EMPLOYMENT TRIBUNALS

Claimant: Ms E Donaldson-Ellison

Respondent: Parkcare Homes Ltd

Heard at: Manchester **On:** 8-12, 15 & 16 November 2021

Before: Employment Judge Phil Allen
Mr BJ McCaughey
Mrs L Heath

REPRESENTATION:

Claimant: In person
Respondent: Mr P Sangha, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent did make unlawful deductions from the claimant's wages and the respondent is ordered to pay the claimant the gross sums of:

    a. **£3,000** for bonus payments due but not made to the claimant;

    b. **£117.50** for the 2018 salary increase which was due but not paid to the claimant; and

    c. **£1,416.02** for annual leave accrued but untaken at termination of employment.

2. The claimant was entitled to the gross sum of £1,010.75 for the last week for which she worked, but the claimant's claim for unlawful deduction from wages for this amount does not succeed as she was in fact paid £2,813.27 in respect of salary, so that the sum paid exceeded the sum due. This element of the claim for unlawful deduction from wages is dismissed.

3. The respondent did breach the claimant's contract of employment by failing to reimburse the claimant for expenses which were due and accordingly is ordered to pay the claimant **£592.42** as damages arising from the breach.

4. The respondent's counterclaim to recover an overpayment (confirmed at hearing as being limited to £916.21) does not succeed and is dismissed.

5. The claimant's claims for direct age discrimination and harassment related to race and/or age do not succeed and are dismissed.

6. The claimant's claims for direct race discrimination arising from all of the allegations/events other than those specifically listed at 7 below, do not succeed and are dismissed.

The judgment of the majority of the Tribunal (Mr McCaughey dissenting) is that:

7. The claimant's claims for direct race discrimination arising from the following events recorded in the list of issues do not succeed and are dismissed: (o); (l) (as it applies to Rose Lodge and Addison Court only); (s) (in relation to the failure to carry out an appraisal in March 2018 only); and (dd) (in relation to the commitment on salary only).

REASONS

Introduction

1. The claimant was employed by the respondent, latterly as a manager, from 3 April 2017 until 17 August 2018. The claimant resigned with immediate effect. The claimant alleged that: she was treated less favourably because of her race and/or age; she was harassed related to her age and/or race; and the respondent failed to make payments due to her which amounted to unlawful deductions from wages and/or a breach of contract. The respondent brought a counterclaim for breach of contract arising from sums paid in error to the claimant after her employment ended, which had not been repaid.

Claims and Issues

2. A number of preliminary hearings were conducted in this case. At the first preliminary hearing on 4 July 2019 Employment Judge Feeney endeavoured to identify the claims which the claimant was bringing. She recorded in her case management order that the claims brought were of race and age discrimination and unlawful deductions from wages. The opportunity to provide further particulars was given. A list of the events upon which the claimant relied in her discrimination claims, which Employment Judge Feeney had identified as being brought, was included within the case management order (33). Those events are recorded as events (a) to (m) in the appended list of issues.

3. Following the first preliminary hearing, the claimant provided thee documents: a document headed "Re write of claims of ET1" (39); further and better particulars (44); and a chronology of events (49).

4. At the second preliminary hearing on 12 August 2019 Employment Judge Holmes considered in some detail the documents which the claimant had provided. His order focussed on the rewrite of the claims and the further and better particulars. In the hearing he considered whether and to what extent the documents provided contained further and better particulars of the existing claims; and whether the documents contained matters which required an application to amend to be allowed to proceed. For those where amended was required, the application was heard and considered. Following the hearing, a detailed case management order was provided (60) which addressed the two documents in detail and, with reference to each relevant paragraph, recorded: which elements of the two documents were further and better particulars of the existing claims identified; which elements required leave to amend and whether it had been granted. In respect of one paragraph only, leave was refused where leave to amend was identified as being required. The claims as amended included claims for harassment related to race and/or age.

5. The respondent had been given leave to provide an amended grounds of resistance following the second preliminary hearing, which it did on 24 December 2019 (83). A further preliminary hearing took place on 6 August 2020 before Employment Judge Feeney, but that added nothing to the identification of the issues and the case management order was not included in the bundle of documents prepared.

6. Unfortunately, prior to the start of this hearing there had not been a list of Issues prepared or agreed. At the start of this hearing this was addressed, and the parties were asked to try to agree a list of issues during the first day whilst the Tribunal was reading the statements and documents identified. An agreed list was not provided. Each of the parties provided their own list of issues. The list prepared by the respondent's representative, for the discrimination claims, recorded what had been identified by Employment Judge Feeney as being the issues in her case management order, followed by the events/claims which had been identified by Employment Judge Holmes as being the new issues which required leave to amend and for which leave had been granted. The claimant's list reproduced the chronology document which she had previously prepared.

7. At the start of the second day of hearing the two lists of issues were discussed with the parties. The Tribunal identified and confirmed that (subject to one point below) the list of issues prepared by the respondent's representative identified the events and issues which needed to be determined as identified and recorded in the relevant case management orders. The claimant's chronology/list of issues did not record what had been identified as the issues in the case management orders and did not provide a list of issues for the Tribunal to consider and address. Accordingly, the Tribunal explained that it needed to commence the hearing with a single list of the identified issues to be determined, and that the list prepared by the respondent would be used for that purpose.

8. The claimant was asked to identify whether there was anything which had been omitted from the list prepared by the respondent and/or whether she disagreed with anything identified within it. The claimant identified: the comment she alleged had been made by Mrs Wilson, which it was confirmed was listed as event (b); the failure to pay her the sums due, which was identified as being recorded in a number

of the events (see (c), (h), (i), and (dd)); and a comment the claimant alleged was made by Ms Allton in a meeting in November 2017 that "*you have to be white and middle class to succeed in the Priory*". For the last of these, the Tribunal identified and noted that this was an important factual issue which the Tribunal would need to determine. However, from the case management orders, the claim form, and particulars of complaint, the rewrite document, and the further and better particulars, it did not appear that the claimant was relying upon the comment as being of itself an act of discrimination or harassment but rather it was contended that it supported her claim that she had been discriminated against because of, or subjected to harassment related to, race and/or age. It was referred to in the claimant's chronology document (51) but not in any of the documents (or parts of those documents) identified by Employment Judge Holmes as being an amendment to the claim or for which an amendment had been granted. The claimant did not disagree with what the Tribunal identified and did not apply to amend her claim or to rely upon the alleged comment as a separate act of discrimination or harassment.

9. The Tribunal identified that one issue appeared to have been omitted from the respondent's list of issues. That was the allegation contained in paragraph 2.0 of the claimant's further particulars document (44), which is recorded as allegation/event (ff) in the attached list of issues. This was discussed on the second morning of the hearing. It was noted that there was an apparent inconsistency between the terms of the recorded Judgment made following the preliminary hearing on 12 August 2019 as: at the start of the case management order (60) it recorded that the relevant paragraph was one for which amendment was required and had been granted; and the detail in the order (68) recorded that it did not appear to be a claim, but was merely evidence in support of other claims made about the attitude of Ms Allton. The Tribunal determined that it would be added to the list of issues to be determined, but also confirmed that the parties would be able to raise any arguments which they wished to in submissions about whether it was genuinely an issue to be determined/part of the claims to be decided (albeit in fact neither party did so).

10. In addition to the claims for discrimination and harassment, the claimant also brought claims for unlawful deduction from wages and/or breach of contract. The sums which the respondent believed it was contended remained outstanding and therefore were part of those claims, had been identified by the respondent in its list of issues. Those claims were also discussed with the claimant at the start of the second day of hearing and it was confirmed that they were the sums claimed. It was confirmed that some other elements of the schedule of loss (such as the entry regarding pension loss) were sums claimed but as remedy arising from the claimant's claims, and not as a separate unlawful deduction from wages and/or breach of contract claim.

11. On the second day of hearing it was also confirmed that the respondent was pursuing its counterclaim for breach of contract. The counterclaim had been pleaded as being for £1,558.27 net (arising from sums which the respondent had paid to the claimant following the termination of her employment). During the course of the hearing the amount claimed was reduced and, in a document provided on the fourth day, it was confirmed that the net overpayment which the respondent sought to recover was in fact only £916.21.

12. It was confirmed with the parties that the remedy issues would be left to be determined later, only if the claimant succeeded in her claims. Accordingly, this Judgment does not address or determine remedy issues.

13. On the fifth day of hearing, in the period between the evidence being heard from the respondent's two witnesses, the claimant reverted to addressing the list of issues and emphasised a concern that she had. She explained that one of her issues (which she felt was not listed as an issue) was that she contended she was not paid properly for each month for which she was employed from April 2017 to August 2018. She confirmed that the issue was being asserted as part of her claim for breach of contract, as well as also being part of her discrimination claims, with particular reliance placed on the comment that the claimant alleged had been made by Mrs Allton (as recorded at paragraph 8 above). At the time the issue was raised, the Tribunal explained that it could be addressed in submissions.

14. The issues identified and which the Tribunal accepted as those which it needed to determine, are recorded in the attached appendix. Where an issue/event has no specific claims recorded against it, the Tribunal understood that the claims being pursued were direct race and age discrimination, but not harassment. Where an issue/event is recorded as being one about which harassment is claimed, the harassment claimed was both age and race unless specifically recorded otherwise.

15. The claimant had originally brought her claim against the Priory Group. The respondent had pleaded that this was not a legal entity and had stated that the correct respondent was Parkcare Homes Limited, which it identified as being part of the Priory Group and being the employer confirmed on the claimant's contract of employment (178). The issue had been addressed and considered by Employment Judge Holmes at the second preliminary hearing on 12 August 2019 and the name of the respondent had been changed as a result as was recorded in an order (79). The claimant raised the issue at the start of this hearing, but after the position was explained no further application was made. However, the claimant wished it to be noted that the use of the name of which entity was her employer was inconsistent. This was noted. The claimant was entirely correct in noting this, as documents such as the offer letter (177), and payslips (546-556) recorded the Priory Group only and not the name of the respondent. The only document identified in which the name of the employing company was recorded as the respondent was the contract (178).

Procedure

16. The claimant represented herself at the hearing. Mr P Sangha, counsel, represented the respondent.

17. The hearing was listed to be conducted in-person. Shortly before the hearing, the claimant applied for the hearing to be converted to be conducted by CVP remote video technology and the respondent responded to say that it agreed. That correspondence was not considered prior to the commencement of the hearing. On the first day the hearing was conducted as a hybrid hearing, with both parties, the Employment Judge, and one of the members, present in the tribunal building, and one member of the panel attending remotely by CVP. When the conduct of the rest of the hearing was raised with the parties, the claimant confirmed her request that it be conducted purely by CVP remote video technology and the respondent did not

object, observing that it would be better for its witnesses to attend remotely due to the distance they needed to travel. Accordingly, it was agreed that the remainder of the hearing would be conducted entirely by CVP remote video technology. All attendees and witnesses attended by CVP from the start of day two and for the rest of the hearing.

18. An agreed bundle of documents was prepared in advance of the hearing. The bundle ultimately ran to 581 pages. A few additional documents were identified during the hearing and were added to the bundle when identified. Where a number is referred to in brackets in this Judgment, it is a reference to the relevant page in the bundle.

19. Witness statements had been prepared by: the claimant; Mr Donaldson Ellison (her partner who was retired but had previously run payroll systems for employers); Mrs Roberta Wilson, previously Regional Director for the respondent; and Mrs Kimberley Robinson, a Payroll Operations Team Leader for the respondent. The Tribunal read the witness statements and the documents in the bundle which were referred to in those statements. The claimant also identified a lengthy list of the pages which she asked that the Tribunal read, which was emailed to the Tribunal (as agreed) during the reading day and those documents were also read by the Tribunal. The Tribunal read only the documents to which it was directed by the parties.

