EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs V Popescu	**v**	Midas Care Limited

Heard at: Bury St Edmunds

On: 06, 08, 09 and 10 January 2020.

In chambers 10 February 2020.

Before: Employment Judge M Warren

Members: Mr RW White and Mr A Schooler

Appearances

For the Claimant: Mr E Popescu, Claimant's Son.

For the Respondent: Mr J Bromige, Counsel.

Interpreter (Language – Romanian):

08 & 09 January 2020 – Elena Dubita

10 January 2020 – Cristina Chaplin

RESERVED JUDGMENT

1. The Claimant's claims that she was constructively unfairly dismissed and victimised contrary to the Equality Act 2010 and for unlawful deductions from wages each fail and are dismissed.

REASONS

Background

1. By a claim form dated 25 December 2018, Mrs Popescu brought claims of unfair dismissal, race discrimination and unlawful deduction from wages.

2. Mrs Popescu has been represented by her son, Mr Popescu, throughout.

3. At a preliminary hearing before Employment Judge Laidler on 2 May 2019, allegations of discrimination dating back to 2016 and 2017 were struck out as being out of time. However, Mrs Popescu was expressly permitted to rely upon those allegations by way of background. Case Management Orders were made and the matter set down for a 5 day hearing commencing 6 January 2020. Unfortunately, the issues in this case were not identified at that preliminary hearing, nor subsequently.

4. Mrs Popescu was ordered to provide further and better particulars of her money claim, these were provided in the form of a schedule of loss.

5. On 19 December 2019, Mrs Popescu applied to add another company and 4 named individuals as Respondents, on the grounds that the Respondent had gone out of business and had transferred its operations to that other company. EJ Laidler refused the application, communicated by letter dated 24 December 2019.

6. On 2 January 2020, Mr Popescu submitted an application:

    6.1 To postpone the 5 day hearing listed for 6 January;

    6.2 For the discrimination claims struck out on 2 May 2019 to be, “reinstated” on the grounds that the preliminary hearing had not been an open hearing;

    6.3 For reconsideration of the refusal of leave to join in further Respondents, and

    6.4 An application to add Cambridgeshire County Council as a Respondent.

7. A letter written on the instruction of EJ Laidler refusing all of those applications was sent by email on 3 January 2019,

8. Later on 3 January 2020, Mr Popescu wrote to the tribunal by email again, seeking to engage in argument with EJ Laidler and informing the tribunal that an appeal would be lodged with the EAT later that day.

9. On EJ Laidler’s direction, a response was provided to confirm that the hearing on 2 May 2019 had been an Open Preliminary Hearing. The

remainder of Mr Popescu's email was, "noted" and the matter was said to remain listed for 6 January 2020.

10. A Romanian interpreter was directed to be made available for this hearing. Unfortunately, no interpreter was available for Monday 6 January and Tuesday 7 January 2020. We were able to get by without an interpreter on the first day of the hearing, as we simply dealt with some preliminary matters and spent the rest of the day reading the witness statements and the documents referred to. Unfortunately, we were unable to sit on Tuesday 7 January 2020 due to the unavailability of an interpreter.

11. We heard evidence from Mrs Popescu on Wednesday 8 January and from the Respondent's two witnesses on Thursday 9 January. We were to hear closing submissions on the morning of Friday 10 January 2020. Unfortunately, as events transpired on the final day, I had to give directions for written submissions and the tribunal arranged to convene in chambers to consider its decision on 10 February 2020.

Attempts to Identify the Issues

12. Unfortunately, final identification of the issues had not been completed before the start of the hearing. Mr Bromige had prepared a draft list of issues, which he told us he emailed to Mr Popescu the Friday before the hearing started. Mr Popescu told us that he did not have that, (at the end of the hearing, he told us that he had received the email, but that it had gone into his, "promotions" box on his email account, where he did not see it). On day one, we adjourned to begin our reading and in the meantime, I suggested to Mr Popescu that he read and consider the draft list of issues. I told the representatives to agree between them a bullet point list of the allegations Mrs Popescu relies upon as placing the Respondent in breach of the implied term to maintain mutual trust and confidence and which caused her to resign and a list of the detriments she relies upon in respect of her victimisation claim.

13. We adjourned to read at 10.30am on Day one and at 12 o'clock, interrupted our reading to see the parties again and discuss the list of issues. Mr Popescu told us that a lot of what he wanted to include had been omitted, but that he had not had enough time to prepare to give us full details. We agreed to return to this the following day, (Tuesday). As events turned out, in view of the lack of an interpreter, we were unable to sit on Tuesday. We therefore returned to the subject of the list of issues on day three, the morning of Wednesday 8 January 2020. By that time, we had received an email from Mr Popescu dated 8 January 2020 timed at 09:57 in which he identified 10 issues. I myself had prepared a bullet point list of the allegations it seemed to me on the pleaded case, Mrs Popescu was relying upon. We discussed the list of issues generally and went through my bullet point list of allegations, amending it to reflect input from Mr Popescu and the points he had made in his email, insofar as they were appropriate. At the end of these discussions, the tribunal understood that we had identified the issues with the parties.

14. Subsequently, Mr Bromige emailed to the tribunal his draft list of issues, which was passed on to me so that I could make amendments to it to reflect our discussions. This was provided to the parties upon their arrival on Thursday 9 January 2020. As at 2pm that day, Mr Popescu told me that he had not had time to consider the document. I believed that the document correctly reflected the issues in this case as identified and agreed with the parties.

15. At the end of Day Three, 9 January, Mr Popescu indicated that he intended to prepare written submissions overnight, (he had specifically requested that he be permitted to do so). On the morning of Friday 10 January 2020, we were therefore expecting to receive by email from Mr Popescu, his written closing submissions. What we received was an email to the tribunal timed at 08:56, in which Mr Popescu set out 8 points, which he said were the claimant's list of issues.

16. Mr Popescu appeared to be arguing that Mrs Popescu's dismissal was direct discrimination. I re-iterated that there was no claim of direct discrimination; an application to amend the claim to bring in an allegation of direct discrimination was refused by Employment Judge Laidler at the preliminary hearing on 2 May 2019. I clarified that the only surviving claim of discrimination is that relating to victimisation following the protected act in the form of the email of 5 August 2018. The list of issues set out those actions alleged to have taken place after 5 August which were said to amount to acts of victimisation and which caused Mrs Popescu to resign, thus amounting to her claim that she was constructively dismissed.

17. Mr Popescu told me that he did not recognise the claimant's claim in the list of issues. I explained that the list of issues as amended by me reflected our discussions on Day Two and what we had thought was agreed.

18. Out of an abundance of caution, having regard to Mr Popescu's status as a lay representative and certain health issues which he had raised, I proceeded to review with him the further points that he raised in his email of 10 January 2020, identifying in some cases that his points were already covered in the existing list of issues and in other instances, agreeing wording with him for amendments that I was prepared to make to the list of issues.

19. I was prepared to permit amendments to the list of issues if they could be shown to be matters that had been pleaded to in the ET1. I did not permit the raising of further issues which appeared in the claimant's witness statement, but not in the ET1.

20. There came a point when Mr Bromige, who had remained silent, objected to Mr Popescu adding an allegation that the Respondent had not followed its own disciplinary policy as a reason for her resignation and as an act of victimisation. He said that this was not pleaded and had not been put to

the Respondent's witnesses. I said that I was not prepared to allow the claimant to add to the issues something which had not been pleaded and which had not been put to the Respondent's witnesses. For the avoidance of doubt, I make the point that the Claimant does plead to the Respondent's failure to follow its procedures in relation to the investigatory meetings at paragraph 17 of her particulars of claim, but she does not complain of the Respondent's failure to follow its procedures in relation to the disciplinary hearing. Mrs Popescu's allegations in relation to the Respondent's failings to follow its disciplinary policy in relation to its investigatory meeting already appeared in the list of issues, (3b ix, x and xi).

21. Mr Popescu protested this was unfair. He described it as, "Unnatural and bizarre". He protested that the question of the list of issues had placed him at a great disadvantage, as had the Respondent's failure to provide him with a printed bundle, (see below).

22. Discussion moved on to item 8 from Mr Popescu's email of 10 January 2020, suggesting that we should add as an issue, whether the investigation after 5 August related to the claimant's colour. We therefore returned to the point that Employment Judge Laidler had struck out the direct discrimination claim. Mr Popescu then wished to take me to correspondence in the tribunal file, (not in the bundle) in which EJ Laidler had dealt with various applications in correspondence made by Mr Popescu in the days leading up to this hearing, as noted above. Amongst them was her refusal of an application for an adjournment. I said that I would not be re-visiting decisions made by EJ Laidler. Mr Popescu told me he wished to allege that EJ Laidler was biased. I explained that would not be a matter for me but for people more senior than I. This exchange led to Mr Popescu making an application for me to recuse myself from this case on the basis that I am biased. Having heard his application, the Tribunal adjourned at 12:35 and resumed at 15:40 to give our decision on the recusal application, which was to refuse it. The reasons given for that refusal have subsequently been provided in writing and I will not replicate them here.

23. Having given our decision on the recusal application, finishing at 16:10, there was insufficient time to hear closing submissions. I therefore made orders with regard to written submissions, which were to be exchanged and filed by 27 January 2020, with any reply by 7 February 2020. I informed the parties that the tribunal had arranged to reconvene in chambers on 10 February 2020 to consider its decision.

24. I arranged for my re-drafted list of issues to be emailed to the parties on 15 January 2020, explaining that if either party disagreed with anything, they may set out their arguments in that regard in their written closing submissions. On 16 January 2020, Mr Popescu emailed the Tribunal and the Respondent a document relating to the list of issues, making it clear that the list of issues was not agreed, asserting that it's wording distorted Mrs Popescu's stated grounds of claim and her witness statement, stating

that the claimant rejected the list of issues because it omitted reference to the Respondent's "violations" of its disciplinary policy and makes no reference to issues raised in the witness statements and cross examination.

25. On my direction, an email was sent to the parties on 23 January 2020 in the following terms:

> *""In light of the correspondence received from the Claimant's representative today regarding the list of issues, the tribunal will decide the Claimant's pleaded case and will consider any points raised by the Claimant's representative in his written closing submissions. If there are matters the Claimant raises in closing submissions that the Respondent's representative could not have anticipated, he may deal with that in any reply. The Tribunal will not make reference to the list of issues in its decision making."*

The Issues

Unfair Dismissal

26. Mrs Popescu claims that she was constructively unfairly dismissed. All the allegations in the ET1 Statement must be taken as alleged acts by the Respondent amounting to a fundamental breach of a contractual term or acts that are without reasonable and proper cause, and are calculated or likely to destroy or seriously damage the relationship of trust and confidence. If there was such a breach, we must ask ourselves whether Mrs Popescu affirmed the contract before resigning and if not, whether she resigned because of such breach.

Discrimination

27. Following the Open Preliminary Hearing before EJ Laidler on 2 May 2019, the only claims of discrimination before us are of victimisation following a Protected Act in the form of an email on 5 August 2018 and discriminatory dismissal, (by way of the Claimant's resignation) flowing from alleged acts of victimisation. It follows that all allegations in the ET1 Statement that come after the email of 5 August 2018 must be regarded as potential detriments inflicted because of the protected act and as contributing to a discriminatory dismissal, if Mrs Popescu resigned because of such post 5 August detriments.

Unlawful Deduction from Wages

28. The pleaded claim is that:

    28.1 Mrs Popescu was paid a daily rate, in breach of her contract, which entitled her to an hourly rate;

    28.2 An increase in the national living wage in April 2018 should have resulted in Mrs Popescu receiving a pay rise, but instead and in

breach of contract, the Respondent introduced an accommodation offset which it was not entitled to do.

29. Further particulars were provided in the form of a Schedule of Loss dated 31 May 2019. Mrs Popescu seeks 22 hours pay per day whilst working as a live-in support worker. The difference between the daily rate and the hourly rate multiplied by 22 amounting to £30,992 between November 2017 and July 2018.

30. During the hearing, Mr Popescu explained that part of his argument with regard to the accommodation off-set is that the Respondent is not allowed to impose it, as it did not provide the accommodation, (he said that the service users did).

Evidence

31. We had witness statements for and heard evidence from: Mrs Popescu and for the Respondent; Ms Samantha Kington, (Live-in Operations Manager) and Ms Heather Pegler, (Business Development Manager).

