had occurred between 3 and 8 April. Her concerns and damage to her ability to trust her employer had been mounting since her conversation with Mrs Rea on Wednesday 3 April. Not wishing to leave her employment she hoped that her conversation on Monday with Mrs Bila might restore trust in her employer such that she could remain in employment. Any hope that she could have trust and confidence in her employer to not adopt discriminatory work practices relating to recruitment decisions was however totally undermined by her conversation with Mrs Bila.

82. The claimant went home after her conversation with Mrs Bila. She emailed Mrs Rea from her home email at 12.47

*“Dear Julia I am informing you of my resignation with immediate effect. I am sorry that this is necessary as I have enjoyed working with you, but after a conversation with Mrs Bila today I am unable to continue working for a company that has illegal working practice with regard to Racial and colour prejudice held by the Managing Director. I am unwilling to lie to Recruitment agencies as that makes me complicit with these illegal practices. Because of the issues regarding my reasons for having to leave I will be unable to work my notice as I believe this would be inappropriate knowing the Office dynamic and your need to deal with the matters that I have brought up in this letter”*

83. Mrs Bila became aware that the claimant had left work reporting herself to be unwell after their conversation that morning. Mrs Bila would not normally contact members of staff who had gone home ill. However, she sent the claimant a text message when she found this out to say that she was sorry that she was feeling unwell and that she hoped she would get better soon. Mrs Bila could provide no explanation for deviating from her usual practice in sending this message to the claimant. I consider that this is indicative of the fact that Mrs Bila knew that the claimant had been upset regarding what Mrs Bila had said in her conversation with the claimant that morning.
84. Mrs Bila then attended the office and was with Mrs Rea when the claimant's resignation letter arrived by email. Mrs Bila and Mrs Rea read the letter together. Mrs Bila said in cross examination that she knew the letter referred to Mrs Mills' ethnicity when she read the resignation letter. She could however provide no explanation of how she reached this conclusion with such ease as on her account at that stage she not even aware that Mrs Mills was black. On her account her discussion with the claimant that morning had been limited to an instruction to set up an second interview with Mrs Mills. On her account there had been no discussions with Mrs Rea and the claimant the week before regarding Mrs Mills' ethnicity. The letter itself is silent regarding any context to the racial and colour prejudice held by the Managing Director.
85. In questioning from me and in re-examination Mrs Bila then explained that she became aware that Mrs Mills was black when Mrs Rea explained to her that the letter was referring to Mrs Mills. However, on Mrs Rea's account the fact of Mrs Mills being black had never been discussed between her and the claimant since her interview in any conversations – it was, on Mrs Rea's account, a non-issue. On the account of the respondent's witnesses there

was therefore no proper basis for a conclusion to be reached by Mrs Rea or Mrs Bila simply upon reading the letter, that it necessarily referred to Mrs Mills.

86. I conclude from this that the real reason that both Mrs Bila and Mrs Rea knew what the letter was referring to, when they read it, was that the claimant's account of the conversations on 3,4,5 & 8 April is truthful and is to be preferred.
87. After sending her letter of resignation, the claimant telephoned Mrs Mills on 8 April at her work address. She told Mrs Mills that if she were to be given a second interview with Mrs Bila she would not be offered the position because of the colour of her skin. Mrs Mills was shocked at this. She considered whether or not to believe the claimant, alert to the possibility that she may be a disgruntled employee causing problems. She asked the claimant how long she had been employed and whether she was subject to any disciplinary processes and the claimant confirmed that there were no disciplinary issues outstanding. The claimant became distressed in her telephone call with Mrs Mills and told her that she had herself resigned because of what had happened and her refusal to be complicit in what she considered to be an unlawful practice. Mrs Mills considered her distress to be genuine and believed the claimant's account of what had happened. Mrs Mills determined that she would not attend a second interview.

#### **Determination of claim**

88. On the basis of my findings of fact the claim of unfair dismissal succeeds in accordance with S95(1)(c) Employment Rights Act. The claimant terminated her contract without notice in circumstances such that she was entitled to terminate it without notice by reason of her employer's conduct.
89. There was a fundamental breach of contract on the part of the employer by reference to the implied term of trust and confidence. Damage had been caused to the implied term of trust and confidence by the conversations that took place on 3,4, & 5 April. The actions of Mrs Bila on Monday 8 April utterly undermined the claimant's ability to trust her employer; the claimant could not tolerate continuing to be employed on the basis that she was being instructed in terms to be complicit in recruitment practices that there were unlawful by reference to the provisions in the Equality Act relating to race discrimination.
90. It was the breach by Mrs Bila on Monday 8 April that caused the claimant to resign. The claimant resigned promptly thereafter by immediately leaving her place of work and going home. She then sent her letter of resignation by email, within hours once she got home.
91. The respondent has submitted that the claimant resigned prematurely and should instead have raised a grievance regarding her concerns before resigning. I do not accept any force in this submission. Given the serious nature of the unlawful recruitment practices that the claimant was being asked to administer for Mrs Bila she was in no sense under a responsibility to raise a grievance before resigning. The claimant's continued employment was simply untenable after the attitude adopted by Mrs Bila in her conversation with the claimant on Monday 8 April.

**Remedy**

92. A Case Management Preliminary Hearing will be listed by telephone to give directions to address matters of remedy.

Employment Judge Christensen

Dated: 3 February 2020

Reserved Judgment & Reasons Sent to Parties: 4 February 2020

FOR EMPLOYMENT TRIBUNALS