20. The Tribunal heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions by the Tribunal. After her evidence was concluded, Mr Donaldson Ellison gave evidence and was also cross examined, before being asked questions by the Tribunal. Mrs Wilson and Mrs Robinson each gave evidence for the respondent, were cross examined by the claimant, and were asked questions by the Tribunal.

21. The evidence was completed during the afternoon of the fifth day of hearing. Each party confirmed that they intended to rely upon both written and verbal submissions. It was agreed that the written submissions upon which the parties wished to rely, would be sent to the other party by 9.15 am on the Monday morning, being the sixth day of the hearing. They were provided to the Tribunal at the same time, providing the Tribunal with the opportunity to review them before the oral submissions were heard. Oral submissions were heard on the morning of the sixth day of hearing. It had been agreed that each party's oral submissions would be limited to no more than an hour.

22. It is important to emphasise that the Tribunal did not hear evidence from a number of people referred to in the findings below, including most notably Ms Allton, Ms Perez and Ms Bales. The respondent called only one witness it currently employed and nobody who had any first-hand evidence of the claimant's employment prior to her move to undertake roles in Northern Ireland from November 2017. The Tribunal has reached findings on the evidence heard without having the benefit of having heard from the individuals listed or any of those within the respondent who addressed the claimant's pay at the time during 2017 or 2018. The respondent provided no explanation whatsoever for the non-attendance of other witnesses including Ms Allton.

23. Judgment was reserved and accordingly the Tribunal provides the Judgment and reasons outlined below.

Facts

24. The Priory Group provides care throughout the United Kingdom organised into three divisions: Adult Care (within which the respondent operates); Healthcare; and Education and Children's Services. The grounds of response informed the Tribunal that the wider Priory Group supports more than 30,000 adults and young people each year through a nationwide network of over 400 facilities, employing more than 20,000 people.

25. The claimant has worked in the management of nursing care for almost 40 years. She had 33 years experience as a manager. That experience included at one stage the claimant working as an owner/director of her own care company. More recently, prior to working for the respondent, the claimant had been a General Manager and the registered Care Quality Commissioned person, responsible for over seven nursing/care homes.

26. In March 2017, following the involvement of a recruitment consultant, Mr Steele, the claimant visited the respondent and met with a manager. In her evidence the claimant was keen to emphasise that this was not an interview it was simply a visit. Following this visit, the claimant was invited to an interview which was held on 20 March 2017 and was conducted by two Managing Directors from the Priory Group, Ms N Bales and Ms J Cahill. The claimant's witness statement recorded that in her interview she was asked to *"help them out by taking a slot in the company"* as a Deputy Manager, with what the claimant described as *"the enticement"* of a *"confidential"* managerial appointment in the coming months. The Tribunal was provided with some handwritten notes prepared by the claimant (195) which did not record such a commitment, but did record *"new role will not need another interview"*. No evidence was given on the respondent's behalf about what was said in the interview nor were any interview notes prepared by the respondent provided.

27. There was no dispute that the role which the claimant accepted was the role of Deputy Manager based at the respondent's Preston Private location. An offer letter was sent to the claimant on 30 March 2017 congratulating the claimant on her recent job offer for the position of Deputy Manager based at Preston Private (177). That enclosed a contract of employment (178) which stated that the job title was Deputy Manager. The contract also recorded (179) that the claimant's reference rate of pay was £18 per hour and that she would be paid in arrears directly into her nominated bank account on 21st of the month. It recorded that her normal weekly working hours were 42. It referred to further terms and conditions being contained in the employee handbook (180). The contract included a provision which said that by accepting the contract the employee authorised the company to deduct from any remuneration accrued or sums due any overpayment of pay, expenses or payments made by mistake (183). The Tribunal was not provided with a signed copy of the contract, albeit there was no dispute that those were the terms which applied to the claimant.

28. The Tribunal was provided with a copy of the Priory Group of Companies employee handbook (185). Of relevance to these proceedings, the handbook included the following:

(1) In relation to pay, *"If for any reason you have ben underpaid, the company will make up the amount in the next available pay run. If for any reason whatsoever, including mistakes of law and fact, you are overpaid, we reserve the right to adjust your future payments or make a deduction from your subsequent salary or require a repayment"* (187); and

(2) In relation to the disciplinary procedure, *"All issues will be fully investigated in the first instance. If there is case for disciplinary you will be invited to attend a disciplinary hearing. You will be provided with full written details of the allegations against you, including all documentation relevant to the case at least 5 calendar days before the hearing"* (189).

29. The Tribunal was also provided with the Priory Group of Companies' policy for colleague expenses, loans and advances (128). At paragraph 2.2 that provided that:

> *"All reasonable expenses actually and necessarily incurred while on Priory Group business will be reimbursed provided that the cost is reasonable in the circumstances and this policy has been complied with"*.

30. At 3.2 in a section headed "*Travel Expenses*" (130) it provided:

> *"Priory Group will pay the reasonable costs of necessary travel on Priory business"*.

31. At clause 3.6.2 the policy had a section relating to payments of five pence per passenger per business mile, where a colleague was transported by a colleague. The policy also included a section on accommodation (131) which stipulated the limits to the rates that would be payable for accommodation. In terms of subsistence with overnight absence, the policy included a maximum of £20 a day for lunch, evening meal and beverages.

32. It was common ground that the claimant was paid on 21st of each month for the hours worked in the period between the 10th of the previous month and the 9th of the month in which payment was made. The claimant's first payment was incorrect, the claimant was not paid for all of the hours which she worked. The claimant's partner, Mr Donaldson-Ellison, has had considerable experience in working in payroll. He, together with the claimant, identified the shortfall in the payment made. Mr Donaldson-Ellison's evidence was that this was not resolved the following month and became an ongoing issue month on month throughout the claimant's employment. Mr Donaldson-Ellison described the amounts and continuous nature of the payment issues as being something which he had never come across or experienced either professionally or personally whilst working for a wide range of diverse companies. As a result, and in order to keep track of the failures by the respondent to pay amounts due, Mr Donaldson-Ellison created a spreadsheet which recorded the wages earned in comparison to the payments made. The claimant's evidence, which the Tribunal accepts, is that the claimant was never paid the full

sums due and the issues were never resolved at any time from her first receipt of salary in April 2017 until her employment ceased in August 2018.

33. In her evidence, the claimant emphasised that she took the position of Deputy Manager with the respondent due to the career progression to Home Manager and based on the assurance she would not have to interview for a managerial role.

34. On 4 June 2017 (200) the claimant emailed Mr Steele and said, *"I would be grateful if you could find out when the plans to award me to work at a senior level are due to commence. I am looking forward to being able to do best within my new employ. As I discussed, when I accepted the deputy position I would always be compromised, yet since 3/4/2017, I have dutifully performed a deputy role, as requested".*

35. The 4 June email went on to say that the claimant would like Mr Steele to look for other senior posts in other companies.

36. The claimant's evidence was that she had had a conversation with Mr Steele between attending the interview and accepting the role with the respondent in which Mr Steele had given certain reassurances regarding the potential managerial role. There was no evidence before the Tribunal that such reassurances had in fact come from the respondent or been based on anything which the respondent had told Mr Steele.

37. The Tribunal was provided with further emails exchanged between the claimant and Mr Steele in June 2017. Of note, an email of 6 June 2017 (202) included an explanation from Mr Steele as to why the claimant had wished to leave her previous workplace which was followed by: *"hence why you took the drop to be part of a team like Priory Group until progression was available".* His email said *"I note on the phone that there could be progression after 4 months, or it could take up to a year, it was not stated that progression would be immediate".*

38. On 30 May 2017 the claimant attended IT management induction training in Bristol. In answer to questions put in cross examination, the claimant explained that Ms Allton (her line manager at Preston Private) had asked her not to attend that training, but the claimant had chosen to do so in any event. Prior to the training the claimant had not been given access to the relevant IT systems at the Preston Private site at which she worked. The claimant's evidence was that the other Deputy Manager and the Manager, Ms Allton, had access. The first part of the training was in relation to IT skills. The second part required access to the management systems of the home at which the attendee was based in order to complete the training. The claimant's evidence was that Ms Featherstone, the trainer, confirmed with the home sites of each of the attendees that the course participants would be allowed to gain access to the management systems. The only attendee whose access was denied was the claimant. The claimant was informed by Ms Featherstone that Ms Allton had said that the claimant did not require access. It was the claimant's evidence that she was the only black attendee at this training, all other attendees were white. The claimant was unable to complete the training or the course due to Ms Allton's decision, and when she subsequently managed other homes she needed to learn on the job how to undertake certain IT tasks as she had been unable to complete the training. The Tribunal having heard no other evidence from anybody else involved,

the Tribunal accepts the claimant's evidence about what occurred at the IT training as being true and accurate.

39. Not too long after the claimant started working for the respondent, the claimant took on roles managing homes or supporting the management of homes on a temporary basis. That included working in a Southport care home in a management role between 12 June and 21 July 2017. The claimant also moved to other roles in the north of England and Scotland including working on placements providing management support to a home in Glasgow and providing support to a home in the Lake District.

40. As with the issues with pay, the claimant's expenses also became a significant issue for her as they were not paid on time or within the required timeframe. The amount of expenses claimed by the claimant increased from June 2017 when the claimant commenced undertaking work at other homes for the respondent. As with the payment of salary, the evidence of the claimant and her partner was that the respondent failed to make payments of the expenses claimed on time or when due. Mr Donaldson-Ellison's evidence was that the respondent (up to and including after the claimant's employment had ended) never provided any breakdown or explanation for the expenses that were or were not paid, and it was impossible for either the claimant or himself to know which expenses it was that had not been paid and why payment had not been made.

41. The claimant's evidence was that Ms Allton informed the claimant in June 2017 that the Operations Director (and Ms Allton's line manager), Ms Perez, would like the claimant to attend any training possible in order to develop the claimant's nursing skills. The claimant was not a general practice trained nurse and she had never undertaken any general nursing practice. She was registered with the NMC as a Nurse Manager and had completed revalidation as a manager.

42. The respondent appointed a Ms Dobson as a Peripatetic Manager for Adult Care, following an interview process. Ms Dobson had reported to the claimant in the claimant's previous role which she had held before joining the respondent. The claimant was clearly unhappy that her former report, Ms Dobson, had been appointed as a manager when the claimant was employed as a deputy manager.

43. On 17 July 2017 the claimant attended a meeting with Ms Allton. The Tribunal was provided with notes made by Ms Allton (220); the claimant did not accept their accuracy. The Tribunal was also provided with some notes made by the claimant (226). The claimant emphasised that those notes were not made to be a formal record of the meeting, but rather were her own points from a forward-looking perspective. It is correct that the claimant's own notes conclude (227) with identifying a way forward, but the remainder of the notes did appear to the Tribunal to be a record made by the claimant of what had been discussed in the meeting.

44. In the meeting on 17 July 2017 the claimant informed Ms Allton that she was used to being in a significantly higher management role and explained her view that she had been promised a higher role within the Priory Group than the role she was fulfilling, of Deputy Manager. She felt the role was significantly below her skill level. There was no dispute that Ms Allton informed the claimant that she had no knowledge of that promise and as far as she knew the claimant had been employed

as a Deputy Manager. Ms Allton's notes record that the claimant was told that she should speak to Ms Perez about this. The claimant's notes record that Ms Allton would inform Ms Perez.

