EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs K Pilgrim	and	Jasmine Care (Holdings) Limited

Heard at Reading on: 6, 7, 8, 9, 10 January 2020 (hearing)
13 January 2020 (in chambers)

Appearances
For the Claimant: In person
For the Respondent: Mr W Lane, solicitor (6 January 2020)
Mr S Swanson, consultant (7-10 January 2020)

Employment Judge: Vowles
Members: Ms C Baggs
Ms H Edwards

RESERVED UNANIMOUS JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties and determined as follows.

Unfair Constructive Dismissal – sections 95(1)(c) and 98 Employment Rights Act 1996

2. The Claimant was unfairly dismissed. This complaint succeeds.

Wrongful Dismissal – article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994

3. The Claimant was wrongfully dismissed. This complaint succeeds.

Direct Race Discrimination – section 13 Equality Act 2010

4. The Claimant was not subject to race discrimination. This complaint fails and is dismissed.

Indirect Race Discrimination – section 19 Equality Act 2010

5. The complaint was withdrawn and is dismissed.

Harassment related to Race – section 26 Equality Act 2010

6. The Claimant was not subject to harassment related to race. This complaint fails and is dismissed.

Unpaid Holiday Pay – regulation 30 Working Time Regulations 1998

7. This complaint will be dealt with at the Remedy Hearing.

Unauthorised Deduction from Wages – section 13 Employment Rights Act 1996

8. This complaint will be dealt with at the Remedy Hearing.

Remedy Hearing

9. A one day Remedy Hearing before the same Tribunal will now be listed.

Reasons

10. This judgment was reserved and written reasons are attached.

Public Access to Employment Tribunal Judgments

11. All judgments and reasons for judgments are published, in full, online at *www.gov.uk/employment-Tribunal-decisions* shortly after a copy has been sent to the Claimant and Respondent.

REASONS

SUBMISSIONS

1. On 21 May 2018 the Claimant presented a claim to the Tribunal with complaints of unfair constructive dismissal, direct race discrimination, indirect race discrimination, race related harassment, victimisation and unpaid holiday pay and unauthorised deduction from wages.

2. On 3 July 2018 the Respondent presented a response and denied all the claims.

3. The claims were clarified at a Case Management Preliminary Hearing on 29 January 2019 and a case management order was produced.

4. The complaints of victimisation and indirect race discrimination were withdrawn by the Claimant.

EVIDENCE

5. The Tribunal heard evidence on oath on behalf of the Claimant from Mrs Keturah Pilgrim (Claimant and Senior Carer), Ms Vanessa Morris (former

Deputy Manager – by Skype from Cyprus), Ms Lynda Beddow (Training Consultant), Ms Nikita Austin (Carer - by Skype from Guyana) and Mr Matthew Alexander (Friend). The Tribunal also read statements from Ms Imelda Manalo (Carer), Ms Imelda Omana (Carer) and Ms Musu Sesay (Carer).

6. The Tribunal heard evidence on oath on behalf of the Respondent from Ms Amanda Griffith (Home Manager), Dr Zyrieda Denning (Director), Ms Virginia Long (Regional Manager), Ms Natasha Brown (Deputy Manager), Ms Dafinka Alexandrova (Home Manager) and Mr Michael Chambers (Company Secretary). The Tribunal also read a statement from Ms Carolyn Padwick (Deputy Manager).

7. The Tribunal also read documents in a bundle provided by the parties.

8. From the evidence heard and read the Tribunal found as follows.

FINDINGS OF FACT

9. The Respondent owns three nursing homes providing accommodation for persons who require nursing and personal care.

10. The Claimant was employed at Jasmine Nursing Home as a Carer from 7 February 2004 until her resignation on 20 April 2018. In 2013 the Administrator resigned and the Claimant was appointed to the post of part time Administrator which was worked around her role as a Senior Carer. She confirmed that she worked on the floor as a Senior Carer in the morning and from 2 pm onwards as Administrator. Over the years, her role grew from Senior Carer and Administrator to include Training Co-ordinator. She was moving and handling trainer and assessed the competencies of current and new staff.

11. In June 2015 the Claimant was offered a post with another care home with an opportunity to do nurse training to become a Registered Nurse. Accordingly, she handed in a letter of resignation. The proprietor of the Respondent, Dr Denning, asked the Claimant if she would reconsider her resignation if the Respondent was willing to match the salary of the other care home, which was £13 per hour. It was agreed that she would stay working for the Respondent at £13 per hour and that her nursing tuition fees would be paid subject to an agreement to remain working for the Respondent for 2 years after she qualified. In fact, the Claimant's pay was not increased until 15 April 2016 to £13 per hour and her tuition fees were not paid.

12. A document headed "*Amendment to Contract of Employment*" dated 15 April 2016 confirmed an amendment to the Claimant's contract of employment under the Employment Rights Act 1996 and included the following:

"Job Title – Manager's assistant and training co-ordinator

Amendment: Increase in hourly rate to £13 per hour."

13. On 24 April 2017 there was a further amendment to the Claimant's contract of employment which included the following:

"Job Title – Manager's assistant and training co-ordinator
Amendment: Increase in hourly rate to £15.50 per hour."

14. During this period, the Claimant's line manager was the manager of Jasmine House Nursing Home, Ms HH.

15. The Claimant's evidence, which was not disputed, was that during the course of 2017, Jasmine House suffered serious staff shortages whereby agency staff had to be brought in to assist. Dr Denning directed that agency staff should not be used, and employed carer staff be used more extensively and more effectively.

16. The Claimant's evidence was that in order to deal with staff shortages, and to avoid employing agency staff, Ms HH's practice was to allow staff to do extra shifts whilst they were on leave. This meant that they would be paid for their leave and additionally, for the same period, paid for being at work. Also, Ms HH's practice was to allow staff to be paid for leave which had not been taken due to the pressures of covering shifts during the year. The Claimant herself was carrying out duties as the Manager's Assistant and as a Senior Carer to cover for shift staff shortages. She said that she was working sometimes 7 days a week in some weeks for months on end and that on occasions she would work 70 or more hours per week.