32. We had before us three indexed and paginated bundles of documents running to page number 1106. Most of these documents appeared not relevant to the case. Certainly bundle 3, running from page number 632 to page number 1106, consists of handwritten service user care record sheets, which were irrelevant.

33. There were issues with the bundle however. Mr Popescu did not have a hard copy of the bundle with him. He had not been provided with one by the Respondent. An electronic version was emailed to him, but he was not provided with a paper copy. Mr Bromige did not have a full explanation for us. He thought that there was an issue with either the claimant being resident at an address in Romania or the Respondent not having her address. The order of EJ Laidler on 2 May 2019, Order 6, plainly states that the Respondent is to provide the claimant with a hard and an electronic copy of the bundle. Providing the claimant with only an electronic copy of the bundle is a breach of that order. That the claimant might be resident in Romania is no excuse. In any event Mr Popescu, of an address in London, is on the record as Mrs Popescu's representative. The hard copy bundle should have been sent to him. That a hard copy of the bundle was not provided in good time to this lay representative and in breach of an order of this Tribunal is in our view, appalling and unprofessional.

34. A hard copy of the bundle was provided to Mr Popescu on the morning of Day One and as events transpired, he had 2 days to familiarise himself with its layout in paper form. He had of course already received an electronic copy, it would not therefore be right to say that he was not in a position to know the content of the bundle and the relevant page numbers for the documents he wished to refer to. During the hearing, Mr Popescu

frequently used his tablet or his iPhone to review documents, which indicated that he was comfortable with viewing documents in electronic format. This suggests that although he protests that the hard copy bundle was not provided and he had an electronic copy only, he would have been able to familiarise himself with the bundle using his electronic copy.

35. However, problems with the bundle continued, in that on a number of occasions Mr Popescu accused the Respondent of not including in the bundle, documents to which he wished to refer. Such aspersions proved to be ill-founded when the presence of the documents was on each occasion bar one, established in the bundle.

36. On Day One we added page numbers 298A-F: copies of Mrs Popescu's email of resignation and the Respondent's acknowledgement, which had been omitted in error.

37. On the morning of Day Two, (8 January 2020) Mr Popescu emailed to the Tribunal a number of documents, (which we were told amounted to 150 pages) and asked the tribunal staff to print them out 6 times. They declined to do so. Parties are expected to provide their own copy documentation.

38. At the start of the hearing on Day Two, I raised this matter with Mr Popescu. Our understanding from this discussion was that the 150 page document consisted of a report from the Care Quality Commission (CQC) regarding the allegation which had been made against Mrs Popescu. Having regard to the issues as we understood them, we were unable to see how that document might be relevant and we did not consider it proportionate to add a further 150 pages to the existing bundle. Mr Popescu argued that the Respondent's witnesses make assertions in their witness statements that are contradicted by information recorded in the CQC report. I indicated that when we reach that point in his cross examination of the Respondent's witnesses, we could take a view then on whether we considered it appropriate to have the document before us. He did not in due course, seek to refer to the CQC report.

39. With the benefit of hindsight, we understand that this email contained a link to a number of documents, including the CQC report, (which is not 150 pages long).

40. At the beginning of Day Three (9 January 2020) Mr Popescu sent 2 emails to the Employment Tribunal attaching 8 documents which he asked the tribunal staff to print out 6 times. I instructed the staff not to comply with this request and that we would discuss the matter at the start of the hearing. Mr Popescu left the building. He went to a local library in order to print out the documents. At 10.45am we were informed by the Respondent that the documents Mr Popescu had attached to his email and was currently printing out at the local library, were already in the bundle. I instructed the tribunal staff to make contact with Mr Popescu and tell him to return to the Tribunal immediately, so that we could resume the

hearing. I was subsequently informed that Mrs Popescu had telephoned her son to pass on this message and that his reply was that he would be 20 more minutes whilst he finished copying the documents. We were unable to resume the hearing until 11.15am.

41. I have set out above what occurred on Day Four: a discussion about the issues followed by a recusal application which then took up the whole of the remainder of the day.

42. Since the hearing concluded on Day Four, (9 January) in addition to his objection to my list of issues, Mr Popescu has done the following:

    42.1 On 16 January 2020, asked for an electronic copy of the recusal decision;

    42.2 On 16 January 2020, asked the tribunal to retain CCTV recordings of his interactions with one of the tribunal ushers and of counsel for the Respondent leaving the tribunal room at the end of Day Four;

    42.3 On 17 January 2020, alleged that the Respondent's counsel did not leave the tribunal room at the end of Day Four;

    42.4 On 17 January 2020, asked the tribunal for evidence of its efforts to secure an interpreter for 6 and 7 January;

    42.5 On 20 January 2020, submitted a second recusal application;

    42.6 On 23 January 2020, asked for copies of the notes taken by me and the members;

    42.7 On 23 January 2020, asked for copies of certificates of the members relating to their qualification to sit on cases of race discrimination;

    42.8 On 27 January 2020, applied for a stay of the proceedings pending the outcome of appeals he says he has submitted to the EAT;

    42.9 On 31 January 2020, applied for a, "fresh hearing";

    42.10 On 31 January 2020, submitted a third recusal application;

    42.11 On 4 February 2020, submitted a document entitled, "Breach of natural justice, appearance of bias and investigation request: interpreters";

    42.12 On 4 February 2020, submitted a document entitled, "Special Knowledge Certificates";

    42.13 On 4 February 2020, submitted a document entitled, "CCTV Investigation Request"

42.14 On 6 February 2020, applied for the tribunal to vary its decision on the third recusal application;

42.15 Attached to an email dated 10 February 2020, which referred to attached, "submissions"; in one document, applied to strike out the response and in a second document, responded to the Respondent's "further submissions".

43. The tribunal met to consider its decision on 10 February 2020. Mr Popescu had not provided any written submissions on the merits of the case, contrary to our order on 10 January. The Respondent provided its written submissions by email on 27 January 2020, but the document was password protected and Mr Popescu was not provided with the password, because he had not provided his written submissions in exchange. We agree that it would not be appropriate to reach our final conclusions without Mr Popescu having seen the Respondent's submissions and having had the opportunity to comment. We therefore directed that the Respondent was to forthwith provide Mr Popescu with the password, allowed him until 4:00pm on 18 February 2020 to provide any comment and allowed the Respondent until the same time to comment on the submissions received from Mr Popescu on 10 February.

44. The Respondent elected to make no further comment. Mr Popescu submitted a draft of his comments on the Respondent's submissions on 8 February and a final version on 19 February, which we have taken into account.

The Law

Constructive Dismissal

45. The right not to be unfairly dismissed is provided for at section 94 of the Employment Rights Act 1996, (ERA).

46. Section 95 defines the circumstances in which a person is dismissed as including where:

> *"(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."*

47. That is what we call constructive dismissal. The seminal explanation of when those circumstances arise was given by Lord Denning in Western Excavating(ECC) Ltd v Sharpe 1978 ICR 221:

> *" 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, then the employee is entitled to treat himself as discharged from any further performance. If he does so,*

> *then he terminates the contract by reason of the employers conduct. He is constructively dismissed."*

48. The Tribunals function in looking for a breach of contract is to look at the employer's conduct as a whole and determine whether it is such that the employee cannot be expected to put up with it, (see Browne – Wilkinson J in Woods v W M Car Services (Peterborough) ltd [1981] IRLR 347)

49. A fundamental breach of any contractual term might give rise to a claim of constructive dismissal, but a contractual term frequently relied upon in cases such as this is that which is usually described as the implied term of mutual trust and confidence.

50. The leading authority on this implied term is the House of Lords decision in Mahmud & Malik v BCCI [1997] IRLR 462 where Lord Steyn adopted the definition which originated in Woods v W M Car Services (Peterborough) Ltd namely, that an employer shall not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

51. The test is objective, from Lord Steyn in the same case:

> *"The motives of the employer cannot be determinative or even relevant...If conduct objectively considered is likely to destroy or seriously damage the relationship between employer and employee, a breach of the implied obligation may arise."*

52. Individual actions taken by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust & confidence, thereby entitling the employee to resign and claim Constructive Dismissal. That is usually referred to as, "the last straw", (Lewis v Motorworld Garages Ltd [1985] IRLR 465).

53. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA 978 the Court of Appeal, (Underhill LJ and Singh LJ) reviewed the law on the doctrine of the last straw and formulated the following approach in such cases:

> *In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*
>
> *(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> *(2) Has he or she affirmed the contract since that act?*

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?

54. The last straw itself need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of mutual trust and confidence, see London Borough of Waltham Forrest v Omilaju [2005] IRLR 35. However, an entirely innocuous act cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of mutual trust and confidence.

55. The employee must prove that an effective cause of his resignation was the employers' fundamental breach. However, the breach does not have to be the sole cause, there can be a combination of causes provided an effective cause for the resignation is the breach, which must have played a part (see Nottingham County Council v Miekel [2005] ICR 1 and Wright v North Ayrshire Council UKEAT/0017/13)

56. There is also implied in every contract of employment, an obligation to deal with Grievances timeously and reasonably, see WA Goold (Pearmak) Ltd v McConnell [1995] IRLR 516.

Victimisation contrary to the Equality Act 2010

57. The relevant law is set out in the Equality Act 2010. Its purpose is to prohibit discrimination on the grounds of a number of protected characteristics identified at section 4, one of which is race.

58. Race is defined at section 9 to include colour, nationality, ethnic and national origins.

59. Section 27 defines victimisation as follows:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;

> *(b) giving evidence or information in connection with proceedings under this Act;*
> *(c) doing any other thing for the purposes of or in connection with this Act;*
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act….*

60. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work. However, an unjustified sense of grievance does not amount to a detriment.

61. Whether a particular act amounts to victimisation should be judged primarily from the perspective of the alleged victim, whether or not they suffered a "detriment". However, an alleged victim cannot establish detriment merely by showing that she had suffered mental distress, she has to show that such was objectively reasonable in all the circumstances; see St Helens Metropolitan Borough Council v Derbyshire [2007] IRLR 540 HL.

62. To be an act of victimisation, the act complained of must be, "because of" the protected act or the employer's belief. Previous legislation had referred to, "by reason that" but this is unlikely to represent any significant change in the test of causation, see the remarks of Lord Justice Underhill in Onu v Akwiwu [2014] IRLR 448. The protected act does not have to be the sole cause of the detriment, provided that it has a significant influence, (see Lord Nicholls in Nagarajan v London Regional Transport [1999] ICR 877). "Significant influence" does not mean that it has to be of great importance, but an influence that is more than trivial, (see Lord Justice Gibson in Igen v Wong cited below).

Direct Discrimination

63. Direct discrimination is defined at s.13(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".*

64. Section 39(2)(c) proscribes an employer from discriminating against an employee by dismissing the employee or, at (d) by subjecting the employee to any other detriment.

65. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the claimant, but not having her protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise.

The employee must show that he/she has been treated less favourably than that real comparator was treated or than the hypothetical comparator would have been treated.

66. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572. Was the reason the protected characteristic, or was it some other reason? One has to consider the mental processes of the alleged discriminator. Was there a subconscious motivation? Should one draw inferences that the alleged discriminator, whether he or she knew it or not, acted as he or she did, because of the protected characteristic? - (see paragraphs 13 and 17).

67. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, "significant influence":

Harassment

68. Harassment *is defined at s.26:*

> *"(1) A person (A) harasses another (B) if—*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of—*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…*
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether it is reasonable for the conduct to have that effect.*
> *(5) The relevant protected characteristics are—*
> *…*
> *race;*
> *…*

We will refer to that henceforth as the proscribed environment.

69. The conduct complained of that is said to give rise to the proscribed environment must be related to the protected characteristic. That means the Tribunal must look at the context in which the conduct occurred. It also means that general bullying and harassment, in the colloquial sense, is not protected by the Equality Act; protection from such behaviour only arises if it is related in some way to the protected characteristic. See Warby v Wunda Group Plc UKEAT/0434/11/CEA

Burden of Proof

70. Section 136 deals with the burden of proof:

> *(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.*

71. It is therefore for the Claimant to prove facts from which the tribunal could properly conclude, absent explanation from the Respondent, that there had been discrimination. If she does so, the burden of proof shifts to the Respondent to prove to the tribunal that in fact, there was no discrimination. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was provided in Igen Limited v Wong and others [2005[IRLR 258, which sets out a series of steps that we have carefully observed in the consideration of this case.

