EMPLOYMENT TRIBUNALS

Claimant: Mrs. K Sowilaska

Respondent: Barchester Healthcare Ltd

Heard at: Birmingham **On:** 14th – 18th June 2021

Before: Employment Judge Meichen, Mr KW Hutchinson, Mr TC Liburd

Representation
Claimant: in person
Respondent: Mr. O'Hare, solicitor

JUDGMENT dated 18 June 2021 having already been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided. Oral reasons were given at the end of hearing and so these written reasons are based on a transcript of the recording of the oral reasons.

REASONS

Introduction

1. This was the final hearing to determine the three claims brought by the claimant: constructive unfair dismissal, direct discrimination because of race and harassment related to race.

2. In relation to her race claims the claimant relied upon her Polish nationality. In summary she alleged that herself and other Eastern European Nurses who worked for the respondent (who the claimant referred to as "the foreign nurses") were treated worse than British nurses working for the respondent.

3. We had an agreed bundle of 141 pages and an agreed supplemental bundle of 13 pages. In addition, 2 documents were added by consent during the course of the hearing. These were firstly on behalf of the claimant an English translation of a hospital discharge summary relating to a hospital visit on 11 December 2018 in Poland. Secondly on behalf of the respondent the notes from the on-line HR system relating to contact between the claimant and HR between 22nd November 2018 and 1st February 2019. Both of those documents were plainly relevant, so we agreed to admit them into evidence and have taken them into account.

4. The clamant called two witnesses these were Clara Bojo and Katalin Vladut. Both of these witnesses provided statements and were cross examined. The claimant also provided a statement on her own behalf and was cross examined. The claimant's two witnesses were both former nurse colleagues who worked with the respondent. The claimant confirmed at the start of the hearing that she did not wish to pursue applications for witness orders in respect of two further witnesses who had been mentioned in correspondence.

5. At the start of the hearing, we identified a potential issue with the claimant's evidence. The issue was that the claimant's witness statement spoke only in very general terms about the nature of her claim. It did not address the specific issues we had to determine as identified by Employment Judge Flood. We considered that as the claimant was representing herself, she had not fully understood what should be included in a witness statement. We sought to deal with this this issue in a practical and pragmatic way.

6. We referred the parties to the grievance which the claimant had submitted on the 18th July 2018. This was a fairly detailed grievance in which the claimant set out her complaints about everything which had occurred up until that point. The claimant confirmed to that absolutely everything she wanted to complain about up until that point was contained in the grievance.

7. We observed that the claimant was off sick at the time she submitted her grievance and she did not return to work prior to her resignation. The only matter which the claimant wished to complain about after the submission of the grievance was the alleged failure to deal with the grievance itself and a related complaint of a failure to deal with the grievance appeal. Those matters effectively spoke for themselves.

8. We therefore suggested the claimant's grievance should be considered as an extension of her witness statement and part of her witness evidence for this hearing. Both parties said that they would be happy with that approach and so we proceeded on that basis.

9. The respondent provided witness statements on behalf of Angela Maclaren an HR Specialist and Kelly Richardson a Deputy Manager. Kelly Richardson had only worked for the respondent (in the same care home as the claimant) between January 2018 and August 2018. She attended the Tribunal under a Witness Order. The respondent also obtained Witness Orders in respect of two further witnesses, these were Michelle Middleton-Price the former General Manager who had worked at the same care home as the claimant and Jane Masterson the former Regional Director who dealt with the claimant's grievance.

10. Ms Middleton-Price did not attend the Tribunal even though a Witness Order had been issued requiring her to do so.

11. Ms Masterson attended the Tribunal although she had not prepared a statement. We gave Mr. O'Hare permission to ask questions by way of examination in chief for that witness and this worked without any issues.

All the respondent's witnesses who gave evidence were cross examined effectively by the claimant.

The issues

12. The issues in the claim were agreed by both parties at the outset of the hearing to be accurately set out in the case management order prepared by Judge Flood following the preliminary hearing on the 18th June 2020. The liability issues are therefore as follows.

1. **Time limits**

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 7 February 2019 may not have been brought in time.

1.2 Were the discrimination and harassment complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

(a) Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
(b) If not, was there conduct extending over a period?
(c) If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

(d) If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

(i) Why were the complaints not made to the Tribunal in time?

(ii) In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

2.1 Was the claimant dismissed, i.e.:

(a) Was the conduct of the respondent a fundamental breach of the contract of employment in that without reasonable and proper cause, they conducted themselves in a manner calculated, or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant? The Tribunal will decide:

(i) whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
(ii) whether it had reasonable and proper cause for doing so.

(b) If so, did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

(c) If not, did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

(d) The conduct the claimant relies on as breaching the trust and confidence term is:-

(i) In June 2018, alleged unfair criticism of the nursing staff by the General Manager in relation to the loss of an NHS Contract in the presence of a Romanian Nurse.

(ii) An error made by the General Manager in relation to the assessment of a newly admitted service user, which caused extra work for the Claimant and other care staff, and, in particular, the attitude of the General Manager when this concern was brought to her attention by the claimant. The claimant alleges that the error was compounded by the General Manager's attitude and she had not followed the Nursing and Midwifery Council of Professional Standards Code and had denied accountability;

(iii) The refusal of the Deputy Manager to provide the claimant with any advice or assistance in relation to the decision whether to transfer a service user to hospital or remain in the care home;

(iv) Despite the fact that the claimant reported the need for help for the nurses working alone for 29 service users on the first floor, management did not respond by assessing the situation or provide any help or support. This meant that the claimant believed that the care for service users was not meeting the Nursing and Midwifery Council of Professional Standards Code which requires staff to work together and co-operate. These matters were raised in May-July 2018.