17. The Respondent disputed the Claimant's account that she was deployed so extensively as a Senior Carer, or that she was required to work 7 days a week.

18. Ms HH's husband, Mr CH, was also employed by the Respondent. Although the Tribunal did not see any documentary evidence regarding the circumstances in which they ceased to be employed by the Respondent, the Respondent's witnesses confirmed in their evidence that both Ms HH and Mr CH were accused of misconduct and both left between 13 and 19 December 2017.

19. During the investigation into Mr CH's conduct, the Claimant attended his disciplinary hearing and provided evidence on his behalf. At the time, the Claimant said that she was reassured by the independent HR representative who was conducting the hearing, that her employment prospects would not be adversely affected by doing so. However, during the course of these Tribunal proceedings, the Claimant alleged that the Respondent's conduct towards her changed after that disciplinary hearing. She blamed the change in her treatment by the Respondent's managers on her attendance at Mr CH's disciplinary hearing and separately, upon race discrimination.

20. At the start of the Claimant's employment in 2004, she was issued with a contract of employment.

21. There was a new contract of employment dated 7 July 2009 in which she was described as Senior Care Assistant working 40 hours per week at a rate of pay of £8.21 per hour.

22. On 30 December 2015 the Claimant received a new contract of employment with a job title of Senior Care Assistant and Training Co-ordinator. It stated:

"Your normal hours will be up to 55 hours per week, this will be worked in accordance with the staff rota, it can be 6, 8 or 11.5 hour shifts and will be agreed with you in advance. Please note that shift patterns may change from time to time and you may be required to work either day or night shifts to ensure the continuity of the business, you will also be required to work weekends."

23. The rate of pay was £10 per hour.

24. As stated above, the Claimant's rate of pay increased to £13 per hour on 15 April 2016 and to £15.50 per hour on 24 April 2017.

25. During the course of disclosure for these Tribunal proceedings, the Respondent also produced a further contract of employment with the job title of *"Manager Assistant"* with hours of work *"Your normal hours will be up to 48 hours per week…."*. That contract, unlike the earlier contracts, was signed only by the then Jasmine House Manager, Ms Griffith, on 19 December 2017. The signature block for the employee's signature was blank. The Claimant denied that she had ever seen this contract before it was disclosed during the course of the Tribunal proceedings disclosure process. The Tribunal found as a fact, in view of the Claimant's denials and the absence of her signature, that this was not a valid contract of employment which had been entered into by her with her agreement.

26. On 23 March 2017 Ms Griffith told Mrs Denning that the Claimant was employed on the 55 hours contract rather than a 48 hours contract.

27. On 19 December 2017 Dr Denning wrote to the Claimant (known as Ketty), Ms Griffith (Manager) and Ms Padwick (Deputy Manager) as follows:

"No one is allowed to work more than an average of 48 hours a week although essential healthcare workers such as nurses and care staff can and MUST have a signed opt out agreement in their files (which I will check next month). Non-essential staff by law are not allowed to work more than an average of 48 hours a week, after breaks deducted. This includes you Ketty, so if you are working 6 days a week, in the building from 8-4.30/5 – lunch and breaks this is 48 hours a week and that is the law.

If you sign an opt out agreement you may pick up extra shifts as a senior carer on senior carer rates (max £10p h) but you cannot do admin for over 48 hours a week by law.
I will therefore from today restrict through Andrew your enhanced rate of pay Ketty, that I was totally unaware of having been slipped in without my knowledge or approval in April to 48 hours a week, so which 6 days you want to work is up to you. By law you should take 1 day off a week anyway.
If you want to work Saturday and Sunday, take a weekday off instead."

28. However, the Claimant took the view that she still had a contract with hours of work up to 55 hours per week and that in fact because of the heavy workload and shortages of staff, she worked longer than 55 hours after December 2017. She pointed out to her managers that she had a contract up to 55 hours, that she had a heavy workload, and that she would be unable to carry out her multi-various duties in 48 hours per week. The Claimant also did not accept that she was not "essential staff" or that her Senior Carer rates should be capped at a maximum of £10 per hour.

29. Ms Brown was employed by the Respondent as an Administrator. During the course of December 2017, she was deployed to assist the Claimant with some of her administrative duties because, said the Respondent, it was recognised that she was overloaded, having taken on some of Ms HH's duties after she left in December 2017.

30. On Friday 16 March 2018 Ms Griffith asked the Claimant if she would come into the office on Monday 19 March 2018 because Ms Brown was absent on sick leave and was not expected to be in on the Monday. The timesheets and payroll documentation were due to be completed on the Monday and she wanted to ensure that this task was completed. The Claimant was not due to be in work on Monday and had a hospital appointment that afternoon. However, she agreed to attend work on her day off.

31. There was a conflict in the Respondent's witnesses' evidence as to whether Ms Brown was actually in work on 19 March 2018.

32. Ms Griffith, when interviewed by Ms VL on 27 March 2018, said:

"V interviewed AG
V asked AG why she had not checked the wages.

AG
Said that she had a day off on the Monday of Payroll and NB was asked to check them with Ketty. When NB had arrived for her shift, Ketty had already started early in the morning and had sent them to the Accountant without having them checked by a second person."

33. However, on 16 April 2018, Ms Brown signed a statement as follows:

"18th April 2018
On Friday 16th March I called to say I would not be in work on Monday 19th March as I was ill and had GP appointment in the morning. I called Carolyn at 13:20 and informed her of the outcome."