72. This does not mean that we should only consider the Claimant's evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case; there is a difference between factual evidence and explanation.

National Minimum Wage

73. The right to be paid a minimum wage, is derived from section 1 of the National Minimum Wage Act 1998, (the Act). Details of the scheme are set out in the National Minimum Wage Regulations 2015, (the Regulations).

74. It is a right which accrues to, "workers", (defined at section 54(3) of the Act).

75. Section 17 of the Act provides, in effect, that a worker who is not paid the national minimum wage, (NMW) is entitled to claim in breach of contract, the difference between what was paid and what should have been paid applying the NMW.

76. To calculate whether a worker has received the NMW, one needs to know, (1) how many hours the individual worked during the pay reference period, and (2) the total pay received during the same period. Dividing the pay received by the number of hours worked, gives the hourly rate which can then be compared to the prescribed minimum hourly rate, (regulation 7).

77. Section 28 of the Act places the burden of proof on the employer, in that the tribunal is to assume that a worker has been paid less than the NMW unless the employer can show otherwise.

78. Employers have a duty to maintain records, (regulation 59(1)). Those records must be sufficient to show that the worker has been paid the NMW. It is a criminal offence not to keep such records.

79. If there is a, "daily average agreement", (see below) the employer must keep a copy, (regulations 59 (3) (4)).

Accommodation provided

80. Regulations 12 (1) and 14 permit employers to make deductions for the provision of living accommodation by the employer, by an amount stipulated in regulation 16, (currently £7.00 per day).

81. Regulation 14 (1) reads as follows:

> *The amount of any deduction the employer is entitled to make, or payment the employer is entitled to receive from the worker, as respects the provision of living accommodation by the employer to the worker in the pay reference period, as adjusted, where applicable, in accordance with regulation 15, is treated as a reduction to the extent that it exceeds the amount determined in accordance with regulation 16, unless the payment or deduction falls within paragraph (2).*

82. Thus, the provision for accommodation may be either in the form of a lower rate of payment or a deduction from wages.

83. The Department for Business, Energy & Industrial Strategy Guide for the Calculation of the Minimum Wage, (December 2018) (which does not carry the force of law) at page 30 clarifies that an employer will be treated as providing the accommodation where the accommodation is in fact provided by a third party if: (a) it is in connection with the worker's contract of employment; (b) continued employment is dependent on occupying particular accommodation, or (c) occupation of the accommodation is dependent on remaining in a particular job.

Hours of Work

84. In order to calculate whether the pay received meets the NMW, one needs to know not just the pay received, but the hours of work that pay is for.

85. The Regulations identify four categories of work:

    85.1 Salaried hours of work – an annual salary paid by regular instalments for working a specified number of hours per year, (regulation 21);

85.2 Time work – paid for by reference to the time for which the worker works or by measure of an output per period of time, (regulation 30);

85.3 Output work – where one is entitled to be paid by reference to some measured output, (regulation 36) and

85.4 Unmeasured work – a residual category of work which does not fall into one of the preceding three, (regulation 44).

Unmeasured work

86. Regulation 45 provides that one can calculate the hours worked for NMW purposes in respect of unmeasured work by either using the total number of hours worked or by the worker and employer entering into a, "daily average agreement".

87. A daily average agreement must:

87.1 Be in writing;

87.2 Be agreed before the start of the pay reference period, and

87.3 Set out the daily average number of hours the worker is likely to work, (which the employer must be able to show is a realistic figure) (regulation 49).

Sleeping in

88. In relation to time work, regulation 32 provides:

> *(1) Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.*
>
> *(2) In paragraph (1), hours when a worker is "available" only includes hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping.*

89. In relation to salaried work, regulation 27 provides:

> *(1) The hours listed in sub-paragraphs (a) to (c) are treated as worked for the purposes of determining whether the worker works more than the basic hours in the calculation year (in accordance with regulation 26(1)(d)) and, where the worker does, the number of hours of salaried hours work in that year (in accordance with regulation 28)—*
>
> *(a) …*
>
> *(b) hours a worker is available at or near a place of work for the purposes of working, unless the worker is at home;*

(c) …

(2) In paragraph (1)(b), hours when a worker is available only includes hours when the worker is awake for the purposes of working, even if a worker is required to sleep at or near a place of work and the employer provides suitable facilities for sleeping.

90. There is no equivalent provision in respect of unmeasured work.

91. Considerable confusion and controversy over how these provisions operate has now been resolved in Royal Mencap Society v Tomlinson-Blake & Others [2018] EWCA Civ 1641. A worker who is required to be available for work at or near his place of work is entitled to have such time count for NMW purposes unless he is at home, or the arrangements are that he will sleep-in, in which case such time will only count when he is required to be and is awake for the purpose of working. People who, "sleep-in" are, "available for work", (per regulation 32) rather than actually working, (per regulation 30) and therefore come within the exception of regulation 32(2); "*the only time that counts for NMW purposes is time when the worker is required to be awake for the purposes of working",* (see paragraph 86)

92. In the Mencap case, Underhill LJ reviewed the existing case law. He referred with approval to Walton v Independent Living Organisation Ltd [2003] EWCA Civ 199. That case was akin to this; the claimant was undertaking unmeasured work under an average hours agreement who for 3 days a week, lived in the home of the person she was caring for. Her case was that she working for all 72 hours she was in the service user's home. The Court of Appeal held that she was not. As a matter of fact, she was not working all the time and further, when she was working, she was doing unmeasured work under an average hours agreement. A carer who is on call but permitted to sleep, is not, "working".

Findings of Fact

93. Mrs Popescu is Romanian and describes herself as having dark skin.

94. The Respondent provides social care. It is community based, providing care in the home of its service users. It employs about 110 people who live-in with service users and about 200 daily carers.

95. Mrs Popescu's employment with the Respondent commenced on 5 May 2016. She was provided with accommodation. She signed a contract of employment on 4 May 2016. A copy of the contract is in the bundle starting at page 82. Hourly rates of pay are set out in a part of the contract under the heading, "Remuneration Conditions" at pages 87-88: Monday to Friday £7.30, weekends and bank holidays, £8.00.

96. The following deduction from wages is authorised, (page 88/89):

> *"h) the real cost of meals, lodging (for the entire duration), and other facilities provided to me by the Company in connection with my employment or training and in accordance with standard Midas Care operating procedures for such charges…*
>
> *N.B. A deduction cannot reduce your pay below the national minimum wage rate"*

97. To begin with, Mrs Popescu was a daily carer, visiting service users in their home and living in accommodation provided by the Respondent. In December 2016, she began working as a live-in support worker. This entailed her moving into a service user's accommodation, to provide support when needed. She signed what is referred to as a, "daily average agreement". That is an agreement between an employer and an employee to the effect that it is anticipated, (for the purposes of the National Minimum Wage Regulations) that on average a certain number of hours of work per day, by way of contact with the service user, will be required. The first such average hours agreement was signed by Mrs Popescu on 2 December 2016, (page 92). In accordance with this particular agreement, it is anticipated that an average of 540 minutes a day will be required to carry out tasks whilst living with the service user. The agreement explains that in each 24 hour period working with the service user, the hours that the individual will be required to work will vary, depending upon the individual service user's needs. It is explained that the purpose of the agreement is to agree the average time the individual will be required to carry out tasks each day. In this standard agreement, the carer agrees to notify the Respondent if there is a change to the time spent carrying out the required tasks in accordance with the service user's care plan. The onus in on the carer to inform the Respondent if the average becomes unrealistic. Expressly, the agreement states that the individual is not paid by the hour.

98. Mrs Popescu did not live permanently with any one particular service user. In between assignments, she would live in accommodation provided by the Respondent and would be paid an agreed standby allowance.

99. Part of the Respondent's disciplinary policy is copied in the bundle at page 114 to 118. We note the following at page 117:

> ***"3.03.15 Disciplinary***
>
> ***Investigation of complaints and allegations may require investigatory meetings. These do not form part of the disciplinary process and thus do not require notice in advance.***
>
> ***Procedure***

In the event that disciplinary action is taken the following procedure will be used.

Step 1: Statement of grounds for action and invitation to meeting.

Midas Care Limited will set out in writing the employee's alleged conduct or characteristics, or other circumstances, which led him to contemplate taking disciplinary action against the employee.

Midas Care Limited wills send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter. (Investigatory)

Step 2: Meeting

The meeting will take place before action is taken except in the case where the disciplinary action consists of suspension.

The meeting must not take place unless:

- *Midas Care Limited has informed the employee what the basis of the meeting is, in writing as above; and,*
- *The employee has had a reasonable opportunity to consider his response to that information*
- *The employee has been advised of their right to be accompanied to the meeting. The person accompanying them may ask questions but may not answer questions on behalf of the employee."*

The employee must take all reasonable steps to attend the meeting. …"

100. Mrs Popescu says that on 17 October 2016, she complained to the Respondent that a work colleague we will refer to as AS, subjected her to bullying and harassment. Specifically, that he had shaken her by her arm, shouted repeatedly at her words such as "Whore" and "Stupid", causing her to spill hot coffee over her hand and that he had threatened to "Beat the shit out of me" and to, "break my teeth". The matter was reported to the Police. Upon his return to work from a holiday shortly thereafter, AS was pronounced "Employee of the Month".

101. The Respondent's witnesses make no comment about this in their witness statements.

102. The grievance about this is in the bundle at page 145, an email from Mrs Popescu sent at 2pm. There does not appear to be any racial element to the complaint. At 2.28pm somebody called Jodie Chatters emailed Mrs Popescu and somebody called Claire Bright, instructing Ms Bright to deal with the matter as soon as possible, to call in AS straightaway, to cover his shift, and to move Mrs Popescu straightaway (she apparently shared a house with AS). At 2.32pm, Ms Jodie Chatters emailed Mrs Popescu to say that the matter was being dealt with as they speak and that she would be moved to a new house that day. Mrs Popescu replied to say thank you. These emails are at pages 146-148.

103. On 19 October 2016, Mrs Popescu chased the Respondent to protest that she had heard no further news. Although the matter was investigated by the Police, no further action appears to have been taken. There is no documentation on any outcome on the part of the Respondent. In her witness statement, Mrs Popescu says that the Police records record that a telephone message had been left with her to say they would be taking no further action. She says she received no such message. This case is not, of course, a case against the Police.

104. In September 2017, Mrs Popescu asked for payment of 11 day's accrued but untaken holiday from the previous year. The Respondent was reluctant to pay but did in the end. Subsequent to this, the Respondent sent reminders to its support workers about its holiday pay policy.

105. On 17 November 2017, Mrs Popescu raised a grievance about an incident involving a fellow Romanian with whom she shared a room, AP. She complained that she overheard AP holding a conversation over the telephone with somebody else who was Romanian and that she could hear that other person ask, by reference to Mrs Popescu, "Is the crow still there?". Mrs Popescu explains that the word crow is a highly offensive racist remark in Romanian, used to refer to people with a dark skin.

106. In Mrs Popescu's letter of grievance dated 17 November 2017 timed at 7.08pm, she complained to the Respondent that she confronted AP, asked her to apologise but that AP refused to do so, saying that her telephone conversations were none of her business. There was another Romanian present who Mrs Popescu refers to as a witness. She also complains that later that day, AP referred to Mrs Popescu and her witness as, "these filthy two".

107. On 20 November 2017, Ms Pegler received an email from one of the directors, (Gino Mullaine) to state that this would have to be fully investigated and such behaviour could not be tolerated. That was not communicated to Mrs Popescu.

108. In her witness statement, Ms Pegler simply says that when she received the email, she forwarded it to Ms Kingston, went on holiday and had no further involvement.

109. Ms Kingston in her witness statement tells us that an investigation meeting with AP was conducted but that, "Due to incorrect processes, unfortunately the outcome of the investigation was not communicated back to the claimant in this instance". Ms Pegler was asked about this in cross examination. She said that she was aware Ms Kingston was investigating, but she was not aware of the outcome. Pressed about a failure to follow the ACAS Code of Practice in this respect, I suggested to Mr Popescu that these were matters he ought to raise with Ms Kingston. Ms Kingston was not however subsequently asked about these matters. We find that the matter was investigated but that the Respondent failed to provide any feedback to Mrs Popescu.

