



**IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH**

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**Judgment of the Employment Tribunal in Case No: 4101101/2020 Heard at  
Edinburgh, In Person, on 18, 19, 22 and 23 March 2021**

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**Employment Judge J G d’Inverno  
Tribunal Member Mary Watt  
Tribunal Member Jean Grier**

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**Ms W Aftab**

**Claimant  
Represented by:  
Miss Lisa Campbell,  
Solicitor, per Duncan &  
McConnell, Solicitors  
Limited**

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**HC – One Ltd**

**Respondent  
Represented by:  
Ms J Hale, Solicitor  
per Watershed HR**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The unanimous Judgment of the Employment Tribunal is that the claims are  
dismissed.

**REASONS**

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1. This case called before a full Tribunal at Edinburgh, for a rescheduled “In Person” Final Hearing, on 18<sup>th</sup> March 2021 at 10 am.
2. Each party enjoyed the benefit of legal representation; for the claimant Miss Campbell, Solicitor and for the Respondent Company, Ms Hale, Solicitor.

3. The complaints given notice of and requiring investigation and determination by the Tribunal at Hearing comprised several instances of alleged Direct Discrimination, in terms of section 13 of the Equality Act 2010, because of the protected characteristic of Race and or of Religion or Belief; and several instances of alleged Harassment, in terms of section 26 of the Equality Act 2010, relating to the same protected characteristics. The claimant defines her ethnicity as British-Pakistani. The claimant is a practising Muslim.
4. All of the claims were subject to challenge of the claimant's Title to Present them and the Tribunal's Jurisdiction to Consider them, by reason of alleged Time Bar. At the Closed Preliminary Hearing which proceeded before her on 19<sup>th</sup> June 2020 that Preliminary Issue of Jurisdiction had been reserved by Judge Robison, with the consent of parties, for determination on a Proof Before Answer basis at Final Hearing.
5. Parties had been directed to adjust between them and lodge with the Tribunal, in advance of the Hearing, a Joint List of Issues requiring investigation and determination, the same to include:-
- (a) Full specification of the statutory provisions founded upon; and
  - (b) In relation to the complaint of Direct Discrimination, a list, by date, by reference to the employee of the respondent at whose hand it allegedly occurred, and by reference to whether it is said to have constituted discrimination by reason of Race and or of Religion or Belief, of each of the incidents of conduct or of omission which were to be relied upon by the claimant.
  - (c) In the event that some or all of the claimant's complaints of Direct Discrimination and or of Harassment, succeed, to what remedy by way of consequential declaration, damages for injury to feelings, and or patrimonial loss, if any, it was maintained the claimant was entitled.

6. In the course of Case Management Discussion conducted at the outset of the Hearing, the following matters were confirmed by parties and were for the purposes of the Hearing recorded:-

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### **The Statutory Provisions Founded Upon**

- 10 (a) The claimant complains of Direct Discrimination under section 13(1) and of Harassment under section 26(1) of the Equality Act 2010 ("EqA") respectively because of and by reason of conduct related to, the protected characteristic of Race (section 9(1)(c)) and or of Religion and Belief (section 10(1) and (2)) both EqA.

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### **Comparator**

- 20 (b) The claimant, who defines her ethnicity as British-Pakistani and who is a practising Muslim, gives notice of relying upon hypothetical comparators, the first being a white-Scottish person in relation to the complaints advanced in terms of section 9(1)(c) of the 2010 Act and the second being a practising Christian in relation to those advanced in terms of section 10(1) and (2).
- 25 (c) The respondent's representative's recorded position was that to constitute valid comparators for the purposes of the section 13 claims, the hypothetical comparators identified would also require to be "Senior Care Assistants employed upon a probationary contract".

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### **The Issues**

- (d) **The Agreed List of Direct Discrimination Issues, including relative Issues of Fact, submitted and identified by the Parties at the commencement of the Hearing together with**

**those verbally added were as jointly articulated by them and as set out below;-**

“1 Did the following situations occur?

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2 If they did, do they amount to less favourable treatment?

3 And if they do, has the respondent treated the claimant less favourably than it treated or would have treated the comparators because (either consciously or subconsciously) of her Race or because of her Religion?

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Alleged Treatment:

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(i) After the meeting of 13<sup>th</sup> March 2019, Janet De Court allegedly failed to take any action in respect of complaints of being isolated and singled out made by the claimant,

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(ii) On the 12<sup>th</sup> of July 2019, Carol Greenfield dismissed concerns raised by the claimant about Kay Gray’s handling of a resident,

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(iii) On 4<sup>th</sup> October 2019, the claimant was reprimanded by Carol Greenfield following a complaint about the claimant’s failure to use the correct moving and handling technique”, (The Commode Tub incident)

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(iv) “On 9<sup>th</sup> October 2019, Jody Clark instructed the claimant not to wear Eziclogs,

(v) On the 18<sup>th</sup> of October 2019 the claimant was reprimanded by Carol Greenfield when it was alleged that the claimant left the lounge unattended,

(vi) On the 18<sup>th</sup> of October 2019, a colleague, Jordan, had spoken to the claimant in a rude and aggressive manner,

(vii) After the claimant's two month review, Amanda Cooper did not allow the claimant to administer medication.

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**Harassment Issues, including relative Issues of Fact,**

1 Did the following situations occur?

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2 If so, in conducting themselves as they did, did the respondent harass the claimant by engaging in unwanted conduct relating to the claimant's Race and/or Religion and Belief which had the purpose or effect of either:

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- Violating the claimant's dignity, or
- Creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

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**Alleged Treatment:-**

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(i) During a conversation, Kay Gray challenged the claimant on why she had to wear a headscarf.

(ii) The claimant was prevented in progressing her job role and was not allowed to do the tasks of a Senior Care Assistant.

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(iii) The claimant completed her medicine e-learning and was not allowed to administer medication.

- (iv) On the 12<sup>th</sup> of October 2019, the respondent excluded the claimant from the notice board that contained photographs of all employees on that floor,
- 5 (v) On the 13<sup>th</sup> of October 2019, the claimant was prohibited from sitting in Carol Greenfield's room to take her break,
- (vi) On various occasions, the claimant was given lists of tasks to do by carers below her station.
- 10 (vii) In May 2019, the claimant's request during Ramadan was challenged and mocked by Jody Clark and Carol Greenfield.
- (viii) On 25<sup>th</sup> July 2019, the claimant attended a meeting where Amanda Cooper and Jody Clark were present. The claimant was accused of poor manual handling and communication. The claimant was asked to consider changing role to a Care Assistant.
- 15 (ix) During this meeting, the claimant was accused of not completing Senior Care Assistant tasks and was advised that she would require to be demoted to Care Assistant or have to leave.
- 20 (x) Throughout the claimant's employment, she was excluded from providing 360° feedback in relation to her colleagues.
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Taking account of: the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.”

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### **Reserved Issues as to Jurisdiction**

- (xi) Are all or any of the allegations relied upon brought outwith the primary statutory periods, extended where applicable by

5 the operation of the Early Conciliation Regulations, and within which the claimant could, of right, present such applications to the Employment Tribunal; and, if any of the allegations are brought outwith the primary statutory period are all or any of them instances of “conduct extending over a period” which fall to be treated as done at the end of that period for the purposes of section 123(3)(a) of the EqA and if so, did the end of that period occur within the primary time period prescribed in terms of section 123(1)(a).

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(xii) In the alternative, let it be assumed that some or any of the claimant’s complaints were not timeously presented in terms of section 123(1)(a) – were any such complaints presented within “such other period as the Employment Tribunal thinks just and equitable” and thus to be regarded as falling within its jurisdiction notwithstanding their late presentation.

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### Remedy

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(xiii) In the event that some of the claimant’s complaints of Direct Discrimination and or of Harassment succeed, to what Remedy, by way of; Declaration patrimonial loss and or damages for hurt to feelings, is the claimant entitled in consequence.”

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### **Objection to Incidents referred to in the Claimant’s Witness Statement (Evidence in Chief) of which no notice given in the initiating Application ET1**

### **Preliminary Issue**

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7. By way of Preliminary Issue the respondent’s representative took objection to identified paragraphs of the claimant’s witness statement which bore to present evidence about matters not given notice of in the claimant’s initiating Application. She sought clarification from the claimant’s representative

before the Tribunal, as to the purpose of the inclusion of these passages and in particular whether the claimant now gave notice of an intention to seek to found upon those matters for the purposes of establishing all or any of her complaints of Discrimination and or of Harassment. By way of response the claimant's representative agreed that the matters spoken to in the identified paragraphs of the claimant's witness statement were matters not given notice of nor founded upon in the initiating Application ET1. She confirmed, under reference to the agreed List of Issues which, (with the exception of that covered at paragraph 26 of the claimant's statement) likewise did not include reference to them, that the claimant did not seek to found upon them for the purposes of establishing her complaints at Final Hearing and that they were included and referred to only by way of background and context.

8. The paragraphs so identified by the respondent's representative and so acknowledged by the claimant's representative at the outset of the Hearing as being in that restricted category were paragraphs 11, 12, 13, 26, 31 and 37.

9. On the basis of that express concession and confirmation by the claimant's representative, given in the presence of the claimant, the respondent's representative confirmed that she did not object to the passages being rehearsed in evidence for the restricted purposes of context and background.

10. The respondent's representative did cross examine the claimant in relation to some of the matters identified in those passages including those spoken to at paragraph 26 of her witness statement.

### **Amendment**

11. At the conclusion of the evidential case and prior to the making of submissions, the claimant's representative made application, at the bar, for Leave to Amend the claimant's pleaded case for the purposes of bringing it into line with and of reliance upon the evidence, led at paragraph 26 of the claimant's witness statement, of the instance of alleged direct discriminatory

conduct described at paragraph 3(iii) of the Joint List of Issues: viz, "*On the 4<sup>th</sup> October 2019, the claimant was reprimanded by Carol Greenfield following a complaint about the claimant's failure to use the correct moving and handling technique*" ("the commode tub incident").

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12. The application was opposed by the respondent's representative who objected to it on the grounds that it represented a departure from a concession made by the claimant's representative at the outset of the Hearing. She stated in answer to the Tribunal's enquiry that notwithstanding the fact that the witness statement had been in the respondent's representative's possession for a period of several weeks in advance of the Hearing there were no enquiries which the respondents could have made, had the allegation spoken to been contained in the initiating Application ET1, which they had not prudently already sought to make following their receipt of the witness statement. She also acknowledged that she had cross examined the claimant on those passages of her evidence and that the respondent could not be said to be prejudiced by the lack of formal notice.

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13. Having heard parties on the opposed Application and being satisfied, in the circumstances that it was in accordance with the interests of justice and the Overriding Objective to do so the Tribunal granted the claimant Leave to Amend in the following terms:-

**"Edinburgh 22<sup>nd</sup> March 2021**

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On the claimant's Application, made at the bar at the conclusion of the evidential case but prior to the making of submissions, the respondent's representative objecting, and being satisfied, upon hearing parties, that doing so was in accordance with the Overriding Objective, the Tribunal;

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**(First)** Allows the Application and Grants the claimant Leave to Amend into her pleaded case and to rely upon, the instance of alleged discriminatory treatment referred and spoken to by

her at paragraph 26 of her written witness statement and articulated under the heading “Direct Discrimination” at paragraph 3(iii) of the Agreed List of Issues viz:- “On 4<sup>th</sup> October 2019, the claimant was reprimanded by Carol Greenfield following a complaint about the claimant’s failure to use the correct moving and handling technique.” (“the commode tub” incident)

**(Second)** Records the respondent’s representative’s:-

(a) confirmation that the respondent does not seek to answer the amendment, the allegation so incorporated being not known to and not admitted by the respondent and thus covered by their general denial, the claimant being put to her proof both in respect of the occurrence of the incident in the manner in which she described, and separately as to the alleged discriminatory character and or motivation,

(b) and explanation, let it be assumed that the occurrence of such an event and of such associated reprimand were to be established in evidence, that it would be normal and expected practice for the nurse in charge of the floor to focus the matter with the care assistant involved because of the necessity to prioritise patient care and the health and safety of the residents, that being a course of action which the respondent would have followed regardless of the ethnicity or religion or belief of the employee involved; and further, that the giving of such a reprimand, were it to be established, being susceptible to that alternative explanation no requirement arose to

infer, nor were there established before the Tribunal any primary facts from which the Tribunal could infer and conclude that the claimant was so treated because of either of her relied upon protected characteristics.”

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14. That the parties' respective positions in relation to those passages remained otherwise unchanged, was a matter also confirmed by the Tribunal with parties' representatives following the conclusion of evidence and prior to the Hearing of submissions.

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### **Documentary Evidence**

15. In advance of the Hearing, parties had lodged a Joint Bundle of Documents which extended to some 226 pages and to which were added, of consent of parties on the morning of the Hearing, an additional 11 pages numbered 227 to 239 inclusive, and to some of which reference was made by parties in the course of evidence and submission.

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### **Oral Evidence**

16. The case had been one previously set down to proceed by way of a remote Hearing and in that context the use of witness statements had been authorised. There were, in consequence, before the Tribunal witness statements;

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(a) of the claimant who gave evidence on her own behalf and,

(b) for the respondent, of;

- (i) Alan Miller-Young (the designated Officer who investigated and determined the claimant's internal grievance submitted on 2<sup>nd</sup> August 2019), and of,
- 5 (ii) Amanda Cooper, the Senior Home Manager of the Care Home operated by the respondent and at which the claimant was employed.

17. All witnesses gave their evidence on oath or affirmation.
- 10 18. With the mutual agreement of parties representatives all witnesses read their witness statements into evidence in chief thereafter answering supplementary questions in chief, questions in cross examination and, where required in re-examination, and questions from the Tribunal."

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### **Findings in Fact**

19. On the documentary and oral evidence presented the Tribunal made the following essential Findings in Fact restricted to those relevant and necessary
- 20 to the determination of the Issues.
20. The respondent carries on the business of providing care for the elderly. It employs about 14,000 people in the United Kingdom and has in place policies and procedures the terms of which prohibit unlawful discrimination
- 25 and harassment.
21. The claimant worked as a probationary Senior Care Assistant at Murrayfield House Care Home in Edinburgh from the 19<sup>th</sup> of February 2019 on which date she submitted written resignation effective as at 30<sup>th</sup> October 2019.
- 30 22. The claimant's letter of resignation, copied and produced at page 157 of the Bundle and addressed to Amanda Cooper, the Senior Care Home Manager was in the following terms:-

*“Dear Mandy*

*I would like to notify you that I am resigning from my job at HC-One from tomorrow 30<sup>th</sup>/10/2019.*

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*Yours sincerely*

*Wajeeha Aftab”*

10 23. Murrayfield House operates approximately 100 beds and provides residential nursing and memory care for those living with dementia.

15 24. The claimant is a qualified doctor in Pakistan but is not currently able to practise as a doctor in the United Kingdom. She had very limited previous experience as a carer but, because the respondents considered it likely, in light of her qualifications, that she would have substantial potential to develop in the role, was appointed as a Senior Care Assistant.

20 25. The claimant worked initially in the Fettes Unit and subsequently moved, at her request to work in the Cramond Unit in or around May of 2019.

### **Allegations of Direct Discrimination**

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26. On 9<sup>th</sup> March 2019 the claimant raised an oral complaint alleging that Karen Morton, the Unit Manager had discriminated against her. The claimant alleged that she had been singled out/targeted by Karen Morton because of her religious beliefs and for wearing a headscarf. A Senior Manager from another Home operated by the respondents, Janet De Court, investigated the claim. In so doing Janet De Court followed the stage 1 informal procedure specified in the respondent’s applicable grievance procedure and produced and copied at page 64 of the Bundle. She held a meeting with the claimant and sought to resolve the matter informally. At the meeting, the claimant

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advised Janet De Court that what she wanted by way of outcome from her grievance was a transfer to another floor. Janet De Court concluded that there was no evidence that went to establish a discriminatory motive on the part of Karen Morton but considered, in the circumstances, that granting the claimant's request for a transfer to another floor would be a positive step and she did so. The claimant shortly thereafter transferred to work on the Cramond Floor.

27. Janet De Court took no other action after her stage 1 grievance meeting with the claimant on 13<sup>th</sup> March 2019 considering the matter to have been resolved by the delivery to the claimant of the desired outcome which she had identified.

28. On 14<sup>th</sup> March 2019 Janet De Court wrote to the claimant communicating her determination of and the outcome of the claimant's complaint. That letter which is copied and produced at page 132 of the Joint Bundle was in the following terms:-

*" 14<sup>th</sup> March 2019*

*Dear Wajeeha*

**RE: OUTCOME OF COMPLAINT**

*I am writing following our meeting on 13<sup>th</sup> March 2019 within Murrayfield House Care Home to discuss the complaint which you submitted on 11/03/19.*

*At the meeting, I fully investigated your complaint and after considering all the facts, based on the information available, I am now in a position to respond to you.*

*We discussed your concerns that your Line Manager was discriminating against you due to religious belief or for the wearing of*

5 *a headscarf. By your own admission you said that you might have made an assumption that you were discriminated against as you felt there was no problem with your work. On investigation, I could find no evidence to suggest that you have been singled out or targeted in any way rather, that your Line Manager was working closely with you as a new Carer to ensure correct documentation and policies were adhered to.*

10 *While I appreciate you have had concerns at work I do need [to] highlight allegations of this nature are taken very seriously by the Company and should not be made lightly.*

15 *I agree that the feelings you expressed towards your Line Manager are not conducive to a peaceful working environment. You stated that you would like to be considered for a move to an alternative unit as your desired outcome of your complaint. Therefore, I have requested that you will be relocated to another unit where supervisions will be conducted with you on a regular basis as part of the probationary process and give you an opportunity to feedback.*

20 *Should you have any queries in relation to this please do not hesitate to contact me or your Home Manager.*

*Yours sincerely*

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*Janet De Court*

*Home Manager*

*0131 553 6868'*

30 29. By letter dated 9<sup>th</sup> September 2019 the terms of which were not in dispute between the parties and which is copied and produced at pages 142 to 150 of the Joint Bundle, Alan Miller-Young wrote to the claimant communicating his determination of the claimant's complaints and that grievance outcome but also advising the claimant of her right to and the timescale within which she

should exercise her right to appeal against the grievance outcome should she so choose.