34. The Claimant said that she attended work on the morning of 19 March 2018 but Ms Brown was not at work. However, Ms Padwick (Deputy Manager) was present. In her witness statement, the Claimant said:

- *At no point during the morning or before 2pm was NB at work as claimed in statements in above evidence statement from AG Manager and NB and in the Grievance minutes. Wages was completed going on 2pm which can be verified from the drop box. Evidence of signing in log requested as above not received.*
- *Padwick can confirm time I left as can MS senior care assistant statement. (Witness Statement 3). Copy of wage details were handed to Padwick, it was explained details were already sent, Padwick said that was okay with fact that I sent the calculations off and that it could be rechecked if needed.*
- *Andrew accountant sent through the payslips the following day and queried the high annual leave for a 4-week period: I emailed back and explained the level of leave untaken and we also had a high intake of staff between September and December, including maternity leave entitlement. Request made for a copy of email never received."*

35. In her witness statement, Ms Padwick said:

"On page 123, the Claimant in her investigation stated that I said people can work and be paid annual leave. She goes on to state that I told her it was fine. I cannot recall this conversation as it is a while back now. But I can say that if it had been said, it would have been under [Ms HH]'s instructions. I was the deputy manager and I was underneath [Ms HH]. This was [Ms HH]'s practice, and everyone had to follow [Ms HH]'s instructions including me. That practice changed when Ms Griffith took over just after Christmas 2017 as [Ms HH] was just following her own rules in my view.
…
On page 25, the Claimant stated that she sent the wages to Andrew at 2pm because she had an appointment to make at 2.30pm, and I knew that as she came downstairs and gave me a list and I said she should hurry and go so she does not miss her appointment. As regards the event of 19 March, I recall that around this time, the Claimant had a lot of appointments with doctors. I know that she was going for doctors appointment on 19 March. Whether I actually said hurry and go, I am not quite sure. I might have said hurry up and go for your appointment, but not to the effect of getting wages wrong or not having annual leave requests approved.

I have never checked wages, nor given to the authorisation to check the wages as this was not part of my role. This was always done between the Claimant and [Ms HH]."

36. Following the submission of the information by the Claimant to the accountant on 19 March 2018, the Respondent had concerns that she had fraudulently claimed payment for untaken leave for herself and other members of staff. Accordingly, an investigation was commenced and the Claimant was suspended from work on 21 March 2018. In a confirmatory letter dated 23 March 2018, Ms Griffith said:

"Further to our meeting on 21/03/2018 I write to confirm that you have been suspended on contractual pay to allow an investigation to take place following the allegations of fraudulent claims for hours on timesheets for herself and other colleagues. As your employer we have a duty to fully and properly investigate this matter."

37. On 27 March 2018 the Claimant attended an investigation interview conducted by Mr Chambers and Ms Long. The Claimant was accompanied by her friends, Mr Alexander and Ms Brown was the notetaker. The content of the interview (which was minuted but not verbatim, and the contents of which were disputed by the Claimant) were the subject of several of the Claimant's complaints dealt with below.

38. On 6 April 2018 the Claimant was invited to a disciplinary hearing. The allegation was:

"Allegations of fraudulent claims for hours on timesheets for annual leave."

39. A further letter dated 7 April 2018 was sent to the Claimant and in that letter, the allegation was as follows:

"Taken part in activities which cause the company to lose faith in your integrity namely, alleged fraudulent claims for annual leave on timesheets, when the annual leave hasn't been taken. Further particulars being that on 19/3/2018 and 22/3/2018 you submitted time sheets for payment for annual leave to the amount of 55 hours to claim payment of £1248 and falsely represent to the company that you had taken these hours as annual leave. It is alleged that in fact you worked during this time and claimed payment for the hours worked in addition to claiming payment for annual leave, which you didn't take. The company alleges that these matters if proven represents a gross breach of trust."

40. Both letters stated: *"If these allegations are substantiated, we will regard them as gross misconduct. If you are unable to provide a satisfactory explanation, your employment may be terminated without notice."*

41. In fact, as conceded by the Respondent, in the 7 April 2018 letter, the reference to *"22/3/2018"* was incorrect. Also, the reference to *"the amount of 55 hours to claim payment of £1248"* was also incorrect.

42. The Claimant said she had also received two further invitation letters that had different allegations on them. They were not included in the bundle of documents before the Tribunal.

43. A disciplinary hearing was held on 19 April 2018 chaired by Ms Alexandrova (Manager, Manor Place Home). The Claimant was accompanied by her Trade Union representative. Ms Alexandrova informed the Claimant at the end of the hearing that she would discuss it with Dr Denning and HR and that the Claimant would receive a letter informing her of the decision within 5 days and she would have the right to appeal any decision.

44. The following day, 20 April 2018, the Claimant handed in her resignation with immediate effect by letter saying that she had been constructively dismissed:

"I hereby tender my resignation from Jasmine House Nursing Home as Managers Assistant, with immediate effect, citing constructive dismissal due to:
1. Racial discrimination and victimisation (Both direct and Indirect). Under The equality act 2010.
2. Breach of contract of employment under Employment Law.
3. Bullying and harassment under the Protection from Harassment Act 1997
4. Breach of confidence and trust contrary to the Policies and Procedures of the home.
5. Breach of confidentiality contrary to the Policies and Procedures of the home and my employment rights.

The behaviour of the management team has had a profound effect on my mental and physical wellbeing. Coupled with the refusal to pay my contracted hours as per my contract of employment, which has caused me financial hardship, and being falsely accused of fraudulent activities, which has also caused me great emotional and psychological destress after 14 years of service to the company."

45. On the same date the Claimant submitted a lengthy grievance complaining about the same matters but with more detail added.

46. On 26 April 2018 Ms Long wrote to the Claimant to ask if she wanted to retract her resignation but if she did so, the outstanding disciplinary matters, which had not yet been determined, would continue.

47. On the same day, 26 April 2018, Ms Griffith also wrote to the Claimant regarding the disciplinary matter and repeated the allegation contained in the invitation letter dated 7 April 2018 referred to above which still contained the errors regarding the date and number of hours.