(v) "Foreign" nurses were allocated most of the time on the busiest floor (i.e. the first floor) where the high dependency service users are situated, which was a very stressful environment and requests for help were ignored so that it was also inadequately staffed.

(vi) Public humiliation of the claimant at a Nurses Meeting on 6th July 2018 when the claimant tried to obtain management support in getting care staff to take responsibility for completing food and fluid charts and

the General Manager stated that it was the claimant's responsibility, using words such as "do you understand me" and/or "is it clear". It is alleged by the Claimant that this response was a continuation of the lack of support which reflected upon her professional standards and caused her to fear serious consequences.

(vii) The dismissive attitude of the General Manager when the Claimant attempted to give her opinion regarding the proposal to promote one of the existing carers to be a senior carer.

(viii) Other violations of the Nursing and Midwifery Professional Standards Code on the part of the management of the care home. The claimant says the following incidents compromised her duty to uphold professional standards (described in Section 6 in "Duties and Responsibilities" part of her "Job Description & Person Specification" document which says: "Comply with the NMC Code all the time". Section 3 in "Prioritise People" chapter of the Code says: "Make sure that people's physical, social and psychological needs are assessed and responded to:

a. Incident involving Ms. K. Richardson being unable to catheterize Mrs M. and records not indicating the lack of nurse's competence to perform the task in the first place (Breach of the Code, Section 10: "Keep clear and accurate records relevant to your practice." (page 4 of claimant's grievance)
b. Incident involving "Mr Y", when his highly specialized appointments with Vascular Team and Diabetic Foot Clinic were missed (Breach of Code, chapter "Practice": "You assess the need and deliver or advise on treatment, or give help (including preventative or rehabilitative care without too much delay and to the best of your abilities, on the basis of the best evidence available and best practice". (page 4 of claimant's grievance)
c. Admission of resident "Mr X" and Ms K Richardson failing to deal with claimant's concerns on force feeding and assist (Alleged breach of the Code: Chapter 16.2 "Preserve Safety": "Raise your concerns immediately if you are being asked to practise beyond your role, experience and training." Section 8.4 of the Chapter "Practice" "Work with colleagues to preserve the safety of those receiving care". Section 13.3 - "Ask for help from a suitably qualified and experienced healthcare professional to carry out any action or procedure

that is beyond the limits of your competence". (page 3 of claimant's grievance)

d. Breach of privacy at nursing staff meeting on 6th July 2018 by disclosing the details of an ongoing investigation involving a colleagues (Breach of Section 8.7 of the Code: "Be supportive of colleagues who are encountering health or performance problems".

e. Failure to deal with grievance and appeal – Breach of sections 25, 25.1 and 25.2 of the Code: "Provide leadership to make sure that people's well-being is protected and to improve their experiences of the health system" and "identify priorities, manage time, staff and resources effectively and deal with risk to make sure the quality of care or service you deliver is maintained and improved, putting the needs of those receiving care or services first" and Section 25.2: "support any staff you may be responsible for to follow the Code at all times. They must have the knowledge, skills and competence for safe practice and understand how to raise any concerns linked to any circumstances where the Code is or could be broken".

(e) If the claimant was dismissed, the respondent relies upon "conduct" as the principal reason for dismissal and contends that it was a potentially fair one, so the Tribunal will need to determine whether the dismissal was fair or unfair in accordance with the Employment Rights Act 1996 Section 98 (4), and, in particular, whether the respondent in all respects acted within the so called "band of reasonable responses"?

3. EQA, section 13: direct discrimination because of race.

3.1 Has the respondent subjected the claimant to the following treatment (all of which took place between February and 10 July 2018)?

(a) The allocation of the claimant and other "foreign" nurses as described in paragraph 2.1(d)(v) above. The claimant's comparator is Bethany Stannard and/or "Donna".

(b) The Deputy Manager failed to provide any hands on support or help to the claimant (and other Eastern European Nurses) when they were working on the First Floor. The claimant's comparator is Bethany Stannard.

(c) The dismissive attitude of the General Manager as set out in paragraph 2.1(d)(vi) above. The claimant's comparator is Bethany Stannard and/or "Donna".

(d) The dismissive attitude of the General Manager when the claimant attempted to give her opinion regarding the proposal to promote one of the existing carers to be a senior carer as set out in paragraph 2.1(d)(vii). The claimant relies upon a hypothetical comparator.

3.2 Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

3.3 If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?

4. EQA, 2010 section 26: harassment related to race.

4.1 Did the respondent engage in conduct as follows:

(a) The claimant relies upon the conduct described in paragraph 2.1 (d)(i) and paragraph 2.1(d)(vi) as set out above.

4.2 If so was that conduct unwanted?

4.3 If so, did it relate to the protected characteristic of race?

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

The law to be applied to the above issues

Time limits in relation to the Equality Act claims

13. Section 123 Equality Act 2010 states:

123 Time limits
(1) Subject to sections 140A and 140B, 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.
. . .
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the e the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(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
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

14. We remind ourselves that the just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. We should take into account any relevant factor.

15. Although the tribunal has a wide discretion it is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit. There is no presumption that the Tribunal should exercise the discretion in favour of the claimant. It is the exception rather than the rule. These principles were clearly expressed in the case of Robertson v Bexley Community Centre 2003 IRLR 434:

> *"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."*

16. There is no requirement that a tribunal must be satisfied that there is good reason for a delay in bringing proceedings. However, whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal should have regard. See Abertawe Bro Morgannwa University Local Health Board v Morgan [2018] IRLR 1050.