5 30. The terms of:- the respondent's grievance procedure, the claimant's grievance, the notes of Alan Miller-Young's investigatory meetings, the claimant's Contract of Employment, the job description for a Senior Carer and of the letter of 9<sup>th</sup> September -2019 communicating the grievance outcome the terms of none of which were in dispute between the parties and which are produced in the Joint Bundle at the page numbers set out above, are referred to for their terms and are held incorporated in these Findings in Fact by reference, for reasons of brevity.

15 31. Alan Miller-Young concluded that he found no evidence of race discrimination, unfair treatment or victimisation towards the claimant from any of her colleagues in Murrayfield House.

20 32. He confirmed this in writing to the claimant on 9<sup>th</sup> September 2019 advising her also of her right to appeal. He offered to meet the claimant to discuss his findings.

33. The claimant did not appeal. In evidence she explained that she did so because Alan Miller-Young was unable to "guarantee me" that if I appealed the outcome would be changed.

25 On the 1<sup>st</sup> of October 2019 the claimant attended a probationary review meeting and it was decided, at that point to extend her probationary period by three months due to ongoing concerns about her performance that needed to be addressed and to afford her the opportunity of addressing them and successfully concluding her probationary period. Had the probationary period not been so extended it would have come to an end on the 30<sup>th</sup> of October giving rise to potential implications for the continuation of the claimant's employment. At the probationary review meeting of 1<sup>st</sup> October 2019 Amanda Cooper offered to pay the claimant for six hours' time per week during which she could carry out e-learning on the respondent's computer.

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She directed the claimant's working shift be proportionately reduced from 48 hours to 42 hours per week. As the shifts were rostered six weeks in advance that adjustment had not yet been reflected in the rotas as at the date of the claimant's resignation on 29<sup>th</sup>/30<sup>th</sup> October 2019.

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34. On 29<sup>th</sup> October 2019 the claimant resigned by email effective on the following day 30<sup>th</sup> October 2019.

35. The claimant's letter of resignation, which is copied and produced at page 157 of the Joint Bundle gave no reason for resignation and was in the following terms:-

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***"RESIGNATION LETTER***

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*Date 29/10/2019*

*To,  
The Home Manager  
Murrayfield House,  
66 Murrayfield Avenue  
EH12 6KY  
Edinburgh, UK*

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*Dear Mandy*

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*I would like to notify you that I am resigning from my job at HC-One from tomorrow 30/10/2019.*

*Yours sincerely*

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*Wajeeha Aftab"*

36. By letter dated 29<sup>th</sup> October 2019, copied and produced at page 158 of the Joint Bundle the respondent's Senior Home Manager Amanda Cooper

acknowledged receipt of the claimant's letter of resignation in the following terms:-

*"29<sup>th</sup> October 2019*

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*Wajeeha Aftab  
41/3 Westburn  
Middlefield  
Edinburgh  
EH14 2TJ*

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*Dear Wajeeha*

*Resignation*

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*Thank you for your letter of resignation dated 29<sup>th</sup> October 2019. I acknowledge your resignation and note your last working day with HC-One will be Wednesday 30<sup>th</sup> October 2019. If you'd like to discuss this matter further please contact me. You will receive your P45 in due course. I would like to confirm that, as per the Working Time Regulations 1998 90.54 hours annual leave will be added to your final pay.*

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*May I take this opportunity to thank you for all your hard work and effort during your time with HC-One and wish you all the best for the future.*

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*If you have any queries regarding the above, please do not hesitate to contact me on 0131 313 4455. If you require a reference for any future employers we would be happy to send this upon request. Please submit all requests directly to the Home that you last worked in.*

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*Yours sincerely*

***Amanda Cooper***  
***Senior Home Manager***

- 5 37. The claimant made no further contact with the respondent. She raised no further grievance at that time.
38. On 4<sup>th</sup> October 2019 the claimant was reprimanded by Carol Greenfield following a complaint about the claimant's failure to use the correct moving and handling technique.  
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39. On at least one occasion, Karen Morton the Unit Manager of the Unit in which the claimant was at the material time working had asked the claimant not to complete her notes at the nurses station.  
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40. That was an instruction which was given from time to time to all care workers as required, and reflected the then policy of the respondents. It did not constitute less favourable treatment. There was nothing in the evidence presented that went to establish expressly or by inference via the operation of section 136 of the EqA, a discriminatory motive for the treatment.  
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41. In respect of Carol Greenfield's reprimand of the claimant on 4<sup>th</sup> October 2019 there was no evidence that went to establish that Carol Greenfield, who was the nurse in charge and ultimately responsible for patient care during her shift, would not have had the same follow up conversation with another probationary Senior Care Worker standing her responsibility as Nurse in Charge on the floor for the health and safety and the care of the residents. Her speaking to the claimant in those circumstances did not constitute less favourable treatment for the purposes of section 13 EqA.  
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42. There was no evidence before the Tribunal which went to establish expressly or by inference via the operation of section 136 of the EqA a discriminatory motive.

43. On the 9<sup>th</sup> of October 2019 Jody Clark instructed the claimant not to wear Eziclogs. The wearing of shoes without a fully formed back, including Eziclogs, while working, was prohibited as a matter of policy by the respondents for health and safety reasons.
44. The claimant was aware of that prohibition.
45. The claimant found wearing Eziclogs more comfortable when working and wished to wear them. The claimant also wished to protect her trainers from becoming wet while helping residents to shower. When staff were found to be wearing inappropriate footwear such as Eziclogs the Senior Care Home Manager's directed policy was that they be told not to do so. The Senior Care Home Manager, Amanda Cooper, had told care workers to stop wearing Eziclogs directly herself on a number of occasions.
46. For the purposes of her complaint of section 13 Discrimination the claimant cited and relied upon the example of a care worker from another floor, who was of Romanian ethnicity and who on the claimant's evidence, had explained to her that she was allowed to wear Eziclogs because of a medical condition. The claimant had not disclosed any such medical condition justifying an exception to the policy to the respondents including to Jody Clark. In her evidence the claimant did not maintain that she suffered from such a medical condition.
47. Jody Clark's instruction to the claimant to stop wearing Eziclogs did not constitute less favourable treatment for the purposes of section 13 of the EqA.
48. There was no evidence presented which went to establish, either expressly or by inference through the operation of section 136 of the EqA a discriminatory motive for the issuing of the instruction.

49. The instruction given by Jody Clark to the claimant and by other Managers on other occasions to other care workers not to wear Eziglogs was an instruction given for reasons wholly unconnected with either of the claimant's protected characteristics.

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50. The exception made in the case of the claimant's colleague of Romanian ethnicity was made for reason of that individual's medical condition which was a reason wholly unconnected with either of the claimant's protected characteristics.

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51. On 18<sup>th</sup> October 2019 the claimant and her care worker colleague with which she was paired on that shift were spoken to by Amanda Cooper, the Senior Home Manager and reminded in strong terms of the obligation incumbent upon all of the care workers within the Home to ensure that residents were not left unattended in the lounge.

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52. On 18<sup>th</sup> October 2019 Amanda Cooper came into the residents lounge and noted that there were no care workers or nurse in attendance and that the residents were wholly unsupervised. She was concerned to find such a situation which put the health and safety of the residents at serious risk. She looked for care workers in order to direct them to return to the lounge and supervise the residents. She looked in the first resident's bedroom in which the external light indicated that care workers were within. The claimant and her co-worker Care Assistant were in the room which Amanda Cooper entered engaged in providing care to a resident in accordance with instructions given to them by Carol Greenfield, the Nurse in Charge. The claimant was on the side of the bed nearest to the door and thus nearest to Amanda Cooper. Amanda Cooper's remarks were addressed to both of the care workers in the room. She expressed her concerns about the situation with which she had been confronted in the lounge and reminded them that it was the responsibility of care workers to ensure that residents were not left unsupervised.

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53. In speaking to the two care workers, including the claimant, Amanda Cooper was annoyed and expressed her annoyance. The claimant felt aggrieved because at the time she and her co-worker had left the lounge on the instructions of the Nurse in Charge, to provide the in-bedroom care which they were engaged in providing, the Nurse in Charge had been present in the lounge in a supervisory capacity. She provided that explanation to Amanda Cooper and was aggrieved that Amanda Cooper, notwithstanding continued to be annoyed with her and her co-worker.
54. There was no evidence before the Tribunal which went to establish that Amanda Cooper would not have been equally annoyed and would not have expressed her concern and annoyance in the same way to the care workers whom she first encountered on that occasion if they were of a different ethnicity or religious belief to that of the claimant.
55. Amanda Cooper so speaking to the claimant and to her co-worker, who was not of the same ethnicity or religion as the claimant, did not constitute in the circumstances less favourable treatment for the purposes of section 13 of the EqA.
56. There was no evidence presented which went to show either expressly or by inference via section 136 of the EqA any discriminatory motive on the part of Amanda Cooper in so speak to, amongst others, the claimant. In so speaking to, amongst others, the claimant Amanda Cooper did so because of her concerns for the health and safety of the residents which was a reason wholly unconnected with either of the claimant's protected characteristics.
57. On the 18<sup>th</sup> of October 2019 a bank worker colleague, Jordan, had spoken to the claimant in a rude and aggressive manner.
58. On 18<sup>th</sup> October 2019 the claimant, the bank worker Jordan and another care worker Stella who had been teamed to work with him in tandem were present in the dining room. The claimant was engaged in clearing the dining tables. The bank worker, Jordan, had called to the claimant – *“Hey you, I’m talking to you, can you assist me with David?”* to which the claimant had not

responded. Jordan had then further called to the claimant *“Wajeeha I’m talking to you, can you help me with David?”*.

5 59. The claimant perceived the manner in which Jordan addressed her to be rude. Upon an objective consideration the manner in which Jordan addressed the claimant fell to be regarded as being rude.

10 60. There was no evidence presented that went to establish that Jordan would not have been equally brusque or rude in addressing the request to another care worker such as that identified as the virtual comparator.

15 61. There was no evidence presented that went to establish, either expressly or by inference via the operation of section 136 of the EqA a discriminatory motive on the part of the bank worker. The terms of the written contract which regulated the claimant’s probationary period of employment included the following term which is copied and produced at page 117 of the Bundle:-

20 *“Your first six months of service will be a probationary period. The purpose of which is to provide a mutually constructive opportunity in which to evaluate your suitability to both HC-One and the role. In order for you to successfully complete your probation period you must have completed your full online Working together as One’s e-learning programme. At the end of this period and providing you are performing to the standard required, your appointment will be confirmed.”*

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62. The claimant commenced her employment with the respondent on or shortly after the 19<sup>th</sup> of February 2019.

30 63. The claimant’s training record, as at the 16<sup>th</sup> of August 2019, a date falling approximately six months into the claimant’s probationary period shows that, as at that date the claimant had not completed all of the necessary medicine related e-learning modules including the “Specialist Administration of Medicines” module.

64. The successful completion of those modules is a prerequisite of being permitted to administer medication.
65. By at or about the 1<sup>st</sup> of October 2019, that is the date of the probationary review meeting conducted with the claimant by Amanda Cooper, the Care Home Senior Manager and Georgios Kournavos, the claimant's Line Manager and Nurse in Charge, the claimant had completed the Specialist Administration of Medicines modules but had yet to complete a number of other modules in the e-learning programme relating to other care skills and competencies.
66. All other things being equal the completion of the medicine related training modules would normally lead to a probationary Care Assistant/Senior Care Assistant progressing to the administration of medication. In the case of the claimant Amanda Cooper directed that, at the 1<sup>st</sup> October 19 probationary review meeting, that the claimant's probationary period be extended to, amongst other things allow her to complete the mandatory outstanding e-learning training modules and that she should concentrate on achieving that completion and on developing and progressing her acquisition of other necessary skills and competencies as a priority and that her progression to the administration of medication should be placed on hold meantime to allow for the same. That was a departure from the normally expected progression to the administration of medication from the completion of the medicine specific training modules. That departure amounted, in the circumstances, to "something more" for the purposes of section 136 of the Equality Act 2010 and had the effect of transferring the burden of proof in relation to motivation, to the respondent.

At the time of so deciding and directing, Amanda Cooper had serious concerns as to the progression made by the claimant in acquiring and in demonstrating the skill sets and competencies required across the spectrum of both basic Care Assistant and Senior Care Assistant roles and duties all of which directly impacted upon the health, safety and care of the residents. She did not consider that the progress made by the claimant as at 1<sup>st</sup> October

2019 was such to engender confidence that the claimant would be regarded as having successfully completed her probationary training at the point at which it was due to conclude, on or about 30<sup>th</sup> October 2019. And, standing the potential implications that might have for the claimant's continued employment bearing in mind the priority which required to be given to the health, safety and care of residents, she extended the claimant's probationary period with a view to allowing her to make the necessary progress in the context of the requirement to give priority to the health and safety of residents. In deciding also that the claimant's progression to the administration of medication should be "put on hold" to allow her to give priority to completing her outstanding mandatory e-learning modules and making progression in the other areas identified in the probationary review meeting Amanda Cooper did so for reasons related to the health and safety of residents and to afford the claimant a continuing opportunity of progressing in her role. Those reasons were reasons wholly unconnected with either of the claimant's protected characteristics. Insofar as the claimant may have felt aggrieved by Carol Greenfield's failure to reprimand Kay Gray she did not escalate the matter beyond Carol Greenfield neither did she include any reference to it in her formal grievance lodged in August 2019.

### **Instances of Alleged Harassment (section 26 EqA)**

67. During the first month after the claimant's move to working in the Cramond Unit and before commencement of Ramadan on 6<sup>th</sup> May 2019, that is in or around April/the first week of May 2019, the respondent's Care Assistant Kay Gray variously asked the claimant:- "*Why do you wear a headscarf?*" and told the claimant, "*It looks weird*" and that she, Kay Gray "*would not wear one*". Kay Gray so treated the claimant notwithstanding the fact that the claimant had explained to her that it was a matter related to her religious practice and belief.

68. In continuing to make enquiry of/statements to the claimant about her wearing of a headscarf, beyond the initial enquiry and the claimant's initial response, Kay Gray was engaging in unwanted conduct related to the claimant's religion.

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69. Those primary facts of persistence constituted, in the circumstances, "something else" for the purposes of section 136 of the EqA and had the effect of switching the burden of proof to the respondents in relation to Kay Gray's motivation. The fact and circumstances of that persistence constituted primary facts from which the Tribunal could, in the absence of an explanation to the contrary draw an inference that Kay Gray's motivation in so questioning and making statements to the claimant related to the claimant's protected characteristic of religion. The questions asked and the statements made by Kay Gray had the effect of violating the claimant's dignity and of creating an intimidating environment for her. It was reasonable in the circumstances, for the purposes of section 26(2)(4) of the Act that they be perceived by the claimant as having that effect.

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70. The only evidence before the Tribunal which might go to discharge the respondent's burden of proof was the hearsay evidence of Kay Gray as noted in Alan Miller-Young's grievance enquiry that she asked the questions and made the statements because "she was curious".

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71. The actings of Kay Gray so relied upon in her complaints first presented to the Employment Tribunal on 25<sup>th</sup> February 2020 and occurring, as they did, in the period March to May 2019 were matters in respect of which the claimant lacks Jurisdiction [Title?] to Present and the Tribunal Jurisdiction to Consider in terms of section 123(1)(a) of the Equality Act 2010.

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72. The claimant, for her part, appeared to accept the position and did not escalate the grievance to a stage 2 procedure.

73. On the 12<sup>th</sup> of July 2019 the claimant witnessed what she considered to be poor handling of a resident by a fellow care worker Kay Gray. She expressed her concerns to Carol Greenfield, the Nurse In Charge. Carol Greenfield had

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not witnessed the incident. She listened to the concerns expressed by the claimant. She spoke with Kay Gray. She initiated an incident report which reflected her assessment of what had occurred based upon what was recounted to her. She did not consider that the circumstances, as assessed by her, provided grounds for reprimanding Kay Gray. She did not reprimand Kay Gray.

74. The claimant's expressed concern in respect of the incident was that set out by her at paragraph 22 of her witness statement viz – "*If it was me they probably would have called the police.*" There was no evidence before the Tribunal that went to establish that proposition. There was no evidence that went to show that Carol Greenfield would likewise not have reprimanded the claimant had it been she who was looking after the resident involved in the incident. There was no evidence before the Tribunal which went to establish, expressly or impliedly via section 136 of the EqA 2010 a discriminatory motivation for Carol Greenfield's decision not to reprimand Kay Gray.

### **The Claimant's Written Grievance of 2<sup>nd</sup> August 2019**

75. On 2<sup>nd</sup> August 2019 the claimant submitted a written grievance. Alan Miller-Young, Senior Regional Human Resources Manager was assigned to investigate the grievance.