110. On 25 April 2018, the Respondent wrote to all live-in support staff, including Mrs Popescu, to explain that the National Living Wage had increased. The letter set out an explanation of how live-in support worker's wages were calculated. It explained:

> *"The pay scales include the accommodation off-set, this is a benefit, for which the Government states is worth £49 per week to you and is therefore included in the NMW and Living Wage calculations.*
>
> *Therefore, due to the increase in the Living Wage Midas Care Limited have reviewed the current calculations and are pleased to tell you, that with effect from 1 April 2018 there will be an increase in the rate of your pay to ensure that we have fulfilled our employer obligations.*
>
> *The weekly rate for live-in support will be calculated as follows:-*
>
> *£449.29 + £49.00 Accommodation Off-set = £493.29*
>
> *£493.29 divided 63 hrs = £7.83 per hour*
>
> *This is the new rate set by the Government for the National Living Wage."*

111. Mrs Popescu's daily rate of pay increased from £61.48 to 63.47, (pay slips for March and April 2018 at pages 606 and 607).

112. On 17 July 2018, Mrs Popescu wrote to the Respondent to request a copy of her employment contract, (page 221).

113. On 1 August 2018, a social worker member of the Cambridge and Peterborough Local Authority MASH Team, (Multi-Agency Safeguarding Hub) reported to Ms Kingston that service user X attended by Mrs Popescu had, "Reported that when Verginia [Mrs Popescu] applies cream to her bottom she inserts her finger into her bottom. She is also quite rough when moving and handling.", (page 225, 227). We should make it absolutely clear at this point before going on, the Respondent

accepts that this is unlikely to be true. Mr Popescu has suggested that the allegation of rough handling was made up by the Respondent. It was not.

114. The Police and the Care Quality Commission were informed.

115. Somebody from the Respondent, (LS) went to see the service user on 1 August 2018 and spoke to her. She asked her for detail about what was alleged. Additional points noted were that the service user confirmed she had a sore on her bottom and also that whilst it felt like Mrs Popescu had done as alleged, she could not be sure (page 251.1).

116. LS also spoke to the service user's daughter, who said that she was present at the time and that she had seen Mrs Popescu do as alleged. She said that she had said to Mrs Popescu, "Don't hurt my mum … how would you feel if I did that to you?". She said Mrs Popescu response was in her own language. Asked why she had not reported it the previous day, (the incident was said to have taken place on 31 July) the daughter's response is recorded as being that she did, "call up, it was about everything including the fingers". She was asked who she had spoken to and she had replied that she did not know.

117. It is the Respondent's standard practice, (as it is in the industry, in the Tribunal's experience) that in such circumstances, the detail of such allegations are not discussed with an alleged perpetrator until such time as the Police have carried out their investigation, or the Police have given their permission to the employer to proceed.

118. On 2 August 2018, Ms Kingston spoke to Mrs Popescu. Handwritten notes of this conversation are at page 252 and a typed version at page 361.12. We accept that they are accurate as to the gist of what was spoken about. Ms Kingston began by making it clear that she could not go into details and asked Mrs Popescu to tell her about her calls on the service user X on 31 July. Mrs Popescu describes cleaning X in the presence of the daughter. The allegation was not put to her.

119. At the conclusion of the interview with Mrs Popescu, Ms Kingston informed her that she would be suspended while the Respondent carried out an investigation and she would be paid during her suspension. She was given a pre-prepared letter which is at page 255. It states that the reason for the suspension was to allow time to investigate, *"certain allegations made against you and a safe guarding having been raised".*

120. Mr Popescu has argued, although it is not pleaded, that suspension was a disciplinary act. He refers to the Respondent's disciplinary policy. That part of the policy that deals with suspension was not before us. It would be surprising if it said anything other than that suspension was a neutral act, as the suspension letter at page 255 states.

121. Also on 2 August 2018, Ms Kingston spoke to Mrs Popescu's work colleague who attended to service user X with her on 31 July, EP. He too

was asked to explain the visit to X on the 31 July and he describes Mrs Popescu cleaning X in the presence of the daughter. He said that Mrs Popescu was very professional, that the daughter does not trust her and that, "they don't like us". Notes of that interview are at page 251.4.

122. During the course of 2 August 2018, Ms Kingston received permission from the Police to discuss the details of the allegation in her investigations.

123. Having received permission from the Police to discuss the details of the allegations, Ms Kingston saw EP again on 2 August. The notes of that interview are at page 251.6. He was bluntly asked whether he had any knowledge of Mrs Popescu acting as alleged and he answered "No". He explained that they always had to clean X's bottom and would have to use wet paper tissue or something similar. He was clear Mrs Popescu had not done anything unprofessional. He also said that at the time, neither X nor her daughter, who were present, suggested anything inappropriate had occurred.

124. On 3 August 2018, Mrs Popescu emailed Ms Kingston to ask for a copy of the notes that had been taken during the meeting with her the previous day, (page 263).

125. Also on 3 August 2018, Mrs Popescu chased for a copy of her contract of employment. A copy was subsequently provided on Monday 6 August.

126. EP was interviewed by Ms Kingston a third time on 3 August 2018. On this occasion, she asked him about the allegation of rough handling. EP said there was no rough moving or handling.

127. On Sunday 5 August 2018 at 5.27pm, Mrs Popescu wrote by email to Ms Kingston. She relies upon this as the protected act upon which her complaint of victimisation is founded. Relevant quotations from this email are as follows:

> *"I would like to draw your attention to the ACAS Code of Practice that Midas should have, but did not follow in regards to my suspension ...*
>
> *It must be said that I have previously made various complaints about much more serious issues.*
>
> *For example, I have informed Midas about Mr [AS] campaign of bullying and harassment against me; Midas did not intervene in any way to stop this and the foregoing culminated in [AS] physically molesting me (please refer to my email of 16 October 2016). Midas did not offer me any kind of support, did not suspend [AS] for an investigation and never clarified my grievance.*

> *Also, I have informed Midas that [AP] engaged in racially abusing me (please see my email of 17 November 2017), but Midas did not even bother to acknowledge my grievance.*
>
> *Given the above, I would also like to have a formal response, in writing, to the following question:*
>
> *In which way did the fact that the Kyle was left on the bed "the wrong way" justify your decision to suspend me?*
>
> *I kindly request Midas to send me a copy of the notes taken during our meeting on 2 August 2018 and to pay heed to the ACAS Code of Practice."*

128. The reference to the "Kyle" is a matter discussed with relation to the relevant service user in Ms Kingston's meeting with Mrs Popescu; she was left with the impression that the reason she had been suspended was that she had left something called a Kyle mat, (sometimes referred to as a Kylie) on the bed of the service user in the wrong position.

129. At 5.34pm, (page 490) Ms Kingston sent a text to Mrs Popescu which reads as follows:

> *"I have received your email and I'm happy to provide you with meeting minutes from your last meeting with us. Can you please attend a meeting tomorrow afternoon at 12pm.*
>
> *I will ask Szasz to collect you."*

130. The text conversation continued with Mrs Popescu asking what the meeting was for. The gist of Ms Kingston's reply was that they would discuss it in more detail with regard to the complaint. Mrs Popescu then pressed Ms Kingston for an answer and Ms Kingston replied that she had responded by email, this last text message at 5.49pm.

131. At 6.13pm Mrs Popescu sent an email to Ms Kingston stating that Ms Kingston had said the complaint was about the Kylie mat, she went on to write:

> *"Given that Midas has not followed the Employment Code of Practice in dealing with the disciplinary procedures, I am not ready to attend a meeting tomorrow.*
>
> *Please reschedule a meeting after you have set out the complaint against me in writing, including the full details, and allowed me sufficient time to prepare a response."*

132. Ms Kingston replied at 6.20pm:

> *"I am not asking you to attend a disciplinary meeting tomorrow, I am asking you to attend an enquiry meeting in which we would like to gather further information for the complaint that you have been named in.*
>
> *I would like to advise that this complaint is not relating to the Kylie, and would like to give you further information in the meeting tomorrow as to what it is relating to."*

133. At 6.39pm Mrs Popescu replied:

> *"We had a meeting 02 August 2018. The purpose of that meeting was for you to explain to me what complaint is about and to get me and my colleague's account.*
>
> *As explained in my previous email, I will be able to attend a meeting after you have set out the complaint against me in writing, including the full details, and allowed me sufficient time to prepare a response, according to the ACAS Code of Practice for disciplinary and grievance procedures."*

134. On 6 August 2018 at 8.41am, Ms Kingston replied to Mrs Popescu:

> *"Thank you for your email, I would like to clarify that it is not a disciplinary hearing but a fact-finding interview. As explained to you on 02/08/2018 suspension is a natural [sic] act whilst an investigation takes place. This is also clearly outlined in the suspension letter that you received on the same day.*
>
> *This fact-finding interview is part of this investigation. It is a requirement of your suspension that you attend meetings as requested by your employer. I have therefore request [sic] that you attend the office today at 12pm as previously stated in order to complete this. You are not entitled as part of this meeting to have a representative."*

135. Mrs Popescu replied at 11.14am that it was obvious that the proposed meeting was a disciplinary meeting. She re-iterated that she would attend a meeting after the Respondent had set out the complaint against her in writing, including full details and allowing her sufficient time to prepare a response, which she said would be in accordance with the ACAS Code of Practice.

136. At 12.27, Mrs Popescu sent a further email, which she copied to the Respondent's Director of Operations, Ms Caroline Freeman, in which she re-iterated her request for minutes of the 2 August meeting and queried why it was in that meeting she had been asked about the Kylie pad but had now been told that the complaint was not about the Kylie pad. She re-iterated her request for details of the complaint against her and lastly:

"Please explain why Midas took a very different approach when presented with complaints about much more serious issues, like Mr AS bullying and harassment campaign, which, following Midas ignoring my grievances, resulted in me being physically assaulted, and Ms AP's racial abuse, which Midas gave the silent treatment. This is not a rhetorical question."

137. Ms Freeman responded at 2.04 on 6 August:

"I think you may be confused, you are required to attend a fact-finding interview, this is not a Disciplinary Meeting. You are required to attend this meeting as part of the investigation, by not attending you are delaying the investigation.

It is a condition of your paid suspension that you are available to attend meetings at the office, as this is not a disciplinary meeting, no further information will be provided. If you do not attend, without due reason, then your paid [sic] will be suspended.

You have been provided with a suspension letter, this is all that is required at this stage.

…

If you would like to raise any concerns regarding a previous case then this matter will be dealt with separately."

138. Mrs Popescu replied to Ms Freeman at 2.42pm:

"Thank you for your email. I agree that someone is confused here, but I don't think that's me. It makes no sense to claim that a "fact-finding" meeting related to a complaint that, in Midas' view, already required suspending an employee is not a disciplinary one. Also, you will certainly agree that suspending an employee without pay contravenes the ACAS Code of Practice.

It is not correct that a suspension letter is all that is required at this stage and I don't know what is the source of this misinformation.

As my previous email has made clear, I do indeed have grievances related to my [sic] Midas failing to even acknowledge complaints made by me …

I am very happy to assist you with your investigation, but you must first fulfil your obligations and:

1. *Provide me the minutes of our 02 August 2018 meeting.*
2. *Explain why you have informed me at that meeting that the complaint against me is about the way in which the Kylie pad*

was left on the bed, only to tell me yesterday that the complaint is not about the Kylie pad.

3. *Set out details of the complaint you are investigating in writing, giving full details.*

Finally, I must add that the way Midas has dealt with the mystery complaint (Thursday it was about the Kylie pad, Sunday about ? …) a bit suspicious and I will only attend a further meeting without [sic] [EP], the colleague that I had been working with on 01 August being present, as well as a representative of my choice.

Please respect the provisions of the ACAS Code of Practice and take my mental health into account when dealing with this investigation."

139. Ms Freeman replied at 2.49:

"Perhaps you may want to call the ACAS helpline 0300 123 1100, as I think you need to take some advice before replying further. We are asking you to attend a fact-finding interview as part of an investigation, you have been suspended as a neutral act whilst this occurs. However, it is a condition of paid suspension that you attend meetings, if you do not then your pay will be stopped."

140. Finally, Mrs Popescu replied at 3.27pm:

"I have just spoken to ACAS and they advise me that it is not ok for an employer to invite an employee to a meeting to explain that there is a complaint made against them regarding a certain thing, suspend her and then say, a few days later, that the complaint is in fact about something else. This is dishonest, ACAS said.

They also said that the way you are dealing with this matter is not, in their view, best practice."

141. Mrs Popescu also clarified that when in her previous email she had said she would only attend a meeting without [EP], she had meant, "with".