48. On 1 May 2018 the Claimant wrote to the Respondent confirming her resignation and referred to the matters raised in her earlier resignation and grievance letter and adding further complaints regarding her treatment by the Respondent.

49. On 3 May 2018, Dr Denning conducted a grievance meeting accompanied by Ms Griffith and Ms Brown. The Claimant declined to attend the meeting. None of the Claimant's grievances were upheld. The Claimant was not informed of the outcome of the grievance meeting until she received the minutes in the disclosed documents for these proceedings.

50. On 21 May 2018 the Claimant presented her claim to the Tribunal.

Documentation and Record Keeping

51. The Tribunal found that the Respondent's general approach to record-keeping and the storage of documentation, and the production of relevant documentation for the purposes of these proceedings, was chaotic. The Claimant complained constantly before the hearing and during the course of the hearing that the Respondent had failed to provide her with documentation which she required in order to pursue her claims.

52. One example was the storage of the Claimant's personnel file. Ms Long (Regional Manager) and Mr Chambers (Company Secretary) gave evidence that they had examined the Claimant's personnel file prior to her interview on 27 March 2017. Ms Long said that the file did not contain the documentation she would expect to find. All that was in there was a photocopy of the Claimant's passport, and a Working Time Regulations 48 hour opt-out form (which was not signed by the manager but only by the Claimant) and some induction documents. She did not find anything which confirmed the Claimant's right to work in the UK, nor did she find a contract of employment. She said that later, before the Claimant was invited to a disciplinary meeting on 7 April 2018, the file had been examined again and a contract of employment and an amended contract of employment had been found. During the course of questioning, Ms Long said that the personnel file was contained in a locked cabinet but it was clear that the cabinet lock had been forced so that it was not secure.

53. Mr Chambers said that he had examined the file at the same time as Ms Long and his recollection was that there was no copy of the passport, no documents regarding permission to work in the UK or leave to stay in the UK. He was specifically looking for the passport because he thought there may be something in the passport regarding these matters. He said that he had not looked again at the file until the evening of 9 January 2020 (during the course of the Tribunal hearing) but when he did so, he found a photocopy of the passport and a letter from the Home Office regarding the Claimant's application for a British passport dated 19 March 2017. He said that these documents had not been in the file when he had previously looked prior to 27 March 2017. He therefore brought a copy of the Home Office letter to the Tribunal on the morning of 10 January 2020 but neither

he nor the Respondent's representative knew that that document was already in the bundle of documents at page 100. He said that the cabinet lock was still broken and it was insecure. He said in his evidence that he thought that the Claimant had removed documents from the file on 28 March 2018 when she had returned to the office to hand in her resignation letter. He therefore suggested that it was she who had removed documents from the file and then replaced them at a later date. However, of course, the Claimant handed in her resignation letter on 20 April 2018, not 28 March 2018.

54. None of this was put to the Claimant in questioning and none of it had been included in any of the Respondent's witness statements.

55. Although not directly relevant to the issues the Tribunal had to determine, it was typical of what the Tribunal found was a chaotic approach to record-keeping. The Claimant's contracts of employment, in particular, were highly relevant to the complaints that the Claimant had made regarding her working hours and duties she had to perform.

Unfair Constructive Dismissal

56. Section 95 Employment Rights Act 1996 sets out the circumstances in which an employee is dismissed. Constructive dismissal is defined as follows:

> *(1) For the purposes of this part an employee is dismissed by his employer if –*
>
> > *(c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

57. Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27 - An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. … He must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

58. Hilton v Shiner Limited [2001] IRLR 727 - The implied term of trust and confidence is qualified by the requirement that the conduct of the employer about which complaint is made must be engaged in without reasonable and proper cause. Thus in order to determine whether there has been a breach of the implied term two matters have to be determined. The first is whether ignoring their cause there have been acts which are likely on their

face to seriously damage or destroy the relationship of trust and confidence between employer and employee. The second is whether there is no reasonable and proper cause for those acts. For example, any employer who proposes to suspend or discipline an employee for lack of capability or misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence, yet it could never be argued that the employer was in breach of the term of trust and confidence if he had reasonable and proper cause for taking the disciplinary action.

59. London Borough of Waltham Forest v Omilaju [2005] IRLR 35 - In order to result in a breach of the implied term of trust and confidence, a "final straw", not itself a breach of contract, must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. Thus, if an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence but the employee does not resign and affirms the contract, he cannot subsequently rely on those acts to justify a constructive dismissal if the final straw is entirely innocuous and not capable of contributing to that series of earlier acts. The final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. Thus, the mere fact that the alleged final straw is reasonable conduct does not necessarily mean that it is not capable of being a final straw, although it will be an unusual case where conduct which has been judged objectively to be reasonable and justifiable satisfied the final straw test. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

60. Kaur v Leeds Teaching Hospital NHS Trust [2018] CA – The point being made in Omilaju was that if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the implied term. To hold otherwise would mean that, by failing to object at the first moment that the conduct reached the threshold for breaching the implied term of trust and confidence, the employee lost the right ever to rely on all conduct up to that point. Such a situation would be both unfair and unworkable. Underhill LJ disagreed with the view expressed by HHJ Hand QC in Vairea: provided the last straw forms part of the series (as explained in Omilaju) it does not 'land in an empty scale'. He recommended that Tribunals put Vairea to one side and continue to draw from the pure well of the Omilaju judgment, which contains all that they are likely to need.