45. Towards the end of the meeting, the claimant handed Ms Allton a letter dated 14 July 2017 which she had previously prepared (224). That letter raised a grievance. The letter commenced by saying, *"As you are aware, I am in the fourth month of joining the company, which I did on the assurance that I was offered an initial 'slot' until a more suitable post which reflected my qualifications and experience, became available"*. Later in the letter the claimant said, *"Consequently, in the absence of any alternative directive, I have been reluctantly forced to consider the possibility that I am subject to victimisation bullying within a hostile working environment and have actively made formal applications for other Priory roles".* The letter did not mention age or race or any issues which would identifiably be race or age discrimination. The claimant's evidence was that Ms Allton's manner in the meeting towards the claimant changed when the letter was given to her. Ms Allton's notes record that she expressed her shock and the meeting concluded fairly shortly afterwards.

46. The claimant alleged that, during the course of the 17 July meeting, Ms Allton told the claimant, *"This is not working for us"*, which the claimant contended meant Ms Allton and Ms Perez. Both Ms Allton's notes and the claimant's notes record issues being discussed regarding communication and computer use, but neither set of notes record such a statement being made. Based upon the claimant's evidence and in the absence of any evidence to the contrary, the Tribunal finds that such a statement was made, but notes it was clearly not of any particular significance to the claimant at the time as she did not record it in the notes which she made of the meeting.

47. Part of the claimant's claim was that she was also told in 17 July meeting by Ms Allton, that Ms Allton was under the impression that the claimant had taken a less demanding role at the end of her career. That comment was not recorded in either of the sets of notes, including those prepared by the claimant. The claimant's detailed witness statement contained no reference whatsoever to that statement having been made in the meeting. As with the previous comment, as the claimant's evidence was that it was made and there was no evidence to the contrary, the Tribunal finds that the comment was made. However, in the light of the complete absence of any reference to it in the notes made by the claimant at the time or in her witness statement prepared for the Tribunal hearing, the Tribunal also finds that the statement was not considered to be of significance by the claimant.

48. Following the claimant's letter, Ms Allton spoke to Mr Johnson, a member of the respondent's HR team. Ms Allton's note recorded Mr Johnson as saying that there was no claim for victimisation or bullying because the claimant's offer letter stated Deputy Manager and she had been recruited as a Deputy Manager. The respondent failed to progress the claimant's complaint as a grievance at all (as they should have done). The claimant's evidence was that she spoke to Mr Johnson regarding her grievance and was told by him that the respondent did not know that the claimant was feeling that way. The claimant's evidence was also that she subsequently met with Ms Perez and arrangements were made for her to work in a

management capacity until interview dates for the Quality Lead and Peripatetic Manager positions were due to take place.

49. The claimant's witness statement recorded that, when they spoke, Ms Perez told the claimant that she would receive a pay increase to a salary equal to that received by Ms Allton (being the manager at the Home at which the claimant worked). At that time, the claimant's salary was half that of that of Ms Allton. In the absence of any evidence to the contrary, the Tribunal accepts the claimant's evidence about what she was told in this meeting. The claimant's salary was never in fact increased to the equivalent of that of Ms Allton.

50. In paragraph 13.7 of the claimant's further particulars (47) as reflected in the list of issues (dd), the claimant alleged that Ms Perez stated that she (together with Ms Bales) would support the claimant's application for the Quality Lead role and a Manager role, but that contention was not identified as being addressed in the claimant's evidence before the Tribunal.

51. In her witness statement, the claimant stated that she submitted applications for the role of Peripatetic Manager on 30 June and a Quality Lead role on 29 June 2017.

52. For the Quality Lead role, the claimant was invited to an interview but was not successful. The claimant was critical of that decision, identifying the successful candidate as being young and white. In answer to questions, the claimant confirmed that she had no knowledge of the successful candidate, her CV, or her qualifications. The claimant was critical that Ms Perez was on the interview panel for that role. It was not entirely clear to the Tribunal why the claimant should be critical that Ms Perez was on that panel, in the light of what was asserted in paragraph 13.7 of the claimant's further particulars (47).

53. The claimant's evidence confirmed was that she did not receive an invitation to interview for the peripatetic role. There was no evidence available about the outcome of the Peripatetic Manager role application.

54. Save for those two specific roles, the claimant did not actively apply for any other roles whilst employed by the respondent. The claimant's position was, based upon the commitments that she believed had been made at interview and in subsequent conversations, she expected the respondent to appoint her to other management roles when they became available.

55. It was the claimant's evidence that in late July 2017 she met with the on-site administrator, Ms Bryan, to discuss pay issues. Ms Bryan was also a Deputy Manager. Ms Bryan was paid £19 per hour whereas the claimant was paid £18 per hour.

56. The claimant's evidence was that during August 2017, whilst the claimant was providing management support to a home in Glasgow, a visiting manager from a home which the claimant had managed whilst that manager had been on leave, directed the claimant to complete tasks in the Glasgow home. The claimant alleged that the manager said, *"You entered the company in a deputy role"* in order to justify the instruction. The claimant highlighted in her evidence that the manager was

younger than her and the claimant described her as having unequal experience and qualifications and no protected characteristic. The comment the claimant alleged was made was factually accurate.

57. The claimant's evidence was that she was, on occasion, whilst working in England and Scotland, asked to undertake nursing duties whilst on shift. The claimant declined as she was not qualified to do so. Save for the one incident detailed below, the claimant's evidence was that she declined on each occasion and never did in fact undertake any such nursing shift. The respondent's evidence was that managers and deputy managers were on occasion asked to undertake nursing shifts to cover staff shortages and absences. The claimant's evidence was that no other managers were asked to undertake nursing shifts, which she said she knew because of conversations she had with other managers during training courses. The Tribunal does not accept that the claimant would have known from such conversations whether any other managers or deputy managers were asked to undertake nursing duties on an occasional basis as described by the respondent. Indeed, the claimant agreed in answering questions that Mrs Wilson (the Regional Manager for Northern Ireland but previously the Manager at Apple Mews) had undertaken nursing shifts, and indeed the claimant was critical of Mrs Wilson for having done so.

58. The one particular occasion about which the claimant gave evidence when she had potentially undertaken nursing duties, was an occasion when she was asked to travel from Glasgow to a home in the Lake District and, upon her arrival, was asked to undertake nursing duties. The claimant's explanation was that the nurse due to carry out those duties in the home, was unable to do so for reasons related to accreditation. The claimant's evidence was that she worked alongside that nurse throughout the particular shift, which resolved the issue but without the claimant needing to undertake general nursing.

59. The claimant's evidence in her witness statement was that Ms Allton requested that the claimant roster herself for an indefinite period to the nursing unit due to the untimely departure of nursing staff. The claimant's evidence was that she declined this request as it would be a change to her contractual role, as well as due to her lack of training in general nursing. The claimant conceded when questioned that she was not in fact asked to do this for an indefinite period. In any event the claimant never actually undertook nursing duties as a result of this request.

60. The Tribunal was shown a note of a meeting between the claimant and Ms Allton which took place on 5 September 2017 (239). The claimant did not dispute that such a conversation had taken place. She contended that it was not a supervisory session as the respondent had a form for formal supervision sessions which had not been used (589). The claimant also disputed what was recorded in those notes and, in particular, denied one comment recorded.

61. In October 2017 the claimant's probation review was undertaken and the Tribunal was provided with a note of the review (242). That review, completed by Ms Allton, was entirely positive and recorded the claimant as having an *"excellent approach with residents + relatives"*.

62. The claimant sought and obtained an alternative role within the Priory Group in November 2017. It appeared from the evidence heard, that the claimant informed the respondent that she had been successful and was intending to leave, but after a discussion regarding notice periods and a placement in Northern Ireland (as recorded below) the claimant never actually handed in her notice. Reference to the claimant's notice period and the need for the claimant to work it, was referred to in emails exchanged between Ms Allton and Ms Perez between 10 and 13 November 2017 (251).

63. The claimant's evidence was that she was approached by Ms Perez to discuss her notice period (albeit the claimant had not actually given notice) and she was offered a placement in Northern Ireland reporting to Mrs Wilson. The claimant accepted the offer on the condition that she be paid sums due for management work which she had undertaken during June, July and September before she would travel. She also sought an additional payment for the assignment and requested written confirmation of what that would be.

64. Ms Perez emailed the claimant on 10 November 2017 (254). The email was headed *"Confirmation of Offer"* and said:

> *"As per our conversations we would appreciate your support in one of our Learning Disability Services in Northern Ireland for an interim period. All travel and accommodation would be covered and an additional payment of £750 per month would be made to you during this period. We envisage this period being two-three months. You have advised that you have been offered an alternative position with another company in Quality which you have yet to confirm with them if you are accepting. As discussed during our call, you would be required to give three months' notice therefore if you would be happy to do so, you can work your notice period in Ireland. As discussed, we need a decision from you within the next hour so that we can pull together a plan and book travel and accommodation accordingly".*

65. In the course of the Tribunal hearing the claimant was very critical of the respondent for later comments made about her return to the UK, as she asserted that she believed her move to Northern Ireland had been made on a permanent basis. However, it was clear from the 10 November email, and indeed from the claimant's own statement which referred to the role at Apple Mews (her first role in Northern Ireland) as a *"placement"*, that the claimant's assignment to Northern Ireland was considered to be a temporary one, at least at the outset. Mrs Wilson's evidence, which the Tribunal accepted as true, was that she understood that the claimant had been assigned to Apple Mews on a temporary short-term basis, she did not consider the assignment to be permanent.

66. The claimant's evidence was that during a conversation with Ms Allton in November 2017 regarding the claimant's promotional prospects, Ms Allton told the claimant *"You have to be white and middle class to succeed in the Priory"*. The claimant also asserted that Ms Allton informed her that the claimant had *"been treated awfully"* and that the claimant could have left. The claimant did not record the conversation in any document at the time nor did she raise it formally or informally in any email of other documentation. Based upon the claimant's evidence and in the

absence of any evidence to the contrary, the Tribunal finds that these comments were made to the claimant by Ms Allton as alleged.

67. Despite the fact that the claimant had only agreed to accept the Northern Ireland assignment on the basis that payments due to her were paid before she went, those sums were not in fact paid. The claimant emailed Ms Allton about this on 22 November 2017 requesting a BACS payment (259). Further emails were provided from later in November that showed the claimant chasing payments due and included detail that a bonus payment had been processed on 24 November, returned to the respondent's account but not spotted until 28 November, and repaid on 28 November (265). That was a bonus for work undertaken in England and Scotland, it was not an instalment of the additional payment offered in the 10 November email for working in the role in Northern Ireland.

68. The Tribunal was provided in the bundle with a document (260) that appeared to be a letter from Ms Perez to the claimant regarding her interim role in Apple Mews. That referred to the claimant as an Acting Manager and stated that she was filling the role for the three months that was her notice period. The letter confirmed, *"In recognition of your commitment, you will receive an additional £750 per calendar month during the period in which this arrangement remains in place"*. The claimant's evidence, which the Tribunal accepts, is that she never received the letter. There was no evidence whatsoever that it was actually sent to her.

69. The claimant's evidence was that what was agreed was that she would receive £750 for each calendar month in which she undertook the work in Northern Ireland (meaning that £750 was due for November, not a pro rata amount). When asked about this while giving evidence, Ms Robinson agreed that that did appear to be what the respondent had agreed. Accordingly, the Tribunal finds that, under the terms agreed, the claimant was due a £750 bonus payment for each calendar month during which she undertook work in Northern Ireland, commencing with a payment being due for November 2017.