142. A Ms Dean, (Recruitment Manager) was appointed to conduct the investigation into the allegations against Mrs Popescu. By email of 7 August timed at 11.20am she confirmed that a meeting had been arranged for 11am the following day and that arrangements had been made for Mrs Popescu to be collected from her residence at 10am. She attached minutes of the discussion with Ms Kingston on 2 August.

143. Mrs Popescu wrote to Ms Dean by email on 8 August 2018 at 3.15am. She began by stating that she had concerns regarding the minutes of the 2 August, making reference to her difficulties with English and with the note takers skills, stating that the combination of the two amounted to, "something similar to Chinese Whispers". She writes:

> *"Thus I am happy to assist you with whatever investigation you are conducting, but given the above, please send me your questions in writing and I will also provide you with my answers also in writing, as soon as possible. It is absolutely not acceptable to "play telephone" when dealing with "quite serious safe guarding complaint" and it is paramount that the account on your records is accurate."*

144. At 8:45 that day, Ms Dean replied by email to say that she takes it from Mrs Popescu's earlier email that she would not be attending. She attached a letter, (page 282) headed "Investigation Meeting" which read as follows:-

> *"You have been invited on two occasions to attend the office for an investigatory meeting and have declined to do so.*
>
> *I am, therefore, writing to inform you that you are required to attend an investigatory meeting to discuss a safeguarding allegation which has been made in relation to the care calls you attended on 31 July 2018 to [X].*
>
> *…We will arrange for you to be collected for the meeting so please ensure you are ready by 8:15am. This is the third meeting that has been scheduled for you and as you have not attended the previous two, the meeting tomorrow will be held in your absence should you fail to attend."*

Ms Dean re-iterated that it was not a disciplinary hearing, the purpose was to investigate an allegation which had been raised. She wrote:

> *"In your recent email you requested that we submit to you in writing the questions you will be asked at this meeting and that you would provide your answers in writing. This is not possible as the meeting needs to be held and both questions and answers be minuted accurately for signature by all parties at the end of the meeting.*
>
> *…*
>
> *In your email you also raised a couple of other issues regarding grievances you have raised and we would like to discuss these following the investigatory meeting."*

145. At 10:05 Mrs Popescu replied to Ms Dean's letter, to say that it was misleading to say that she has been invited on two occasions and has failed to attend, because she did attend on 2 August. She argued that it challenged, "logic and common sense" to say that the meeting needed to be held and questions and answers to be minuted accurately. She went on to say:

> *"Please act respectfully and do not send anyone to collect me at 8:15 tomorrow, as you have been advised that it is my decision not to attend a further meeting in regards to this matter, but to provide you my answers to your further questions in writing, should you decide to address those to me in writing"…"*

146. In an email of 8 August at 4.43pm Ms Dean wrote:

> *"Unfortunately due to confidentiality and the sensitive nature of the questions that need to be asked in this investigatory meeting we are unable to send our questions via email and we require you to attend tomorrow morning at 9am, as previously stated. Therefore we will, as previously arranged, be sending someone to collect you around 8.15-8.30."*

147. At 7.20pm on 8 August Mrs Popescu wrote:

> *"It appears that you have been persuaded by the argument that it challenges logic and common sense to say that you cannot send me the questions in writing and be provided with written answers because both the questions and answers must be minuted accurately for signature by all parties at the end of the meeting.*
>
> *You now have replaced that with "the confidentiality and the sensitive nature of the questions". But I must point out that there is truly no difference between the two options. "The sensitive nature" will be unaffected, and the end result will be the same: both me and Midas will end up with written, signed copies of your questions and my answers. Thus your new argument against doing this "fact-finding" in writing challenges logic and common sense no less than the first, albeit in a more subtle manner.*
>
> *At this point it appears that your aim is, in fact, to bully and harass me and to obtain answers to "question of a sensitive nature" written down not by me, but by you. I have made as clear as it gets that this is not an option.*
>
> *Please have the decency not to send someone to collect me tomorrow morning to attempt to force me to attend a meeting against my wish."*

148. Subsequent to that email, Mrs Popescu contacted Ms Dean to inform her that she was ill and would not therefore, be attending the meeting. The investigatory meeting went ahead in Mrs Popescu's absence and it was resolved to proceed to a disciplinary hearing. A decision was also taken that as Mrs Popescu lived in accommodation shared with other employees, the Respondent ought to carry out a welfare check to ensure that she was ok. Ms Dean attended the property to carry out that check on 9 August 2018, accompanied by Ms Pegler. There is a dispute between the parties as to what happened during the course of this welfare check.

We found Ms Pegler to be a credible witness and preferred her evidence to that of Mrs Popescu, who had been seeking to avoid meeting with the Respondent all along; her leaving the building when Ms Dean and Ms Pegler arrived is consistent with that behaviour. It is also odd and a remarkable, (not credible) coincidence that Mrs Popescu should choose to telephone the Respondent at all to say that she was going to the doctors and that she should choose to do so just at the time at about which, the Respondent was visiting unannounced. We therefore prefer Ms Pegler's account of what happened.

149. When Ms Dean and Ms Pegler arrived at the property at 1:20 pm, one of the residents informed them that they had gone to Mrs Popescu's room, knocked on the door, spoken to her, informed her that Ms Dean and Ms Pegler were there to see her and that Mrs Popescu had replied she would be down in a moment, or words to that effect. They waited a period of time and Mrs Popescu did not appear. They went upstairs to Mrs Popescu's room, knocked on the door and received no reply. They opened the door and found that Mrs Popescu was not there. One of the residents placed a letter from the Respondent addressed to Mrs Popescu in her room.

150. The letter referred to is dated 9 August 2018 and was headed "Notification of disciplinary action". It refers to to Mrs Popescu not attending the investigatory meeting scheduled for that day and states that the Respondent was therefore considering disciplinary action against her for rough moving and handling of a service user and inappropriate touching. Mrs Popescu was warned that this was potentially gross misconduct, which could result in her dismissal. She was invited to attend a disciplinary hearing on Monday 13 August. She was informed that copies of documentation to be discussed would be available to her to view at the offices of Midas Care, "due to confidentiality and the sensitive nature of the allegation". She was informed of her right to be accompanied by a work colleague or Trade Union representation. The point was made that the work colleague must not have been involved in the investigation.

151. Later that day at 3.47, Ms Dean wrote by email to Mrs Popescu as follows:

> *"Heather Pegler and I came to visit you this afternoon to carry out a welfare check. One of your colleagues from the house came and informed you that we were there, however, after waiting a while and you not coming down the same colleague came back to your room only this time you did not reply to her. Having checked the whole house, it was clear that you had left the property which is a shame as we are keen to make sure that you are OK and try to understand why you will not attend a meeting at the office.*
>
> *As I have explained to you previously, the investigatory meeting would be held in your absence should you not attend and this has in fact taken place. We have left a letter in your room regarding this*

but I am also attaching a copy of that to this email for your information.,

Please can I ask that you contact me to let me know that you are alright although I would have much preferred to see you in person."

152. On Friday 10 August 2018 at 8.59am, Mrs Popescu wrote a long email to Ms Dean. She thanked Ms Dean for not sending someone to attempt to force her to attend the previous days meeting. She also thanked her for her "unannounced and unscheduled welfare check visit". She said that she had telephoned the Respondent's office at 13.33 and informed somebody that she was leaving the property to attend a medical appointment and suggests that it is in response to this, that the Respondent decided to carry out the welfare check. Mrs Popescu then wrote:

"Then you mention that at your arrival "a colleague" informed me that you and Heather were there and that, after being informed of your visit, I have sneakily vanished from the house (may be by turning into a fly), "which is a shame". It is not the case that I was in the house when you arrived or that "a colleague" informed me about your presence.

While I would like to give you the benefit of the doubt and infer that there must have been a misunderstanding between you and "the colleague", it is very strange that you have "checked the whole house" to find me but made no attempt to call me. Strange behaviour that is.

In your previous letter, you wrote to me, "You have been invited on two occasions to attend the office for an investigatory meeting and have declined to do so". This is called lying by omission. You were fully aware that I did attend an "investigatory meeting" on 02 August 2018. It is hard to understand why you did not address the relevant questions at that time.

Then I must mention your insistence on having my answers to your questions written down by you, your refusal to tell me what allegations you investigate, your failure to provide me with a copy of the minutes of the 02 August meeting minutes on that day and the delay in providing them at all.

So to explain to you why I refused to attend a meeting without witnesses where you, not me, would write down my answers, it is because this whole incident appears to be a Midas set-up.

In regards to the disciplinary meeting, you have scheduled, you will surely agree that my English and my current mental state come in the way of having a fair process should I attend the meeting on my own, so please invite [EP] to attend the meeting.

Also please set out the allegations made about me in full, in writing, and explain why do you believe those allegations are credible, in order to ensure that there is a fair process."

153. Mrs Popescu sent a further email to Ms Dean on 13 August 2018 at 11.01am, (page 208). In this email she asked Ms Dean to conduct the disciplinary proceedings in a fair and transparent manner and to allow her to prepare appropriately, paying heed to matters she goes on to raise and asking her to reschedule the disciplinary hearing. She wrote:

"It is not the case that I have engaged in anything remotely resembling "rough moving and handling" or "inappropriate touching" of any service user, and it is peculiar that this "investigation" came up all of a sudden after I had complained that you are allowing your care assistants to be used as domestic staff, that you are unlawfully deducting money from people's salaries and that you failed to fulfil other obligations. Please provide all the relevant information and evidence related to the allegations you claim to investigate and the reason why you believe they might be true.

As you are aware, my level of English and my current mental state come in the way of a fair hearing should I attend this meeting on my own. I would like to have [EP] present at the meeting.

Given that I didn't have any complaints in more than two years of working for Midas, I am not familiar with the rules governing your disciplinary proceedings. Please provide me in good time with a copy of the Midas grievance and disciplinary procedures.

And given the "sensitive nature" of the investigation, please ensure that someone fully fluent in English and Romanian will attend the meeting in order to write down your questions in English, my answers in Romanian and a translation they will provide verbatim.

Please provide me with a copy of the minutes of the meeting that has taken place in my absence on Thursday 09 August.

The way in which Midas has treated me in relation to this investigation is absolutely appalling, and the 09 August 2018 "welfare check" was (I hope) the culmination of it. After being informed that I am on my way to a scheduled medical appointment in Ely you came to deliver me a "welfare check" in my absence and, after obviously not being able to find me, instead of calling me you got everyone in the house to assist you in a thorough "hide and seek" game, which included looking for me behind the bed and in my male colleagues rooms. This is a degrading action meant to smear me and to raise suspicion with my colleagues. Please refrain from ever engaging in such actions.

Finally, please deal with my outstanding grievances before scheduled disciplinary meeting."

154. Mrs Popescu did not attend the scheduled disciplinary hearing on 13 August. The Respondent did not proceed. Instead, it wrote to her again, inviting her to attend a re-arranged hearing on Thursday 16 August, (page 290). The letter re-iterated:

"Any evidence to be discussed at the meeting will be made available to you on your attendance at the office either directly before the meeting or the day before. As previously explained this cannot be sent to you due to the confidential and sensitive nature of its content."

155. On 14 August 2018, Ms Dean sent an email to Mrs Popescu timed at 9.39am, to respond to Mrs Popescu's email of 13 August. She explained that the grievances raised would be discussed at a second meeting which will take place immediately after the disciplinary meeting. She explained that EP will not be permitted to attend the hearing because he was part of the investigation. Mrs Popescu was informed that she may take another work colleague or Trade Union official. Ms Dean also gave a further re-iteration of her version of the facts relating to the welfare check; she said that she had not been made aware that Mrs Popescu was to attend a medical appointment and that had she been, she would not have attended. Finally, she attached a copy of the Respondent's grievance and disciplinary policy. In her final paragraph, she warns Mrs Popescu that should she not attend the rescheduled disciplinary meeting, that meeting may proceed in her absence and a decision made.

156. Mrs Popescu replied on 14 August at 11.53am, (page 293) setting out a series of questions:

"1 Why did you call "the house" instead of calling me?

2 What is the name of the person you identify as "the house"?

3 What is the name of the colleague that, according to you, informed me about your due visit?

4 At what time have you called "the house"?

5 What was the time of your arrival at the Witchford House?

6 Why did you not call me on my mobile to let me know of your arrival and instead relied on "a colleague" to announce your arrival?