76. Alan Miller-Young met the claimant on 2<sup>nd</sup> August 2019. The claimant was accompanied by Catherine Lyons, a friend of the claimant.

77. Alan Miller-Young then investigated the complaints during which:-

(a) On 7<sup>th</sup> August 2019 he met with and interviewed Amanda Cooper, Home Manager and Georgios Kournavos, Unit Manager and the claimant's Line Manager

(b) On 8<sup>th</sup> August 2019 he met with and interviewed Carol Greenfield

- (c) On 15<sup>th</sup> August 2019 he with and interviewed Karen Morton, Unit Manager
- 5 (d) On 16<sup>th</sup> August 2019 he met with and interviewed Georgios Kournavos, Unit Manager, Jody Clark, Home Manager and Amanda Cooper, Home Manager
- 10 (e) He obtained the role profile for the Senior Care Assistant, extracts of the daily records for 9<sup>th</sup> of March 2019, the letter to the claimant from Janet De Court dated 14<sup>th</sup> March 2019 communicating the outcome of the claimant's stage 1 informal grievance which had been investigated by Janet De Court, the notes of the probationary review meeting of 21<sup>st</sup> June 2019, a
- 15 letter to the claimant about her training dated 11<sup>th</sup> July 2019, staff counselling record of the claimant dated 25<sup>th</sup> July 2019, things to do notes and record of training completed (all documents copied and produced in the Joint Bundle)
- 20 78. Alan Miller-Young conducted an investigation in accordance with the respondent's applicable grievance procedure copied and produced at pages 62 to 70 of the Joint Bundle.
- 25 79. The claimant's grievance, the terms of which were not in dispute between the parties is copied and produced at pages 71 and 78 of the Bundle. The notes of the investigatory meetings held by Alan Miller-Young in the course of his investigation, including those held with the claimant are copied and produced at pages 79-116(o) of the Joint Bundle.
- 30 80. The claimant's Contract of Employment and the job description for the Senior Carer role in which she was employed on a probationary basis and the terms of neither of which were in dispute between the parties are copied and produced at pages 117 to 126 and 127 to 130 of the Bundle respectively.

Having conducted his investigation and considered the evidence before him Alan Miller-Young reached a determination of the claimant's grievance.

- 5 81. The Findings in Fact already made, above, in relation to Amanda Cooper's decision to put the claimant's progression to the administration of medication on hold, in the context of her complaint of direct discrimination, are referred to for their terms.
- 10 82. The claimant did not have access to computer facilities at home and accordingly sought to progress her e-learning during her normal working hours. She also considered that her Manager Georgios Kournavos had not been available to assist her in the completion of some of her medicine related e-learning modules at the time when she was ready to receive his assistance. On such occasions, the reason for Georgios Kournavos's non-availability was  
15 that he was busy.
- 20 83. The claimant brought those matters to the attention of Amanda Cooper and Georgios Kournavos in the course of her probationary review meeting of 1<sup>st</sup> October 2019. As a result of her doing so the respondent's Amanda Cooper agreed to a reduction on the claimant's working duties such as to allow her to utilise a portion of her salaried time at work to complete outstanding e-learning modules. In the course of her 1<sup>st</sup> October 2019  
25 probationary review meeting Amanda Cooper highlighted to the claimant in the presence of her Line Manager a number of concerns regarding the state of the claimant's progress in what was, at that point planned as the last month of her probationary period in the completion of mandatory e-learning modules and in the acquisition and application of certain skills and competencies required in the Care Assistant and Senior Care Assistant role, all as recorded in the respondent's note of that meeting which are produced  
30 and copied at pages 152 to 155 of the Bundle and all as confirmed in all but the first bullet point of the claimant's own note of the meeting which is copied and produced at page 151 of the Bundle. Amongst the other matters focused by Amanda Cooper at the meeting was the fact that a lot of the Senior Carer role couldn't be trained but rather was to do with experience and aptitude that  
35 being a matter which the claimant confirmed she understood.

84. In Amanda Cooper's assessment these areas of concern which she highlighted to the claimant at the claimant's meeting with her and her Line Manager were preventing the claimant from progressing in her job role of Senior Care Assistant such that she decided to extend the claimant's probationary period for three months to allow her a further opportunity to complete all elements of the mandatory e-learning and to make satisfactory progress in the other highlighted areas before the end of what was now the extended probationary period.
85. When so extending the claimant's probationary period Amanda Cooper advised the claimant that she should give priority to completing the outstanding modules of e-learning which was mandatory and to progressing in the various highlighted areas and that in the meantime her progression to the administering of medication should be put on hold to allow for the same. The task of administering medication was primarily the responsibility of the Nurse in Charge.
86. The reason for Amanda Cooper's decision that the claimant's progression to the administration of medication should be placed on hold pending her achieving progress in the highlighted areas of concern was a reason which related to the requirement to give priority to the health, safety and care of residents and was not a reason which was related to either of the claimant's protected characteristics.
87. There existed in each of the Units a notice board upon which from time to time the photographs of some of the staff who worked in the Units appeared.
88. There was no consistent practice in relation to which members of staff's photographs appeared on the board. Some members of staff did not wish their photographs to appear on the board.
89. The boards were frequently out of date. The boards were updated from time to time on an ad hoc basis.

90. No member of managerial staff had specific responsibility for updating the photographs of staff which appeared on the boards. On occasion staff undertook that task directly.
- 5 91. The claimant's photograph did not appear on the board in the Cramond Unit. The claimant was not asked to have her photograph taken or to provide a photograph for that purpose. The claimant, for her part did not ask, at any point during her employment with the respondents to have her photograph taken for that purpose or to otherwise provide a photograph for the purposes  
10 of being displayed on the board.
92. On the 12<sup>th</sup> of October 2019 the claimant observed a co-worker taking photographs of some newly inducted employees. The claimant understood that the photographs were being taken with a view to being placed on the  
15 Cramond Unit notice board.
93. The claimant's co-worker did not ask the claimant on 12<sup>th</sup> of October 2019 whether she also wished her photograph to be taken for that purpose. The claimant, for her part, did not ask her co-worker to take her photograph on the  
20 12<sup>th</sup> of October 2019 for the purposes of displaying it on the board.
94. On the 13<sup>th</sup> of October 2019 the claimant was advised by Carol Greenfield, the Nurse in Charge, to take her break in the rest room designed for that purpose which was located on the ground floor rather than in an empty room  
25 on Cramond Floor which Carol Greenfield in her capacity as Nurse in Charge of the Floor and Kay Gray had, on other occasions utilised for the purposes of taking a break. In so directing the claimant not to utilise the room on Cramond Floor for that purpose Carol Greenfield explained that the claimant, unlike other Care Assistants who on occasion she did allow to take their  
30 breaks in such a room had not identified any health issue which would justify a departure from the policy that Care Assistants were required to take their breaks away from the resident floor in the rest room designed for that purpose.

95. The requirement that Care Assistants utilise the ground floor rest room to take their breaks was a policy requirement designed to ensure that the Assistants had a genuine break away from the residents and their ongoing care requirements.
- 5 96. The claimant's reasons, on the 13<sup>th</sup> of October 2019 for wanting to use the empty residents room on Cramond Floor was that the lift to the ground floor was out of order, she was tired and did not wish to have to use the stairs.
- 10 97. There was no evidence presented which went to establish either expressly or by inference to the operation of section 136 of the Act that Carol Greenfield so advising the claimant was conduct related to either of the claimant's protected characteristics.
- 15 98. The claimant stated in evidence that she considered that Care Assistants from time to time seemed to have more responsibility than her and that some of them had started giving her lists of jobs to do which were below her station and that she felt that she "would get into trouble if something went wrong in those circumstances not having any control over the situation". There was no  
20 evidence presented upon which Findings in Fact that particular Care Assistants had given the claimant particular tasks to do on particular occasions.
- 25 99. Shortly before the commencement of Ramadan on the 6<sup>th</sup> of May 2019 the claimant made a request of her Line Manager and the Nurse in Charge Georgios Kournavos that during the month of Ramadan she be relieved from providing assistance to male residents with a compensating increase in the care which she provided to female residents. After some brief consultation with co-workers regarding the adjustment of rotas the request was granted by  
30 the respondent's Manager and Nurse in Charge Georgios Kournavos.
- 35 100. In May 2019 after the claimant's Ramadan request had been granted ?? The Deputy Home Manager Jody Clark questioned the claimant about the religious basis upon which she had made her request. Jody Clark continued to do so after the claimant in terms of her first response had confirmed that

the request related to her practice of her Muslim faith in the month of Ramadan.

5 101. In the course of her meeting with Alan Miller-Young when he was investigating the claimant's grievance Jody Clark stated that she was acquainted with a number of practising Muslims and had never heard of such a request being made before. She stated that she considered that it was necessary, in those circumstances, for her to question the claimant about her professed religious belief and to do so also in order to inform herself about  
10 such matters.

102. In so persisting in questioning the claimant beyond the claimant's initial confirmation that the matter related to her religious practice, Jody Clark was engaging in conduct which related to the claimant's protected characteristic of  
15 religion and which had the effect of violating her dignity and creating an intimidating and offensive environment for her in terms of section 26(1) of the Equality Act 2010.

103. It was reasonable in the circumstances and in terms of section 26(4) of the  
20 Equality Act 2010 that the conduct be perceived as having that effect.

104. Upon being questioned by Jody Clark the claimant had advised Jody Clark that she, Jody Clark, could obtain clarification on the question of religious practice, if she wished to, from the Imam of the Edinburgh Mosque and that  
25 not all Muslims practised their religion in the same way. Jody Clark's hearsay explanations given to Alan Miller-Young of her conduct, namely that because she had never encountered such a request from a Muslim employee in the past it was appropriate for her to challenge the basis of the claimant's request and separately, that she required to inform herself about such matters did  
30 not, in the circumstances, operate to remove her conduct from the category of harassment.

105. There were readily available to Jody Clark other means by which she could have satisfied herself as to the basis of the claimant's request which other

means would neither have violated the claimant's dignity nor created for her an intimidating or offensive environment.

- 5 106. Jody Clark's conduct in persisting in her questioning of the claimant in May 2019 as to the basis of her religious belief and practice was conduct which, subject to the Tribunal being satisfied that, as at the date of its presentation 25<sup>th</sup> February 2020, the claimant had Title to Present and the Tribunal Jurisdiction to Consider the complaint, was conduct which otherwise constituted section 26 EqA 2010 Harassment.
- 10 107. On the 25<sup>th</sup> of July 2019 the respondent's Senior Care Home Manager Amanda Cooper witnessed the claimant interacting with a resident by utilising what Amanda Cooper, in her capacity as Senior Care Home Manager, considered to be an unsafe handling practice.
- 15 108. As is recorded in the staff counselling record produced at page 136 of the Bundle Amanda Cooper spoke to the claimant on that occasion about; that incident, safe moving and handling practices, the requirement to develop leadership skills and earn the respect of work colleagues in advance of the probationary review meeting which was to take place. She advised the claimant that she had concerns that the claimant was not currently fulfilling the role of a Senior Care Assistant and invited the claimant to consider whether changing role to that of Care Assistant to allow her to develop and apply the basic care skill sets might be a course of action which would allow her to better progress in the long term. In the course of that meeting Amanda Cooper expressed her concerns to the claimant and made the points that she made firmly. She did not shout at the claimant. She did not advise the claimant that she would "*require to be demoted to Care Assistant or have to leave*". The claimant undertook to give consideration to a change of role but ultimately did not elect to change role.
- 20 25 30
- 35 109. The respondent did not require the claimant to change role and the claimant remained employed throughout the currency of her probationary period up until her resignation on 29<sup>th</sup> October 2019, in the role of Senior Care Assistant.

110. During the currency of her employment the claimant was not asked to provide 360 feedback in relation to her colleagues.
- 5 111. In the course of her employment the claimant's Line Manager Georgios Kournavos had sought feedback from the claimant's colleagues, with whom she interacted in the performance of her duties, and had discussed that feedback with the claimant as part of the probationary review. Neither Georgios Kournavos or any other of the respondent's Managers asked the  
10 claimant to provide feedback on her colleagues.
112. At that time it was common practice within the respondent's organisation, among a number of Managers, not to ask new colleagues to comment on other members of staff as they were in their initial probation period and in the  
15 process of learning.
113. There was no consistent approach in that regard and Alan Miller-Young recommended, as part of the output and determination of the claimant's formal grievance, that in the future feedback should be sought from all  
20 members of staff irrespective of their length of service. The respondent's failure to ask the claimant to give feedback on her colleagues was unwanted conduct which, in the context of the claimant being unaware of what the general position was and in particular of the widespread inconsistency of practice, had the effect of creating for her a hostile environment and in the  
25 circumstances of the claimant's unawareness it was reasonable that it have that effect.
114. There was no evidence presented that went to establish, either expressly or by inference through the operation of section 136 of the EqA, that that  
30 conduct, in the failing by any of the respondent's Managers including the claimant's Line Manager Georgios Kournavos, was related to either the claimant's protected characteristic of religion or of race. The conduct, in failing to so ask the claimant for feedback, including the conduct of her Line Manager Georgios Kournavos was conduct related to and resulting from the

inconsistent practice which at that time existed among Managers, that being a reason unconnected with either of the claimant's protected characteristics.

### **The Reserved Preliminary Issue of Jurisdiction (Time Bar)**

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115. By letter dated 29<sup>th</sup> October 2019 (page 157 in the Bundle) the claimant gave the respondent one day's notice of resignation. The Effective Date of Termination of the claimant's employment was 30<sup>th</sup> October 2019. The last instance of alleged less favourable treatment/unwanted conduct on the part of the respondent of which the claimant gave notice of relying upon for the purposes of her claim, occurred on the 18<sup>th</sup> of October 2019. The act of the claimant giving notice of resignation on the 29<sup>th</sup> effective on the 30<sup>th</sup> of October 2019 of her resignation was a unilateral act on the part of the claimant. It required no acceptance or reaction on the part of the respondent to make it effective.

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116. The letter of resignation produced at page 157 of the Bundle made no reference to any reason for or alleged cause of the claimant's decision.

117. The claimant's resignation was not an instance of conduct or of a failure to do something at the hands of the respondent for the purposes of section 123(3)(a) of the Equality Act 2010.

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118. The three month statutory time period within which the claimant had, at first instance, entitlement in terms of section 123(1)(a) of the EqA to present her complaints to the Employment Tribunal began to run on the 18<sup>th</sup> of October 2019 and, absent timeous engagement with early conciliation, would have expired on the 17<sup>th</sup> of January 2020.

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119. The date upon which the claimant commenced early conciliation was a date falling within the initial three month period and her doing so had the effect of stopping the clock running on the three month statutory period for the 30 days which elapsed between the date of receipt by ACAS of the EC notification on 11<sup>th</sup> December 2019, and the date of issue by ACAS of the Early Conciliation Certificate 9<sup>th</sup> January 2020 inclusive.

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120. The claimant commenced early conciliation on the 11<sup>th</sup> of December 2019 and the Early Conciliation Certificate was issued by ACAS to the claimant on the 9<sup>th</sup> of January 2020 which dates are vouched by the Conciliation Certificate attached to the file copy initiating Application ET1.
121. Those 30 days fall to be added to the three month statutory period prescribed in section 123(1)(a) of the EqA, extending it to midnight on the 16<sup>th</sup> of February 2020.
122. The claimant's initiating Application ET1 was first presented to the Employment Tribunal on 21<sup>st</sup> February 2020.
123. As at the date of first presentation of her initiating Application ET1, 21<sup>st</sup> February 2020, the claimant lacked Title to Present and the Tribunal lacked and continues to lack Jurisdiction to Consider the claimant's complaints in terms of section 123(1)(a) of the EqA, the claimant's complaints of discrimination insofar as founded upon alleged instances of treatment, unwanted conduct or failure to do something by or on the part of the respondent which are said to have occurred prior to the 24<sup>th</sup> of October 2020.
124. The date relied upon by the claimant in the alternative, as the date of the occurrence of the last alleged discriminatory act/acts was the 18<sup>th</sup> of October 2019.
125. Let it be assumed that the Tribunal had found in fact that a discriminatory act had occurred on that date, which the Tribunal has not so found, that date would have been the date which fell to be regarded as the end of the period for the purposes of section 123(3)(a) of the 2010 Act.
126. That date, of 18<sup>th</sup> October 2019 is a date which falls outwith the ambit of the early conciliation extended section 123(1)(a) Jurisdiction of the Tribunal.
127. The instances of alleged discriminatory conduct occurring at the hands of Kay Gray in or around the first month after the claimant's move to work in the Cramond Unit on the one hand and the conduct of Jody Clark's persistent

questioning of the claimant regarding the religious basis for her Ramadan related request which occurred in May 2019, were sufficiently connected instances of unwanted conduct for the purposes of section 123(2) of the EqA.

5 128. Let it be assumed that the Tribunal had Jurisdiction to Consider the two instances of unwanted conduct respectively at the hands of Kay Gray in relation to the claimant's wearing of a headscarf and at the hands of Jody Clark in respect of her questioning of the basis of the claimant's religious belief the last of the two events and thus the end of the period for the purposes of section 123(2)(a) occurred in May of 2019 and thus on a date  
10 falling outwith the Jurisdiction conferred on the Tribunal in terms of section 123(1)(a).

129. The claimant's experience, culminating in the last two incidents founded upon  
15 by her which occurred on the 18<sup>th</sup> of October 2019 impacted upon the state of her mental health and upon her ability to focus upon next steps including upon her ability to take the steps necessary to the raising of proceedings.