70. The bonus payment received in November 2017 was the payment of the outstanding bonus the claimant was due for work undertaken in England and Scotland. The claimant's evidence was that, whilst in Northern Ireland, she received four bonus payments in: December 2017; January 2018; May 2018; and August 2018. She worked in Northern Ireland for eight months and should have received eight payments. The other four were never paid. The respondent's representative in his closing submissions accepted that three of the payments were never made but contended that one had been, albeit that one was not specifically identified.

71. In the claimant's claim form she contended that her line manager, after a meeting, in a telephone conversation, occurring in approximately November 2017, referred to gossip as *"the jungle drums"*. In paragraph 2.9 of the claimant's rewrite of her claim (41) the claimant made reference to this comment and stated that it was in a telephone conversation in November 2017. In her witness statement, the claimant made two references to this comment, both describing the words having been said during a telephone conversation but dating the conversation as December 2017 (or in one case erroneously 2018). In cross examination, the claimant expanded upon her evidence and explained that Mrs Wilson made the comment in reference to a

discussion about a number of managers flying over to Northern Ireland. The claimant described how she has gasped during the telephone conversation. The claimant said that she did not raise the issue at the time because she was new in post and wished to focus on the issues in the home. The claimant's evidence was not consistent about when the comment was made and indeed the answers she gave in cross examination were not consistent with the basis upon which she subsequently asked questions. Whilst being cross-examined and during her oral evidence, the claimant said that the comment was made by Mrs Wilson in the first telephone conversation between the claimant and Mrs Wilson prior to the claimant commencing work in Northern Ireland. The claimant described the term as being *"insensitive, arrogant and ignorant of my feelings"*.

72. Mrs Wilson's evidence was that she had no particular recollection of using the term to the claimant, but did not deny that she had used the term as alleged. She described it as a comment in general use that she would occasionally use. Mrs Wilson's evidence was that as the comment was made during the first telephone conversation which she had with the claimant, she would not have known when she said it that the claimant was black.

73. The Tribunal finds, primarily based upon the claimant's own answers to cross examination, that the comment was made in the first conversation between the claimant and Mrs Wilson and on the telephone. The claimant gasped and did consider the comment made to be insensitive. The Tribunal accepts Mrs Wilson's evidence that the comment was not made with any intent directed at the claimant or indeed with any knowledge of her race.

74. The claimant commenced a placement at Apple Mews undertaking the role of manager on 20 November 2017. Mrs Wilson's evidence was that the claimant continued to be paid by payroll from Preston Private, with Apple Mews recharged for the sums due. Whilst working in Northern Ireland the claimant would travel to the airport (initially Manchester and later Liverpool) to fly out on a Monday morning and would return by flight on a Friday evening. Whilst in Northern Ireland she would stay in a hotel as procured through the respondent's team. The costs of the flight and the hotel were charged directly to the respondent, arranged by the relevant team, and other expenses such as meals, mileage and parking needed to be reclaimed by the claimant in the usual way.

75. The claimant's witness statement included reference to the fact that, shortly after her arrival in Ireland, a manager left the company, sending all other managers throughout the group an email noting his discontent. The claimant's evidence was that she brought this to Mrs Wilson's attention at the time, citing that improved communication would deter this. The Tribunal was not directed to any specific email which related to or detailed the issues raised, nor was there any evidence that the departing manager made any reference to race.

76. The claimant attended the monthly managers' meeting in Northern Ireland together with other managers and Mrs Wilson. The claimant's evidence was that on an occasion another attendee was not present at the start of the meeting. Mrs Wilson explained that as he was due to go on holiday and there were issues at the airport in Belfast, he had needed to go to the airport rather than to attend the

meeting. The claimant's evidence was initially that this person was called *"Paul"*, but she could not recall his other name. In fact, as was identified during the hearing, the claimant had identified the other manager in her further particulars as being Mark Beattie (41) in her rewrite of her claim. The claimant's evidence was that she would have expected Mrs Wilson to have told her about the issues at the airport, as they would have an obvious impact upon the claimant if she was unable to return to England later that day. After the claimant became concerned, she asked Mrs Wilson if she could leave early, and Mrs Wilson authorised her to do so. The claimant was understandably concerned that she might miss her flight home and if she missed her flight then she would be unable to return easily (or on the day when she was due to do so). Mrs Wilson did not recall this incident albeit she was clear that there was no manager called Paul. Mr Beattie was a manager who lived in Northern Ireland.

77. In late December 2017 concerns were raised between the respondent's managers about the claimant's attendance at work. On 22 December 2017 (276) Mrs Wilson emailed Ms Perez and informed her that the claimant had not attended work in Northern Ireland that week at all and she said that she presumed that the claimant had attended Preston Private on the days when she was not in Northern Ireland. Subsequent emails showed that Mr Johnson (the HR Manager) had spoken to Ms Allton and had explained that the claimant had not applied for or been granted annual leave for 20 or 21 December, having attended authorised training in England on 18 and 19 December.

78. Ms Allton emailed the claimant at 2.03pm on 27 December 2017 (281) and explained that if the claimant was not in Northern Ireland she was expected to be at Preston Private to fulfil her contracted hours as she had no annual leave authorised. The claimant responded in an email at 3.10pm (277) and referred to conversations with Mrs Wilson and to having accumulated hours to cover 27-29 December with her not being physically present at the relevant home but continuing to act in a management capacity using the phone. The claimant also emailed Mrs Wilson at 4.16pm (278) on 27 December. At 7.41am on 28 December 2017 (279) the claimant emailed Mrs Wilson to say that she was not fit to work on that day due to the stress caused the previous day. The claimant's evidence was that this was the only day of sickness absence which she took throughout her time employed by the respondent. Mrs Wilson subsequently emailed the claimant to request a conversation (282). Ms Allton sent an email to the claimant on 28 December explaining that the claimant was technically absent without leave asking to meet with her at a time earlier that day (289), an email that was based upon one provided by Mr Johnson of HR (288). In fact, Mrs Wilson had a lengthy discussion with the claimant on 5 January 2018 and confirmed to other managers in an email of 6 January (296) that she had cleared up all the issues and was happy that the situation had been resolved. She emailed details of which days over the Christmas period had been taken as annual leave and sick leave and the reason for the claimant's accrued hours (which were primarily due to issues with travel).

79. There was clearly some confusion and disagreement between those at the respondent about who was the manager to whom the claimant should have reported at this time. Ms Allton remained the claimant's line manager in her substantive role. Mrs Wilson was her line manager in the role she was fulfilling at the time. The claimant clearly considered Mrs Wilson to be her line manager and all matters were

resolved and addressed with Mrs Wilson. There was a notable absence of any correspondence or documentation at any time provided to the claimant to address matters such as who was her line manager and what was the precise nature of her role, including throughout the time when she was undertaking placements in Northern Ireland.

80. In January 2018 the claimant was sent a P45. That was received at her home address, while the claimant was working in Northern Ireland. The claimant's evidence was that this caused a degree of concern. The respondent confirmed that a P45 had been sent in error. The reason for the P45 appeared to have arisen from the claimant transitioning from one payroll to another and her erroneously having been sent a P45 as a result. Whilst the respondent's representative's submissions made reference to this having been accepted as occurring for a number of managers, the Tribunal heard no such evidence. The limited evidence about the event was provided in an email sent from an HR Business Partner, Ms Nelson, to Mrs Wilson on 28 February 2018 (318) when she explained that she would ask payroll what had happened in this case as it appeared unusual for a P45 to be issued when someone was transferring within the Priory Group but between different payrolls.

81. In January 2018 the claimant's placement at Apple Mews came to an end. It was clear that the claimant was unhappy about this. The claimant was also unhappy that she was not slotted into the role of manager of Apple Mews. Another individual was appointed to the role. Mrs Wilson's very clear evidence was that in Northern Ireland, in order to ensure compliance with fair employment legislation, an employee could not be slotted into a vacant role and a process was required to be followed. Mrs Wilson's evidence was that an employee would need to make a formal application in writing for a post that was vacant. If they did so, a transparent interview and recruitment process would be required to be followed. Her evidence was that she knew that the claimant was interested in going to Northern Ireland and had discussed the possibility of the claimant relocating with her, but Mrs Wilson had never received any confirmation from the claimant that she wished to relocate or any application for a vacant role. The role at Apple Mews was filled following a transparent and open interview process. The Tribunal entirely accepts Mrs Wilson's evidence and in particular accepts and understands her emphasis on the requirements of the fair employment legislation in Northern Ireland. Unfortunately, it would appear that no-one ever explained to the claimant the requirements of the fair employment obligations in Northern Ireland, which of course differ from what the claimant might have expected in England.

82. The claimant accepted that she did not apply for any roles with the respondent, other than the two referred to at paragraph 51 above. She did not apply for any of the roles in Northern Ireland. The respondent's evidence was that all vacancies were advertised on their intranet and individuals were able to apply for those roles. The claimant simply did not apply for any of the roles (aside from the two evidenced), including the role at Apple Mews. It was notable from the claimant's evidence that she had an expectation that the respondent would slot her into a management role (her claim describes her as being passed over for roles), placing reliance upon what she believed she had been told when she started employment with the respondent. However, in Northern Ireland, based upon the evidence of Mrs

Wilson, the respondent's position was that all roles required a formal application of some sort and would require a transparent interview process alongside the opportunity for other candidates to apply. The Tribunal was not provided with any evidence about when the Apple Mews role was advertised, interviewed, or filled, but accepts Mrs Wilson's evidence that the successful candidate was appointed following such a process.

83. At the time that the claimant's role at Apple Mews ended, the claimant's evidence was that Mrs Wilson suggested that she return to England and offered to approach Ms Perez to arrange this. Mrs Wilson's evidence was that she understood the claimant's work in Northern Ireland to have been arranged on a temporary basis. There was no dispute that the claimant stated that she would prefer to continue to work in Northern Ireland. Mrs Wilson offered the claimant the opportunity to move to Shaftsbury Mews to work at that home as a manager. The claimant's evidence was that this was whilst the manager there was on sick leave and to support the deputy who was in post. As a result, the claimant moved to hold the role of manager at Shaftsbury Mews. As evidenced by the claimant, this role was on a temporary basis during the absence of the pre-existing manager.

84. During her time as manager of Shaftsbury Mews there was a successful external inspection of the home. The claimant in her evidence highlighted that there were successful inspections at each of the three homes in which she worked in Northern Ireland during her time there. Mrs Wilson's evidence was that the respondent did not receive advance notice of such inspections and that it was usual practice for Mrs Wilson and the quality lead to endeavour to attend sites if they had received notice of such inspections.

85. During her time in Northern Ireland the claimant did not have formal supervision meetings recorded on the respondent's supervisory form, nor did she have an appraisal. Mrs Wilson's evidence was that she spoke to the claimant regularly, both in meetings and on the telephone, and she considered those informal meetings and conversations to constitute usual supervision, and indeed was what she did with other managers. Mrs Wilson said that she tended to use the formal supervisory forms only if there were particularly problematic issues which needed to be addressed.

86. In terms of appraisals, the Tribunal was provided with some exchanges of emails between Mrs Wilson, Ms Allton and Ms Perez (of which the claimant was not aware prior to disclosure) regarding the claimant and her appraisal. Appraisals were due to be completed by 31 March 2018. Both Mrs Wilson and the claimant emphasised that the relevant director, Ms Bales, placed particular emphasis on appraisals being completed. Ms Allton emailed Mrs Wilson on 5 March 2018 (322) and asked Mrs Wilson to confirm that she was completing the appraisal for the claimant. Ms Bales responded on the same day to suggest that Ms Allton should do the formal appraisal. Ms Perez suggested to Ms Allton that once she had received written feedback from Mrs Wilson, she could complete the appraisal via phone (321). Mrs Wilson's evidence was that because the appraisal related to the previous year, the majority of which the claimant had worked in England, it was appropriate for Ms Allton to do the appraisal. The appraisal due by 31 March 2018 was never

completed. There was no evidence of the claimant raising with any senior manager the absence of an appraisal.