7 What is the name of the "colleague" that came to my room and spoke to me to let me know of your arrival?

8 Why did you not call me on my mobile instead of searching my room when I "had not come down"?

9 Why did you engage everyone in the house in a "thorough search" throughout the house, including in my male colleagues rooms?

10 Can you please confirm with Lavinia that I have called your office at 13:33 in order to speak with Samantha and that she was informed that I am on my way to Ely?"

157. Ms Dean replied on 15 August at 4pm, (page 295):

"As I have made perfectly clear in all previous correspondence I am unable to email the documents you are asking for due to the confidentiality [sic] and sensitive nature of their content. All of these documents will be made available to you to see upon your attendance at the Midas Care Offices in Waterbeach.

I do not intend to discuss with you by email the events surrounding the welfare check but I'm happy to do so when you attend the meeting that is scheduled for tomorrow morning."

158. By an email dated 16 August timed at 11.53, Mrs Popescu resigned her employment, (page 298C). Her letter of resignation read as follows:

"It is clear that you have no intention to follow the ACAS Code of Practice and provide me with the full details of your "investigation" in advance of the disciplinary hearing you have scheduled.

Further, in your email sent to me on 14 August not only you continue to falsely claim that I have been home when you arrived at the house on Thursday 9 August, but you add further dishonest "detail". Given that you have the ability to make my colleagues see me and hear me in the place where I am not present, I ought to ask myself, what else are you able to do?

The way Midas treated my grievances and the way in which you have investigated "the undisclosed complaints about me" represent a fundamental breach of contract and damage my reputation and career prospects.

Therefore whatever the result of your "disciplinary proceedings", continuing to work for Midas is no longer possible, so I am writing to inform you that I resign from my position of support worker with immediate effect. Please accept this is my formal letter of resignation and a termination of our contract."

159. The Respondent acknowledged receipt of the resignation on 16 August at 3.55, the author of that acknowledgment is redacted in the copy of the same in the bundle at page 298A.

Conclusions

160. As we have been unable to agree upon a list of issues, we approach our conclusions by analysing Mrs Popescu's statement appended to her ET1, in other words, her pleaded claim.

Paragraph 1

161. Mrs Popescu sets out her stall in her opening paragraph. We will break it down and consider it, allegation by allegation:

161.1 We do not consider that the Respondent's conduct in the last two weeks of Mrs Popescu's employment can properly be characterised as harassment. The Respondent was duty bound to investigate a very serious allegation. Mrs Popescu was not cooperating. She was apparently doing all that she could, after the initial meeting at which she was suspended, to avoid a meeting with anyone to discuss the allegations. The Respondent had been politely and appropriately trying to persuade her to attend an investigatory meeting. When she persistently refused to attend, it had little choice but to move to a disciplinary hearing. The Respondent visited the property at which it provided accommodation to Mrs Popescu because it had heard that she was ill. In light of Mrs Popescu's lack of cooperation, it was entitled to leave a letter for her inviting her to a disciplinary hearing. There is nothing to suggest that this behaviour by the Respondent was related in any way to a protected characteristic and so does not amount to discriminatory harassment in the legal sense. Nor does it amount to harassment in the colloquial sense that we would use the word, (Concise OED 11 Edition, to torment by subjecting to constant interference or intimidation). Mr Popescu cites the Cambridge Dictionary and suggests, behaviour that is, "threatening or that annoys or upsets…"; it was not threatening behaviour, it may well have been annoying or upsetting to Mrs Popescu, but it was not reasonable for her to react in that way.

161.2 There were no, "blatant lies" by the Respondent.

161.3 The Respondent did not attempt to coerce, (attempting to persuade by use of force or threats) Mrs Popescu into attending the fact finding meeting. It politely, in measured terms, invited her to attend, adopting a helpful, conciliatory tone, seeking to reassure Mrs Popescu that the proposed meeting was investigatory, not disciplinary.

161.4 Mrs Popescu had said she would not attend the disciplinary hearing unless the Respondent provided her in advance with details of the allegations against her. The ACAS code at paragraph 4 lists as amongst the elements of dealing with matters fairly:

> *"Employers should **inform** employees of the basis of the problem and give them an opportunity to **put their case** in response before any decisions are made."*

And at paragraph 9:

> *"If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."*

The letter of 9 August 2018 inviting Mrs Popescu to the disciplinary hearing does not contain sufficient information to allow her to prepare her answer. That is potentially a breach of the ACAS code. However, it does say that copies of the documentation is available to her at the Respondent's offices. It is explained that this is because of the sensitive nature of the allegation. Paragraph 3 of the code reads:

> *"Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code."*

161.5 There had been no threat to take Mrs Popescu to a meeting by force. None of the correspondence could be interpreted that way. Simply offering to arrange for someone to pick Mrs Popescu up to give her a lift, does not amount to a threat of force. In his submissions, Mr Popescu refers to the sequence of emails, (and a letter sent by email) on 8 August: at 03:15 she said she did not wish to attend the proposed meeting on 9 August, at 08:45 the Respondent in its attached letter said that someone would collect her, at 10:05 Mrs Popescu replied to ask that the Respondent act respectfully and do not send anyone to collect her, at 04:43 the Respondent wrote that she was required to attend and someone would call to collect her, at 19:20 she replied to ask that no one should attend to try and force her to attend. No one did attend. The Respondent was doing its best to persuade and facilitate Mrs

Popescu's attendance, the correspondence does not amount to an attempt to take her to a meeting by force.

161.6 Mrs Popescu's living premises were not violated. Managers visited her. She left in order to avoid them. They thought she was there and so when she did not appear, they went to her room to check if she was still there. They did not enter her room. That does not amount to violation.

161.7 Mrs Popescu was not embarrassed and humiliated in front of her colleagues.

Paragraphs 2 – 4

162. Mrs Popescu did make a serious allegation against AS. It was taken seriously by the Respondent to start with, but it seems to have dropped the matter after it was reported to the police. AS was subsequently awarded, "employee of the month".

Paragraphs 5 & 6

163. Mrs Popescu did make a complaint of race discrimination against AP. The Respondent appeared to take the allegation seriously, (although Mrs Popescu was not aware of that, as she was not copied into the email between Mr Mullaine and Ms Pegler). However, it then let the matter drop and provided no outcome.

Paragraph 7

164. The complaint is that the Respondent was reluctant to pay 11 days holiday pay in September 2017, (although it did so). The holiday pay related to untaken holiday the previous year. It appears from Mrs Popescu's witness statement to be an allegation relied upon by way of background, suggesting that the Respondent's lack of clarity in its holiday policy meant that non-English speakers often did not take holiday.

165. The Respondent would have been right to be reluctant to make the payment, as payment in lieu of the statutory minimum holiday is unlawful.

166. Mrs Popescu acknowledged that after her grievance, the Respondent started to send support workers reminders about its holiday policy.

Paragraph 8

167. We heard no evidence about carers investing their own money in a client's garden and Mrs Popescu being told that it was none of her business

Paragraphs 9 and 12

168. Mrs Popescu did ask for a copy of her contract on 27 July 2018 and sent a reminder on 3 August. She was provided with a copy on 6 August 2018.

Paragraph 10

169. Mrs Popescu was suspended.

Paragraph 11

170. Mrs Popescu did attend a meeting on 2 August, she was not told what the allegations against her were and she may have been left with the impression that the problem was the way the Kylie mat was left. It is correct to say that the Respondent did not provide information about the actual complaint; it had reasonable cause not to do so, until such time as the police gave them permission.

Paragraph 13

171. Mrs Popescu did write to the Respondent on 5 August, a letter prepared, as was all of her correspondence, by her son, Mr Popescu. She did assert that the Respondent was in breach of the ACAS code. She was wrong to do so. There is no requirement to provide advance information prior to an investigatory meeting and it is common practice not to do so.

172. Mrs Popescu in evidence confirmed that she had not read the ACAS code and knew nothing of its content**.** She acted on advice from her son.

173. She did also make reference to her earlier grievances and asked for an explanation as to why she was being treated differently from AS and EP. It is accepted that this email was a Protected Act. The allegations against Mrs Popescu are very different from those against AS and EP, although that is no excuse for the apparent inaction by the Respondent in relation to her actions.

174. She also requested a copy of the minutes of the 2 August meeting.

Paragraphs 14 & 15

175. It is correct to say that on 5 August, the Respondent confirmed that the complaint was not about the Kylie pad, but refused to explain what the complaint was, for which it had reasonable and proper cause, as explained above.

176. The quotation at paragraph 15 is not from the ACAS code, which is written in neutral terms, not addressed to the employee as in the putative quote. Mrs Popescu is misrepresenting the provisions of the ACAS code at this point. Paragraphs 5 to 8 of the code relate to establishing the facts, the investigation. It is clear that this is what is done before disciplinary action is decided upon. The code makes no reference to a requirement to disclose allegations before any investigatory meeting. The Respondent is right to draw a distinction between a fact finding interview and disciplinary action.

177. Paragraphs 9 to 12 of the ACAS code then go on to explain what ought normally to happen if it is decided, (at the investigatory stage) that there is a disciplinary case to answer. It is at that stage the employee should be

notified in writing that there is a case to answer, with sufficient information about the alleged misconduct to enable the employee to prepare an answer, normally including written evidence. A disciplinary hearing should then follow.

Paragraphs 16 & 17

178. The relevant passages from the Respondent's disciplinary policy is quoted above. It begins by making it clear that investigatory meetings do not require notice in advance. That is not unusual.

179. Embarrassingly for the Respondent, the policy goes on to set out the procedure that is to be followed if it is decided after the investigation, that disciplinary action should be taken, but it includes an errant, "(investigatory") after a full stop at the end of the sentence that states that employees will sent a statement setting out the alleged conduct that has lead to contemplating disciplinary action, under the heading, "Statement of grounds for action and invitation to meeting".

180. It is clear though that the policy provides, in accordance with common industrial relations practice, that there is no requirement to provide information in advance of an investigatory meeting, as there is in respect of a disciplinary meeting.

181. We perhaps ought to make it clear that we are not suggesting that it would be unusual for an employer to provide in its policy that information is to be provided in advance of an investigatory meeting, just that the contrary is common.

Paragraph 18

182. In her email of 6 August at 8.41, Ms Kingston did tell Mrs Popescu that she was not entitled to be accompanied by a representative at the proposed investigatory meeting. There is no statutory right to be accompanied at an investigatory meeting. Some employers allow it, some do not, as acknowledged in the ACAS code at paragraph 7.

183. Mr Popescu says that the Respondent should have allowed a companion at the investigatory meeting, citing Stevens v University of Birmingham [2015] EWHC 2300 (QB), IRLR 899. That is a very different case from this one; it involved a medical consultant, conducting medical research under the auspices of both a university and an NHS trust, with differences in procedure in terms of investigating gross misconduct and whether or not companions were allowed at investigatory meetings. The Claimant faced highly technical allegations and would have benefited from a companion with a particular expertise in those technical matters. On the particular facts of that case, not allowing the Claimant a companion at investigatory meetings was a breach of the mutual trust and confidence implied term. The case is not authority for the proposition that a companion should be allowed at any investigatory meeting.

Paragraph 19

184. We have set out above our view that the Respondent's conduct cannot properly be described as a campaign of harassment.

Paragraph 20

185. The statement in the letter of 8 August 2018 that Mrs Popescu had been invited to attend meetings on two occasions and had declined to do so was true, not false. That she had attended an earlier meeting, does not render the statement false.

Paragraph 21

186. In light of Mrs Popescu's continuing refusal to attend meetings, the Respondent had reasonable and proper cause to warn her that if she did not attend the next investigatory meeting, it would proceed in her absence. That is in accordance with common industrial relations practice.

Paragraphs 22 and 23

187. There is no requirement to provide questions in advance of an investigatory or disciplinary meeting. Indeed, it would be unusual to do so. It might, for example, be appropriate if the individual concerned had a disability. A language barrier, depending on the circumstances, might be a reason to investigate by written question and answer. In Mrs Popescu's case, from our experience of her in giving evidence, we are of the view that her English is perfectly adequate for the purposes of fairly conducting the matter at hand in the proposed investigatory and disciplinary meetings, without the assistance of an interpreter.

188. One very good reason not to conduct investigations in writing, is that the employer needs to be sure that the response is that of the employee and not of someone assisting them or writing on their behalf. It is also important in an investigation, to be able to respond to an answer with a follow up question, or sequence of questions, which is not practical using a written format. It is also important to be able to assess the demeanour of the individual and test the veracity of the answers with impromptu, follow up questions.