61. This claim was set out in the case management order made on 29 January 2019 as follows in **bold**.

(iii) **Was the Claimant dismissed, i.e. (a) was the reduction in the Claimant's standard hours of work from 55 hours to 48 hours per week and the payment at a lower rate of hours worked exceeding 48 hours a fundamental breach of an express term of the contract and/or did the Respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant]? (b) if so, did the Claimant affirm the contract of employment before resigning? (c) if not, did the Claimant resign in response to the Respondent's conduct (to put it another way, was it a reason for the Claimant's resignation – it need not be the reason for the resignation)? If the Claimant was dismissed, they will necessarily have been wrongfully dismissed because they resigned without notice.**

(iv) **The Claimant relies on the reduction in her hours of work from 55 to 48 and the payment at a lower rate of hours worked over 48 hours per week as a fundamental breach of an express term of her contract of employment.**

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62. The Tribunal found this matter factually proved. In the Claimant's contract of employment which she signed on 28 December 2015, it is stated:

> *"HOURS OF WORK*
> *Your normal hours will be up to 55 hours per week, this will be worked in accordance with the staff rota; it can be 6, 8 or 11.5 hour shifts and will be agreed…; with you in advance. Please note that shift patterns may change from time to time and you may be required to work either day or night shifts to ensure a* [sic] *the continuity of the business, you will also be required to work weekends.*
>
> *Breaks are unpaid and duration in line with working time regulations.*
>
> *REMUNERATION*
> *Your wage is currently £10.00 per hour payable monthly by credit transfer as detailed on your pay statement. For any authorised additional hours worked, you will be paid at your basic rate. Details regarding the payments for night shifts are available from your Line Manager.*
>
> *COLLECTIVE AGREEMENTS*
> *No collective agreements directly affect your terms and conditions of employment."*

63. The Claimant's rate of pay was increased from £10 per hour on 15 April 2016 to £13 per hour by way of a formal written amendment to her contract of employment. Then, on 24 April 2017, her hourly rate of pay was increased again to £15.50 per hour by way of a written amendment to her contract of employment. However, her contract was subject to unilateral

change by Dr Denning on 19 December 2017 in the email of that date which is quoted above.

64. A unilateral variation was therefore made by the Respondent and her contract was now for hours of work *"up to 48 hours per week"* in place of *"up to 55 hours per week",* and her rate of pay was now reduced from £15.50 per hour to £10 per hour for any hours worked above 48 hours. There was no consultation with the Claimant about this variation, it was simply imposed upon her.

65. The Tribunal found that this unilateral change amounted to a breach of the Claimant's contract of employment regarding the maximum hours of work and her rate of pay. The Tribunal found that both breaches, regarding hours and pay, going to the heart of the employment relationship, were sufficiently serious as to amount to a fundamental breach of contract.

***(v)* The conduct the Claimant relies on as breaching the trust and confidence term is as follows:**

***(v) a.* The matters listed below as less favourable treatment on grounds of race are also relied on as breaches of the trust and confidence term;**

***(v) b.* Whilst the Claimant was suspended, pending disciplinary action, suppliers of the Respondent were informed that the Claimant no longer worked for the Respondent.**

66. The Tribunal found this allegation was not factually proved.

67. It was based entirely upon the witness statement of Ms Austin who said that after the Claimant had been suspended, she walked in to Ms Brown's office and heard her say on the telephone that the Claimant does not work for us anymore. Ms Brown told Ms Austin that she could not discuss the matter with her when she asked if the Claimant had left. There is very little detail of the incident, no specific date, no detail of who Ms Brown was speaking to, the context of the call or the words overheard.

***(v) c.* Whilst the Claimant was suspended, pending disciplinary action, the Respondent employed other staff to replace Claimant.**

68. The Tribunal found this allegation was not factually proved.

69. The Claimant had no direct knowledge of anyone being employed to replace her when she was suspended and Ms Brown said that the employee referred to was employed as a receptionist and mainly answered the phone and opened the door. He resigned not long after he started and was employed for about a month.

***(viii) b.* In late December 2017, the Claimant was instructed that she should no longer work in the main office but should work upstairs in a back office.**

70. The Tribunal found this allegation was factually proved.

71. Dr Denning said that the reason for the Claimant being asked to move was because the office she was using (referred to as the "quiet room") was in fact used as a dining room. Ms Griffith said that she told the Claimant to use the upstairs office so that she could concentrate on her workload and it was because it was a dining area which was not appropriate for work. It was accessible to residents and guests. She said that at the time the Claimant did not raise any issue about this.

72. The Tribunal found that this did not amount to a breach of a term of the Claimant's contract, either implied or express.

(viii) c. **From 5th December 2017, the Claimant's responsibilities were reduced and parts of her role were given to NB (specifically updating risk assessments, completing residents' documentation, doing payroll, answering phones and dealing with enquiries).**

73. The Tribunal found that this allegation was factually proved.

74. However, it was clear that the Claimant had complained about her excessive workload, hours and duties, and Ms Brown was brought in to assist her and to reduce her burden. Although the Claimant complained about the manner in which this was done, in that she was not properly informed or consulted about it, in fact she appreciated the help and it was genuinely done to assist her.

75. The Tribunal found that this did not amount to a breach of a term of the Claimant's contract, either implied or express.

(viii) d. **In March 2018, the Claimant was suspended for allegedly making arrangements to pay excessive annual leave payments to other staff**

76. The Tribunal found this allegation was factually proved.

77. The Claimant's suspension was in accordance with the Respondent's disciplinary procedures which included:

"On some occasions, temporary suspension on contractual pay may be necessary in order that an uninterrupted investigation can take place. This must not be regarded as disciplinary action or a penalty of any kind."

78. The reason for the suspension on 21 March 2018 was explained in a letter dated 23 March 2018 from Ms Griffith:

"Further to our meeting on 21/03/2018 I write to confirm that you have been suspended on contractual pay to allow an investigation to take place following the allegations of fraudulent claims for hours on timesheets for

herself and other colleagues. As your employer we have a duty to fully and properly investigate this matter.".

79. The Tribunal found that this did not amount to a breach of a term of the Claimant's contract, either implied or express.

(viii) e. **During the period of the Claimant's suspension she was underpaid, receiving pay for 48 rather than 55 hours.**

80. The Tribunal found that this allegation was factually proved.

81. During the period of eight weeks prior to suspension, the Claimant regularly worked in excess of 50 hours per week. However, during her suspension, she was paid for only 48 hours per week. This was a breach of an express term of the Claimant's contract of employment which as found above, stated that her normal hours would be up to 55 hours per week, not up to 48 hours per week, and that her rate of pay at that time was £15.50 per hour.