87. The claimant's evidence was that on 26 April 2018 she was informed that she had to go to Carlingford Lodge, an alternative home, to cover a manager who was on maternity leave, as soon as possible. There was no dispute that Carlingford Lodge was located in a more rural location than the other homes at which the claimant worked and involved additional travel time from the airport. When questioned about this, the claimant explained that she understood the reasons why others had not been asked to take on the Carlingford Lodge management role, albeit it was clear that she was disappointed to leave Shaftsbury Mews, being a home where she clearly felt she had been a success and had established rapport with the staff. Mrs Wilson's evidence was that the claimant's placements were always temporary and the request was for her to cover maternity leave absence in Carlingford Lodge where there was a need for cover to be put in place.

88. According to the claimant's statement the request was made on 26 April 2018, and the claimant commenced working at Carlingford Lodge on 7 May 2018. The Tribunal was shown a certificate of registration dated 30 April 2018 (355/356) which recorded the claimant being the Acting Manager of the establishment. An issue raised in the claimant's allegations (r) was that she was not asked to register, nor was she involved in registering (or informed of the registration of), her position with the relevant registration authority, which she believed to be the normal procedure for other managers. Mrs Wilson's evidence was that the relevant registration requirements differed for Northern Ireland to those which applied to England. The process was that after a relatively short period someone needed to be identified to the regulatory authority as fulfilling the role. Where someone such as the claimant went into the role on a temporary basis it was Mrs Wilson's usual practice for her to provide that information to the regulatory authority. If someone was taking on a managerial role on a long-term or permanent basis, the relevant manager would complete the relevant forms themselves and undertake the process. Accordingly, the process followed for the claimant was the same process that Mrs Wilson would have followed for any other person stepping into the role on a temporary basis.

89. The claimant received a nomination for a "Making a Difference" award from the Priory Group of Companies in May 2018 (357).

90. The claimant's evidence was that she attended management safeguarding training in May 2018. A Unit Manager from Shaftsbury Mews said to the claimant, *"You are a good manager…you keep us on our toes"*. Mrs Wilson heard this. The claimant's evidence was that Mrs Wilson seemed aggrieved, and replied, *"I thought it was me who did that"*. Mrs Wilson could not recall the conversation and denied that she would have been aggrieved, but accepted that she may have made such a comment.

91. The claimant alleged that in June 2018 Mrs Wilson instructed her to apply tactics of spot-checking to the claimant's work, as it had been reported in a regional meeting by staff that this worked. The claimant asserted that she informed Mrs Wilson that the claimant was aware that it was the Unit Manager at Shaftsbury Mews who had stated this, and that the claimant had been the instigator of these tactics

which had been applied in Shaftsbury Mews. Neither this allegation, nor the contention that it was discriminatory, was put to Mrs Wilson in the course of questioning.

92. In June 2018 the claimant conducted a relatives' meeting at Carlingford Lodge. One had not been carried out for a year and the previous one had not been successful. During the Tribunal hearing the claimant gave evidence about the meeting. Another staff member who attended left in tears. The meeting had ultimately been a success. The claimant's allegation was that Mrs Wilson had not acknowledged this as successful and had said to the claimant that she was *"let off easy"* and questioned whether there were staff witnesses at the event.

93. The Tribunal also heard various other evidence about issues which arose during the claimant's time at Carlingford Lodge. The claimant was unhappy with the hotel to which she had been assigned, the claimant referring to the lack of door locks and the fact that it was a family run hotel. The claimant's preference was to stay in an alternative hotel, where she stayed on an occasion including when her partner visited. The claimant complained that Mrs Wilson was not happy with the claimant staying in that hotel and the claimant's view was that there were concerns about it. The claimant also had issues with the family run hotel with meals and access at the times required. There was also an incident when the claimant was inappropriately approached by a man on her way home from work, which she discussed with Mrs Wilson. The claimant alleged that Mrs Wilson was persistently patronising on the basis of her age (d). In her evidence, the claimant was not consistent about what this meant and what was perceived to be patronising about what Mrs Wilson said and did. The claimant's evidence appeared to be that she did not think it had been appropriate for Mrs Wilson to address issues with her in the way that she had, because of the claimant's age and experience. Mrs Wilson's evidence, in particular in relation to the claimant's partner's visit, was that what the claimant did in her private life was a matter for her and was not something with which she needed to get involved.

94. Limited evidence was heard about holiday entitlement. Mrs Wilson's evidence was that the respondent's employees in Northern Ireland had predominantly been employed previously by two different companies prior to transfer to the respondent. One of those companies had given their managers enhanced annual leave. There was no other evidence heard by the Tribunal about any manager having a greater entitlement to annual leave than the claimant.

95. When the claimant moved to Carlingford Lodge, the claimant was offered a salary rather than being paid on an hourly basis. The claimant's evidence was that the salary she was initially offered was less than the salary she received when the bonus was taken into account. Her evidence was also that Mrs Wilson urged her to accept an increased salary offer. The Tribunal heard no other evidence about the negotiations in relation to salary. The claimant ultimately accepted a salary of £47,000 per annum. Mrs Wilson was asked questions about the rates paid to managers in Northern Ireland. Her evidence was that the salaries ranged from £35,000 to £50,000. The amount paid depended upon the numbers in a home and the complexity of the work undertaken at the home. Mrs Wilson confirmed that there were other homes in Northern Ireland with more beds than Carlingford Lodge, but

that Carlingford Lodge was at the higher end of bed numbers. Mrs Wilson did not consider Carlingford Lodge to be the most complex home. The £47,000 paid to the claimant was towards the top end of the range given by Mrs Wilson.

96. Throughout her time in Northern Ireland the claimant continued to raise issues regarding the non-payment of sums due to her, both bonuses and expenses. The Tribunal was provided with numerous emails where the claimant raised issues. During 2018 the non-payments became increasingly important to the claimant due to the significant sums which she had not received, many of which arose from expenses which she had incurred.

97. Ms Abernethy, an administrator, became involved in endeavouring to address the claimant's pay issues. One email of note sent by her to the claimant on 10 May 2018 (370) stated that Ms Abernethy had pulled together everything apart from the first few months in 2017, but stated that unfortunately Mrs Wilson had not yet given written approval and therefore the payroll deadline had been missed. Mrs Wilson's evidence was that she took efforts to try and ensure that the claimant's payroll issues were resolved. She stated that she signed the forms that she needed to, when she was required to do so. The issues clearly initially arose from the fact that the claimant was on the payroll for Preston Private and had moved round a number of homes in England/Scotland and had historic payroll issues in England/Scotland. Many of those issues were not rectified when she moved to Northern Ireland. Once in Northern Ireland, further problems appeared to have arisen because she was (at least initially) on the payroll in England while working in Northern Ireland, hourly paid, and with an unusual bonus arrangement. Mrs Wilson was clear in her evidence that she was unable to assist with anything which related to the claimant's time in England or in relation to a particular course which related to an English qualification.

98. Following the claimant's move to an annual salary, the claimant was informed that the respondent would not be able to change the rate of pay to the one agreed due to a pay freeze (390). Ms Robinson's evidence was that the pay freeze did not mean that the payments would not be made in the end, but it required a period when changes could not be made so that existing pay could be assessed before pay decisions were taken. Nonetheless the impact on the claimant was that the respondent failed to comply with the terms to which it had contractually agreed (for the new annual salary).

99. The claimant's evidence was that an exception to the pay freeze was arranged for her Unit Managers after the involvement of Mrs Wilson. Ms Robinson's evidence was that exceptions could be arranged to the pay freeze on a case by case basis.

100. By mid July 2018 Ms Stutt, the respondent's Human Resources Director, and Ms Cammock, the respondent's Payroll Manager, were involved in endeavouring to resolve the claimant's pay issues. In an email on 19 July 2018 (410) Ms Cammock stated to the claimant in an email, *"I would like to personally apologise on behalf of my team for the issues, errors and unfortunate communications to which you have received and would to assure you that this type of service will not be tolerated under my direction. I have also requested the team to arrange payment of the outstanding*

monies for you which you should receive over the next couple of days". Despite this apology and assertion, the payroll issues were not resolved in July.

101. The claimant took a period of annual leave from 23 July to 6 August 2018. She expected matters to have been resolved during her absence. In fact, the claimant received an HMRC notice related to the non-payments by the respondent. She raised this issue with the respondent's payroll team. On 7 August 2018 (419) Ms Cammock emailed the claimant to say, *"Firstly I want to sincerely apologise for any distress that has been caused in relation to your payroll processes. After investigation the team have now rectified your year to date figures within the system accordingly. Unfortunately, my investigation has shown that when payrolls transferred from one system to another (internal move of schemes) your figures were not carried forward when the transfer was completed. Please note that these transfers do not normally affect employees to which I am so sorry that on this occasion this process fell down and this has created you an issue"*.

102. The claimant was due to travel to Northern Ireland on 13 August 2018 to continue undertaking her work. As a result of the significant failures to pay her what was due and the shortage of money which had resulted, the claimant (entirely understandably) decided that she would not travel out to Northern Ireland and incur further expenses whilst such significant sums remained due. Accordingly, the claimant did not do so. The claimant did not therefore attend at work at the site where she was expected to be working in Northern Ireland. She had not been given authorisation by her manager for her absence, albeit the reasons why she had not travelled or attended were entirely understandable.

103. On 14 August 2018 Mrs Wilson sent the claimant an invite to an investigation meeting (585). That explained various concerns raised, the pertinent one being that the claimant had been absent from work without prior authorisation. The letter explained that Mrs Wilson had made attempts to contact the claimant by telephone and by email and had requested that the claimant contact her directly to discuss her absence, but the claimant had not done so. The invite asked the claimant to attend an investigation meeting on 17 August at Carlingford Lodge.

104. Mrs Wilson also sent an email to the claimant on 16 August 2018 (443) which followed a telephone conversation between the claimant and Mrs Wilson, where she clarified the discussion and explained that Mrs Wilson had expected the claimant to be in attendance at Carlingford Lodge that week and had made arrangements to be on site on 13 August and meet with the claimant, but the claimant had given no indication that she would not be returning. The email also explained that the delay in payment of expenses was due to a tax check and fell outside Mrs Wilson's area of responsibility. Later on 16 August, Mrs Wilson emailed the claimant and said that in order to accommodate the claimant's concerns regarding travelling to Northern Ireland, she would meet with the claimant at the closest of the respondent's facilities in England to the claimant's home, on 17 August. The claimant only read the email from Mrs Wilson after the time proposed for the meeting.

105. On 18 August 2018 the claimant resigned by email (459). The resignation emphasised the work the claimant had undertaken, but made no reference to race or

age discrimination. There was no dispute that the claimant's resignation was intended to be with immediate effect.

106. Following the claimant's resignation, Mrs Wilson sent the claimant a letter dated 26 August 2018 (472). That explained that the investigatory process into the allegations, which included absence from work without permission, would not continue. The letter stated, *"Please note that we will place a summary of our findings thus far into your personal file"*. The letter went on to say, *"I would like you to be aware that as you have not worked your notice period and as this is a breach of your contractual terms and conditions, we will be stating this in any reference request that we receive for you".* Mrs Wilson's evidence was that the letter was based upon a standard form letter. The inclusion of the paragraph regarding notice was as a result of ticking a specific box and, indeed, the respondent's practice on references changed so that mention would not have been made to that in any reference in any event. In terms of the summary on the personnel file, Mrs Wilson confirmed that at that stage there was no summary to place on the file and she was not sure why the sentence had been included in the letter at all.