130. On 4<sup>th</sup> December 2019 the claimant was sufficiently recovered to take up new  
20 employment with Ranstad Care.

131. On 11<sup>th</sup> December 2019 the claimant made contact with ACAS and commenced the process of early conciliation. On 9<sup>th</sup> January 2020 ACAS issued to the claimant an Early Conciliation Certificate enabling her to raise  
25 proceedings if she so wished.

132. The claimant first presented her initiating Application ET1 to the Employment Tribunal on the 21<sup>st</sup> of February 2020.

30 133. The Tribunal regarded it just and equitable in the circumstances that the statutory time limit be extended by the 48 days which elapsed between the date of occurrence of the last incident founded upon, 18<sup>th</sup> October 2019 up to and including the date upon which the claimant accepted appointment and commenced working with her new employer Ranstad Care on 4<sup>th</sup> December  
35 2019. The effect of doing so is to extend the Jurisdiction of the Tribunal to consider the claimant's complaints insofar as founded upon alleged instances

of conduct or failure to act on the part of the respondent said to have occurred on or after the 8<sup>th</sup> of September 2019 and, that extension of time operates to bring within the Tribunal's Jurisdiction consideration of the claimant's complaints insofar as founded upon the alleged instances of direct discrimination said to have occurred:-

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- At the hands of Carol Greenfield on 4<sup>th</sup> October 2020 (3(iii) on the List of Issues)

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- At the hands of Jody Clark on 9<sup>th</sup> October 2019, the instruction to not wear Ezclogs (3(iv) on the List of Issues)

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- At the hands of "Carol Greenfield" *sic* Amanda Cooper, on 18<sup>th</sup> October 2019 in expressing dissatisfaction on finding residents in the lounge unattended (3(v) on the List)

- At the hands of the bank worker "Jordan" on 18<sup>th</sup> October 2019 in speaking to the claimant in a rude and aggressive manner (3(vi) on the List) and,

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- The instances of alleged section 26 EqA Harassment said to have occurred:-

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- At the hands of Amanda Cooper on or about the probationary review meeting of 1<sup>st</sup> October 2019 in not allowing the claimant to administer medication pending her completion of other outstanding e-learning modules (2(iii) on the List of Issues)

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- At the hands of the respondent on 12<sup>th</sup> October 2019 by allegedly excluding the claimant from the notice board that contained photographs of employees on that floor (2(iv) on the List)

- At the hands of Carol Greenfield on 13<sup>th</sup> October 2019 in refusing to allow the claimant to take her break on an empty resident's room located on Cramond Floor (2(v)) (on the List) and, at the hands of the respondents throughout the claimant's employment, by her exclusion from providing "360 feedback" in relation to her colleagues, (2(x) on the List).

134. While the claimant's complaints, insofar as founded upon those alleged instances of discriminatory conduct fall within the Tribunal's section 123(1)(b) EqA Jurisdiction and have been considered by it, the Tribunal did not find in fact and in law that any of those instances relied upon respectively constituted instances of section 13 EqA Direct Discrimination and of section 26 EqA Harassment.

## Submissions

### Submissions for the Claimant

The claimant's representative first addressed the reserved Preliminary Issue of the challenge to the Tribunal's Jurisdiction by reason of asserted Time Bar. She invited the Tribunal to hold that the various instances of alleged section 13 Direct Discrimination and section 26 Harassment, both EqA, as instances of a continuing discriminatory act which extended over a period for the purposes of section 123(3)(a) of the EqA and which should accordingly all be viewed as having occurred at the end of that period.

135. Under reference to *Hendricks v Metropolitan Police Commissioners* [2002] EWCA Civ 1686, she submitted that the Tribunal should consider whether the respondents were to be regarded as being responsible for an ongoing state of affairs in which the incidents were instances as opposed to there having occurred a series of unconnected incidents. She submitted that although on the face of it the incidents relied upon by the claimant might appear to be separate, they all formed part of a pattern of regular and continuing acts which had occurred throughout her period of employment in

respect of which the respondents had failed to take steps to prevent against. Under reference to **Hendricks** she submitted the issue was not whether a policy of permitting such conduct existed but rather, “Has the respondent been responsible for an ongoing situation or state of affairs”. She submitted that the various incidents in respect of which the claimant complained in her formal grievance submitted on 2<sup>nd</sup> August 2019, on the one hand, and, the incidents which occurred thereafter during the currency of her employment, on the other, were sufficiently similar in nature and circumstance so as not to be considered isolated incidents.

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136. Under reference to **Southern Cross v Owolabi** UKEAT/0056/11 (Number 2 on the list), she further submitted that sufficient connection can be demonstrated where allegations can be linked by circumstance or common personality and, in relation to the section 123(3)(a) point it would be to impose an unnecessary burden upon an employee to require that they raise a grievance after each and every incidence of discrimination which they experience.

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137. It was necessary, when applying the provisions of section 123(3) to identify when the end of the period occurred. In the claimant’s representative’s primary submission the period should be regarded as ending with the claimant’s intimation of her resignation on the 29<sup>th</sup> of October which failing, and in the alternative, she submitted that the period fell to be regarded as having ended on 18<sup>th</sup> October 2019 being the dates upon which the last occurrences which the claimant gives notice of founding upon occurred, and those being a reprimand by Amanda Cooper in respect of residents being left unattended in the lounge and the claimant being spoken to rudely and aggressively by a bank worker “Jordan”. In the alternative, and let it be assumed notwithstanding the above submission, that the Tribunal lacked Jurisdiction to Consider the claimant’s claims in terms of section 123(1)(a) of the EqA the claimant’s representative submitted that it would be just and equitable, in the circumstances, that the claimant’s claims, first presented on the 21<sup>st</sup> of February 2020, be regarded as having been presented within “such other period as the Employment Tribunal considers just and equitable

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and thus, she invited the Tribunal to conclude, in any event, that it had Jurisdiction to Consider the complaints, in terms of section 123(2)(b) of the 2010 Act.

5 138. In so submitting the claimant's representative relied upon the evidence in  
chief of the claimant at paragraph 40 of her witness statement, largely  
unchallenged in cross examination, and which was to the effect that following  
the last of the incidents and beyond the date of her resignation she had  
continued to be upset to the extent that this constituted an impediment to her  
10 being able to address next steps, including the raising of her claims with the  
Employment Tribunal, and that once she had felt sufficiently recovered, a few  
weeks after her resignation, she had taken steps to address matters.

### **The Complaints of Direct Discrimination**

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139. Turning to the substance of the claimant's section 13 EqA complaints, the  
claimant's representative confirmed that the claimant relied upon her  
protected characteristics of Race (ethnic or national origins) in terms of  
section 9(1)(c) and of Religion, she being a practising Muslim, in terms of  
20 section 10(1) of the Act. She confirmed, that in relation to all of the alleged  
incidents of direct discrimination and or of harassment, the claimant relied  
principally upon her protected characteristic of Religion which failing her  
ethnicity.

25 140. In relation to the instances of alleged discriminatory conduct focused at  
paragraph 3(i) to paragraph 3(vii) she invited the Tribunal to find in fact;

30

- that the claimant was the only employee of the respondents who was subjected to such treatment
- that the claimant was the only practising Muslim who wore a headscarf on the Cramond Floor

- that she had not witnessed any other employee being treated in the way that she was treated
  
- 5 • that the claimant had felt bullied by Amanda Cooper and Jody Clark at the meeting of 25<sup>th</sup> July 2019 at which both Amanda Cooper and Jody Clark had shouted at the claimant
  
- 10 • that Alan Miller-Young had accepted in the initial grievance outcome that the issues focused by Janet De Court with the claimant in relation to her “Ramadan related request”, could have been handled differently due to the seriousness of the matter and that because of the way in which it had been handled the claimant had felt challenged and isolated
  
- 15 • that notwithstanding the above, the respondents had failed to take action, beyond agreeing to the claimant’s request that she be moved to work on another floor, to address the danger of the recurrence of such treatment which, it was reasonable to infer no employer would want to see their employee subjected to
  
- 20 • that it would have been reasonable for the respondents, in the circumstances, to have taken some follow up action by way of subsequent checking back with the claimant and or emphasising to staff the requirement to behave appropriately; and, that their failure to do so, in relation to concerns raised by the claimant about
- 25 discrimination constituted treating the claimant less favourably than they would treat the identified hypothetical comparator and the matter relating directly to the claimant’s professed religion hold that such treatment was because of that protected characteristic.

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141. In approaching the matter the claimant’s representative submitted that the Tribunal must take into consideration the fact that the claimant was in her evidence, clear that she perceived the treatment as being less favourable treatment.

142. Under reference to an article (not further specified) but which she said appeared on the Cloisters Chamber's website. She submitted that employers and Tribunals must bear in mind that employers and employees for whose  
5 acting they are liable, from time to time discriminate unconsciously and despite no conscious intention to do so. The claimant's representative recognised that in order to establish a discriminatory motive for conduct, whether expressly or impliedly through the operation of section 136 of the 2010 Act (switching the burden of proof), it was insufficient to establish only  
10 the possession of a protected characteristic on the one hand and the experience of less favourable treatment on the other to do so establishing only the possibility of discrimination and that there needed to be something more. Under reference to ***Deman v Commission for Equality and Human Rights and others*** [2010] EWCA Civ 1279, CA (number 3 on the list),  
15 however, she submitted that the "something more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred. The claimant's representative  
20 prayed in aid in this regard that on more than one occasion on which it was the claimant's perception that she had been less favourably treated by the respondent's employees, the treatment was treatment which related directly to her religious belief, see the references to;

- 25 (a) her wearing a headscarf by Kay Gray,
- (b) Janet De Court's refusal to accept that that was discriminatorily motivated, and,
- 30 (c) Jody Clark's questioning her about the basis for her Ramadan related request.

143. In relation to paragraph 3(ii) on the List of Issues the claimant's representative submitted that it was reasonable in the circumstances for the

claimant to perceive the treatment as being racially and or religiously motivated because she, the claimant, was unaware of any other apparent reason which would go to explain the treatment, including;

- 5 (a) Carol Greenfield not reprimanding Kay Gray's handling of a resident on the 12<sup>th</sup> of July 2019 after the claimant had expressed concerns to Carol Greenfield about that handling, (3(ii)) on the List of Issues), when compared with Carol Greenfield's reprimanding of the claimant on the 4<sup>th</sup> October 10 2019 following a complaint about the claimant's failure to use the correct moving and handling technique and the resident's related upset, when a commode tub fell off the commode chair, (3(iii)) on the List);
- 15 (b) On 9<sup>th</sup> October 2019, Jody Clark instructing the claimant not to wear Eziclogs (3(iv)) on the List) albeit that the exception to the general prohibition, which the claimant prayed in aid had been made to another employee of Romanian ethnicity, related to that individual's medical condition.
- 20 (c) Amanda Cooper reprimanding the claimant and another care worker with whom she was teemed, for working away from the lounge in circumstances where the lounge was left unattended with residents in it (paragraph 3(v) on the List),
- 25 (d) the claimant being spoken to rudely by a bank worker named Jordan on the 18<sup>th</sup> of October 2019, (3(vi)) on the List), and,
- 30 (e) Amanda Cooper's decision not to allow the claimant to administer medication after her two month probationary review (3(vii)) on the List). These instances of treatment had combined submitted her representative to leave the claimant feeling isolated and shocked.

144. In relation to the reason for such treatment and under reference to **Nagarajan**  
35 **v London Regional Transport** [1999] ICR 877, HL, the claimant's

representative reminded the Tribunal that the crucial question in every case, was 'why the claimant received less favourable treatment ... was it on the grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'. She submitted that it was enough that the Tribunal be satisfied that the protected characteristic was an effective cause or had a significant influence on the outcome, for discrimination to be made out, and that the motivation in acting may be "subjectively discriminatory", quoting Lord Nichols in Nagarajan:-

*"Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an Employment Tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did".*

145. The claimant's representative urged the Tribunal to consider what she submitted was the real possibility that those involved in the incidents relied upon by the claimant were subconsciously acting in a discriminatory way.

### **Harassment section 26 EqA**

146. Turning to the section 26 Harassment complaints, the claimant's representative invited the Tribunal to hold that each of these had had the effect of leaving the claimant feeling isolated and secluded, effects which sat within the terms of section 26(1)(b) and that it was reasonable in the circumstances and in terms of section 26(4), for them to be perceived by the claimant as having that effect.

147. In relation to the instances set out at paragraphs 2(i) and 2(vii) of the List of Issues, respectively, Kay Gray challenging the claimant on why she had to

wear a headscarf and Jody Clark challenging the religious basis of the claimant's Ramadan related request, the claimant's representative submitted that the treatment self-evidently related to and was because of the claimant's professed religious practice. The fact that both Kay Gray and Jody Clark had respectively persisted in their questioning of the claimant beyond the claimant's initial response in which she had explained and confirmed that the matters related to the practice of her religion, amounted to proof of primary facts sufficient to establish, on the balance of probabilities, a discriminatory motive which failing constituted "something more" for the purposes of section 136 of the Act and the switching of the burden of proof to the respondents. In that latter circumstance she invited the Tribunal to regard the hearsay explanations of Kay Gray and Jody Clark, as respectively recorded in their interviews with Alan Miller-Young, as insufficient to discharge that burden of proof in respect of demonstrating that the treatment was for a reason wholly unconnected with the claimant's protected characteristic of Religion.

148. She likewise submitted that it was self-evident that the conduct was unwanted conduct. She invited the Tribunal to find in fact that the instances of treatment had occurred respectively at the hands of Kay Gray and Jody Clark and to find further that they constituted instances of harassment in terms of section 26 of the EqA.

149. Regarding the balance of the instances of treatment given notice of as constituting complaints of harassment; the claimant's representative confirmed that the claimant relied upon those appearing on the Joint List of Issues at;

(a) paragraph 2(ii) "The claimant was prevented in progressing her job role and was not allowed to do the tasks of a Senior Care Assistant".

(b) 2(iii) The claimant completed her medicine e-learning and was not allowed to administer medication.

- (c) 2(iv) On 12<sup>th</sup> October 2019, the respondent excluded the claimant from the notice board that contained photographs of all employees on that Floor.
- 5 (d) 2(v) On 13<sup>th</sup> October 2019 the claimant was prohibited from sitting in an empty resident's room to take her break.
- (e) 2(vi) On various occasions, the claimant was given lists of tasks to do by carers below her station.
- 10 (f) 2(viii) On 25<sup>th</sup> July 2019 the claimant attended a meeting where Amanda Cooper and Jody Clark were present. The claimant was accused of poor manual handling and communication. The claimant was asked to consider changing her role to a Care Assistant.
- 15 (g) 2(ix) During this meeting (of 25<sup>th</sup> July 2019, the claimant was accused of not completing Senior Care Assistant tasks and was advised that she would require to be demoted to Care Assistant or have to leave.
- 20 (h) 2(x) Throughout the claimant's employment she was excluded from providing 360 feedback in relation to her colleagues.
- 25 150. In respect of all of the above alleged instances, the claimant's representative invited the Tribunal to find;
- (a) the occurrence of the same, in the manner described by the claimant, to have been established on the balance of probabilities and to further hold,
- 30 (b) that the same were all instances of unwanted conduct which related to the claimant's protected characteristic of religion and or of race, that each had had the effect set out in paragraph 26(1)(b) and that was reasonable, in the circumstances and in
- 35

terms of section 26(4) of the Act that the claimant perceived them as having that effect and, she invited the Tribunal to hold that each of the relied upon incidents had been established on the evidence presented as being instances of section 26 EqA Harassment.

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151. Taking account also of ACAS guidance that such effect may result from unintentional behaviour on the part of perpetrators coupled with the fact that the respondent did not take any reasonable steps following the occurrence of any of these incidents to prevent a reoccurrence.

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152. Regarding remedy the claimant's representative founded upon the Schedule of Loss produced at page 159 of the Bundle but as updated in terms of the claimant's evidence. She submitted that in the event that the Tribunal found itself unable to deal adequately with the disposal of remedy that the appropriate step to take would be the fixing of a separate Hearing on Remedy.

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153. In relation to the operation of any section 207 TULRCA 92 reduction, the claimant's representative submitted that the claimant had confirmed in evidence she had neither escalated her first complaints to a Stage 2 grievance nor had she exercised her right of appeal against Alan Miller-Young's outcome of her second Stage 2 outcome in relation to the grievance raised by her in August 2019, because Alan Miller-Young could not guarantee that her doing so would produce a different result. In so stating in her evidence the claimant's representative submitted the Tribunal should understand the claimant to mean that she did not have sufficient confidence in the respondent's operation of the system to consider it worthwhile progressing either matter. Thus, and in those circumstances, the claimant's failure to comply with the relevant ACAS Code should be regarded as a reasonable failure not giving rise to any section 207A deduction which failing and in the alternative to a modest deduction only.

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154. The respondent's representative first made submissions on the issue of remedy. She submitted that the respondent's position was that the claimant took new work in the period 4<sup>th</sup> December to 4<sup>th</sup> April 2020 when she resigned and thus that the actual loss that the claimant had incurred related only to the period 1<sup>st</sup> November (the day after her resignation and upon which she ceased to be paid by the respondent at her previous loss hourly gross rate of £9.50 per hour x 48 hours which equalled £456 gross per week) up to the 3<sup>rd</sup> of December 2019, the day before she commenced her new employment and which totalled the sum of £2,052 gross.