189. The Respondent had reasonable and proper cause to decline the request to provide for written questions and answers and to insist that Mrs Popescu attend a meeting.

190. The Respondent also had reasonable and proper cause to be concerned about confidentiality. It is a particularly vile allegation, made by a vulnerable service user, who has a right to preserved confidentiality.

Paragraph 24

191. In quoting her email of 19:20 on 8 August 2018 in full, Mrs Popescu, through her son's drafting, is demonstrating the common theme of her

correspondence with the tribunal between 2 August and her resignation on 16 August 2018: sarcasm, hyperbole, exaggeration and obstructiveness.

Paragraphs 25, 27 & 29

192. Mrs Popescu's emails of 10 and 14 August 2018, quoted in full at paragraphs 27 and 29, set out her complaints about the welfare check visit on 9 August:

192.1 There was no attempt to force her to attend a meeting against her will.

192.2 The visit was unannounced and unscheduled. Mrs Popescu was living in accommodation provided by the Respondent and she had told them that she was ill. It was prudent of them to check on her wellbeing. In light of the history of obstructiveness and lack of cooperation so far, they were entitled to hand deliver an invitation to the proposed disciplinary meeting.

192.3 We have found as a fact that Ms Pegler and Ms Dean arrived at the property at 13:20. Mrs Popescu was in the house when they arrived. Her call at 13:33 to inform the Respondent that she was attending a medical appointment was made after Ms Pegler and Ms Dean had arrived and was made so as to provide an explanation for her leaving the property without speaking to them

192.4 It is fair to say that Ms Dean and Ms Pegler might have called in advance to say that they were coming, but equally, they might not.

192.5 They might also have called Mrs Popescu on arrival at the house. Equally, that is not necessarily something that would come naturally, asking another resident to go and tell Mrs Popescu that they were there and would like to see her, is.

192.6 They did not search Mrs Popescu's room.

192.7 Given that Ms Pegler and Ms Dean had understood, from what they had been told by another resident, that Mrs Popescu was in the house when they arrived and was aware that they wanted to see her, it was reasonable of them to look for her or ask someone else to look for her, when she did not appear.

192.8 In summary, the Respondent had reasonable and proper cause for undertaking the welfare check visit and for the actions that it took whilst conducting that visit.

193. Mrs Popescu responds to the invitation to a disciplinary meeting in this quoted email:

193.1 She accused the Respondent of lying by omission in stating that she had on 2 occasions not attended an investigatory meeting, an

allegation on her part that is without merit. She had twice in succession, failed to attend.

193.2 She raised the written questions and answers point again, we have dealt with that above.

193.3 She suggested that this was a, "Midas set-up". She had no good reason to make such an allegation.

193.4 She makes reference to her poor English and her requests that EP attend as her companion. We have already explained that in our view, her English is adequate. It is usual industrial relations practice not to allow as a companion at a disciplinary meeting, someone who is somehow involved in the matters at hand, such as a witness to the alleged events.

193.5 She again asks for details of the allegations in advance. This time, the invitation is to a disciplinary hearing and compliance with the ACAS code would on the face of it, require such information to be provided, see below. If she had attended the investigatory meeting, she would have known what the allegations against her were.

Paragraph 26

194. In view of her uncooperative, obstructive attitude, the Respondent had very little choice but to invite Mrs Popescu to a disciplinary hearing. These were serious allegations which it had a duty to investigate in an appropriately rigorous manner. It certainly had reasonable and proper cause to do so.

Paragraph 28

195. The Respondent's letter of 13 August 2018 was poorly worded when it said that Mrs Popescu had, "failed to attend the 13 August 2018 disciplinary meeting, 'without reason'"; it gave Mrs Popescu the opportunity to refer to this as a false representation. It would have been more accurate for the letter to have read that she had failed to attend, "without *good* reason".

Paragraph 30, 31 & 32

196. It was reasonable in the particular circumstances of this case, for the Respondent not to forward copies of documents relating to the allegations, even before the disciplinary meeting, but to make them available for study at the Respondent's premises at any time beforehand. The primary allegation was singular, particularly personal, not complex. In other circumstances, where for example there were multiple allegations or a more complex matrix of facts, requiring more thought before answering them, such a measure would be less likely to meet the requirements of the ACAS code by making the evidence available for inspection, rather than providing copies.

Paragraph 33

197. We consider each of the reasons given for her resignation by Mrs Popescu in her letter of resignation:

197.1 Failure to follow the ACAS code by providing full details of the investigation in advance of the disciplinary hearing. This is not strictly true: the details were provided, by being made available for viewing at the Respondent's premises. There is no statutory requirement to follow the ACAS code. Failing to follow the precise letter of the code does not automatically render a dismissal process unfair. In a case of alleged constructive dismissal, failure to follow the code does not automatically amount to conduct calculated or likely to undermine mutual trust and confidence. We have quoted the code above. Paragraph 9 says that it would, "normally" be appropriate to provide copies of evidence in advance, which envisages there will be circumstances in which it is not. Making the evidence available for inspection in these particular circumstances, complies with the code. We have already explained that the Respondent had reasonable and proper cause for not providing copies in correspondence, but making the evidence available at its offices.

197.2 Falsely claiming that Mrs Popescu was at home during the welfare visit: we have found that it was not a false claim.

197.3 The way that the Respondent has treated Mrs Popescu's grievances, (as compared to the way that it has investigated the complaint against her): the Respondent did fail to adequately deal with Mrs Popescu's 2 earlier grievances, in 2016 and 2017. There is an implied obligation in every contract of employment to properly and timeously deal with grievances. The Respondent's failure to do so is a fundamental breach of contract: of that implied term and of the implied term in relation to mutual trust and confidence. The difficulty for Mrs Popescu is the passage of time, by remaining in the Respondent's employment, without further protest, (until the disciplinary investigation). She has thereby waived the breach and affirmed the contract. We consider this further below. As for the difference in the way that it has treated the allegation against her as compared to its failings in dealing with her grievances; without in anyway denigrating the complaint of race discrimination, the allegation of a physical, sexual assault of a vulnerable service user is a far more grave matter, giving rise to far more serious considerations in terms of duty of care. That is not to excuse in any way, the Respondents failure to provide an outcome to Mrs Popescu's earlier grievances.

197.4 One possible interpretation of the reference to the way the Respondent, "has treated my grievances" might be a reference to their refusal to progress them after the email of 5 August 2018. The Respondent was going to address them, but it was right to, had

reasonable and proper cause to, treat Mrs Popescu's grievances and the allegations against her as separate matters, as they clearly were.

Paragraphs 34 to 37

198. At paragraphs 34 to 37, Mrs Popescu recites moving out of her accommodation, the Respondent's written acknowledgment of her resignation, the Respondent confirming that it would inform, "safeguarding" that it had not been able to complete its investigation, being called by the police, attending the police, learning of the detail of the allegation, denying it and the police taking no further action. In so far as these are actions by the Respondent, acknowledging the resignation and informing safeguarding that the investigation of the allegation has not been concluded, they post-date resignation and so cannot be relevant to constructive unfair dismissal. They may be acts of victimisation.

199. Mr Popescu has suggested, (not pleaded) that the Respondent notified the authorities without believing the allegations to be true, (although at paragraph 38 (c) of the particulars of claim, Mrs Popescu complains that the authorities were not informed quickly enough). The Respondent's view on the veracity of the allegation is irrelevant to its obligations to report and investigate such matters.

200. Mr Popescu has also suggested, (not pleaded) that the Respondent lied to and misled the authorities in order to make them believe that they were true. They did not.

Paragraph 38

201. Our view of Mrs Popescu's criticisms of the Respondent in this paragraph is as follows:

201.1 (a) The Respondent could not put the allegation to Mrs Popescu at the 2 August 2018 meeting because of the police embargo;

201.2 (b) As we have explained above, the Respondent was entitled to withhold detail of the allegation until the proposed investigatory meeting, that is neither a breach of the ACAS code nor a breach of the Respondent's own procedures.

201.3 The Respondent did refer the matter to the proper authorities without delay.

Paragraph 39

202. As discussed above, the Respondent did not harass Mrs Popescu to attend a second investigatory meeting and it had reasonable and proper cause to seek to persuade and encourage her to do so.

Paragraph 40

203. The Respondent did not delay the police investigation.

Paragraph 41

204. It is correct to say that the Respondent's desire to hold an investigatory meeting was not affected by Mrs Popescu's accusations of dishonesty and, "setting things up" and rightly so. The Respondent had reasonable and proper cause not to be so affected.

Paragraph 42

205. It is clear that there were two points of concern, one much more serious than the other.

Paragraph 43

206. We find that the Respondent did not act in bad faith or with malice. We found nothing sinister in the timing of events or the way the Respondent sought to investigate. The nature of the allegations was not, "dubious". Dealing with Mrs Popescu's specific points:

206.1 (a) As discussed above, the Respondent was not trying to coerce Mrs Popescu to attend the investigatory meeting.

206.2 (b) As discussed above, there were no threats to take Mrs Popescu to any meeting by force.

206.3 (c) Mrs Popescu deploys absurd sarcasm. The welfare check visit is discussed above.

206.4 (d) Ms Pegler and Ms Dean did not lie when they stated that Mrs Popescu was at home when they visited for the welfare check. They were entitled to rely on information provided to them by another resident of the house.

206.5 (e) The Respondent did not claim that Mrs Popescu had, "magically disappeared", that is an embellishment and sarcasm. Mrs Dean wrote in her 9 August email referred to above, "Having checked the whole house it was clear that you had left…". We do not understand why Mrs Popescu claims to have been embarrassed, humiliated and to have raised the suspicion of her colleagues, unless it is because she had left the building as we have found she did. It is true that they could have attempted to call her on her mobile phone and did not do so.

206.6 (f) Neither Ms Pegler nor Ms Dean entered Mrs Popescu's living space. A fellow resident merely placed a letter on her desk.

206.7 (g) The Respondent was right to say that Mrs Popescu had failed to attend meetings and as we have noted above, her failure to attend was without good reason.

206.8 (h) The, "excuse" for insisting on the meeting, that the Respondent needed to write down the answers was not, "ridiculous" (see above).

Paragraph 44

207. The Respondent was not attempting to make Mrs Popescu resign, nor had it delayed in referring matters to the police.

Paragraph 45

208. We will turn below to the questions of whether the Respondent's actions amounted to a breach of the implied terms of mutual trust and confidence or a breach of the equality act.

Paragraph 46

209. This paragraph reads:

> *"It appears that reminding the Respondent on 05 August 2019 of its failure to deal properly with grievances that I have raised, including a complaint of racial abuse, was part of the Respondent's motivation. Therefore the Respondents actions amount to breaches of sections 13, 26 and 27 of the Equality Act 2010"*

210. Although sections 13 and 26 are mentioned, this is clearly a pleaded claim of victimisation: that reminding the Respondent of the complaint of racial abuse was the motive for the Respondent's actions. However, sections 13, (direct discrimination) and 26, (harassment) are also mentioned. We will therefore below, deal with whether the Respondent's actions were acts of direct race discrimination or harassments as well as of victimisation, even though direct discrimination and harassment are not pleaded.

Paragraph 47

211. The impact on Mrs Popescu of what happened goes to remedy, not a matter before us at the moment.

Paragraph 48

212. Mrs Popescu claims that pursuant to her contract of employment, she should have been on an hourly rate, not a daily rate. She in fact changed her role to live-in, signed an average hours agreement and continued to work thereafter without demur. The contract had been varied to provide for payment of a daily rate for living in and to the extent that she may not have expressly agreed to such variation, (and to be clear, we find that she did) she had waived any breach and affirmed the contract as varied, by her continuing to work under the new terms without complaint. This aspect of Mrs Popescu's claim fails.

Paragraph 49

213. Mrs Popescu claims that as her contract of employment did not expressly mention, "accommodation offset" and that the Respondent was required by her contract to provide her accommodation in addition to her wages, which were set at the national minimum wage. When the national minimum wage was increased, her pay should have increased by exactly the same amount. This is not correct for a number of reasons:

213.1 The original contract provided for an hourly rate of pay of £7.30; the national minimum wage from April 2016 was set at £7.20; her hourly rate therefore happened to be more than the national minimum wage.

213.2 At no point does the contract expressly state that the hourly rate is set at the national minimum wage. There is a note that a deduction may not reduce the rate of pay below the national minimum wage, that is not the same as setting the hourly rate at the national minimum wage.