107. In the Tribunal hearing, Mrs Wilson gave evidence about the reason for each of her decisions in Northern Ireland. Mrs Wilson was no longer employed by the respondent. The Tribunal found Mrs Wilson to be an entirely credible and genuine witness and accepted her evidence about the decisions which she made and, in particular, that she did not make any decisions because of the claimant's race and/or age.

108. The claimant's evidence was that she had sought employment/legal advice from the RCN in July 2018. She had previously approached the RCN many months earlier and had sourced counselling from the RCN, but not employment/legal advice (on the earlier occasion).

109. The Tribunal was not provided with the documents which showed the claimant's expense claims or the evidence which showed the expenses incurred. No breakdown of what had been claimed and paid (or not paid) was provided by either party. The Tribunal was provided with some emails which were exchanged between employees of the respondent regarding the claimant's expense claim. The claimant's evidence was that not all of her expenses were reimbursed and she claimed that £607.42 remained outstanding. In the respondent's internal exchanges of emails, Ms Bales summarised on 16 August 2018 (447) that the claimant had claimed £1,986.50 in expenses but would only be paid £1,379.08.

110. Mr Donaldson-Ellison's evidence was that it was impossible to know which expenses had been reimbursed and which had not, because the respondent never provided any information. The respondent did not provide any breakdown of expenses refused or the reasons for their refusal.

111. In her 16 August email (447) Ms Bales said that the main adjustments were in relation to two things: journeys to and from the airport; and the correct food allowance. In the respondent's representative's submission, it was identified that £478.80 of the sums not paid related to travel to and from the airport. That is that the claimant had claimed as part of her expenses travel to and from the English airport for each journey when she had worked in Northern Ireland. The journey back from

the airport had been undertaken in the claimant's vehicle, but was by her partner alone returning from dropping the claimant off. It was not in dispute that these expenses were cheaper for the company than the claimant driving to the airport, parking her car there, and claiming the costs of parking (which she would have been able to do). The respondent refused to reimburse the claimant for the mileage costs for the journeys back from the airport undertaken by her partner after dropping her off. Ms Stutt, the respondent's Human Resources Director, on 16 August 2018 (447) said the following (with which the Tribunal agreed):

> *"Playing devils advocate, I don't see that she's done much wrong here – if paying for 4 journeys (to & back each time) was cheaper than paying 2 journeys plus parking, I don't really see the problem? Fine she should have checked if it was ok, but she certainly hasn't defrauded us in any way and we would have a hard job not paying her for it if she genuinely did this – we are not explicit in the expenses policy that this is not allowed"*.

112. Despite what was said by Ms Stutt, the payment of these expenses incurred was not made to the claimant. In a later internal email on the same date, Mr Bowskill said (446):

> *"I have every sympathy for Erica as the return journeys have undoubtedly saved us money, for whatever reason this choice was made…Our expenses policy explicitly states that passenger allowance cannot be claimed unless the passengers are Priory Group employees therefore by inference it must follow that mileage cannot be claimed unless the driver is a Priory employee, which for half the journey in this case they were not and there was no Priory employee in the car".*

113. The Tribunal entirely disagreed with Mr Bowskill on this point. The claimant was not claiming passenger expenses under clause 3.6.2; she was claiming reasonable costs of necessary travel on Priory business. The inference Mr Bowskill said was required to be drawn, was not one the Tribunal found appropriate or necessary.

114. The respondent was unable to identify why the remainder of the expenses had not been paid. Ms Robinson's evidence was that the daily limit on subsistence was £25 rather than £20 recorded in the document shown to the Tribunal. The claimant acknowledged in her evidence that on at least one occasion she had claimed for a meal (including drink) which exceeded the £25 daily limit, contending that she was able to recover that amount because she always fell below the amount she would have been entitled to over a week if the daily limits were aggregated. Mrs Wilson's evidence was that she recalled on one occasion the claimant had claimed approximately £40 which would not have been paid to the extent that it exceeded the daily limit. Other than the one occasion identified by Mrs Wilson (and the airport travel), the respondent identified no other specific expense claimed which had not been legitimate or for which there was an identified reason for non-payment.

115. Following the termination of the claimant's employment, the claimant was paid some of the outstanding sums due. The Tribunal was provided with a payslip of 21 August 2018 (554). That included backpay of £649.86, a single bonus of £750, and what was described as reference salary of £1,137.42, as well as reference salary of

£3,916.67, and a reference salary adjustment of £60.20. An explanation was provided by email by Mr Elliott, the respondent's Payroll Team Leader (Healthcare), on 4 October 2018 (491), in which he endeavoured to explain what was being paid and how the amounts had been calculated. His email was not very clear, but did identify that some of the salary adjustments related to payments which should have been made in the previous tax year (but were only being paid in August 2018).

116. In September 2018 the respondent paid the claimant £2,813.27. In practice the respondent did this in error because it failed to stop the claimant's usual pay being paid to the claimant. A payslip was provided to the claimant (555). When the error was identified, a subsequent payslip was provided to the claimant (556) which endeavoured to address the payments that had been made but provided absolutely no explanation whatsoever as to how the adjustments had been calculated. The overpayment which had not been repaid, was the subject of the respondent's counterclaim.

117. The payslips provided failed to identify or record the salary which was due to the claimant for the week for which she had worked for which payment was due in September 2018 (which was acknowledged by the respondent as being due). When endeavouring to recover the overpayment the respondent should have taken this into account and explained clearly how it was intending to do so. It did not.

118. The respondent at no time provided any statement to the claimant recording the outstanding holiday which had been accrued or any amount which was being paid to her in respect of the outstanding holiday. The only information provided was an email from a solicitor sent on the respondent's behalf on 3 July 2019 (581) which confirmed that the claimant was owed 121.8 hours annual leave. Having acknowledged this, the respondent failed to make any payment to the claimant for the sum. The respondent also failed to provide a revised statement addressing what had been paid to the claimant, how much of it she had been entitled to, and what it was said remained due to be repaid.

119. Ms Robinson gave evidence to the Tribunal about payroll issues. Ms Robinson was not involved in any of the payroll issues at the time that the claimant was employed. She gave very honest evidence. In the course of the hearing she herself had identified that the respondent's counterclaim had been incorrectly calculated. To accompany her evidence, she provided some new documentation prepared during the hearing (590) which included a payslip corrected to show what should have been paid in September 2018 and a breakdown explaining how those calculations had been reached. Her payslip acknowledged that the claimant was due a salary payment of £1,010.75 (gross). She also acknowledged that the claimant was due pay in lieu of annual leave in the sum of £1,416.02. Ms Robinson also identified that the respondent's counterclaim had overstated the amount that was due, and her evidence was that the claimant was only due to repay the respondent the sum of £916.21 even on Ms Robinson's own calculations.

120. In answer to questions asked about pay increases, Ms Robinson's evidence was that the respondent's employees were paid a 1.5% pay increase in 2018. That pay increase applied to all employees. Ms Robinson confirmed that the pay freeze which had been referred to in documents was not a freeze of the salary due, but

simply a freeze on the change being applied to payroll (that is it was a delay in payment, not a delay in entitlement). Based upon Ms Robinson's evidence, the Tribunal found that employees of the respondent were paid a 1.5% pay increase effective from July 2018. The respondent provided no evidence whatsoever which identified any reason why the claimant was not due this amount. No increase in the claimant's salary was paid for the period of July and August 2018 as a result of the pay increase due.

121. During her evidence, the claimant was asked why she had not raised discrimination complaints earlier (either internally or in a Tribunal claim). The claimant's explanation was that she did not wish to see what had occurred as discrimination. In practice she had only identified discrimination as a result of two things: the fact that her family had told her to consider whether it was; and following discussions with advisers after the termination of her employment. Essentially the claimant's case was that she was treated differently and badly and when she asked why, the conclusion that she ultimately reached was that it must be on the grounds of race and/or age. Aside of this general reason for not identifying treatment as being discriminatory, the claimant did not provide evidence about any particular reason why she had been unable to enter her Tribunal claim at an earlier date or why she had not raised matters with the RCN earlier than she did.

122. In her evidence, the claimant emphasised the lack of racial diversity within the respondent's Adult Division, explaining that usually when she attended meetings of managers and deputy managers at the respondent's main offices or large premises, she was the only black person in attendance. In terms of the diversity of the respondent's workforce, statistics were provided for the Priory Group which appeared to demonstrate some diversity both at nurse level and amongst managers. However, as the respondent failed to provide such statistics either limited to the respondent itself or limited to the Adult Division, the statistics provided no evidence of diversity in the areas where the claimant worked. The Tribunal accepted the claimant's evidence about the lack of diversity which she saw during her time working for the respondent.

The Law

123. The claimant claims direct discrimination because of the protected characteristics of race and/or age.

124. Section 13 of the Equality Act 2010 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."**

125. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur, including: the terms of employment; the way in which access to opportunities for promotion or transfer or any benefit or service are afforded; or by subjecting the employee to any other detriment.

126. In this case, the respondent will have subjected the claimant to direct discrimination if, because of her race or age, it treated her less favourably than it treated or would have treated others. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different (**Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285**). It is not a requirement that the situations have to be precisely the same.

127. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

128. In short, a two-stage approach is envisaged:

i. at the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that she has been treated less favourably than she hypothetically could have been (but for her race or age); there must be something more.

ii. The second stage is reached where a claimant has succeeded in making out a prima facie case. In that event, there is a reversal of the burden of proof: it shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

129. The respondent's representative in his submissions cited at length from **Shamoon v Chief Constable of the RUC 2003 IRLR 285** in which the House of Lords explained how this test should be applied. The submission included a longer extract than the following, but some of what was cited was:

> *"In deciding a discrimination claim one of the matters employment tribunals have to consider is whether the statutory definition of discrimination has been satisfied. When the claim is based on direct discrimination or victimisation, in practice tribunals in their decisions normally consider, first, whether the*

claimant received less favourable treatment than the appropriate comparator (the 'less favourable treatment' issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining. No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined."

It also said:

"Employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as [she] was, and after postponing the less favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason?"

And that there may be cases where:

"The act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy enquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the enquiry is the ground of, or the reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in James v Eastleigh, a benign motive is irrelevant…the ultimate question is – necessarily what was the ground of the treatment complained of (or - if you prefer - the reason why it occurred)."

130. In **Johal v Commission for Equality and Human Rights UKEAT/0541/09** the Employment Appeal Tribunal summarised the question as follows:

"Thus, the critical question we think in the present case is the reason why posed by Lord Nicholls: "Why was the claimant treated in the manner complained of?""

131. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867**. In

order for the burden of proof to shift in a case of direct discrimination it is not enough for a claimant to show that there is a difference in race or age, and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation. In **Madarassy v Nomura International PLC [2007] ICR 867** Mummery LJ said:

> *"The court in* **Igen v Wong** *expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> *'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it…The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*

132. The decision of the Employment Appeal Tribunal in **London Borough of Islington v Ladele [2009] IRLR 154** (upheld in the Court of Appeal) set out the following commentary on direct discrimination claims:

> *"The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:*
>
> *(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in* **Nagarajan v London Regional Transport [1999] IRLR 572, 575** *—"this is the crucial question". He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.*
>
> *(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in* **Nagarajan** *(p 576) as explained by Peter Gibson LJ in* **Igen v Wong** *.. paragraph 37.*

> *(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in* **Igen v Wong**.…
>
> *(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. …*
>
> *(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the* **Igen** *test: see the decision of the Court of Appeal in* **Brown v Croydon LBC** *…*
>
> *(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in* **Anya v University of Oxford** …
>
> *(7) As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated."*

133. As the respondent submitted, unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36.** It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different race or age would have been treated reasonably.