155. In the respondent's representative's submission any such award made by the Tribunal should be subject to a reduction of up to 25% for failure on the part of the claimant to mark any appeal against the outcome of Alan Miller-Young's grievance and her failure to register any further complaints beyond the date of outcome of that grievance these being matters in respect of which she now directly makes complaint to the Employment Tribunal, which failures constituting a failure on the part of the claimant to follow the relevant ACAS Code, for the purposes of section 207A of the Trade Union and Labour Relations Consolidation Act 1992. The effect of a 25% reduction on that actual loss would be to reduce the gross amount of loss to £1,539 and the net amount to a figure of around £1,300.

156. Regarding damages for injury to feeling in respect of any of the complaints which the Tribunal held it had Jurisdiction to Consider and further held were established, she submitted that while parties representatives were agreed that such damages would sit properly in the lower band of the updated relevant *Vento* scale, in the respondent's submission it would sit properly at the bottom of that band falling to be quantified in an amount of approximately £900.

157. In the period 3<sup>rd</sup> December 2019 to 4<sup>th</sup> April 2020, the claimant had not incurred any wage loss and that her resignation from her subsequently secured employment on the 4<sup>th</sup> of April should operate as a cut-off point

beyond which the Tribunal should not regard future loss as resulting from any act or omissions on the part of the respondent or its employees. Thus, she submitted, the issue of the claimant's failure to mitigate her loss beyond 4<sup>th</sup> of April fell away. While it was noted that the claimant decided to resign because of the impact of Covid-19 and that that was regrettable, that was not a matter that could be laid at the door of the respondents.

158. Turning to the question of comparator the respondent's representative submitted that the appropriate comparator required to be someone who, in addition to having the attributes identified by the claimant also required to be a senior carer who was in their probationary period of employment.

159. The above was a matter which also had the potential to impact upon the reason for any treatment experienced by the claimant.

160. The respondent's representative accepted that discrimination was rarely overt but made the following detailed submissions:-

(a) In relation to the instances of alleged direct discrimination set out at paragraphs 3(i) to 3(vii) on the List of Issues she submitted that the same were:-

- Not instances of less favourable treatment
- - Had not occurred because of either of the claimant's protected characteristics; and in the alternative, each was an isolated incident which was out of time and
- If they had so occurred
- That it was not just and equitable, on the evidence presented and in the circumstances, to extend the time

161. In relation to the latter submission regarding extension of time she invited the Tribunal to consider

- (a) that there was no clear evidence as to why the claims were presented late
- 5 (b) that it was an undisputed matter of fact that the claimant had felt sufficiently strongly about matters to and had been capable of commencing early conciliation with ACAS on the 11<sup>th</sup> of December 2019 but had thereafter delayed until the 21<sup>st</sup> of February 21 that is to a date after the expiry of the extended time period, before first presenting her complaints.
- 10 (c) There was evidence that she had spoken with ACAS
- (d) There was no evidence or suggestion of any ignorance on her part as to her right to complain to the Employment Tribunal or  
15 of the time limits which affected that right.

162. In relation to the claimant's reliance upon the terms of section 123(3) of the EqA – conduct extending over a period to be treated as done at the end of the period – the respondent's representative submitted that it was necessary,  
20 as a starting point that the claimant offer to prove and prove, on the balance of probabilities, and that the Tribunal make a finding in fact as to what was the date upon which the relevant period, for the purposes of section 123(3)(a) ended. In her submission that could not have occurred when the claimant's representative had primarily submitted it occurred namely on the claimant  
25 giving notice of her resignation on 29<sup>th</sup> or as at the effective date of her resignation on 30<sup>th</sup>, October 2019.

163. She submitted that resignation is and the claimant's resignation was, a  
30 unilateral act which was effective without the requirement for any act or failure to do something on the part of the respondent. Separately, and in any event the letter of resignation which was produced at page 157 disclosed a simple intimation of resignation without reference to any issue including in particular to any issue of discrimination. Neither and in any event, could it be suggested that the respondent had failed to do something in the face of the

resignation since, as was clear from page 154 of the Bundle Amanda Cooper had both attempted to call the claimant and had written to her inviting her to make further contact should she wish to discuss her decision. Thus, there was no act or omission and no decision not to act or failure to do something by or on the part of the respondent as at the date of the claimant's resignation i.e. 29/30<sup>th</sup> October 2019 that could be pointed to as constituting the end of the period.

164. If the above was the case, let it be assumed that the instances relied upon by the claimant did constitute conduct extending over a period, which was denied, the last instances of such conduct relied upon by the claimant were said to have occurred on the 18<sup>th</sup> of October 2019. Thus submitted the respondent's representative and let it be assumed that either of the 18<sup>th</sup> October 19 incidents constituted acts of discrimination, which was denied, the section 123(3) period would fall to be regarded as having ended on the 18<sup>th</sup> of October 2019. That being so the effect could be only to result in the alleged connected instances of conduct, which were in effect all of the instances of conduct complained of by the claimant being treated as having occurred on the 18<sup>th</sup> of October 2019 for the purposes of section 123 of the Act.

165. The claimant having first presented her complaints on the 21<sup>st</sup> of February 2020 it followed, after allowing for the extension of the primary statutory time period of three months by the days of early conciliation which proceeded from the 11<sup>th</sup> December 19 to 9<sup>th</sup> January 20 inclusive (30 days), that in terms of section 123(1)(a) of the EqA the claimant lacked Title to Present and the Tribunal Jurisdiction to Consider her complaints insofar as founded upon any alleged discriminatory act or omission of the respondents said to have occurred prior to the 24<sup>th</sup> of October 2019.

166. In those circumstances, and while reminding the Tribunal that it was for the claimant to satisfy it on the balance of probabilities that the occurrences founded upon by her did constitute conduct extending over a period and submitting that the claimant had not done so on the evidence, were the claimant to have so done, all of the claims would remain outwith the scope of

the Tribunal's section 123(1)(a) Jurisdiction. Under reference to those submissions and her earlier submission that on the evidence presented the Tribunal should not consider it just and equitable to extend the time limit, the respondent's representative invited the Tribunal to dismiss all of the complaints of direct discrimination and of harassment, for want of jurisdiction.

167. Turning, in the alternative, to the merits of the complaints in the order in which they figured in the Joint List of Issues, the respondent's representative submitted in relation to the complaints appearing in the Joint List of Issues at:-

(a) 3(i) That it was clear from the terms of Janet De Court's outcome of the informal grievance meeting, which was produced at page 132, that she had taken action in response to and after the claimant's grievance she had followed the Stage 1 informal grievance procedure and had done precisely what it required her to do (as set out at paragraph 2(a) on page 64 of the Bundle) namely she had tried to, and on her understanding had, resolved the matter informally by holding a meeting with the claimant at which she agreed to and thereafter implemented it the desired outcome which the claimant had identified and requested, namely her move to work on another floor. The claimant, for her part, had raised no further issue about the matter which was the subject of informal resolution and in particular she had not progressed the matter to a formal Stage 2 procedure which course of action it was her right to take and as was clearly set out at paragraph 2(b) of the grievance policy, at page 64 of the Bundle, was the course which she should take in circumstances where she considered that the matter had not been resolved informally. In those circumstances, the failure on the part of the respondents to take action beyond delivering the claimant's requested outcome could not be properly regarded as less favourable treatment. It was Janet De Court's position that she would have acted in the same way in relation to the identified hypothetical comparator.

Separately, and in any event, there was nothing, presented in the evidence, that went to establish or from which the Tribunal could properly infer a causal connection.

5 (b) In relation to the complaints that Karen Morton the Unit Manager at the Glendevon Unit had asked the claimant not to complete her notes at the nurses station, that was a reasonable instruction which was given from time to time to all care workers and reflected the then policy and thus, did not constitute less  
10 favourable treatment (a position confirmed in the course of Alan Miller-Young's investigation interviews with, amongst others the Home Manager Amanda Cooper). Separately, there was nothing in the evidence that went to establish or from which the Tribunal would be entitled to infer a discriminatory motive.

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(c) 3(ii) Carol Greenfield, who had not witnessed the incident had been entitled to make the assessment of the incidents that she had made and which she reflected in the Incident Report including taking the view that Kay Gray's handling of the resident  
20 did not merit criticism or escalation.

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(i) Amanda Cooper had confirmed in her evidence that having investigated that particular incident and based upon the Incident Report which she had sight of, she had also reached the view that it did not disclose a basis for criticising Kay Gray's handling of the resident.

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(ii) While the claimant had maintained before the Tribunal that this was because Carol Greenfield had deliberately misrepresented the incident in the Report in order to protect Kay Gray, that was speculation and there was no evidence before the Tribunal on which it could make such a Finding in Fact.

5 (iii) It was of relevance, in the respondent's representative's submission that the claimant had not chosen to escalate the matter directly beyond Carol Greenfield and neither had she included it in her August 2019 grievance and thus the respondents had been denied the opportunity of both fully investigating and exploring with her, the claimant's concerns.

10 (iv) There was no evidence before the Tribunal, including the evidence of the claimant at paragraph 22 of her witness statement which at its highest was evidence of speculation, upon which the Tribunal could properly find that Carol Greenfield, the Nurse in Charge, would not have treated the claimant in the same way had she been the care worker involved in the incidents.

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(v) Separately, and in any event, there was no evidence of primary fact before the Tribunal which went to establish or from which the Tribunal could infer, for the purposes of section 136, a discriminatory motive.

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(d) 3(iii), (iv), (v) and (vi) respectively said to have occurred on 4<sup>th</sup>, 19<sup>th</sup>, 18<sup>th</sup> and 18<sup>th</sup> October 2019, were all matters in respect of which:-

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(i) No issue had been raised by the claimant during the course of her employment and were out of time.

30 (ii) Separately the issue at:- 3(iii) did not constitute less favourable treatment as, on the evidence before it, including Amanda Cooper's evidence, all care workers would have been so cautioned as to patient handling since the overriding issue was the fact that the resident had been frightened and the primary focus always

required to be on the care, health and safety of the residents.

5 (e) 3(iv), the instruction to the claimant by Jody Clark that she should not wear Eziclogs that the same did not constitute less favourable treatment.

10 • The claimant was aware, on her own evidence, of the prohibition against the wearing of footwear without a fully formed back.

15 • The evidence of Amanda Cooper was that staff who were found to be wearing Eziclogs were told not to and that she herself had on a number of occasions given staff that direction and there was no evidence upon which the Tribunal could properly conclude that that was not the case.

20 • The one instance cited and relied upon by the claimant, of the care worker from another floor who was of Romanian ethnicity, was a worker who, on the claimant's evidence had explained to her that she was allowed to wear them because of a medical condition that being a matter unrelated to either of the claimant's protected  
25 characteristics.

30 (f) 3(v), although Carol Greenfield was identified on the Joint List of Issues as the person who had allegedly reprimanded the claimant on that occasion, it was clear from the claimant's evidence and that of Amanda Cooper that it was in fact Amanda Cooper the Senior Care Home Manager who had spoken to the claimant and her co-worker with whom she was teamed.

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- (i) The respondent's representative submitted that Amanda Cooper had made clear in her evidence that her concern was with the fact that she had found the lounge, with residents in it unattended by any staff,
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- (ii) that she had looked to find staff to direct to return to the lounge, she had gone into the first room in which the exterior light indicated staff were present and had found the claimant and her co-worker (Care Assistant) in that room attending to a patient,
- 15
- (iii) she had reminded them that priority remained at all times the care of the residents who should not be left unattended in the lounge.
- 20
- (iv) Her evidence was that while she accepted that she was annoyed and would have expressed annoyance in speaking to the two colleagues, including the claimant, but that she would have expressed similar annoyance had members of staff whom she first came across not included the claimant and separately,
- 25
- (v) that her remarks were, in her view, addressed on that occasion not only to the claimant but equally to her colleague, albeit that the claimant may have happened to be physically closer to her at the time.
- 30
- (vi) The respondent's representative invited the Tribunal to hold that on the particular occasion Amanda Cooper had treated the actual comparator who was present in the same way as she had treated the claimant and the Tribunal had no evidential basis to conclude that she would have treated the identified hypothetical comparator differently.

5 (vii) Separately, there was no evidence before the Tribunal which went to establish, or from which it could properly infer for the purposes of section 136, discriminatory motivation for the conduct.

10 (viii) Finally, in relation to that incident, the respondent's representative submitted that based upon the claimant's oral evidence, her real complaint in relation to the incident was the fact that Amanda Cooper appeared to be blaming the claimant (and for that matter her work colleague) for the fact that the residents had been left unattended in the lounge that being something which was not her fault because at the time when she and her colleague had left the lounge, on the instruction of Carol Greenfield to provide care to a resident in his bedroom, Carol Greenfield, the Nurse in Charge, had been in the lounge, and that Amanda Cooper had so appeared to blame them despite the fact that the claimant had given that explanation to her. In the respondent's representative's submission, regardless of how fair or unfair that conduct may appear to be or in fact was, that, of itself, did not provide a basis upon which it could be held to be discriminatory conduct.

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30 (g) 3(vi), that on 18<sup>th</sup> October 2019 a bank worker, named Jordan, had spoken to the claimant in a rude and aggressive manner. In the respondent's submission this was again a matter in respect of which the claimant had made no complaint prior to raising her Employment Tribunal proceedings. Accordingly, there was no record of any such incident and the respondent had had no opportunity and had no basis of investigating and or of establishing that such conduct occurred. Notwithstanding and let

it be assumed that it had occurred, there was nothing before the Tribunal that went to establish the circumstances in which the event was said to have taken place or that the bank worker Jordan Burnett would not have spoken equally rudely to the identified hypothetical comparator. There was no evidence to link him as an individual to a culture or practice of rudeness or aggression. Separately, and in event there was no evidence before the Tribunal that went to establish or from which it could infer for the purposes of section 136, a discriminatory motive.

(h) 3(vii) after the claimant's two month review, Amanda Cooper did not allow the claimant to administer medication. The completion of all medical related e-training modules is a prerequisite of progressing to the administering of medication. The training records examined by Alan Miller-Young in the course of his investigation and produced in the Bundle, made clear that at what would have been the claimant's two month point of employment she had not completed all of that specified training. While, on the evidence presented the date upon which the claimant ultimately completed all those medicine related training modules was not clearly established, let it be assumed that it had been established by the claimant's probationary review meeting with Amanda Cooper and her Line Manager Georgios Kournavos which took place on 1<sup>st</sup> October 2019, it was accepted by Amanda Cooper that she did direct that the claimant make progress on a number of other outstanding training modules, which she had yet to complete, before progressing further to the administration of medication. Let it be assumed that the fact of completion by the claimant of the directly medicine related training modules amounted to "something else" for the purposes of transferring the burden of proof, in the respondent's representative's submission the evidence before the Tribunal both in terms of the notes of the probationary review meeting of 1<sup>st</sup> October produced by the respondents at pages 152 and 155 together with all but the first

bullet point of the notes produced by the claimant of that same meeting at page 151 of the Bundle, when taken together with Amanda Cooper's oral evidence demonstrated that the reason for her so directing was a reason unrelated to either the claimant's religion or race. It was, she invited the Tribunal to find in fact for a reason related entirely to the fact that technical competence in the administration of medication required to be confirmed in the context of the spectrum of skills and attributes which a care worker required to develop, that there were, in Amanda Cooper's assessment, some areas in which the claimant required to develop those basic complementary skills and, in the light of priority to be given to resident care, that the claimant's time would be best spent in doing that before seeking to progress further on the path to administration and medication.

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168. A true comparator was not only another senior carer who had completed all the medicine related training modules but one who had likewise still to complete those which were outstanding in the case of the claimant. There was no evidence before the Tribunal upon which it should properly hold that Amanda Cooper would not have treated such a hypothetical comparator who had still to complete outstanding similar areas of training and e-learning in relation to basic skills as had the claimant, in the same way. She submitted therefore that the incident relied upon or the decision relied upon did not constitute less favourable treatment and separately that no discriminatory causal connection had been established.

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169. Turning to the specific complaints of harassment, the respondent's representative while accepting that in assessing the effect of any established unwanted conduct the starting point was the claimant's subjective view, reminded the Tribunal that the other requirements of section 26(4) namely that in the other circumstances of the case it must be reasonable for the conduct to have that effect, introduced a measure of objectivity to the assessment of the claimant's subjective perception.

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170. Against the background of that general proposition the respondent's representative submitted in relation to the incidents identified in the Joint List of Issues; at paragraph:-

5 (a) 2(i) that the claimant's complaint about Kay Gray's questioning of her in relation to her wearing of a headscarf said to have occurred in the period March to May 2019 was clearly out of time and outwith the Tribunal's Jurisdiction to Consider and in any event was a matter which the claimant had not raised by way of grievance or other complaint internally and accordingly should be subject to an up to 25% section 207A TULRCA reduction of award in the event that it were to succeed

15 (i) The claimant in her evidence, paragraph 16 of her witness statement, stated that it had occurred about a month after she commenced working in the Cramond Unit, that move being a move which occurred shortly after Janet De Court's letter of outcome sent to the claimant on 20 14<sup>th</sup> March 2019 (page 132 of the Bundle). She submitted separately that there was insufficient evidence before the Tribunal upon which it could be held established that the reason for Kay Gray's questions, let it be assumed they had 25 been posed in a manner in which the claimant says they were posed, was a reason related to the claimant's protected characteristic of religion or belief

30 (b) 2(ii) It was accepted by Amanda Cooper, certainly in relation to the claimant progressing to the administration of medication, that she had directed at the probationary review meeting of 1<sup>st</sup> of October that the claimant's progression to the administration of medication be put on hold pending her completion of outstanding

e-learning training modules in other areas. The respondent's representative invited the Tribunal to hold, upon an acceptance of Amanda Cooper's evidence, however, that she would have treated a hypothetical comparator whose other e-learning training modules were similarly outstanding and in arrears, in a similar way and secondly that her reason for so doing related wholly to the priority which required to be given to the care of residents. It was not related to either of the claimant's protected characteristics. Separately, that far from preventing the claimant from progressing in her role the respondents had at that point extended the claimant's probationary period for three months to afford her the opportunity of completing outstanding e-learning and affording her that opportunity as opposed to allowing her probationary period to expire in circumstances where it had not been completed with associated implications for the continuation of her employment.