17. A list of relevant factors which may (not must) be taken into account are set out in British Coal Corporation v Keeble [1997] IRLR 336 derived from section 33(3) of the Limitation Act 1980, which deals with discretionary exclusion of the time limit for actions in respect of personal injuries or death. Those factors are: the length and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by it; the extent to which the respondent had cooperated with requests for information; the promptness with which a claimant acted once aware of facts giving rise to the cause of action; and steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

The Equality Act claims

18. Firstly, we must bear in mind the burden of proof provisions of the Equality Act 2010 ("EA"). Section 136(2) Equality Act 2010 sets out the applicable provision as follows: "*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".* Section 136(3) then states as follows: *"but subsection (2) does not apply if A shows that A did not contravene the provision".*

19. These provisions enable the employment tribunal to go through a two-stage process in respect of the evidence. The first stage requires the claimant to prove facts from which the tribunal could conclude that the respondent has committed an unlawful act of discrimination, absent any other explanation.

20. The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that he did not commit the unlawful act.

21. That two stage approach has been settled since the case of Igen Ltd v Wong [2005] IRLR 258.

22. It is well established that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate the possibility of discrimination. They are not, without something more, sufficient material from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination. These principles are most clearly expressed in the case of Madarassy v Nomura International plc 2007 [IRLR] 246.

23. In addition to the above case law has shown that mere proof that an employer has behaved unreasonably or unfairly would not by itself trigger the transfer of the burden of proof, let alone prove discrimination (see in particular the case of Bahl v The Law Society and others [2004] IRLR 799).

24. The claimant's direct discrimination claim falls under section 13 EA which provides that*: "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".* For the claimant's claim she relied on the protected characteristic of race and in particular her Polish nationality.

25. Regarding the claim of harassment section 26 EA states as follows:

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

26. In GMB v Henderson [2017] IRLR 340, the Court of Appeal suggested that deciding whether the unwanted conduct "relates to" the protected characteristic will require a "consideration of the mental processes of the putative harasser".

27. The test as to whether conduct has the relevant effect is not subjective. Conduct is not to be treated, for instance, as violating a complainant's dignity merely because she thinks it does. It must be conduct which could reasonably be considered as having that effect. However, the tribunal is obliged to take the complainant's perception into account in making that assessment.

The constructive dismissal claim

28. The fundamental questions which we must ask ourselves have been settled since the case of Western Excavating Ltd v Sharp [1978] 1 All ER 713. They are as follows:

(i) Did the respondent breach a fundamental term of the contract?
(ii) Did the claimant resign in response to the breach?
(iii) Did the claimant delay too long before resigning, thereby affirming the contract?

29. In this case the claimant relies on an allegation that the Respondent breached the implied term of trust and confidence. The concept of the duty of trust and confidence was clearly set out in Mahmud v Bank of Credit and Commerce International SA [1997] IRLR 462. The contractual term was described there as follows: “The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”.

30. More recent case law has clarified that it is not necessary for the employer to act in a way which is both calculated and likely to destroy the relationship of trust and confidence, instead either requirement need only be satisfied – see Baldwin v Brighton & Hove City Council [2007] IRLR 232.

31. The claimant argues that there was a series of acts making up the breach of the implied term. The question for the tribunal will therefore be “does the cumulative series of acts taken together amount to a breach of the implied term?” (Lewis v Motorworld Garages Ltd [1985] IRLR 465, per Glidewell LJ).

32. In cases where a series of acts is relied upon the tribunal must consider the “last straw” which caused the Claimant to resign. The last straw must not be an innocuous act – it must be something which goes towards the breach of the implied term (see London Borough of Waltham Forest v Omilaju [2005] ICR 481).

Findings of fact

33. The clamant is a highly experienced nurse having worked in nursing for around 30 years.

34. The respondent is one of the largest independent care providers in the UK. They provide nursing care mainly to older people but have recently expanded their care provision across different client groups.

35. The claimant was employed by the respondent as a registered general

nurse at the Mount House care home from 12 August 2005 until her resignation with effect from 1st March 2019.

36. The first 12 years or so of the claimant's employment seemed to us to have been uneventful and we concluded from the fact the claimant stayed at the home for so long that she enjoyed her time working over that period. However, things began to change from around Summer 2017. At that time the care home lost its' long- term General Manager and a new Manager, Mr. Stubbs, took over. There then appears to have been a period where there was quite a turnover of managerial staff and there were some challenging times at the care home. Mr. Stubbs left after only a few months.

37. In around May 2018 Ms Middleton-Price was appointed to become the General Manager working alongside Kelly Richardson the Deputy Manager who was also quite new in her post having only been appointed in January 2018.

38. It seems clear to us that Ms Middleton-Price was aiming to turn the care home around after what had been a difficult period. There were plainly a number of problems in the care home. These were exemplified by the fact that the home had lost an NHS contract due to a complaint concerning a resident who had been left dehydrated and then died after being admitted to hospital. The care home also had issues with the CQC who had assessed the home as requiring improvements.

39. In consequence of those sorts of problems Ms Middleton-Price saw it as her responsibility to change the culture in the home so that improvements could be made. We have taken our finding about that from the notes of the nurses meeting which was held on 6th July 2018 when Ms Middleton-Price outlined her vision and said that the old culture needed to be changed.

40. We think Ms Middleton-Price could fairly be described as strong and forthright in her approach. This is apparent from the contemporaneous evidence such as the notes of the meeting of 6 July and our overall impression from the evidence. However, we did not conclude that her managerial style was in any way inappropriate.

41. As far as the claimant was concerned matters came to a head at that nurses meeting on the 6th July 2018. No doubt in recognition of her knowledge and experience the claimant had been nominated by her nursing colleagues to speak on their behalf at the meeting and voice some concerns. A particular issue which the claimant raised was about a lack of structure, and she identified a specific point about a lack of information being placed on the charts.