134. Also, as included in the respondent's submissions, the fact that a claimant honestly considers themselves to have been treated less favourably does not, of itself, establish less favourable treatment (**Burrett v West Birmingham Health Authority [1994] IRLR 7**). It is for the Tribunal to decide whether there was less favourable treatment. A difference in treatment is not sufficient, it must be less favourable treatment, which is an objective question for the Tribunal to decide (**Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065**). The respondent also relied upon **Lee v Ashers Baking Company Ltd [2018] IRLR 1116** as authority for the fact that it cannot constitute direct discrimination to treat all employees in precisely the same way.

135. The protected characteristic does not have to be the only reason for the conduct provided that it is an "*effective cause*" or "*significant influence*" for the

treatment. Authorities for this are: **Owen and Briggs v James [1982] IRLR 502; Nagarajan v London Regional Transport [199] IRLR 572**; and **O'Neill v Governors of St Thomas More RCVA Upper School [1997] ICR 33** (the question is the "*effective and predominant cause*" or the "*real and efficient cause*").

136. The claimant also alleged harassment on the grounds of race and/or age.

137. Section 26(1) of the Equality Act 2010 says:

> **"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."**
>
> **"In deciding whether conduct has the purpose or 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."**

138. The Employment Appeal Tribunal in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for her; (c) on the prohibited grounds (here of race or age). Although many cases will involve considerable overlap between the three elements, the EAT held that it would normally be a 'healthy discipline' for Tribunals to address each factor separately and ensure that factual findings are made on each of them. In considering the prescribed effect the EAT in that case said that

> **"***Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended'*

139. The alternative bases in element (b) of purpose or effect must be respected so that, for example, a respondent can be liable for effects, even if they were not its purpose (and vice versa). It is important that the Tribunal states whether it is considering purpose or effect.

140. In considering whether the conduct has the required effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the claimant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element.

141. In **Nazir and Aslam v Asim and Nottinghamshire Black Partnership [2010] ICR 1225**, the Employment Appeal Tribunal placed particular emphasis on the last element of the question, i.e. whether the conduct related to one of the prohibited grounds. When considering whether facts have been proved from which a

Tribunal could conclude that harassment was on a prohibited ground, the EAT said it was always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic. In **Nazir and Aslam v Asim and Nottinghamshire Black Partnership**, HHJ Richardson said:

> **"***The provisions to which we have referred find their place in legislation concerned with equality. It is not the purpose of such legislation to address all forms of bullying or anti-social behaviour in the workplace. The legislation therefore does not prohibit all harassment, still less every argument or dispute in the workplace; it is concerned only with harassment which is related to a characteristic protected by equality law – such as a person's race and gender. In our judgment, when a Tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of sex or race, it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of sex or race. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of sex or race. The Tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed.***"**

142. The respondent's representative in his submissions placed particular emphasis on what was said in **Warby v Wunda Group Plc UKEAT/0434/11/CEA** in which Langstaff J (as he then was) said the following:

> **"***In* Grant *at 1401, para 43, again, the importance of the particular circumstances were emphasised there by Elias LJ: "for example, it will generally be relevant to know to whom a remark is made, in what terms, and for what purpose". We therefore accept the Respondent's submission that context is everything. It is for a tribunal who hears the witnesses, whose job it is to determine the facts, and who considers the submissions made to it in the light of having heard those witnesses and determined those facts, to decide what the context is and to contextualise what has taken place. We would add that it may be a mistake to focus upon a remark in isolation. A tribunal is entitled to take the view, as we see it, that a remark, however unpleasant and however unacceptable, is a remark made in a particular context; it is not simply a remark standing on its own.*
>
> *…. we accept that the cases require a tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a tribunal, in our view, is not obliged to do so. The words are to be seen in context*"

Time limits/jurisdiction

143. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it.

144. The key date is when the act of discrimination occurred. The Tribunal also needs to determine whether the discrimination alleged is a continuing act, and, if so, when the continuing act ceased.

145. In terms of conduct extending over a period, the question is whether a respondent's decision can be categorised as a one-off act of discrimination or a continuing scheme. The Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs for which the respondent was responsible in which the claimant was treated less favourably. **Lyfar v Brighton & Sussex University Hospitals Trust [2006] EWCA Civ 1548** highlights that Tribunals should look at the substance of the complaints in question as opposed to the existence of a policy or regime and determine whether they can be said to be part of one continuing act by the employer. **Aziz v FDA [2010] EWCA Civ 304** shows that one relevant factor is whether the same or different individuals were involved in the incidents, however this is not a conclusive factor. In **Moore Stephens LLP v Parr UKEAT/0238/20** the Employment Appeal Tribunal undertook a helpful review of the key authorities.

146. If out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable"*

147. The most important part of the exercise of the just and equitable discretion is to balance the respective prejudice to the parties. The factors which are usually considered are contained in section 33 of the Limitation Act 1980 as explained in the case of **British Coal Corporation v Keeble [1997] IRLR 336**. Those factors are:

- the length of, and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the relevant respondent has cooperated with any request for information;
- the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action; and

- the steps taken by the claimant to obtain appropriate advice once she knew of the possibility of taking action.

148. Subsequent case law has said that those are factors which illuminate the task of reaching a decision but their relevance depends upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to interpret it as containing such a list or to rigidly adhere to it as a checklist. This has recently been reinforced by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23** (a case cited by the respondent's representative in his written submissions) where it was emphasised that the best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time and that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

149. **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434** confirms that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases. It says, of the discretion, *"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 claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule".* The onus to establish that the time limit should be extended lies with the claimant.

Unlawful deduction from wages

150. The claim was brought as one for unlawful deductions from wages under section 23 of the Employment Rights Act 1996, relying upon the right not to suffer unauthorised deductions from wages under section 13. Section 13 of the Employment Rights Act 1996 provides that:

> "*An employer shall not make a deduction from the wages of a worker employed by him unless:*
>
> *(a) The action is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract; or*
>
> (b) *The worker has previously signified in writing his agreement or consent to the making of the deduction*."

151. Section 14 of the Employment Rights Act 1996 provides that section 13 does not apply to a deduction from a worker's wage made by his employer where the purpose of any deduction is the reimbursement of the employer in respect of an overpayment of wages or expenses.

152. Section 27 defines wages (which includes any bonus payable) and, under section 27(2)(b) excludes from that definition any payment in respect of expenses incurred by the worker in carrying out her employment.

Breach of contract

153. As the claimant emphasised at the start of her verbal submissions, her claim was one of breach of contract as well as for unlawful deductions from wages. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides the Tribunal with jurisdiction to determine: under section 3, a claim from the employee arising or outstanding on termination of the employee's employment; and, under section 4, a claim from the employer which arises or was outstanding on the termination of the employee's employment and in proceedings in which the has brought such a claim before the Tribunal.

154. The sums which can be claimed as part of a breach of contract claim do not (unlike the provisions which apply to unlawful deductions from wages) exclude recovery of expenses.

Conclusions – applying the Law to the Facts

155. In considering the List of Issues, the Tribunal approached the events upon which reliance was placed in chronological order rather than in the rather confusing order in which they were included in the list. For some events it was not entirely clear where they fitted within the chronology, not least because several of the allegations related to an extended period, nonetheless the order below is the order in which the Tribunal considered the events following the approximate chronology of when they occurred.

The alleged promise at recruitment (k)

156. What was recorded in the List of Issues for (k) was that: when recruited, the claimant was told she would get the next manager's role that came up, but this did not happen. This was alleged to be: direct race discrimination; and/or direct age discrimination. This was an allegation recorded by Employment Judge Feeney in the case management order following the hearing on 4 July 2019 (34) and was based upon what was said at paragraph ten of box 8.2 of the claim form (8) in which the claimant asserted that she was promised a manager's role at interview.

157. It was very clear to the Tribunal that there was a mismatch of expectations between the claimant and the respondent following the claimant's interview. As the claimant clearly stated in evidence to the Tribunal, she expected to be appointed to a managerial role shortly after being appointed to the respondent. Whilst the Tribunal has heard no evidence from the respondent from those from those who attended the interview, the evidence available to the Tribunal did not show any such recorded intention on behalf of the respondent. The starting point was the claimant's offer letter and contract (177 and 178) which clearly recorded the claimant as being appointed as a Deputy Manager located at Preston Private. The exchange of emails between the claimant and her recruitment consultant (Mr Steele) also provided evidence from the time about what the position was considered to be. The claimant's email of 4 June 2017 (200) was not consistent with a binding commitment having been made that the claimant would be moved into a manager's role, and what Mr Steele said in his email of 6 June 2017 (202) was in fact inconsistent with a manager's job being guaranteed. It is also notable that the claimant's own notes of

the interview (195) recorded the fact that a further interview for a management role would not be required, but did not record that the claimant would be appointed to such a role as soon as it came up. Accordingly, the Tribunal does not find that the claimant was told that she would certainly be appointed to the next manager role, albeit she was clearly given some indication that a management appointment would be likely without the need for a competitive interview.

158. Even if the claimant was not appointed to the next manager's role which came up (and it was the case that she was not appointed to the two roles for which she applied), there was no evidence whatsoever that the respondent did not do so because of the claimant's race and/or age. There was nothing at all which would show that a prima facie discrimination case had been made out, that is there was not the "something more" required for a claim of direct age or race discrimination which would reverse the burden of proof. Whilst clearly not being offered a promotion that was expected was potentially less favourable treatment and there was clearly a mismatch of expectations between the claimant and the respondent following the interview, the Tribunal does not find that there was any evidence that the claimant was treated less favourably than a hypothetical comparator in materially the same circumstances would have been (who was younger or of a different race).

Being asked to work nursing duties (g)

159. Allegation/event (g) was that the claimant was asked to work nursing shifts, and in the List of Issues it was identified that the claimant said that no white managers were asked to do this, only black managers were asked to do so. This was alleged to be direct race discrimination. This was an allegation recorded by Employment Judge Feeney in the Case Management Order following the hearing on 4 July 2019 (33). As was recorded in that Case Management Order, the respondent said that the claimant was incorrect and that managers and deputy managers were asked to work nursing shifts, when there were staff shortages.

160. As recorded in paragraphs 57 and 58 above, the claimant was asked to undertake nursing shifts. There was one occasion when the claimant worked alongside a nurse undertaking nursing duties, in the Lake District. The evidence was that on all other occasions the claimant declined to undertake the shifts when she was asked. There was no evidence of any adverse consequences resulting from her declining to do so.

161. Whilst the Tribunal entirely accepts that the claimant was not aware of other managers or deputy managers being asked to undertake nursing shifts (save for Mrs Wilson), as is recorded at paragraph 57 the Tribunal did not find that the claimant's evidence regarding conversations she had on courses proved that others were not asked in the circumstances contended by the respondent. Mrs Wilson did undertake such shifts. The evidence heard did not prove what the claimant asserted, which was that no white managers were asked to undertake such shifts.

162. The Tribunal can see no reason why a manager or deputy manager who had the relevant nursing qualification should not be asked to undertake a nursing shift when required due to unusual or emergency circumstances, and the respondent's evidence about when this may be required was accepted. The Tribunal finds that

being asked to undertake a nursing shift would not constitute less favourable treatment.