82. The Claimant should have been paid her contractual entitlement for the average hours worked during the previous 12 weeks (under section 222 Employment Rights Act 1996). She was therefore underpaid.

83. The Tribunal found that this was a breach of an express term of the Claimant's contract and it was a fundamental breach.

(viii) f. **During an investigation meeting the Claimant was repeatedly asked by Michael Chambers to repay excess annual leave paid to staff.**

84. The Tribunal found this allegation was factually proved.

85. During the investigative interview on 27 March 2018 during which the Claimant was questioned by Ms VL and Mr MC, the following exchange took place:

Ketty: *I have followed instruction from management.*

Michael: *Whether it was an honest mistake or not you've cost the company over £50,000 This is why we are here.*

Ketty: *I accept this.*

Michael: *In light of that would you be willing to pay back what is owing?*

Ketty: *I took my annual leave and worked the same as other staff too.*

Virginia: *We will get statements.*

Ketty: *[Ms HH] always said it amounted to the same as agency so may as well use our own staff."*

86. During the hearing, Mr Chambers said that he did not intend that the Claimant should have to repay £50,000 and he said that it was not credible that anyone would expect her to repay that sum. He said that the Claimant had *"accidentally or opportunistically misinterpreted"* what he had said.

87. The Tribunal found that it was reasonable for the Claimant to have understood that she was being asked to repay £50,000 in respect of payments paid to her and to other members of staff.

88. The Tribunal found that this was a fundamental breach of the implied term of trust and confidence in the Claimant's contract.

(viii) g. **In March 2018 and during her investigation meeting, Virginia Long and Michael Chambers questioned the Claimant about her immigration status and asked her to produce her passport and proof of her right to stay in the country.**

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89. The Tribunal found this allegation was factually proved.

90. It is based upon the following exchange during the course of the meeting on 27 March 2018

*"**Virginia:** Who updates the staff folders?*

Keturah: *Yes, me.*

Virginia: *Are you aware its only copies in yours? No originals.*

Ketty: *Should be originals.*

Virginia: *Are your documents all current and up to date?*

Ketty: *Yes.*

Virginia: *How long have you been here?*

Ketty: *14 years.*

Virginia: *We can't see any application for you, do you think it has been taken?*

Ketty: *Don't know.*

Virginia: *How often do you look at staff files?*

Ketty: *When there is an update or changes, myself and [Ms HH] did it.*

….

Virginia: *The reason we looked is because your passport should be updated before, why are you doing it now?*

Ketty: *I am applying for a British passport.*

Virginia: *Why now?*

Ketty: *Always wanted to but it always been too busy, the rules are changing now so I am doing it now."*

91. Ms Long and Mr Chambers both denied the Claimant had been asked directly about her immigration status and in the extract above, there is only a reference to her passport. However, the Tribunal found that, within the context in which she was being questioned, immigration status and her passport were matters which were inextricably linked. Mr Chambers said the passport was sought as it would show she had a right to stay to work in the UK. Ms Long said that she had seen an out of date passport in the Claimant's personnel file. In fact, as found above, there was much confusion as to what was and what was not in the Claimant's personnel file at different times.

92. The investigation meeting was convened to discuss the allegation that the Claimant made fraudulent claims for hours on timesheets for herself and other colleagues. Her immigration status and her passport had no relevance whatsoever to these matters. Both the Claimant and Mr Alexander on her behalf said that both Mr Chambers and Ms Long referred to her immigration status several times during the meeting but no reference to that was made in the minutes. The Tribunal found that the questioning of the Claimant was in connection with her immigration status whether the phrase was used or not, and it was reasonable for her to understand that to be the case.

93. The Tribunal found that raising this wholly irrelevant matter during the course of the investigation meeting amounted to a fundamental breach of the implied term of trust and confidence in the Claimant's contract.

(viii) h. **Between March and May 2018, the Claimant was subject to disciplinary action for allegedly fraudulently claiming for hours worked in excess of 48 hours and in respect of accrued but not taken annual leave.**

94. The Tribunal found this allegation was factually proved. The Respondent produced a policy stating:

"1. The care service's holiday year runs from 1st April to 22nd March. All holiday entitlement for the year must normally be taken within it. No payment in lieu will be made for any holiday not taken, other than in respect of holiday (over and above the statutory entitlement of 5.6 weeks) not taken as a result of the business needs of the care home.

2. Employees may, provided they have obtained the manager's prior approval, carry forward any days of their holiday entitlement which are in excess of the first 28 days to the next holiday year in circumstances where the business needs of the care service have prevented them from taking all their holiday entitlement in the current year. Such holiday must be taken no later than the first week of March after the end of the holiday year to which the unused holiday relates.

3. If employees have been prevented due to sickness absence from taking their full holiday entitlement in the current holiday year, carry-forward of up to four weeks accrued and untaken holiday entitlement to the next holiday year will be permitted. However, employees should note that they must take any accrued holiday by reason of sickness absence within 18 months from the end of the leave year in which it accrued or risk losing it."

95. The Claimant's evidence, which the Tribunal had no reason to doubt, was that it was commonplace for employees to be requested, and authorised, to come into work when they were on leave, thereby benefiting from both pay for leave and pay for work, and also that leave outstanding at the end of the leave year would be paid.