42. Ms Middleton-Price responded to those concerns and in her response to the claimant she emphasised that it was in fact the nurses' responsibility to make sure that the charts were properly updated. She did not single the claimant out for criticism; it was instead a general point that this was the nurses' responsibility. Nevertheless, the claimant was aggrieved about the way in which Ms Middleton-Price responded to her raising the

concerns.

43. The claimant went off sick shortly after the meeting. On the 7th July she was signed off with migraine, sickness and high blood pressure but this later changed to being signed off for work related stress.

44. The claimant then submitted a grievance on the 18th July 2018. This was a detailed grievance. The claimant made it clear from the start of her grievance that she was complaining primarily about the management style of Ms Middleton-Price and Kelly Richardson. She believed their style was having a negative effect on the welfare of the employees and residents. The claimant raised a number of concerns about their management and also suggested that their treatment of British nurses was different to their treatment of foreign nurses. The respondent did not deal with the claimant's grievance as promptly as they should have. However, the claimant was contacted to explain the delay and apologise for it.

45. On the 3rd August the respondent wrote to the claimant to say that her grievance had been received and they were in the process of making arrangements for a hearing. The claimant was then written to again on the 20th August to apologise for the delay. The reason that was given for the delay was operational requirements and pre-booked annual leave. As a result of those matters the respondent said they had not been able to arrange a hearing date.

46. On the 5th September the respondent wrote to the claimant to confirm that Jane Masterson would hear her grievance on the 10th September. The claimant then attended the meeting with Jane Masterson on the 10th September. This was in our view a detailed and through meeting in which the claimant was asked appropriate questions and given a proper opportunity to provide further details and information about her grievance complaints. However, again, following the meeting the respondent did not issue an outcome as promptly as they should have done. However, they again wrote to the claimant to explain the delay.

47. In particular on the 24th October the respondent wrote to the claimant apologising and explaining that the letter containing the grievance outcome would be issued shortly. The respondent then sent the claimant the grievance outcome on the 15th November 2018 and in our view that outcome was appropriately detailed and thorough. In our judgement it engaged with all the key points which the claimant had raised and it was obvious both from the content of the outcome letter and from Ms Masterson's evidence before us that she had done a significant amount of investigation into the issues raised by the claimant and had attempted to address all of the issues which the claimant wanted to complain about.

48. The overall conclusion on the grievance was that it was not upheld.

49. The claimant appealed the grievance outcome by letter dated 20th November 2018. The respondent initially responded to the appeal promptly. In particular they wrote to the claimant on the 29th November to invite her to attend a grievance appeal meeting on the 6th December. The claimant attended that meeting. Again, the meeting was detailed and it

addressed all the key points which the claimant had raised on her appeal. In our judgement the claimant had an appropriate opportunity to explain and expand upon her appeal points.

50. We should note at this juncture that the claimant had returned from Poland to attend her grievance appeal hearing. The claimant told us, and we accept, that she had in fact moved back to Poland in October 2018. Other than attending the grievance appeal hearing we understand the claimant did not then return to the UK until 2020. The claimant told us, and we accept, that whilst in Poland she was looking after her elderly parents.

51. The person dealing with the claimant's appeal was Angela Bradford, who was a Senior Regional Director. By the 15th January 2019 Angela Bradford had not completed the grievance appeal outcome. However, the respondent's HR records which we accept are a contemporaneous and accurate record of events show that on the 15th January Angela Bradford asked HR to contact the claimant to inform her that Ms Middleton-Price had now left her employment with the respondent. This was significant because what it meant was that the two people the claimant had specifically complained about - Kelly Richardson and Michelle Middleton-Price - had now left. In light of that Angela Bradford asked HR to contact the claimant to see if this would enable the claimant to return to work.

52. Angela Bradford asked for her view to be passed on that she did not want the claimant to leave and would be happy for her to return to her post as a nurse. Regrettably we should record that by this stage the claimant was still off sick but she had not been submitting sick notes as she was in Poland and there appears to us to have been an almost complete breakdown in communication between the parties. The situation had been allowed to drift and so the circumstances of the claimant's absence and whether she was going to return to work were uncertain.

53. Against that background Angela Bradford's decision to contact the claimant to see if she was now willing to return in light of the management changes strikes us as pragmatic and potentially effective way of dealing with things. After all, the claimant was somebody who had had some 12 years good employment with the respondent and it was only in the last few months of her working in the care home that things started to go wrong.

54. HR contacted the claimant on the 25th January to inform her of what Angela Bradford had said. The claimant told HR that she was still in Poland and was not well enough to return to work.

55. We have to observe that the claimant's assertion that she was at this stage too ill to attend work has not been substantiated with any medical evidence. As we have said the claimant had stopped submitting sick notes as she had returned to Poland. The last medical evidence which we have is the hospital discharge card which the claimant was given in Poland following a visit to a hospital on the 11th December 2018. What that record says is that the claimant had been tested for pneumonia but that test had come back negative. The record states that the claimant was in a generally good state of health and she was discharged on the same day.

56. The claimant was asked to make contact with HR to advise if she was returning to work or resigning. The claimant then had a further conversation with HR on the 1st February 2019 in which she confirmed that she was resigning. What she informed HR was that she was staying in Poland to look after her elderly parents. She also said that in the circumstances she considered her grievance closed. We have made our findings of what the claimant said on the basis of the respondent's HR records which we consider is the most accurate and reliable evidence which we have before us. There was no evidence presented to us to suggest that these contemporaneous records might be in any way inaccurate.