(c) 2(iii) – the claimant completed her medicine e-learning and was not allowed to administer medication. The respondent's representative prayed in aid the submission made above in respect of paragraph 2(ii). While Amanda Cooper had accepted at the probationary review meeting of 1<sup>st</sup> October 2019 she had indicated to the claimant that her progression to the administration of medication should be put on hold pending her completing, or at least bringing more up to date, outstanding e-learning modules in other areas of the basic carer skill set, she invited the Tribunal to accept, as she had done in her previous submission, that the evidence of Amanda Cooper made clear that her reasons for doing so related to the care of residents and in no way related to either of the claimant's protected characteristics. She further submitted that in the context of the discussion which proceeded between the claimant, Amanda Cooper and the claimant's Line Manager Georgios Kournavos at the probationary review meeting of 1<sup>st</sup> October 2019, including Amanda Cooper's

5 explanation for her decision as recorded in the respondent's notes of that meeting at page 152 to 155 and also in the claimant's notes at page 151 with the exception of the first bullet point, and further bearing in mind that the claimant was in her probationary period of service, it was not reasonable in the circumstances that the claimant perceive Amanda Cooper's decision in that regard as having the effects set out at section 26(1)(b).

10 (d) 2(iv), on the 12<sup>th</sup> of October 2019, the respondent excluded the claimant from the notice board that contained photographs of all employees on that floor. The respondent's representative invited the Tribunal to hold that the factual basis of this complaint had not  
15 and, if it were the case had not known at the material time, that the claimant's photograph was not on the board. Amanda Cooper had confirmed in evidence that the boards were frequently not up to date and separately and in any event some employees did not want their photographs to be displayed on  
20 these boards. While the boards were updated from time to time, no member of managerial staff was particularly tasked with doing so. It appeared to happen on an ad hoc basis often at the instance of the staff themselves. Equally, the claimant for her part had not, on the 12<sup>th</sup> of October 2019 when she saw a  
25 colleague taking photographs of some newly inducted staff, ask that colleague to take her photograph and neither had she made any such request of anyone in the preceding six months of her employment. In those circumstances, even let it be assumed that the Tribunal could be satisfied there had been some proactive  
30 element of exclusion and further let it be assumed that there was before the Tribunal evidence from the claimant, of who were all of the other persons working on the floor were on 12<sup>th</sup> October 19, and of whether all of their photographs were on the board, which there was not, it would not have been and was not reasonable, in

the circumstances, for the claimant to perceive the fact that her photograph was not taken and placed on the board on that day, the 12<sup>th</sup> of October 2019, as having the effects set out in section 21(1)(b).

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(e) 2(v), "On 13<sup>th</sup> of October 2019 the claimant was prohibited from sitting in Carol Greenfield's Room (sic) an empty resident's room from time to time used by Carol Greenfield the Nurse in Charge) to take her break." The respondent's representative invited the Tribunal to find that the claimant had failed to establish the same as an incidence of harassment.

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(i) While it was accepted that Carol Greenfield had given the claimant a direction not to use the room for the purposes of taking a break, and while it may have been the case that Carol Greenfield in her capacity as Nurse In Charge of her Floor utilised the room from time to time, the evidence, including the claimant's own evidence was that there was a policy, of which the claimant was aware, that care workers should take their breaks in the Rest Room designed for that purpose which was located on the Ground Floor, in order that they might have a genuine break from responsibilities of caring for residents who were located on their working floor.

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(ii) The claimant's reason confirmed in her evidence, for not wishing to use the Rest Room was that the lift was out of order and she was feeling tired and did not wish to have to use the stairs and that when she had referred Carol Greenfield to the fact that she had seen other members of care staff use the room to take breaks Carol Greenfield had explained to her that she exceptionally gave permission on those occasions

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5 because the individuals concerned had medical conditions, including asthma. That evidence of the claimant was the only evidence before the Tribunal as to the reason for Carol Greenfield's differential treatment and was evidence of a reason unrelated to either of the claimant's protected characteristics. There was no evidence before the Tribunal which went to establish either expressly or impliedly that the treatment was related to either of the claimant's protected characteristics.

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(iii) Separately and in any event, in the circumstances of the explanation given by Carol Greenfield to the claimant on 13<sup>th</sup> October 2019 it was not reasonable that the claimant perceive the refusal as having the effects set out in section 26(1)(b) of the Act.

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(f) 2(vi) – “On various occasions, the claimant was given lists of tasks to do by carers below her station.” There was, in the respondent's representative's submission insufficient evidence before the Tribunal on which it could find in fact that particular care workers “gave the claimant lists of tasks, the date of such occurrences and or the particular task given on any such occasion. Separately and in any event, there was no evidence upon which the Tribunal could hold that the claimant had established, either expressly or by inference, that such requests that the claimant do a particular thing, even if made of her by a care worker, were more because of either of the claimant's protected characteristics.

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(g) 2(vii) “In May 2019, the claimant's request during Ramadan was challenged and mocked by Jody Clark and Carol Greenfield. There was no evidence before the Tribunal of Carol Greenfield raising the issue of the claimant's Ramadan related request with

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5 her. While it was accepted that Jody Clark did ask the claimant questions about the grounds upon which the claimant made her request, after the request had been granted, the hearsay evidence of Jody Clark, as recorded in the investigatory interview conducted with her by Alan Miller-Young was that she had done so because, although she knew and had experience of working with other persons of the Muslim faith, she had never heard of such a requirement and she required to educate herself in relation to such matters. The claimant's representative submitted that for Jody Clark to do so did not amount to her mocking the claimant. Nor was it unreasonable for an employer to ask such questions of their employee in order to inform themselves, and that doing so did not constitute harassment. Further, that it was not reasonable, in those circumstances, that the claimant perceive Jody Clark's interaction with her on the subject, as having the effect set out in section 26(1)(b).

10 (h) 2(ix); Under reference to the staff counselling record produced by Amanda Cooper at page 136 of the bundle, the respondent's representative submitted that it was entirely appropriate and ought not to be surprising to the claimant that after Amanda Cooper had observed the claimant feeding a resident and had been disappointed with her interaction with the resident during the process that she should speak to the claimant in relation to practice related matters, or that in doing so she should make her points "firmly" as she, Amanda Cooper, had herself characterised the conversation in evidence.

25 (i) She invited the Tribunal to accept, as both credible and reliable, the evidence of Amanda Cooper which was that she was "not a shouter" and did not shout at the claimant on that occasion.

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5 (ii) She submitted that it was perfectly acceptable and indeed necessary, and appropriate in the course of a probationary period, for the claimant's Manager to describe difficulties which appeared to exist in relation to her skills and to suggest strategies for addressing them. Particularly when the same relate directly to the care of residents.

10 (iii) While it is true that Amanda Cooper did suggest that the claimant might give consideration to functioning in the role of a care worker as opposed to a senior carer, until she had acquired and confirmed to her own satisfaction the necessary spectrum of care skills, doing so was, in the circumstances, a reasonable potential option for relieving the claimant, as it would in the  
15 meantime, of the anxieties that she had about either her inabilities or lack of opportunity to lead when required, that being one of the functions of a senior carer and until such times as she had better  
20 established and developed relationships of mutual respect with colleagues.

(i) 2(ix) during the meeting the claimant was accused of not  
25 completing Senior Care Assistant tasks and was advised that she would require to be demoted to Care Assistant or have to leave. The respondent's representative invited the Tribunal to find that there was no evidence before it which went to establish that any such consequence would be attached to the claimant not agreeing to change role to that of Care Assistant. As a matter of  
30 fact the respondents had never required the claimant to change her role and she had remained in the role of Senior Carer as at the point of her resignation.

(j) 2(x) "Throughout the claimant's employment, she was excluded from providing 360 feedback in relation to her colleagues." It was accepted that the claimant had not been asked, in the course of her employment, to provide feedback on her colleagues and while accepting that in Alan Miller-Young's grievance outcome he had recommended, for reasons of consistency and openness, that all employees going forward, regardless of their probationary or non-probationary status, be asked to provide feedback on colleagues. Alan Miller-Young had also found, upon investigation, however, there to be inconsistency within the respondent organisation as between Line Managers, some of whom operated a practice of not asking probationary members of staff to express opinions on their colleagues as they themselves were in the process of undergoing training. No inference or presumption arose from the fact that some probationary staff, including the claimant were, from time to time, not asked to provide feedback on their colleagues, that in failing to so ask the claimant the respondent's Line Manager Georgios Kournavos and the respondent's at his hand, were treating the claimant less favourably than they would have treated a hypothetical comparator who was also a probationary employee. Separately, there was no evidence before the Tribunal which went to show, either expressly or impliedly via section 136, that the failure to ask the claimant to provide feedback was related to either of her protected characteristics.

171. On the basis of the above submissions the respondent's representative invited the Tribunal to dismiss all of, which failing some of the claimant's complaints, for want of jurisdiction and, in the alternative, to dismiss all of the complaints on the basis that the claimant had failed to discharge the burden of proof such as to establish them on their merits.

**Reply by the Claimant's Representative**

172. In exercising a restricted right of reply, the claimant's representative submitted, in relation to the operation of any section 207 TULRCA 92 reduction, the claimant's representative submitted that the claimant had confirmed in evidence she had neither escalated her first complaints to a Stage 2 grievance nor had she exercised her right of appeal against Alan Miller-Young's outcome of her second Stage 2 outcome in relation to the grievance raised by her in August 2019, because Alan Miller-Young could not guarantee that her doing so would produce a different result. In so stating in her evidence the claimant's representative submitted the Tribunal should understand the claimant to mean that she did not have sufficient confidence in the respondent's operation of the system to consider it worthwhile progressing either matter. Thus, and in those circumstances, the claimant's failure to comply with the relevant ACAS Code should be regarded as a reasonable failure not giving rise to any section 207A deduction which failing and in the alternative to a modest deduction only.

### **Applicable Law**

173. The complaints of direct discrimination which the claimant advances are prescribed by the terms of section 13 of the Equality Act 2010 which is in the following terms:-

#### ***"13 Direct discrimination***

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*(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.*

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*(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*

(3) *If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*

5 (4) *If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.*

10 (5) *If the protected characteristic is race, less favourable treatment includes segregating B from others.*

(6) *If the protected characteristic is sex—*

15 (a) *less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;*

(b) *in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.*

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(7) *Subsection (6)(a) does not apply for the purposes of Part 5 (work).*

(8) *This section is subject to sections 17(6) and 18(7)."*

25 174. The complaints of harassment are regulated by the terms of section 26 of the EqA which is in the following terms:-

**"26 Harassment**

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(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*

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*(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

*(2) A also harasses B if—*

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*(a) A engages in unwanted conduct of a sexual nature, and*

*(b) the conduct has the purpose or effect referred to in subsection (1)(b).*

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*(3) A also harasses B if—*

*(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,*

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*(b) the conduct has the purpose or effect referred to in subsection (1)(b), and*

*(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.*

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*(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;*

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

(5) *The relevant protected characteristics are—*

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- *age;*
- *disability;*
- *gender reassignment;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.”*

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175. In advancing her claims the claimant does so in reliance of the protected characteristics of race and or religion or belief which are respectively regulated by sections 9 and 10 of the EqA which are in the following terms:-

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**“9 Race**

(1) *Race includes—*

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(a) *colour;*

(b) *nationality;*

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(c) *ethnic or national origins.*

(2) *In relation to the protected characteristic of race—*

5                   (a) *a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;*

10                   (b) *a reference to persons who share a protected characteristic is a reference to persons of the same racial group.*

15                   (3) *A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.*

                    (4) *The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.*

20                   (5) *A Minister of the Crown —*

                    (a) *[must by order] amend this section so as to provide for caste to be an aspect of race;*

25                   (b) *[may by order] amend this Act so as to provide for an exception to a provision of this Act to apply, or not to apply, to caste or to apply, or not to apply, to caste in specified circumstances.*

30                   (6) *The power under section 207(4)(b), in its application to subsection (5), includes power to amend this Act.”*

**“10 Religion or belief**

(1) *Religion means any religion and a reference to religion includes a reference to a lack of religion.*

(2) *Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.*

(3) *In relation to the protected characteristic of religion or belief—*

(a) *a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;*

(b) *a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.”*

## **Jurisdiction**

176. The Tribunal’s Jurisdiction to Consider such complaints is regulated by the terms of section 123 of the EqA which is in the following terms:-

### **“123 Time Limits**

(1) *([Subject to section 140A] proceedings on a complaint within section 120 may not be brought after the end of -*

(a) *the period of 3 months starting with the date of the act to which the complaint relates, or*

(b) *such other period as the Employment Tribunal thinks just and equitable*

(2) *Proceedings may not be brought in reliance on section 121(1) after the end of—*

(a) *the period of 6 months starting with the date of the act to which the proceedings relate, or*

(b) *such other period as the employment tribunal thinks just and equitable.*

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(3) *For the purposes of this section—*

(a) *conduct extending over a period is to be treated as done at the end of the period;*

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(b) *failure to do something is to be treated as occurring when the person in question decided on it.*

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(4) *In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*

(a) *when P does an act inconsistent with doing it, or*

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(b) *if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”*

177. The mechanism by which a Tribunal may hold that a contravention of the provisions of the Equality Act 2010 (including an act of direct discrimination and or of harassment), are informed by section 136 of the Equality Act 2010 which is in the following terms:-

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***“136 Burden of proof***

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

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

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

(4) *The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*

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(5) *This section does not apply to proceedings for an offence under this Act.*

(6) *A reference to the court includes a reference to—*

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*(a) an employment tribunal;*

*(b) the Asylum and Immigration Tribunal;*

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*(c) the Special Immigration Appeals Commission;*

*(d) the First-tier Tribunal;*

*(e) the Special Educational Needs Tribunal for Wales;*

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*(f) the First-tier Tribunal for Scotland Health and Education Chamber.”*

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178. The provisions of those sections were not regarded as being in contention by parties representatives.

### **Case Authority referred to**

179. In the course of submission the claimant's representative referred the Tribunal to the following case authorities upon some of which the respondent's representative commented. The Tribunal found all of the cases referred to to contain helpful guidance on how the requirements of the statutory provisions may be satisfied, which guidance it has sought to apply to the Findings in Fact which it has made on the evidence presented.

- (1) **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96 CA
- (2) **Hendricks v Commissioner of Police for the Metropolis** [2002] EWCA Civ 1686
- (3) **Southern Cross v Owolabi No 3**
- (4) **Deman v Commission for Equality and Human Rights and others** [2010] EWCA Civ 1279, CA
- (5) **Nagarajan v London Regional Transport** [1999] IRLR 572

### **Discussion and Disposal**

180. On the Findings in Fact which it has made and on consideration of parties submissions, the Tribunal unanimously disposes of the issues as follows:-

### **Comparator**

181. The Tribunal accepted the submission of the respondent's representative the characteristics of the correct comparators should, in addition to those identified by the claimant include the characteristics/circumstance of working in a probationary period.

### **Direct Discrimination Issues**

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182. Paragraphs 1, 2 and 3 of the Joint List of Issues

### **Alleged Treatment**

(a) **First Instance**

5 3(i) *“After the meeting on 13<sup>th</sup> March 2019 Janet De Court allegedly failed to take any action in respect of complaints of being isolated and singled out by the claimant”*:- the Tribunal found in fact that Janet De Court followed the stage 1 informal procedure specified in the respondent’s applicable grievance procedure and copied at page 64 of the Bundle in that she held a meeting with the claimant and sought to resolve the matter informally. After the meeting Janet De Court implemented the transfer which the claimant had identified in the course of the meeting as a desired outcome. There was no evidence before the Tribunal that went to establish that Janet De Court had taken any other action after the 13<sup>th</sup> March 2019 meeting. The Tribunal did not consider that failure to take action beyond giving effect to the requested transfer constituted less favourable treatment in the circumstances. There was no evidence which went to expressly establish a discriminatory causal connection nor primary facts from which the Tribunal could so decide in the absence of any other explanation.

20 (b) **Second Instance**

25 *“3(ii) – “On 12<sup>th</sup> July 2019, Carol Greenfield dismissed concerns raised by the claimant about Kay Gray’s handling of a resident”*. On the Finding in Fact which it made the Tribunal did not consider that Carol Greenfield’s reaction to the incident constituted less favourable treatment for the purposes of section 13 of the EqA. Carol Greenfield did not witness the incident. She initiated an Incident Report which reflected her assessment of what had occurred based upon what was recounted to her. The claimant’s expressed concern, as set out at paragraph 22 of her witness statement, was that Carol Greenfield had not reprimanded Kay Gray for her part in the incident whereas she asserted at paragraph 22 *“If it was me they probably would have called the police”*. The Tribunal considered that there was no evidence placed before it that went to establish that Carol Greenfield would

likewise not have reprimanded the claimant had it been she who was looking after the resident. Separately the Tribunal considered that there was no evidence before it which went to establish expressly, or impliedly via section 136 of the EqA a discriminatory causal connection.