96. Two of the Claimant's witnesses, who did not attend the hearing, Imelda Manalow and Imelda Omana, said that in December 2017, they had booked holiday abroad but could not travel because their visas had not arrived. Therefore, they asked if they could work whilst on annual leave and be paid as they were no longer going on holiday. The Claimant on that occasion refused but the two employees were told by Ms Padwick (Deputy Manager) because there were lots of gaps in the rota and she was not allowed to use agency staff, then they could work shifts during their leave. Dr Denning said that she had occasionally allowed employees to work whilst on annual leave by way of overtime to avoid using agency staff but she said that was very rare. In her witness statement, Ms Padwick (who did not attend the hearing) on behalf of the Respondent said as follows:

"On page 123, the Claimant in her investigation stated that I said people can work and be paid annual leave. She goes on to state that I told her it was fine. I cannot recall this conversation as it is a while back now. But I can say that if it had been said, it would have been under Ms HH's instructions. I was the deputy manager and I was underneath Ms HH. This was Ms HH's practice, and everyone had to follow Ms HH's instructions including me. That practice changed when Ms Brown took over just after Christmas of 2017 as Ms HH was just following her own rules in my view."

97. The Tribunal found, based upon the above evidence, that, particularly in 2017, there were severe staff shortages at Jasmine House. There was a prohibition on employing agency staff and therefore staff were allowed to come into work to do shifts whilst they were on annual leave (and therefore be paid twice). As staff were often unable to take their full quota of annual

leave because of staff shortages, they were allowed to be paid for untaken leave at the end of the leave year.

98. The Tribunal found that subjecting the Claimant to disciplinary action in these circumstances, because she had claimed for her own hours in excess of 48 hours per week (see **(viii *a.)*** above) and in respect of accrued and not taken annual leave, was a fundamental breach of the implied term of trust and confidence.

(viii) i. **Between March and May 2018, the Claimant was subject to disciplinary action for allegedly forging a document to increase a relative's rate of pay (Samika Pilgrim).**

99. The Tribunal found this allegation was not factually proved. The Claimant was not subject to disciplinary action in respect of this document.

(viii) j. **Between March and May 2018, the Claimant was subject to disciplinary action for allegedly making arrangements to pay staff for working during periods of annual leave.**

100. The Tribunal found this allegation was factually proved. This was a fundamental breach of the implied term of trust and confidence for the same reasons given at paragraph **(viii) *h.***

(viii) k. **The Claimant was refused access to information that she requested during the disciplinary process.**

101. It is clear that the Claimant requested information and documents so that she could defend herself against the allegations of fraud but these were not provided. On 11 April 2018, the Claimant's representative wrote to the Respondent requesting the list of documents which the Claimant required to prepare her defence against the alleged allegations. The information was not provided. During the course of the Tribunal hearing, the Claimant complained several times about the Respondent's failure to disclose information and documents to her.

102. The Tribunal found that this allegation was factually proved and that it amounted to a fundamental breach of the implied term of trust and confidence.

(viii) l. **The Claimant raised a grievance about her treatment by the Respondent and was told that Dr Denning would chair the grievance even though she was one of the subjects of the grievance.**

103. The Tribunal found this allegation was factually proved. However, the grievance was raised after the Claimant resigned so this could not amount to a breach of contract in response to which she resigned. Her employment had ended.

Constructive Dismissal

104. The Tribunal found that there was, as described above, a series of acts by the Respondent which individually and cumulatively amounted to fundamental breaches of express and implied terms of the Claimant's contract of employment.

105. The first breach was on 19 December 2017 (reduction in hours and rate of pay) and the last act was 19 April 2018 (conduct of the disciplinary interview as part of the disciplinary process).

106. The Claimant did not at any stage affirm the contract or waive the breaches found proved above. Immediately after the first breach on 19 December 2017, the Claimant complained to her manager when she was told that Dr Denning had reduced her hours to 48 hours per week. She complained that her contracted hours were 55 per week and indeed she could not complete her workload within 48 hours a week. In fact, thereafter, she continued to work more than 48 hours per week in order to complete her workload.

107. The Claimant's resignation letter and grievance expanded upon the resignation letter, both dated 20 April 2018. In those documents, the Claimant complained of all the matters found proved above.

108. The Tribunal found that the Claimant resigned in response to the breaches of contract which were fundamental breaches. In particular, unilateral changes to her contractual entitlements regarding hours of work and rate of pay.

109. The Claimant was constructively dismissed within the meaning of section 95(1)(c) Employment Rights Act 1996.

110. The Respondent's conduct, found proved above, which amounted to breaches of contract, was not reasonable or justified. It did not have any proper cause.

111. The dismissal was unfair under section 98(4) Employment Rights Act 1996.

Direct Race Discrimination

112. The Claimant's case was based upon her Afro-Caribbean origin.

113. Equality Act 2010

Section 13 – Direct Discrimination

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

Section 136 – Burden of Proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

114. There is guidance from the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination, they are not without more sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent had committed an unlawful act of discrimination. The Claimant must show in support of the allegations of discrimination a difference in status, a difference in treatment and the reason for the differential treatment.

115. If the burden of proof does shift to the Respondent, in Igen v Wong [2005] IRLR 258 the Court of Appeal said that it is then for the Respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof and to prove that the treatment was in no sense whatsoever on the prohibited ground.

116. In Ayodele v Citylink Ltd [2017] the Court of Appeal held that the burden of showing a prima facie case of discrimination under section 136 remains on the Claimant. There is no reason why a Respondent should have to discharge the burden of proof unless and until the Claimant has shown a prima facie case of discrimination that needs to be answered. Accordingly, there is nothing unfair about requiring a Claimant to bear the burden of proof at the first stage.

117. Section 23 - Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case.

118. In Law Society and others v Bahl [2003] IRLR 640 EAT it was said that:

"Tribunals may find it helpful to consider whether they should postpone the question of less favourable treatment until after they have decided why the

particular treatment was afforded to the claimant. Once it is shown that the protected characteristic had a causative effect on the way the complainant was treated, it is almost inevitable that the effect will have been adverse and therefore the treatment will have been less favourable than that which an appropriate comparator would have received. Similarly, if it is shown that the protected characteristic played no part in the decision-making, then the complainant cannot succeed and there is no need to construct a comparator.