57. In light of the fact that the claimant had resigned and informed HR that she considered her grievance closed we consider that that is the most likely explanation as to why the respondent did not in fact issue any grievance appeal outcome.

58. Around the same time as the claimant had her conversation with HR at the beginning of February, she submitted her resignation letter. We found this to be a significant document. What that letter records is that the claimant was resigning for circumstances beyond her control. She did not suggest that she was resigning because of any conduct on the part of the respondent. In particular she did not allege that she was being forced to resign because of the respondent's failure to deal with her grievance appeal properly which we understand is the last straw she now relies upon.

59. In fact, in her resignation letter the claimant spoke very warmly and positively about the respondent. She said that she would like to extend her gratitude for all the opportunities and experience which she had been afforded and she said it was only after careful consideration that she had come to the decision to resign. In our judgement this letter is entirely consistent with the information and the explanation which the claimant had given HR. In other words, it is entirely consistent with the evidence which shows that the claimant was resigning for her own personal reasons i.e., to stay in Poland and look after her elderly parents rather than because of any reason relating to the respondent's conduct.

60. The resignation letter is to our mind inconsistent with the claimant's case before us that she was in effect being forced to resign because of the respondent's poor conduct.

61. We therefore concluded that the real reason why the claimant resigned was to stay in Poland and look after her elderly parents. It was not because of any conduct on behalf of the respondent.

62. The claimant resigned on notice and her effective date of termination was the 1st March 2019.

Conclusions

63. We now turn to our conclusions on the issues which we have to determine.

64. Firstly, we have to consider the question of time limits. The situation is that the allegations which happened before 7th February 2019 are out of time. This means that all of the claimant's claims under the Equality Act are out of time. The claimant did not present any reason as to why the complaints were not made in time or why it may be just and equitable to extend time. We did not consider that there was any proper basis on which we could conclude that it would be just equitable to extend time in the circumstances. In summary it seemed to us that these were complaints that the claimant could and should have brought earlier and we would therefore conclude that the tribunal does not have jurisdiction to deal with those complaints. Nevertheless because of the overlap between the discrimination complaints and the constructive dismissal complaints we have decided to consider and reach conclusions on all the claims which are before us so the claimant can fully understand our decision-making process.

65. We turn now to the specific allegations made by the claimant. These are set out in Paragraph 2.1 of the Order made by Employment Judge Flood, beginning at point (d). We will take each allegation in turn.

66. The first allegation is that in June 2018 the nursing staff were criticised by the General Manager in relation to the loss of the NHS contract. There was very little evidence presented to us about the nature of this incident. However it seems clear, and we find, that the General Manager was not making any specific criticism of the claimant but was instead raising her concerns generally about the performance of the nursing staff in light of the fact that the NHS contract had been lost. It was to our mind perfectly reasonable for the Manager to express those concerns in light of the problems which clearly existed in the home at that time. In those circumstances we cannot see how this matter can succeed either as an incident going towards breach of the implied term or as an act of harassment related to race.

67. We did not make any findings of fact from which we could conclude that this incident was in any way related to race. In fact, because it was a concern raised generally about the nursing staff we do not see how it could possibly be an act of harassment related to race since the nursing staff included both British nurses and Eastern European nurses. We emphasise our finding that the claimant was not being singled out in any way. Similarly, we do not think this was a matter going toward a breach of the implied term as the Manager was raising what we consider to be valid and reasonable concerns in light of the fact there were clearly problems within the care home as demonstrated by the loss of the NHS contract.

68. The second matter relied upon by the claimant is an alleged error made by the General Manager in relation to the assessment of a newly admitted service user. We understand that this relates to a service user who had difficulties feeding. The claimant's case is that those difficulties were so serious this particular service user should never have been admitted and that error in assessment created extra work for the claimant. The claimant alleges that the error was compounded by the General Manager's attitude and that she denied accountability for the error.

69. We have not been provided with any evidence which could possibly lead us to conclude that the General Manager made an error in relation to an assessment. In particular we do not have any evidence of the assessment which was carried out or of the particular medical needs of the service user or any cogent evidence as to why those needs meant it was inappropriate for him to be admitted.

70. The most that we can conclude is that there was a difference in professional opinion between the claimant and the General Manager over whether this service user should have been admitted. In those circumstances we cannot conclude that this is a matter which might go towards breach of the implied term of the claimant's employment contract. In our judgement this was at most a difference of opinion and there was no basis for the claimant to suggest that the General Manager should in some way been held accountable for an assessment error or creating extra work.

71. The third matter relied upon by the claimant is an alleged refusal by the Deputy Manager to provide the claimant with advice or assistance in relation to a decision over whether to transfer a service user to hospital or to remain in the care home. Again, we have very little evidence to substantiate this allegation. It is unclear on the basis of the evidence provided to us when this incident is alleged to have taken place or what the circumstances were.

72. We do not think it was explicitly suggested to Ms Richardson that she had refused to provide advice but it did become clear during the course of Ms Richardson's evidence that she had emphasised in her dealings with the claimant that it was part of the claimant's professional responsibility as a nurse to take clinical and other decisions such as this herself. The claimant did not disagree with that evidence.

73. We are entirely satisfied from Ms Richardson's evidence, which we found to be cogent, credible and compelling for reasons which we shall explain in a moment, that she would not have refused assistance on any particular decision which the claimant had to make but rather she would have emphasised that it was the claimant's responsibility ultimately as a treating nurse to take these sorts of decisions. This was an accurate and fair reflection of the claimant's professional responsibilities. In those circumstances we cannot see how the reaction of Ms Richardson could be a matter going towards a breach of the implied term in the claimant's employment contract.