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**(c) Third Instance**

10 “3(iii) – *“On 4<sup>th</sup> October 2019 the claimant was reprimanded by Carol Greenfield following a complaint about the claimant’s failure to use the correct moving and handling technique”.* On the Findings in Fact which it has made about the same the Tribunal did not consider that Carol Greenfield’s reaction, as found in fact, constituted less favourable treatment for the purposes of section 13. There was no evidence that went to show Carol Greenfield would not have had the same follow up conversation with  
15 another probationary senior care worker, standing her responsibility as the nurse in charge on the floor for the health and safety and care of the residents. Separately, the Tribunal considered that there was no evidence before it which went to establish expressly, or by inference, via the operation of section 136 of the Act, a discriminatory causal connection”.

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**(c) Fourth Instance**

25 “3(iv) – *On 9<sup>th</sup> October 2019, Jody Clark instructed the claimant not to wear Eziclogs”.*

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On the evidence presented and the Findings in Fact made, the Tribunal considered that it had not been established that Jody Clark’s instruction to the claimant constituted less favourable treatment nor, separately, that there was any evidence expressly or impliedly or the existence of a discriminatory causal connection. On her own evidence the claimant was aware of the fact that the wearing of Eziclogs was prohibited. The Tribunal accepted the evidence of Amanda Cooper, the Senior Home Manager that Eziclogs, including those described by the claimant as being worn by her, did not meet the directed requirements for footwear and that whenever staff were

found to be wearing them her directed policy was that they be told not to do so, something which she had herself done on a number of occasions. Separately, in relation to the actual member of staff with whom the claimant drew comparison in her evidence, the claimant, again in her own evidence,  
5 stated that that member of staff had informed her that she was entitled to wear them by way of a dispensation because of a medical condition, whereas the claimant in her evidence described her reasons as finding it tiring to be on her feet and that the clogs were a more comfortable form of footwear in her experience and further that she wished to avoid her trainers becoming wet when assisting residents in the shower. The claimant had  
10 not made any request of the respondents that they consider allowing her to wear Ezclogs because of a medical condition.

**(e) The Fifth Incident**

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*“3(v) – On 18<sup>th</sup> October 2019, the claimant was reprimanded by Carol Greenfield when it was alleged that the claimant left the lounge unattended”.* The Tribunal considered, notwithstanding the wording appearing in the draft List of Issues and based on the evidence presented, that the reprimand of  
20 which the claimant complains was one administered not by Carol Greenfield but rather by Amanda Cooper, the Senior Home Manager. On the evidence presented the Tribunal did not consider that Amanda Cooper’s speaking to the two care workers concerned, including in particular to the claimant, in the terms in which it has found occurred, constituted less favourable  
25 treatment for the purposes of section 13. Separately, the Tribunal considered that there was no evidence before it that went to establish expressly, or by inference via section 136 of the Act a discriminatory causal connection. It further accepted Amanda Cooper’s evidence which was not  
30 seriously challenged in cross examination, that in so speaking to, amongst others, the claimant she was motivated entirely by concern for the health and safety of the residents.

**(f) Sixth Incident**

“3(vi) – On 18<sup>th</sup> October 2019, a colleague, Jordan, had spoken to the claimant in a rude and aggressive manner”. The Tribunal accepted the claimant’s evidence, which the respondent’s representative was not in a position to challenge, that, on or about the 18<sup>th</sup> of October 2019 a bank worker “Jordan” had said to the claimant “Hey you, I’m talking to you, can you assist me with David?” and, after the claimant had not responded:- “Wajeeha I’m talking to you, can you help me with David?” The Tribunal further found in fact on the claimant’s evidence that at the time the request was made of her another care worker, Stella, with whom Jordan had been teamed to work in tandem was also present in the Dining Room and that she, the claimant, was engaged in clearing the dining tables. The Tribunal also accepted the claimant’s evidence to the effect that she perceived the manner in which Jordan addressed her to be rude and, upon an objective consideration that it fell to be regarded as rude. Beyond establishing that Jordan had addressed his request to the claimant and not to the other care worker Stella, the evidence presented did not go to establish that Jordan would not have been equally brusque or rude in addressing the request to another care worker such as that identified as the virtual comparator. Nor was there evidence that went to establish either expressly, or by inference via the operation of section 136, a discriminatory causal connection.

**(g) Seventh Incident**

“3(vii) – After the claimant’s two month review, Amanda Cooper did not allow the claimant to administer medication”. The date upon which this conduct or alleged “failure to do something” for the purposes of section 123(3)(b) of the EqA, was not unequivocally established in evidence. The claimant’s training record as at 16<sup>th</sup> of August 2019, a date falling six months into the claimant’s probationary period, show that, as at that date the claimant had not completed all of the necessary medicine related e-learning modules including the “specialist administration of medicines” module. On the evidence of Amanda Cooper and of Alan Miller-Young both of whom the Tribunal accepted as credible and reliable on the point, the successful completion of those modules is a prerequisite of being permitted

to administer medication. Accordingly no question of less favourable treatment of the claimant in that regard, as at the point of the claimant's two month review (the timeline identified in the List of Issues) arises. The claimant's evidence was that there came a point in her employment by which she had completed all of the medicine related modules but, notwithstanding, was not allowed to administer medication. She was unable to be specific as to when that completion was achieved. An inference arises from the statement made by her and Amanda Cooper's response thereto, which are recorded at page 154 of the Bundle as being made in the course of the 1<sup>st</sup> October 2019 probationary review meeting that as at that date, 1<sup>st</sup> October 2019, the claimant had completed all of the medical e-learning training modules. That was a position not disputed by the respondents in cross examination. Separately Amanda Cooper in explaining the response she is recorded as having made at page 154 viz "*I think we need to work on other things first*", confirmed in evidence that as at that date her communicated position to the claimant was that the claimant required to advance her completion of other training modules including certain which require to be prioritised and none of which were optional, before she progressed further towards the administration of medication. The Tribunal also accepted the claimant's evidence that all other things being equal, a probationary Senior Care Worker would expect to make progress towards, albeit in the first instance supervised, administration of medication once they had successfully completed the e-learning medicine related modules, and considered where that did not occur, the same could amount to "something more" for the purposes of transferring the burden of proof to the respondent. Let it be assumed that Amanda Cooper's decision taken as at 1<sup>st</sup> October 2019 not to allow the claimant to administer medication was the alleged Direct Discrimination complained of, the Tribunal considered that the respondent had discharged the burden of proof of showing that the reason for the decision was a reason wholly unconnected to the claimant's race or religion. The Tribunal further considered that the relevant date of the alleged failure to permit the claimant to administer medication was, for the purposes of section 123(3)(b) of the EqA, 1<sup>st</sup> October 2019.

**Instances of Alleged Harassment (section 26 EqA)**  
**Agreed List of Issues**

5 183. “1. Did the following situations occur?

2. If so, in conducting themselves as they did, did the respondent harass the claimant by engaging in unwanted conduct related to the claimant’s race and or religion or belief which had the purpose or effect of either:

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- Violating the claimant’s dignity, or
- Creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant”

15 (a) **The First Alleged Instance**

“2(i) – during a conversation, Kay Gray challenged the claimant on why she had to wear a headscarf.”

The Tribunal accepted the evidence of the claimant that during the first month after her move to work on the Cramond floor, and before the commencement of Ramadan on 6<sup>th</sup> May 2019, that is in or around April/1<sup>st</sup> week of May 2019, the respondent’s Care Assistant Kay Gray variously; asked the claimant; “*Why do you wear a headscarf*” told the claimant, “*It looks weird*” and that she, Kay Gray, “*would not wear one*”, and that she did so notwithstanding the fact that the claimant had explained to her that it was a matter related to her religious practice and belief. The Tribunal was satisfied that in continuing to make enquiry of/statements to the claimant about the wearing of a headscarf, beyond the initial enquiry and the claimant’s initial response, Kay Gray was engaging in unwanted conduct related to the claimant’s religion. The Tribunal considered that those primary facts had the effect of switching the burden of proof to the respondent in terms of section 136 of the EqA and that the respondent, in the absence of direct evidence to the contrary, had failed to discharge that burden of proof and establish that the Tribunal did not so relate to the claimant’s protected characteristic. The Tribunal further considered, on the evidence, that the conduct had the effect of violating the

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claimant's dignity and of creating an offensive environment for her for the purposes of section 26(1)(a) and (b)(i) and (ii) of the EqA. In consideration of Kay Gray's statement that the claimant's headscarf "looked weird" the Tribunal further considered in the context of the other circumstances of the case, that it was  
5 reasonable in terms of section 26(4) of the 2010 Act for the conduct to have that effect. Accordingly, the Tribunal considered, subject to the challenge of jurisdiction, that the incident concerning the claimant's headscarf did occur, in the factual terms that it has found established, and subject to the Tribunal being satisfied that it had Jurisdiction to Consider the claim, that it would constitute an  
10 established instance of section 26 Harassment.

**(b) The Second Alleged Instance**

*"2(ii) The claimant was prevented in progressing her job role and was not allowed  
15 to do the tasks of a Senior Care Assistant."*

Subject to the findings which it has made in respect of the claimant not being permitted to administer medication, the Tribunal did not consider that the claimant's evidence of fact, as opposed to her opinion, was sufficient to establish  
20 that any conduct or failure to act on the part of the respondent had that purpose or effect. Other than the administration of medication in respect of which the Tribunal has held resulted from a decision of Amanda Cooper's taken for reasons wholly unconnected with the claimant's ethnicity or religion, the matters founded upon by the claimant in her evidence were:-

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- (i) that she was not given time to complete her e-learning during her normal working hours, and
- (ii) nor was she given the support by her Line Manager Georgios Kournavos to complete her medicine related e-learning modules at  
30 the time when she was ready to receive it, albeit that the claimant was clear in her evidence that she accepted that was a result of her Line Manager being busy and she did not assert that it was because of either her ethnicity or religion; and,

(iii) of not being given the opportunity to lead.

5 184. The Tribunal accepted as credible and reliable the evidence of Amanda  
Cooper in relation to her assessment of the claimant's progress as at the date  
of the probationary review meeting held by her with the claimant in the  
presence of her Line Manager and Nurse in Charge Georgios Kournavos on  
1<sup>st</sup> October 2019. The Tribunal further considered that evidence to be  
10 reflected in the notes of that meeting produced by the respondent at pages  
152 to 155 of the Bundle. That evidence identified a number of areas  
including incompleting e-learning training modules which, in Amanda  
Cooper's assessment and overview, were preventing the claimant from  
progressing in her job role of Senior Care Assistant and which resulted in  
Amanda Cooper deciding to extend the claimant's probationary period for  
15 three months to allow her a further opportunity to make satisfactory progress  
in them during the probationary period which, but for the respondent's  
extension of it would have concluded at the end of October 2019 requiring the  
respondents to take a decision as at that date, on the claimant's continuing  
employment. On the basis of that evidence, which the Tribunal accepted,  
20 and on the general nature of the claimant's own evidence, the Tribunal  
considered that the claimant had not established, on the balance of  
probabilities, that her lack of progress occurred because she "was prevented"  
from progressing by the respondents.

25 185. (i) While the Tribunal was satisfied, it not being a matter in dispute that  
the claimant was not allowed as a result of a conscious decision on  
the part of the respondents to carry out one of the tasks of the Senior  
Care Assistant, namely the administering of medication, a task which  
was the primary responsibility of the Nurse in Charge, the Tribunal  
30 has also found:

- That the respondents have established on the balance of probabilities that the reason for that decision was one wholly unconnected with the claimant's race or religion

- 5                   • that Amanda Cooper, at the 1<sup>st</sup> October 20 probationary review meeting and in response to the claimant's statement that she did not have enough time to complete her e-learning modules, offered to pay the claimant for six hours' time per week during which she could carry out e-learning on the respondent's computers,
  
- 10                  • That the claimant's working shift was proportionately reduced from 48 to 42 hours per week and, that, as shifts were rostered about six weeks in advance, and
  
- 15                  • It was possible that adjustment had not yet been reflected in the rotas as at the date of the claimant's resignation on 29<sup>th</sup>/30<sup>th</sup> October 19.
  
- 20                  • Separately and in any event let it be assumed that the claimant had established that she had been so prevented by the respondents, the Tribunal did not consider that the evidence before it went to establish either expressly, or impliedly through the operation of section 136 of the Act, that such prevention was related to the claimant's religion or race

25           (ii)   The Tribunal was also conscious of the terms of the claimant's probationary contract (the third paragraph of page 117 of the Bundle) – *“Your first six months of service will be a probationary period. The purpose of which is to provide a mutually constructive opportunity in which to evaluate your suitability to both HC – One and the role. In order for you to successfully complete your probation period you must have completed your full online Working together as One's e-learning programme. At the end of this period and providing you are performing to the standard required, your appointment will be confirmed.”* The Tribunal found that this alleged incidence of Harassment was not established.

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**(c) The Third Alleged Instance**

5 “2(iii) *The claimant completed her medicine e-learning and was not allowed to administer medication*”. Reference is made to the above paragraphs. While the Tribunal has found on the balance of probabilities that the claimant had completed her medicine related e-learning training modules by 1<sup>st</sup> October and was not thereafter allowed to administer medication in the four weeks prior to her resignation the Tribunal has also found in fact that the respondents have established, on the balance of probabilities, that Amanda Cooper’s decision in that regard was for reasons wholly unrelated to the claimant’s race or religion. The Tribunal found that this alleged instance of Harassment was not established.

15 **(d) The Fourth Alleged Instance**

(i) “2(iv) – *On 12<sup>th</sup> October 2019, the respondent excluded the claimant from the notice board that contained photographs of all employees on that floor*”. On the evidence presented, the Tribunal considered that the claimant had not established on the balance of probabilities that the respondent had so excluded the claimant from the notice board. The claimant’s evidence, which the Tribunal accepted, was to the effect:-

- 25 • that as at that date, 12<sup>th</sup> October 2019 her photograph was not amongst those of staff which appeared on the notice board on the Cramond Floor.
- That the claimant had not provided a photograph to the respondent for that purpose nor had she requested that her photograph be taken for that purpose and displayed on the board.
- 30 • that on the 12<sup>th</sup> of October the claimant witnessed another member of staff taking photographs of recently inducted new employees for what she understood was the purposes of putting them on the notice board.

- that that member of staff did not ask the claimant if she wanted her photograph taken.
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- that the claimant, for her part, did not ask the member of staff to take her photograph.

(ii) The Tribunal also accepted the evidence of Amanda Cooper, which was not challenged in cross examination and, which was to the effect that;

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- not all members of staff's photographs were to be found on the boards at any particular time,
  - some members of staff did not want their photographs to be displayed on the board,
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- the boards were updated from time to time but were frequently out of date.
  - There was no member of management whose responsibility it was to take and display such photographs.
- 20
- The practice varied from floor to floor in the Care Home.
  - Nor was there evidence presented which went to establish either expressly or impliedly via section 136 of the Act that the non-appearance of the claimant's photograph on the notice board or the non-asking of her by her colleague on that occasion whether she wished her photograph taken related to the claimant's race or religion. The Tribunal found this instance of alleged Harassment to be not established.
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**(e) The Fifth Alleged Instance**

- (i) "2(v) – On 13<sup>th</sup> October 2019 the claimant was prohibited from taking her break in an empty room on the Floor which was, from time to time, utilised by Carol Greenfield the Nurse in Charge, to take her break."
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(ii) On the claimant's evidence, which it accepted, the Tribunal found;

- 5           • that Carol Greenfield who with the Nurse in Charge of the Floor had, on 13<sup>th</sup> October 2019 refused the claimant's request for permission to utilise an empty resident's room on Cramond Floor for her morning break,
  
- 10          • that Carol Greenfield had explained that in doing so the claimant, unlike other Care Assistants who on occasion she did allow to take their breaks in such a room, had not identified any health issue which would justify a departure from the policy that Care Assistants were required to take their breaks in the Rest Room which was designated for that purpose and
  
- 15          • located on the Ground Floor and that the claimant was aware of that policy.

(iii) The Tribunal also accepted the claimant's evidence that the reason advanced by her to Carol Greenfield when making the request was that she was tired and as the lift wasn't working did not want to go down and return from the Rest Room by  
20 the stairs. (that Carol Greenfield, who was the Nurse in Charge of the Floor and Kay Gray, a Care Assistant had on other occasions had each, on other occasions, utilised an empty room on C Floor for that purpose)

(iv) The Tribunal also accepted the evidence of Amanda Cooper, the Home  
25 Manager, which was to the effect;

- 30          • that let it be assumed that Carol Greenfield had refused the claimant's request, her doing so would constitute her acting in accordance with the respondent's policy that care staff should take their breaks away from C Floor in order to put distance between themselves and the responsibility of their duties i.e. the residents, and should utilise the Rest Room designed for that purpose which was located on the Ground Floor.

(v) The Tribunal did not consider that the evidence presented went to establish on the balance of probabilities either expressly, or impliedly in terms of section 136 that Carol Greenfield's refusal of the claimant's request was related to either her race or religion.

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(vi) Separately, and in any event, it was a matter of concession on the part of the respondent's representative made at the outset of the Hearing and before submissions, both in the claimant's presence, that the alleged incident was spoken to only by way of context and background and was not a matter, let it be assumed that its occurrence was established in fact, upon which the claimant sought to found a complaint of section 26 Harassment.