213.3 The contract expressly authorises the deduction of the real cost of lodging or other facilities provided in connection with employment. However, it would be right to observe that this does suggest an actual cost to the Respondent and that it authorises specific deduction from the wages that are payable under the contract.

213.4 The Respondent set out the change to the rate of pay for Mrs Popescu and her colleagues in its letter of 25 April 2018. The wage slips show that the net effect of the changes were that she benefited from a pay rise, (pages 606 and 607).

213.5 If there was a breach of her contract of employment, (and we find that there was not) she waived such breach and affirmed the contract by continuing to work without protest thereafter.

214. Not pleaded, but raised at the outset of the case and in Mr Popescu's submissions, is the argument that the Respondent is not entitled to apply the accommodation offset because it does not itself provide the accommodation; it is provided by the service user. This is relevant because there is implied in every contract of employment a term that the employee will receive at least, the national minimum wage. If the accommodation off-set is not permissible, Mrs Popescu was not paid the national minimum wage from April 2018.

215. However, the accommodation is provided by the Respondent, in that it makes the arrangement with the service user and the local authority for the accommodation to be provided. Although the Department for Business, Energy & Industrial Strategy guide is not law, we take comfort from the fact that the guide supports our view. The accommodation is provided in connection with Mrs Popescu's contract of employment, Mrs Popescu's continued employment as a live-in carer is dependent on occupying

particular accommodation and her accommodation is dependent on her remaining in a particular job.

216. Mr Popescu's argument appears to misunderstand the significance of the accommodation off set. It is not a deduction from Mrs Popescu's wage, (and is not therefore something which needs to be shown on her wage slip, an unpleaded argument of Mr Popescu). It is an element of the formula used to calculate whether or not an individual is paid the national minimum wage.

Constructive dismissal

217. From the foregoing, we consider each instance in which, without reasonable or proper cause, the Respondent's conduct might arguably be in breach of contract or thought to be calculated or likely to undermine mutual trust and confidence:

217.1 The Respondent failed to complete its investigation into Mrs Popescu's grievance against AS in 2016. That is a breach of the implied term that an employer will deal with grievances timeously. It is also conduct without reasonable and proper cause that is likely to undermine trust and confidence. The difficulty for Mrs Popescu is the passage of time; she has waived the breach and affirmed the contract.

217.2 The same reasoning applies to the Respondent's failure to complete its investigation into Mrs Popescu's allegations against AP. It is a more serious matter, as it as an allegation of race discrimination. Nevertheless, the grievance was raised 9 months before Mrs Popescu resigned; by the passage of time, she has waived the breach and affirmed the contract.

217.3 The Respondent may have had an unclear holiday policy. That in itself, without more, is not sufficient to amount to conduct calculated or likely to undermine mutual trust and confidence. Furthermore, the Respondent rectified any lack of clarity with reminders to its support staff. Any potential breach of contract, (and we see none) was waived by Mrs Popescu by the passage of time without further protest; her grievance in this regard was in September 2017.

217.4 Mrs Popescu had to send a reminder in respect of her request for a copy of her contract of employment. The delay was between 17 July and 6 August; 3 ½ weeks. Without more, this could not be regarded as conduct calculated or likely to undermine trust and confidence.

217.5 The Respondent did not allow Mrs Popescu to be accompanied at the investigatory meeting. We have explained that there is no obligation on it to do otherwise. Her English was sufficiently adequate. Some employers would have allowed a companion, but the Respondent not doing so was not calculated to and was not likely to undermine mutual trust and confidence.

218. The Respondent's actions in trying to conduct an investigatory meeting with Mrs Popescu and ultimately, inviting her to a disciplinary hearing, did not amount to conduct calculated or likely to undermine mutual trust and confidence. For reasons explained above, it had reasonable and proper cause for its actions. However, having regard to its failure to deal adequately with the grievances of 2016 and 2017, we adopt the approach in Kaur to consider whether, notwithstanding the passage of time, they might amount to a course of conduct, of which the investigatory and disciplinary action might be a last straw so that together, they amount to such a breach:

    218.1 The most recent act complained of before Mrs Popescu's resignation is the invitation to a disciplinary hearing, which did not contain details of the allegations she faced.

    218.2 She had not affirmed the contract after that and before her resignation.

    218.3 That invitation did not amount to a fundamental breach of contract; the Respondent had reasonable and proper cause, as explained above.

    218.4 Was it nevertheless a part of a course of conduct, (having regard to Omilaju) which viewed cumulatively, amounted to a breach of mutual trust and confidence, thereby negating any earlier affirmation? Omilaju is authority for the proposition that a, "last straw" does not have to be in itself, a breach; it need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term. However, the Respondent had to take the action that it did, pursuant to its obligations to X, to its service users, to the local authority and indeed, to society at large. It in no way contributed to a breach of the implied term.

219. In conclusion, the 2016 and 2017 breaches of contract are stand alone breaches that do not link up to what happened in 2018. Mrs Popescu's latest grievance, that the earlier grievances had not been dealt with, does not resurrect them; the Respondent confirmed that it would deal with her latest complaint and it was right to treat it separately from the disciplinary issue at hand. There was no breach and no contribution in the Omilaju sense, to a breach of the implied term relating to mutual trust and confidence.

220. For these reasons, the claim for constructive unfair dismissal fails.

Victimisation

221. We consider whether each incident after 5 August 2018 which might be said to amount to a detriment, was in fact a detriment and whether each such detriment was inflicted on Mrs Popescu because on 5 August 2018

she had protested that the Respondent had not properly dealt with her earlier complaint of discrimination.

222. We have explained above the Shamoon test for what amounts to a detriment: the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that she had been disadvantaged.

223. We ask ourselves when considering each of these matters, whether there are facts from which we could properly conclude, absent an explanation from the Respondent, that the reason behind these events in the decision makers mind, was that Mrs Popescu had complained about race discrimination in 2017 and had on 5 August 2018, reminded the Respondent that it had not properly dealt with her complaint. The very fact that the Respondent did not take sufficiently seriously an allegation of race discrimination, of racial abuse, by properly investigating that allegation and providing an outcome, may be sufficient to raise the inference of a racist culture within the Respondent. Being reminded of its failure to deal with the earlier complaint, might have been a factor in the subsequent decision making.

224. In terms of decision makers, we only heard evidence from Ms Pegler and Ms Kingston; we found them credible witnesses and did not think that the protected act played any part in their decision making. In so far as any of the detriments that are potentially acts of victimisation and are as a consequence of decisions made by others, we can only base our decision on the likelihood that such was the motive, based on the evidence available.

225. Not providing an explanation of the allegations Mrs Popescu would have to answer in advance of an investigatory meeting: this is a detriment; there is a disadvantage in not knowing in advance what one is accused of so that one can prepare one's answers. We have already explained why we take the view that this was something the Respondent was entitled to do in the circumstances; there was a reasonable explanation for its actions. It is not an unusual course of action to adopt. It is in any event a position the Respondent adopted before the protected act. There are no facts from which we could conclude that the protected act was the motive. It was originally the decision of Ms Kingston and subsequently of Ms Dean. We are satisfied that the protected act played no part.

226. Not allowing Mrs Popescu to be accompanied at all or by EP: with regard to EP, it is usual industrial relations practice not to allow someone who is involved in the facts under investigation to attend as companion at a disciplinary or investigatory meeting. Mrs Popescu's complaint in this regard is an unjustified sense of grievance and not a detriment. In terms of not being allowed to be accompanied at all at the investigatory meeting proposed after 5 August; a reasonable employee might feel disadvantaged by not having a companion and so this is a detriment. However, there is no right to representation at an investigatory meeting, (although employers often do permit it). This was a decision originally made by Ms Kingston

and subsequently by Ms Dean. It was a decision they were entitled to take and was the Respondent's usual practice. There are no facts from which we could conclude that the protected act was the reason for the decision. The protected act played no part in the Respondent not allowing Mrs Popescu a companion at the investigatory meeting. She was permitted a companion at the disciplinary meeting.

227. Stating in the letter of 8 August 2018 that Mrs Popescu had twice failed to attend meetings is an accurate statement of fact and could not be described as a detriment.

228. The Respondent stating that it would proceed in Mrs Popescu's absence if she failed to attend the investigatory meeting on 9 August or the second proposed disciplinary hearing on 16 August, (decisions of Ms Dean): this could clearly be a detriment, a disadvantage. However, there comes a point when in the face of an implacable lack of cooperation from an employee in relation to matters that must be investigated, that an employer has to proceed in any event and on the basis of the information to hand. The Respondent had shown patience and was justified in taking the view that it had reached the point where it had to proceed. It is a step almost any employer would have taken. There is no evidence from which we could conclude that the reason for the decisions were the protected act, which we find played no part therein.

229. Not providing Mrs Popescu with the questions she was going to be asked in advance of the disciplinary hearing: it would have been very unusual to have done so and would only be likely in unusual circumstances. This is a case of an unjustified sense of grievance and not a detriment.

230. Carrying out a welfare check was not a detriment; there is no disadvantage to the Claimant in the Respondent ensuring that she was well. Nor was there a detriment in hand delivering a letter of invitation to a disciplinary hearing.

231. Not having an explanation of the allegations before the disciplinary hearing and not being provided with copies of the documents relating to the allegations in advance of the disciplinary hearing: this would be a detriment; one would be at a disadvantage in attending a disciplinary hearing without knowing in advance what allegations one faced and having the opportunity to prepare one's defence. However, that was not the situation here; Ms Dean's decision was that the details and documents were to be available for Mrs Popescu to see and study, at the Respondent's premises. That too though, might be regarded as a detriment: it is usual industrial relations practice for copy documents to be provided. However, we accept the Respondent's explanation for this: the very personal, confidential nature of the allegations relating to a vulnerable person. There is no evidence that the protected act was the reason that the information was not copied to Mrs Popescu and we are satisfied that it played no part in the decision not to do so.

232. Inviting to a disciplinary hearing, (a decision by Ms Dean): there is obviously a detriment in having to face a disciplinary hearing. However, the Respondent had no choice in the face of Mrs Popescu's lack of cooperation and so this may be described as an unjustified sense of grievance and not a detriment. Had we decided that it was a detriment, we would have found that the reason for it was Mrs Popescu's failure to cooperate with the investigation and that the Respondent had to proceed with a disciplinary hearing in order to properly deal with what was a serious allegation. There are no facts from which we could conclude that the reason Mrs Popescu was invited to a disciplinary hearing was the protected act and we conclude that it played no part the Respondent doing so.

233. Informing Safeguarding that the investigation had not been completed, (it is unclear who the decision maker was): the Respondent had no choice but to do so. This was not a detriment but represents an unjustified sense of grievance on the part of Mrs Popescu. In any event, had we decided that it can properly be described as a detriment, clearly the reason for the Respondent doing so was its obligation to do so and not because of the protected act, there are no facts on which we could properly conclude otherwise. The protected act played no part in the decision to so inform Safeguarding.

Direct Discrimination

234. It is very clear that the sole motivation for all of the Respondent's actions were that a serious allegation of an assault had been made against Mrs Popescu, that the Respondent was required to investigate the allegation and that Mrs Popescu had not cooperated with the investigation. There are no facts from which we could properly conclude that a White person in the same circumstances, behaving in the same way, would have been treated any differently. The failure to deal with the 2017 grievance adequately would not have been enough to raise an inference and shift the burden of proof. Had there been a pleaded claim of direct discrimination, it would have failed.

Harassment

235. None of the matters complained of could be said to be related to race. Had there been a pleaded claim of harassment, it would have failed.

Discriminatory dismissal

236. It follows that as there has been no discrimination in the matters that led Mrs Popescu to resign, there was no discriminatory constructive dismissal.

Breach of contract

237. The claim in breach of contract based upon being entitled to an hourly rate rather than a daily rate fails: the contract was varied so that Mrs Popescu was to be paid a daily rate. If there was a breach, it was waived.

238. The claim founded on the accommodation off-set fails because in the first place, the Respondent was entitled to offset accommodation costs pursuant to the contract. If there was a breach, it was waived. In any event, the accommodation off-set was not in fact a deduction from wages, but a device to calculate what the new rate of pay would be and that new rate of pay was not below the national minimum wage.

_____
Employment Judge M Warren

Date: 20 April 2020

Sent to the parties on..15/07/2020.....

.....S.Kent ….....
For the Tribunal Office