74. The fourth allegation relied upon by the claimant relates to her allegedly reporting the need for help for nurses working alone on the first floor of the respondent's care home. The claimant asserts that management did not respond by assessing the situation or providing any help or support, Again, there is very little evidence presented by the claimant to substantiate this allegation. In particular it is unclear when the claimant reported the need for help or who she reported it to or what the circumstances were.

75. What we find striking and significant is that in the meeting of the 6th July 2018 Ms Middleton-Price raised how the nursing staff were going to be split between the two floors. The claimant did not raise any concerns about a need for help from nurses working on the first floor and neither did any of the other nurses present at that meeting.

76. We cannot conclude on the evidence presented to us that the claimant ever reported a need for help which was ignored. The claimant's case on this point appeared to be based on her belief that the first floor was busier than the ground floor but for reasons which we will explain a little later we do not accept that. In those circumstances we conclude that this cannot be a matter going towards a breach of the implied term in the claimant's employment contract.

77. The fifth incident relied upon by the claimant is an allegation that the foreign nurses were allocated most of the time on the busiest floor which was the first floor, whereas British nurses were generally allocated to what the claimant believes was the less busy floor which was the ground floor.

78. Again, it is striking that this allegation was not raised by anyone in the meeting of 6th July when the allocation to floors was specifically addressed by Michelle Middleton-Price.

79. In assessing this allegation, we paid particular regard to Kelly Richardson's evidence. In the Tribunal's Judgement Kelly Richardson's evidence was highly credible. She was only employed by the respondent for a period of about half a year and it seemed to us that she had no need to either support the claimant or to support the respondent. We felt she could properly be regarded as an independent and neutral witness - she had simply attended the Tribunal to give her evidence as best as she could remember it.

80. We noted there were a number of specific matters which the claimant asked her about where Ms Richardson answered that she could not recall the specific detail of the incident which the claimant has referred to. We found that to be unsurprising given the short duration of Ms Richardson's employment with the respondent and how long ago it was. However, we observed that it would have been quite easy for Ms Richardson to say that she did remember so that she could specifically deny the allegations the claimant was making. Instead, she told the truth and simply said she couldn't remember but did her best to explain to the Tribunal what she believed she would have done in the circumstances. In our judgement this made her evidence all the more impressive and credible.

81. We therefore take Ms Richardson's evidence as the best evidence that we have as to the nature of the working environment in the care home at the relevant time. What Ms Richardson told us and what we accept is that the first floor was not busier than the ground floor. Instead, the floors were equally split in terms of the dependency levels of the service users situated on each floor. What Ms Richardson told us, however, was that the first floor was less openly set out than the ground floor and it had smaller corridors and rooms. This may have led to the perception that it was a busier floor. We concluded that it was this difference in layout

which led to the perception which was held by the claimant that the first floor was busier.

82. Ms Richardson also gave evidence that in the period that she was employed at the care home it was not the case that foreign nurses were mainly allocated the first floor and British nurses were mainly allocated to the ground floor. Instead, her evidence was that British and Foreign nurses worked on each floor approximately on an equal split. Even in the claimant's own evidence she accepted that there were occasions where she and other foreign nurses had worked on the ground floor.

83. We again accepted Ms Richardson's evidence as being the most credible evidence which we have before us and we concluded that foreign nurses were not allocated most of the time on the first floor and British nurses were not allocated most of the time on the ground floor. Rather the allocation was roughly equal.

84. In those circumstances we cannot conclude that the allocation to floors was a matter going towards breach of the implied term.

85. Moreover, the claimant had not proved any facts from which we could possibly decide that the claimant's treatment in relation to floor allocation was because of race.

86. A further allegation of direct race discrimination was made against Kelly Richardson in that she had failed to provide any support to the claimant and other Eastern European nurses when they were working on the first floor. There was no evidence presented to us of any specific occasions when this was have meant to have occurred. It was a very broad and general allegation.

87. We do not accept that the factual allegation is made out. We accept Ms Richardson's evidence to the effect that she did not treat the foreign nurses any differently from the British nurses. We emphasise our findings about Ms Richardson's credibility as set out above. We have also taken into account the evidence from the claimant's 2 witnesses but we think that their perception was wrong in the same way as the claimant's. Again, their view of things seemed to be heavily influenced by the impression of the first floor being busier which we do not accept. We refer to our earlier finding as to how the misperception of the first floor being busier came about.

88. Finally, on the issue of floor allocation we should note that at the meeting on 6th July 2018 Michelle Middleton-Price explained the decision that she had made as the allocation of the flooring. In particular she explained that each nurse would be allocated to a team and that each team would work on one floor for six months and then swap over after that period. The claimant asserts that she and two other foreign nurses were placed in the team which would work on the first floor for the first six months. The claimant believes this supports her allegations of race discrimination. We do not agree.

89. We firstly have to take into account that there were only two British nurses

working at this care home at that particular time. It is therefore not particularly surprising that one team did not include any British nurses. Moreover, the crucial evidence it seems to us is that the nursing teams would swap over after six months. The clear intention was for the claimant and the other Eastern European nurses on her team to work on the ground floor for a six month period after they had spent six months on the first floor. The system being proposed by Ms Middleton-Price therefore meant that the nursing staff would spend an equal amount of time on each floor after one year.

90. In those circumstances we cannot see how we could conclude that there was any race discrimination at play in the allocation of nursing staff to floors. We do note and take into account that the claimant told us that she did not believe that the teams would be swapped around as promised after six months. However, we did not see any basis on which the claimant could reasonably had reached that conclusion given that she stopped attending work long before the swap was due to take place.

91. The sixth allegation raised by the claimant is that she was publicly humiliated at the nurses meeting on the 6th July 2018 when she raised the issue about completing the charts. The claimant's allegation is that the General Manager stated that it was the claimant's responsibility and that she used words such as "do you understand me" and "is it clear".