119. The Claimant relied upon the list of events set out above and she cited comparators as follows:

***(ix)* Was that treatment "*less favourable treatment*", i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The Claimant relies on the following comparators and/or hypothetical comparators.**

***(ix) a.* Sushita Stretsa (worked as both a senior carer and a nursing assistant but was paid the higher rate of pay as a nursing assistant for both types of work).**

***(ix) b.* Natasha Brown (claimed pay for hours that she had not worked and claimed for excess annual leave but was not subject to disciplinary action).**

***(ix) c.* Holly Gilette, Katherine Smith, Chelsea Hubbard and Emma Pond (all claimed pay for accrued annual leave in March 2018 and were not subject to disciplinary action for doing so).**

***(ix) d.* Two other staff members at other care homes operated by the Respondent made pay roll errors in January 2018 which resulted in overpayments. The Claimant does not believe that these staff members were disciplined.**

***(x)* If so, was this because of the Claimant's race and/or because of the protected characteristic of race more generally?**

120. The Tribunal heard very little evidence of the circumstances of the comparators.

121. During the course of questioning at the Tribunal, the Claimant was asked what she asserted to be the cause of the less favourable treatment at paragraphs ***(viii) a – l***. She said it was because she had provided evidence at the disciplinary hearing of Mr CH in December 2017 but also because of her race. She said: *"That's just my opinion, maybe I'm wrong"*.

122. The Tribunal did not have sufficient evidence to make a meaningful assessment of the Claimant's treatment as compared to her comparators. The evidence simply was not provided.

123. The Tribunal concluded, based upon the Claimant's evidence, that the reason for the change in the Respondent's conduct towards the Claimant, after 14 years' service, was her involvement in Mr CH's disciplinary hearing. She had provided information and accompanied him as a work colleague at the hearing. The Claimant said that the Respondent's conduct towards her changed after the disciplinary hearing on 13 December 2017.

124. By 19 December 2017, Mr CH and Ms HH (husband and wife and both accused of misconduct) had left the Respondent's employment. Ms Amanda Griffiths took over as manager of Jasmine House from Ms HH thereafter.

125. There is no doubt that the Claimant had misgivings about assisting Mr CH at his disciplinary hearing. She went so far as to ask the outside HR representative conducting the hearing if her involvement would adversely affect her employment and she was told that it would not. However, the Tribunal found that it clearly did affect her employment and the Claimant became aware of that.

126. The next day, 14 December 2017, Ms HH received an email from Dr Denning which was critical of the Claimant being unable to work as a carer because she had been involved in Mr CH's disciplinary and, on 19 December 2017, Dr Denning sent the email which has been quoted above and which unilaterally varied her contract from up to 55 hours to up to 48 hours and queried her rate of pay when carrying out carer duties.

127. The Tribunal found that whilst this treatment of the Claimant amounted to a fundamental breach of contract, it was not motivated by her race.

128. There was no evidence of any racial motive nor any animosity towards the Claimant's race. The Tribunal accepted the Respondent's evidence that the demographic of the Respondent's workforce was dominated by black employees, approximately 80%. The Claimant had worked for the Respondent for 14 years and when she resigned she was encouraged to stay but she declined.

129. There were no facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent had contravened the Equality Act 2010 such that the burden of proof transferred to the Respondent's witnesses. Indeed, as explained above, the Tribunal found a non-discriminatory reason for the Claimant's treatment.

Harassment Related to Race

(xvii) **Did the Respondent engage in conduct as follows?**

(xvii) a. **The Claimant considers that the matters listed as acts of less favourable treatment on grounds of race were also conduct amounting to harassment.**

(xvii) b. **In December 2017, Amanda Griffiths accused the Claimant of forging a document relating to Colin Hawkins training records and threatened her with disciplinary action.**

(xiii) **If so was that conduct unwanted?**

(*xix)* If so, did it relate to the protected characteristic of race

(xx) **Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?**

130. As found above in respect of direct race discrimination, there was no evidence that any treatment of the Claimant by the Respondent was motivated by or related to her race.

Unpaid Annual Leave

(xxi) **What was the Claimant's leave year?**

131. The Claimant's leave year ran from 1 April – 31 March.

(xxii) **How much of the leave year had elapsed at the effective date of termination?**

132. One year and 20 days.

(xxiii) **In consequence, how much leave had accrued for the year under regulations 13 and 13A?**

133. 6 days plus 2 days = 8 days, the rate of pay being £15.50 per hour. The number of hours per week will have to be calculated in accordance with section 222 Employment Rights Act 1996 by taking an average over the previous 12 weeks prior to 19 March 2018.

134. This can be dealt with at the remedy hearing.

(xxviii) **Did the Respondent make unauthorised deductions from the Claimant's wages in accordance with ERA section 13 by failing, during the period of her suspension, to pay the Claimant wages based on a 55-hour working week and if so how much was deducted?**

135. The Claimant was entitled to the difference between the actual pay of 48 hours per week from 12 March 2018 to 20 April 2018 and her contractual/legal entitlement must be based on an average over the previous 12 weeks prior to 21 March 2018 at £15.50 per hour.

136. This can be dealt with at the remedy hearing.

Time Limits

137. In the case management order, it was stated that considering the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 19 February 2018 is potentially out of time so that the Tribunal may not have jurisdiction to deal with it.

138. The Tribunal has not found any of the claims under the Equality Act 2010 to be successful and the time limits do not apply to the events which amounted to fundamental breaches of contract. The resignation, which was the effective date of termination, was within the time limit prescribed by section 111 Employment Rights Act 1996.

Wrongful Dismissal

139. The Tribunal found that the Claimant had been wrongfully dismissed and is entitled to notice pay.

140. She was constructively dismissed due to the conduct of the Respondent which amounted to fundamental breaches of her contract of employment. She herself was not guilty of any breach of contract.

…….
Employment Judge Vowles

Date: ……04/03/2020

Sent to the parties on:

..……..…10/03/2020

.....
For the Tribunals Office