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**(f) The Sixth Alleged Instance**

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*"2(vi) – On various occasions, the claimant was given lists of tasks to do by carers below her station".* The claimant's evidence in relation to that matter was restricted to the statement contained at paragraph 17 of her witness statement which was in general terms only viz:- *"The Care Assistants had more responsibility than me and they started giving me lists of jobs to do and then if something went wrong I felt that I would get into trouble despite not having any control over the situation."* The example which appears to follow thereafter at paragraph 17 of the statement is not an example of a Care Assistant giving the claimant a list of tasks but rather to the incidence of alleged direct discrimination at the hands of the Senior Home Manager Amanda Cooper which is the subject of paragraph 3(v) of the Joint List of Issues (on 18<sup>th</sup> October 2019). The Tribunal considered that the evidence presented was insufficient to establish on the balance of probabilities the general proposition given notice of and separately and in any event either expressly, or impliedly that such conduct, let it be assumed that it occurred, was conduct related to either the claimant's race or religion.

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**(g) The Seventh Alleged Incidence**

(i) “2(vii) – *In May 2019 the claimant’s request during Ramadan was challenged and mocked by Jody Clark and Carol Greenfield*”. The Tribunal considered that there was no evidence presented which went to establish such conduct on the part of Carol Greenfield. On the evidence of the claimant and the hearsay evidence of Jody Clark the Deputy Home Manager, as recorded on interview by Alan Miller-Young at page 99 of the Bundle and as spoken to by him in oral evidence, the Tribunal found established that in questioning the claimant, in May 2019, beyond her initial question about the religious basis upon which the claimant had advanced her request which had been already granted, that she be relieved from providing assistance to male residents during the month of Ramadan with a compensating increase in the care which she provided to female residents;

- Jody Clark was engaging in conduct which related to the claimant’s protected characteristic of religion,
- which had the effect of violating her dignity and creating for her an intimidating and offensive environment in terms of section 26(1) of the Equality Act 2010, and further,
- in terms of section 26(4) that it was reasonable, in the circumstances, that the conduct have that effect.

(ii) On the evidence of the claimant she had not only already explained, at the time of making her request of her Line Manager, that her request related to her religious beliefs and practice, that she had also given that response at first instance to Jody Clark further explaining that not all Muslims necessarily hold the same belief or practice their religion in the same way and had suggested to her that if she wished to have clarification about the matter she could speak to the Iman at the Edinburgh Mosque. The Tribunal was satisfied that in continuing to question the claimant about her assertion of her religious practice in those circumstances, Jody Clark was engaging in unwanted conduct which related to the claimant’s protected characteristic of religion which had the effect set out at section 26(1)(b) and that it was

reasonable that it had that effect in terms of section 26(4). The Tribunal did not accept that the explanation given by Jody Clark, in her interview with Alan Miller-Young, namely that because she had never encountered such a request from a Muslim employee in the past; it was appropriate for her to challenge the basis of the claimant's request and separately, that she required to inform herself about such matters, operated to remove her conduct from the category of harassment. There were readily available to Jody Clark other means by which she could have satisfied herself as to the basis of the claimant's request which would have neither violated the claimant's dignity nor created an intimidating or offensive environment for her. Accordingly, and subject to being satisfied that it had Jurisdiction to Consider the complaint, the Tribunal considered, on the evidence presented, that the particular instance of conduct relied upon would constitute a conduct of section 26 EqA Harassment.

#### (h) **The Eighth Alleged Incidence**

(i) *"2(viii) – On the 25<sup>th</sup> of July 2019 the claimant attended a meeting where Amanda Cooper and Jody Clark were present. The claimant was asked to consider changing role to a Care Assistant and during the meeting Amanda Cooper and or Jody Clark shouted at the claimant. The claimant was accused of poor manual handling and communication. The claimant was asked to consider changing role to a Care Assistant"*.

(ii) On the evidence presented, including the evidence of the claimant, of Amanda Cooper and hearsay of Jody Clark as recorded at interview with Alan Miller-Young, the Tribunal was satisfied:-

- that on 25<sup>th</sup> July 2019 Amanda Cooper and Jody Clark respectively the Home Manager and Deputy Home Manager, met with the claimant and communicated to her during the course of that meeting concerns which they had about, amongst other matters the claimant's manual handling and interaction with residents.

- That they had further emphasised to her the need for Care Assistants to constantly explain and reassure residents, the importance of safe moving and handling practices and of effective communication with residents and colleagues, and
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- that the claimant could give consideration to switching into the role of a Care Assistant while she was developing skills.
- That it was Amanda Cooper who had advanced those concerns and made that suggestion at the meeting. Her reasons for doing so were unrelated to either the claimant's race or religion but rather, were wholly related to the concerns which she had, from her own direct observations of the claimant, about the state of development of her relevant basic Care Assistant skills; and,
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- That the claimant was upset at the conversation but undertook to give thought to a possible change of role. The claimant did not elect to change her role, neither did the respondent require her to do so.
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- (iii) The Tribunal did not find established the one aspect of the claimant's note at page 151 of the Bundle which appeared to be in direct conflict with the notes of the probationary review meeting produced by the respondents at pages 152 to 155, that is to say that;
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- the Tribunal did not find established that at the meeting the claimant was told by Amanda Cooper "that she couldn't "be trained as a Senior Carer" but rather that while certain aspects of the role could be trained there were some which were developed through experience and aptitude. The Tribunal did not find this alleged instance of Harassment to be
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- 30
- established

**(i) The Ninth Alleged Incidence**

- (i) "2(ix) – *During this meeting [25<sup>th</sup> of July 2019] the claimant was accused of not completing Senior Care Assistant tasks and was advised that she*
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*would require to be demoted to Care Assistant or have to leave.”*

Reference is made to the above paragraphs. On the evidence presented, including that of Amanda Cooper which the Tribunal accepted in relation to this matter, the Tribunal considered that it had not been established that the claimant was advised at the meeting of 25<sup>th</sup> July 2019 by Amanda Cooper that she would require to be demoted to Care Assistant or have to leave. In the event, while the claimant undertook to give consideration to a change of role she did not ever elect to change role. The respondent, for their part, did not require the claimant to change role and she remained employed on a probationary period, in the role of Senior Care Assistant as at the date of her resignation 29<sup>th</sup>/30<sup>th</sup> October 2019. The Tribunal found that alleged instance of Harassment not to be established.

**(j) The Tenth Incidence**

(i) *“2(x) – Throughout the claimant’s employment, she was excluded from providing 360 feedback in relation to her colleagues.”* On the evidence presented, including that of Alan Miller-Young the Tribunal found in fact that:-

- During the currency of her employment the claimant was not asked to provide 360° feedback in relation to her colleagues
- That in the course of her employment the claimant’s Line Manager, Georgios Kournavos, had sought feedback from the claimant’s colleagues with whom she interacted in the performance of her duties and had discussed that feedback with the claimant as part of the probationary review.
- That the claimant had not been asked by Managers to provide feedback on her colleagues.
- That at that time it was common practice within the respondent’s organisation among a number of the Managers

not to ask new colleagues to comment on other members of staff as they were in their initial probation period and in the process of learning.

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- That there was no consistent approach in that regard and that Alan Miller-Young recommended, as part of the output and determination of the claimant's grievance that, in the future, feedback should be sought from all members of staff irrespective of their length of service.

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(ii) The Tribunal was satisfied that the conduct was unwanted conduct which in the context of the claimant being unaware of what the general position was, had the effect of creating for her a hostile environment and, given the circumstance of the claimant's unawareness of the general position and

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lack of consistency, that it was reasonable that it have that effect. The Tribunal considered that there was no evidence presented that went to establish, either expressly or by inference through the operation of section 136, that that conduct, in the failing by any of the respondent's Managers, including the claimant's Line Manager Georgios Kournavos was related to

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either the claimant's protected characteristics of religion or of race. Rather the evidence went to establish that it was due to the inconsistent practice amongst Managers, including the claimant's Line Manager that being a reason unconnected with either of the claimant's protected characteristics.

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**Reserved Preliminary Issue of Jurisdiction (Time Bar)**

186. By letter dated 29<sup>th</sup> October 2019 (page 157 in the Bundle) the claimant gave the respondent one day's notice of resignation. The Effective Date of Termination of her employment was 30<sup>th</sup> October 2019. The last instance of

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alleged less favourable treatment/unwanted conduct, of which the claimant gives notice of relying upon for the purposes of her claim, occurred on 18<sup>th</sup> October 2019. In her primary submission the claimant's representative invited the Tribunal to regard the Effective Date of Termination (30<sup>th</sup> October) as the operative date for the start of the primary statutory period, set out at

paragraph 123(1) of the EqA, and within which the claimant had Title to Present her complaints of Discrimination. The Tribunal did not accept that submission. The resignation was a unilateral act of the claimant. It was effective without any requirement that the respondent accept it. It was not an instance of conduct, or of a failure to do something at the hands of, the respondent.

187. The letter of resignation, addressed to Amanda Cooper the Care Home Manager was in the following terms

*“Dear Mandy*

*I would like to notify you that I am resigning from my job at HC – One from tomorrow 30<sup>th</sup>/10/2019.*

*Yours sincerely*

*Wajeeha Aftab”*

188. The letter contains no reference to or allegation of discrimination. The date of the last instance of alleged discriminatory behaviour, of which the claimant gives notice of founding, is 18<sup>th</sup> of October 2019. The three month statutory time period within which the claimant had entitlement in terms of section 123(1)(a) of the EqA to present her complaints to the Employment Tribunal began to run on that date and, absent timeous engagement with early conciliation would have expired on the 17<sup>th</sup> of January 2020. The date upon which the claimant commenced early conciliation was a date falling within the initial three month period and her doing so had the effect of stopping the clock running, on the three month statutory period, for the 30 days which elapsed between the date of receipt by ACAS of the EC notification on 11<sup>th</sup> December 2019 and the date of issue by ACAS of the Early Conciliation Certificate – 9<sup>th</sup> January 2020 inclusive. Those 30 days fall to be added to the three month statutory period extending it to midnight on the 16<sup>th</sup> of February 2020. The Early Conciliation Certificate issued by ACAS under reference R807638/19/50 (attached to the principal initiating Application ET1 presented on 21<sup>st</sup> February 2020 confirms the above dates, viz; that the claimant commenced the early conciliation process on 11<sup>th</sup> of December

2019 and that the process and date of issue of the Certificate was 9<sup>th</sup> January 2020.

5 189. The claimant first presented her initiating Application ET1 on the 21<sup>st</sup> of February 2020. Accordingly, as at that date, the claimant lacked Title to Present and the Tribunal lacks Jurisdiction to Consider, both in terms of section 123(1)(a) of the EqA, the claimant's complaints of discrimination insofar as founded upon alleged instances of treatment, unwanted conduct or failure to do something by or on the part of the respondent which are said to have occurred prior to the 24<sup>th</sup> of October 2020.

10 190. The claimant's representative submitted that each of the instances of alleged discriminatory conduct founded upon fell to be regarded as connected instances of conduct extending over a period and thus, in terms of section 15 123(3)(a) to be treated as done at the end of that period. The Tribunal having rejected the primary contention that the period, for the purposes of section 123(3)(a) fell to be regarded as having ended on the Effective Date of Termination, 30<sup>th</sup> October 2019, the date relied upon by the claimant, in the alternative, 18<sup>th</sup> October 2019, let it be assumed that a discriminatory act 20 occurring on that date was established, and thus falling to be regarded as the end of the period, is a date that falls outwith the ambit of the early conciliation extended section 123(1)(a) jurisdiction. Accordingly in the event that the Tribunal had been satisfied that any of the acts were sufficiently connected to an established act which occurred on the 18<sup>th</sup> of October such as to be 25 regarded as having been done on that date the claimant's complaints, insofar as founded upon them, are complaints which the Tribunal lacks Jurisdiction to Consider in terms of section 123(1)(a).

30 191. In the event the Tribunal found only two acts of discrimination to be established these being instances of section 26 EqA Harassment; the first occurring at the hands of Kay Gray in relation to the claimant's wearing of a headscarf, some time in the first month after the claimant's transfer to the Cramond Floor, and the second being Jody Clark's questioning of the claimant regarding her granted request to not provide care to male residents

during the month of Ramadan, which occurred in May 2019. While the Tribunal did consider those two instances of unwanted conduct to be sufficiently connected for the purposes of section 123(2)(a), by reason of Kay Gray's and Jody Clark's persistence in challenging the claimant's position after she had in terms of her initial response explained that the matters related to her religious practice, the last of the two events and thus the end of the period for the purposes of section 123(2)(a) occurred in May of 2019 and thus outside the jurisdiction conferred on the Tribunal in terms of section 123(1)(a).

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192. In the alternative the claimant's representative invited the Tribunal to hold that the claimant's complaints, insofar as the Tribunal found the same established on the facts, and first presented on the 21<sup>st</sup> of February 2020 to have been presented within such other period as the Employment Tribunal thinks just and equitable and thus that the claimant had Title to Present them and the Tribunal Jurisdiction to Consider them, in terms of section 123(1)(b).

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193. In this regard the claimant's representative invited the Tribunal to accept the claimant's evidence as to the impact of her experience, which with the last two incidents founded upon by the claimant said to have occurred on 18<sup>th</sup> October 2019 her subsequent resignation on 30<sup>th</sup> October 2019, upon her state of mental health and her ability to focus upon next steps, paragraphs 39 and 40 of the claimant's witness statement, and which, in her submission, included an impact on the claimant's ability to take steps to raise proceedings. The Tribunal accepted the claimant's evidence in this regard which was not seriously challenged in cross examination, and, taking that evidence at its highest, held that it would be just and equitable in the circumstances to extend the statutory time limit by the 48 days which elapsed between the date of the last incident founded upon, 18<sup>th</sup> October 2019 up to and including the date upon which the claimant accepted appointment and commenced working with her new employer Ranstad Care on 4<sup>th</sup> December 2019. The effect of so doing is to extend the jurisdiction of the Tribunal to consider the claimant's complaints insofar as founded upon alleged instances of conduct or failures to act on the part of the respondent said to have

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occurred on or after the 8<sup>th</sup> of September 2019 and, taking that evidence at its highest, that extension of time operates to bring within the Tribunal's jurisdiction consideration of the claimant's claims insofar as founded upon the alleged instances of direct discrimination said to have occurred:-

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- at the hands of Carol Greenfield on 4<sup>th</sup> October 2019 (3(iii)) on the List of Issues.

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- at the hands of Jody Clark on 9<sup>th</sup> October 2019, the instruction to not wear Eziclogs (3(iv) on the List of Issues)

- at the hands of "Carol Greenfield" *sic* Amanda Cooper on 18<sup>th</sup> October 2019 in expressing dissatisfaction at finding residents in the lounge unattended (3(v) on the List).

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- at the hands of the bank worker "Jordan" on 18<sup>th</sup> October 2019 in speaking to the claimant in a rude and aggressive manner (3(vi) on the List); and, the instances of alleged section 26 EqA Harassment said to have occurred:-

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- at the hands of Amanda Cooper on or about the probationary review meeting of 1<sup>st</sup> October 19 in not allowing the claimant to administer medication pending her completion of other outstanding e-learning modules (2(iii) on the List of Issues)

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- at the hands of the respondent on 12<sup>th</sup> October 2019 by allegedly excluding the claimant from the notice board that contained "photographs of all employees on that floor" (2(iv) on the List)

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- at the hands of Carol Greenfield on 13<sup>th</sup> October 2019 in refusing to allow the claimant to take her break on an empty resident's room located on Cramond Floor (2(v)), and, at the hands of the respondents throughout the claimant's employment by her exclusion from providing "360 feedback" in relation to her colleagues (2(x) on the List).

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194. While the claimant's complaints, insofar as founded upon those alleged instances of discriminatory conduct fall within the Tribunal's jurisdiction and were considered by it as, and for the reasons, set out above in its Disposal of the Issues the Tribunal did not find in fact and in law that any of those instances relied upon respectively constituted instances of section 13 EqA Direct Discrimination and or section 26 EqA Harassment and that they fall to be dismissed on their merits.
195. The two instances of section 24 Harassment which the Tribunal did find would have been established on their merits, had it had Jurisdiction to consider them, were instances that occurred outwith the extended section 123(1)(b) jurisdiction and as such were complaints which, as at the date of their first presentation the claimant lacked Title to Present and the Tribunal lacks Jurisdiction to Consider in terms of section 123(1)(a) or (b) of the EqA. They accordingly fall to be and are dismissed for want of jurisdiction.
196. The occurrence of those two instances of treatment of the claimant, the Findings in Fact which the Tribunal has made in respect of them, and the inappropriateness of the occurrence of such treatment in the workplace, are matters which are worthy of reflection on the part of the respondent notwithstanding non success of those complaints for want of jurisdiction.
197. In the interests of addressing the entirety of the helpful submissions made by both parties representatives the Tribunal considered that it would have been just and equitable to have reduced any award made in terms of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 in relation to any instance of discriminatory conduct that it found established but in respect of which the claimant had failed to comply with the relevant ACAS Code. The Tribunal further considered on the evidence presented and the Findings in Fact made that patrimonial loss (loss of wages) suffered by the claimant would not fall to be regarded as having occurred in consequence of the respondents beyond, at the latest, the date of the claimant's resignation from her subsequent employment with Randstad Care.

Employment Judge: Joseph d'Inverno

Date of Judgment: 27 April 2021

Entered in register: 31 May 2021

and copied to parties

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**I confirm that this is my Judgment in the case of Aftab v HC – One Ltd and that I have signed the Judgment by electronic signature.**