92. It seems obvious to us from the notes of the meeting that the General Manager regarded it as the nurses' responsibility for the charts to be filled in. We would accept that she delivered that message in a strong and forthright manner however we do not think that her manner was in any inappropriate. She was simply delivering her message strongly and firmly in light of the fact that she was determined to change the culture at the care home. This approach was in our judgement consistent with the overall message and vision for the care home which Ms Middleton Price outlined at that meeting. This was to the effect that the old ways of working needed to change and staff needed to take more responsibility for their actions.

93. Crucially, there is absolutely no evidence to suggest that it was ever suggested at the meeting of 6 July that the claimant was personally at fault or that it was her responsibility. It is clear from the notes of the meeting, and we find, that the claimant was not singled out in any way.

94. In those circumstances we do not find that the claimant was publicly humiliated and we do not therefore think this allegation can succeed on the facts we have found. It was not in our judgement a matter which could go towards a breach of the implied term.

95. The claimant further alleged that the approach of Ms Middleton-Price at this meeting demonstrated a lack of support. We do not agree. What Ms Middleton-Price was emphasising was that the nurses needed to take responsibility for their own actions and this was plainly part of her plan to turn the care home around.

96. We saw absolutely no evidence from which we could conclude that what

Ms Middleton-Price was saying was either because of race or related to race. Again, it appears to us to be significant that Ms Middleton-Price was not singling the claimant or any particular nurses out, rather what she was doing was conveying a general message that the nurses as a whole needed to change their ways. As we have said the cohort of nurses at this stage included two British nurses and they were included within the group who Ms Middleton Price was saying needed to improve. The claimant has not proved any facts from which we could infer race discrimination or harassment.

97. The seventh allegation relied upon by the claimant is what she describes as the dismissive attitude of the General Manager. This allegation relates to an occasion when the claimant attempted to give her opinion regarding a decision to promote an existing Carer to be a Senior Carer. The claimant disagreed with the decision to promote which had been made by Ms Middleton-Price and she sought to give Ms Middleton-Price her opinion on the matter. In response the claimant told us, and we accept, that Ms Middleton-Price made it clear that it was her decision to make and not the claimant's.

98. The claimant believed that as a senior member of the nursing staff she should have been consulted about this promotion. We disagree with that assertion. In our judgement it was plainly within the General Manager's gift to make the decision on promotion. She was not under any obligation to consult with the claimant or indeed any other member of nursing staff and we consider that there may well have been good managerial reasons why she decided not to do so. We do not therefore think Ms Middleton Price's attitude can properly be described as dismissive; she was referring to the fact that the decision on promotion was her responsibility as General Manger.

99. Moreover, at the time the claimant gave her view the decision had already been made. We consider the General Manager was plainly right to inform the claimant that it was her decision to make and we see nothing inappropriate about her telling the claimant that in a forthright manner given that the claimant was attempting to give her view on a decision which had in fact already been made.

100. In those circumstances we do not see how a failure to take into account the claimant's views after the promotion can be said to be a matter going towards a breach of the implied term.

101. The claimant also complained that this was an act of direct race discrimination, but we did not make any findings from which we could possibly conclude that the General Manager's actions were because of race. It was relevant that the claimant's evidence before us was that other British members of staff were similarly disappointed and disagreed with this particular promotion but their concerns were also not taken into account. It therefore seems to us that that Ms Middleton-Price had in fact treated British and Non-British staff the same.

102. The eighth allegation relied upon by the claimant comprises five alleged failures on part of the respondent to comply with the Nursing and

Midwifery Professional Standards Code. We shall consider each one in turn.

103. The first incident concerned an allegation that Ms Richardson had been unable to catheterise a service user. When she was asked about this Ms Richardson made it clear she could not remember the specific incident but she was a highly trained nurse having originally been trained in the military and then rising to a managerial position. Her evidence, which we accept, was that she was well used to catheterising patients and it would be very unlikely that she would have been unable to perform a catheterisation. She also said and we also accept that if she had had a problem with catheterising a patient she would have reported it and obtained support to make sure the patient was properly catheterised as if they weren't this could lead to serious health problems. We therefore did not accept the claimant's evidence that Ms Richardson was responsible for a failure to catheterise this patient.

104. We also note that it is surprising that there is no evidence that the claimant raised this concern at the time. Rather she only raised it for the first time in her grievance several weeks later. We consider that if the claimant had genuinely believed that a patient had not been catheterised correctly she would have raised it and recorded it at the time.

105. We therefore concluded on the evidence before us that Ms Richardson had not been unable to catheterise a service user. There was nothing in the evidence which could lead us to conclude that the respondent had failed to comply with the code. There was nothing from which we could conclude that the respondent had acted in such a way as to constitute a breach of the implied term.

106. The second incident relied upon the claimant involved another service user where the claimant realised that he had missed his medical appointments. The claimant was concerned about that as the medical appointments were important. She placed the blame on the staff who were looking after the patient at the time that the service user missed the appointments. The claimant suggested that they were in effect responsible for the patient not having attended.

107. On the evidence which we have before us we concluded that the service user did not attend his medical appointments. However, the reason why he did not attend them was because he did not want to. In circumstances where a patient has capacity and decides that he does not want to attend an appointment the respondent is not able to force them to attend even if they consider that it is in their best interest to do so.

108. The claimant agreed before us that the patient in this case did not lack capacity and had not been assessed to lack capacity. Her evidence was that she had concerns over the patient's capacity and felt that he may have been wrongly assessed. However, in the absence of any proper assessment that the patient lacked capacity it seems clear to us that there is no basis for the suggestion that the respondent could have forced the claimant to attend these appointments. We do not there think that the staff looking after this service user can be said to have done anything wrong.

The respondent did not on our findings breach the code. We therefore conclude that this is not a matter which can possibly go to a breach of the implied term.

109. The third matter relied upon by the claimant related to the admission of the patient who had feeding issues. However, we have already reached our conclusion to the effect that we do not find that the patient was wrongly admitted.

110. The claimant goes on to further allege that Ms Richardson failed to assist her when she raised concerns about the patient's feeding. Again, Ms Richardson could not specifically remember this incident. However, her evidence was to the effect that she would emphasise in those circumstances that it was the claimant's responsibility as the nurse to make her own clinical decisions as to what was best for the patient. The claimant did not disagree with that.

111. We do not therefore think there was any refusal by the Deputy Manager to assist but she instead emphasised that it was up to the claimant to discharge her own responsibilities.

112. In those circumstances we do not find any breach of the code and this is not a matter going towards a breach of the implied term of the claimant's employment contract.

113. The fourth allegation relied upon by the claimant was what she described as a breach of privacy at the meeting on the 6th July. This related to the General Manager disclosing the details of an investigation involving one of the claimant's colleagues following the incident where a resident had been left dehydrated and was subsequently admitted to hospital. It is clear that at this meeting the incident was discussed and the disciplinary action which had been taken against the staff member - which was dismissal - was mentioned. The name of the relevant staff member was not revealed, albeit in reality those present would have known who was being talked about as a dismissal is not something which is easy to conceal.

114. In those circumstances we cannot see how this can possibly be said to be a breach of privacy or a matter going towards breach of the implied term. Instead, it seems to us that it was entirely appropriate for the respondent to discuss this very serious incident and the actions that had been taken in response to it at a staff meeting. After all, the matter concerned a failure in patient care and safety which had led to a hospitalisation of a patient who later died. It seems clear to us that the respondent was very concerned to try and ensure that such an incident would not be repeated and transparency over what had gone wrong and what actions were taken in response was part of that.

115. The fifth and final allegation relied upon by the claimant is a failure to deal with the grievance and appeal.

116. Considering the grievance first of all. We accepted that there were delays in arranging the grievance meeting and in producing the grievance

outcome. However, the claimant was kept informed as to the reasons for those delays and apologies were offered. This was reasonable and proper. In the circumstances and in view of the fact that we did not think the length of delay was truly excessive we do not conclude that is matter which goes towards breach of the implied term.

117. In terms of the grievance hearing and the grievance outcome we have already made our findings that these were in our judgement thorough and comprehensive. We therefore conclude that there was no failure by the respondent to deal properly with the claimant's grievance.

118. We have taken into account the specific criticisms which the claimant made of the grievance decision but we do not think these were so serious as to go towards breach of the implied term. By way of example the claimant pointed out that the decision maker had got the identity of the service user who missed the appointments wrong. However, it is clear that confusion arose because the claimant had anonymised the service user's details when she submitted her grievance. This was a reasonable and proper explanation. Moreover, the conclusion which the decision maker actually reached on this issue was still sound because both the service user who the claimant was referring to and the service user referred to in the decision had capacity.

119. The claimant also complained about the decision maker's failure to interview the foreign nurses who had attended the meeting on the 6th July. What the decision maker did however was to speak to the note taker who was present at that meeting. It seemed to us that was an appropriate and reasonable decision to make as the note taker was effectively independent as a member of administrative staff who was attending the meeting only to observe and take notes. Moreover, the claimant had not asked the decision maker to interview any particular witnesses.

120. Therefore, we consider those were complaints which did not go towards a breach of the implied term. Overall, the claimant's complaints about the approach taken did not undermine our finding that the grievance was dealt with in a thorough and detailed manner.

121. Dealing finally with the appeal. We do not consider there is any valid criticism about the speed with which the respondent organised the appeal meeting or the conduct of the appeal meeting itself. We refer to our findings that the respondent acted promptly to arrange the meeting and that the meeting was appropriately detailed and through.

122. We were initially highly concerned about the failure by the respondent to provide a grievance appeal outcome to the claimant before she resigned. However, those concerns were effectively dissipated by the evidence which was produced later in the hearing of the respondent's notes on its HR system. That evidence showed that the respondent was seeking to try and deal with matters pragmatically so that the claimant could potentially return to work. In our view this could have been the best outcome for everyone.

123. It is also clear from the HR notes that the reason why the appeal

outcome was ultimately not provided is because the claimant had decided to resign and had informed the respondent that she considered the grievance closed. In those circumstances we think it was reasonable and proper for the respondent to not produce an appeal outcome. It would effectively have gone against the claimant's wishes if they had produced one. We therefore do not consider that could be a matter going towards the breach of the implied term.

124. We therefore conclude that there is nothing in relation to the respondent's handling of the grievance and the appeal which could go towards a breach of the implied term of trust and confidence.

Our overall conclusions

125. Stepping back and looking at the picture overall and cumulatively we conclude from our findings above that the respondent did not breach the implied term of trust and confidence in the claimant's employment contract.

126. Moreover, we have to point out that the claimant's constructive dismissal claim would necessarily have failed because our conclusion was that she resigned because of her decision to stay in Poland and look after her parents rather than because of any conduct on the part of the respondent.

127. As our findings above have made clear the claimant has also failed to prove any facts from which we could conclude that her treatment was because of race or was related to race or was in any way generally discriminatory.

128. We therefore must conclude that the claimant's claims of constructive dismissal, direct discrimination because of race and harassment related to race must fail and be dismissed.

129. That concludes the Tribunal's judgment.

Employment Judge Meichen

13 August 2021