163. Accordingly, the Tribunal does not find that the claimant has proved less favourable treatment compared to a hypothetical comparator, as such a hypothetical comparator of a different race would also have been asked to work a nursing shift. The Tribunal also does not find that being asked to work a nursing shift was less favourable treatment in any event, but in particular when the person being asked was free to decline and not do so. The Tribunal does not find that there was less favourable treatment on the grounds of race.

IT access and IT management induction training (o)

164. Event (o) was recorded at some length in the List of Issues (see the appendix for what was said in full). This related to the IT management Induction Training in Bristol on 30 May 2017 and the claimant being denied access to her home's site to complete the training (which was by her line manager, Ms Allton). This was an allegation for which amendment was granted by Employment Judge Holmes following the hearing on 12 August 2019, the claim having been recorded at paragraph 2.4 of the claimant's rewrite of her claims (40).

165. The facts regarding this allegation are recorded at paragraph 38 above. As recorded, the only evidence which the Tribunal heard about this event was the evidence of the claimant and the Tribunal accepted the claimant's evidence about what occurred as being true and accurate.

166. Based upon the claimant's own evidence, the claimant did suffer less favourable treatment compared to the other attendees at the course (who were not black, and predominantly younger), being unable to gain the IT access required or to complete the training. If the burden of proof were to be reversed, the respondent has not proved why the claimant suffered the less favourable treatment, having presented no evidence about the reason why this occurred at all.

167. Whether or not the burden of proof was reversed, that is whether the "something more" had been identified (had the claimant shown the prima facie case), was therefore very important for this allegation, as if it was reversed the claimant's case (that the refusal to allow access to the IT system for the home for the training was because of race) would succeed. As explained at paragraph 283 below, the Tribunal addressed the question of whether this had been shown collectively for a number of the allegations, and the decision reached is recorded in that part of the Tribunal's judgment.

Request to attend training and peripatetic roles (t)

168. Allegation/event (t) was a somewhat complex allegation and what was alleged is recorded in full in the list appended. It was an assertion that in June 2017 Ms Allton informed the claimant that the Operations Director, Ms Perez would like the claimant to attend any training possible in order to develop the claimant's nursing skills. It also included an assertion by the claimant that she had observed that there were a number of black nurses in long unit manager or nurse roles who were

performing peripatetic nursing cover at several sites. This was an allegation of direct race and/or age discrimination. The allegation had been set out in the claimant's further and better particulars at paragraph 1.0 (44) and leave to amend had been granted by Employment Judge Holmes following the preliminary hearing on 12 August 2019.

169. In practice this allegation appeared to break down into two distinct allegations. The first allegation was that Ms Allton informed the claimant that Ms Perez (Ms Allton's manager) would like the claimant to attend any training possible in order to develop her nursing skills. The Tribunal does not find such a proposal (or informing the claimant about such a proposal) to be less favourable treatment at all. The suggestion that someone should attend training is not less favourable treatment. There was no evidence that any adverse consequences arose from the suggestion. In any event, there was no evidence that the suggestion was made because of the claimant's race and/or age, and the Tribunal does not find that it was (and certainly does not find that a prima facie case was made, which would have reversed the burden of proof).

170. The second part of the allegation, recorded what the claimant asserted she observed while working at homes in the north of England and Scotland. This part of the issue identified does not appear to be something which could have amounted to less favourable treatment of the claimant at all. As recorded in the facts above, the claimant fulfilled management roles at a variety of locations because she wished to undertake a more senior role than the one to which she had been appointed. The identification of such roles at alternative locations arose because the respondent was trying to identify such roles for the claimant. The claimant did give evidence that she believed that black nurses were more likely to be working on unfavourable twilight and night shifts, or to be expected to work peripatetically. That evidence was general in nature and not specific to any role or decision. Even if correct, what might apply to other nurses in general could not amount to less favourable treatment of the claimant.

A comment made by Ms Allton at a meeting on 17 July 2017 (y)

171. What was recorded in the List of Issues as event (y) was an allegation that at the meeting on 17 July 2017 the claimant was told by Ms Allton that "*it is not working for me and Sara Perez*". This was recorded as a claim for direct race discrimination and direct age discrimination, as well as a claim for harassment on grounds of age and/or race.

172. The evidence about this meeting and the findings about what occurred are recorded in paragraph 46. There was no evidence to suggest that a hypothetical comparator who was younger than the claimant or of a different race would have been treated differently. Accordingly, the Tribunal does not find that the claimant has shown that she was treated less favourably than a comparator would have been in this comment being made and does not find that a prima facie case was made, which would have reversed the burden of proof.

173. In terms of the elements required for a harassment complaint, the Tribunal has focussed upon whether the comment was on the grounds of race and/or age.

Such a comment would have been unwanted. It might have created a hostile or offensive environment for the claimant, albeit not one which violated her dignity or created an intimidating, degrading or humiliating environment. However, there was no evidence whatsoever that the comment related to the claimant's race or age. The comment addressed the working relationship between the claimant and Ms Allton, and the matters that were being raised with the claimant in the meeting. Accordingly, the Tribunal finds that the comment did not amount to unlawful harassment related to race or age (and does not find that a prima facie case was made, which would have reversed the burden of proof).

Ms Allton's comment regarding the claimant's role in the meeting on 17 July 2017 (ff)

174. Allegation (ff) was based upon paragraph 2.0 of the claimant's further and better particulars (44) in which the claimant asserted that in the meeting on 17 July 2017, Ms Allton told the claimant that she was under the impression that the claimant had taken a less demanding role at the end of her career. This was an allegation of direct age and race discrimination. This was an issue that had not been recorded in the respondent's List of Issues, but was added as is explained at paragraph 9 above, because of what was recorded in the Judgment of the Tribunal following the hearing on 12 August 2019 (60), rather than what was recorded at paragraph 33 in the reasons for that Judgment (68).

175. The findings of fact in relation to this comment are recorded at paragraph 47 above, where it is found that the comment was not of significance to the claimant as it was not recorded in the claimant's notes or her witness statement. It is found that the comment was made.

176. This was an allegation of direct discrimination. The Tribunal did not find that the comment of itself amounted to less favourable treatment, in the context of a conversation where Ms Allton was explaining that she did not know that the claimant had been promised a more senior role (as the claimant asserted), and was explaining why she thought the claimant had accepted a deputy management role. The lack of significance of the comment to the claimant also further supports this decision that it was not less favourable treatment of the claimant in the context of the conversation which took place on 17 July 2017.

177. In any event, the Tribunal did not find that the comment was made because of the claimant's race and/or age. There was no evidence to substantiate that it was made because of either of those protected characteristics and the Tribunal does not find that a prima facie case was made, which would have reversed the burden of proof.

Salary promise July 2017 (dd)

178. Allegation/event (dd) arose from what was recorded at paragraph 13.9 of the claimant's further particulars (47) in which the claimant asserted that she was told by Ms Perez in July 2017 that she would receive a salary equal to Ms Allton. The allegation in the list also recorded that Ms Perez stated that (together with Ms Bales) she would support the claimant's application for the Quality Lead role and the

manager's role would also be supported, but was never received. This was brought as a claim of direct race discrimination and direct age discrimination.

179. In relation to the pay commitment contained within this allegation, the facts are addressed at paragraph 49. The Tribunal found (in the absence of any evidence to the contrary) that the claimant was told by Ms Perez in July 2017 that she would receive the pay increase, but it was never in fact paid.

180. In relation to the commitment to support the claimant, there was no evidence of this given by the claimant (see paragraph 50).

181. When determining whether the pay commitment made and the failure to pay it was direct discrimination on the grounds of race and/or age, the position is addressed collectively below (as already explained for allegation (o)). The Tribunal's decision about whether the claimant had shown the prima facie case required to reverse the burden of proof is addressed at paragraph 283 below.

Issues in August 2017 (u)

182. Allegation (u) is recorded in full in the appended list of issues, but in practice it included a number of different allegations. It was contained in paragraph 5.0 of the claimant's further particulars (44) for which permission to amend was granted by Employment Judge Holmes following the hearing on 12 August 2019.

183. In summary what was alleged was that: in August 2017 the then manager of Dalton Court stated "*you entered the company in a deputy role*" in order to justify her approach and maintain the claimant deputising under her direction; the manager was younger than the claimant and had less experience and qualifications, but was paid as a manager; the claimant was told to leave Glasgow and drive to the Lake District; and the claimant was instructed to provide instructions to the night nurses during the night shift. The text of the issue also contained reference to the pay increase promised by Ms Perez, which has not been addressed in determining this allegation as it has already been addressed for (dd) above. Allegation (u) was of direct race discrimination, direct age discrimination, and harassment on the grounds of race and/or age.

184. As noted, this single allegation/event appeared to involve a number of different matters. The statement that the claimant had entered the company in the role of deputy manager was an accurate statement. At the time the statement was made, the claimant was (at least substantively) a deputy manager and therefore was both junior to a manager and would have been paid less than a manager. The remainder of the events alleged would have arisen from instructions given to the claimant as a deputy manager by a manager and also reflected the requests made for the claimant to work at other sites. It was clear to the Tribunal that the claimant was not very happy during the time when she fulfilled roles in the north of England and Scotland, which is what led the claimant to find another job and to consider leaving the respondent (before she was offered the assignments in Northern Ireland).

185. The Tribunal does not find that any of what was recorded in this allegation was less favourable treatment of the claimant than a comparator would have been. An appropriate hypothetical comparator would have been an individual appointed as a deputy manager, working at other sites as agreed and being instructed by the manager as someone considered more junior than her (of a different race or who was younger). That comparator would have been treated in the same way and the same comment and instructions would have been made to her.

186. The Tribunal finds that there was nothing about what was alleged which was because of the claimant's race and/or age and does not find that a prima facie case was made which would have reversed the burden of proof.

187. For the harassment complaint, the Tribunal does not find that what was alleged had the effect of violating the claimant's dignity or creating a hostile, degrading, humiliating or offensive environment for the claimant. The matters raised were effectively those which were of the trivial or transitory nature described in **Richmond Pharmacology**. Whilst the claimant was unhappy with her role and responsibilities at the time, that did not mean that comments and instructions of this nature fall within the type of conduct required to amount to unlawful harassment. There was also no evidence whatsoever that what was alleged related to the claimant's race or age and the Tribunal does not find that a prima facie case was made, which would have reversed the burden of proof. Accordingly, the Tribunal does not find that what was alleged amounted to unlawful harassment related to race or age.

The Quality Lead post (n)

188. Event/allegation (n) was that in September 2017, the claimant asserted she unsuccessfully attended an interview for the Quality Lead post. In the list of issues it was stated that Ms Perez, on the interview panel, informed the claimant that she required more experience in order to fulfil the role. The claimant alleged that the post was given to a younger white new recruit known to Ms Perez. This had been recorded as paragraph 1.8 in the claimant's rewrite of her claims (39) and was an allegation for which leave to amend had been granted at the same preliminary hearing as referred to for other allegations.

189. The interview and outcome for the Quality Lead role is addressed at paragraph 52. In the Tribunal hearing it was clear that the claimant objected to Ms Perez being part of the interview panel. The Tribunal could see no meritorious basis for the objection to Ms Perez being part of the panel.

190. The Tribunal heard no evidence whatsoever about the successful candidate. The claimant's assertion that she should have been appointed to the role was based purely upon her perception of the successful candidate as being younger and white; and her unsubstantiated assumption that the candidate had less experience. The claimant did not know the successful candidate's CV or experience. In those circumstances, the Tribunal does not find that the burden of proof in the claims for direct race or age discrimination had shifted, because the claimant has simply not proved the "something more" required to make out a prima facie case. Whilst clearly the claimant was unfavourably treated by not being appointed to the role, when a

(presumably) younger candidate of a different race was, without more the burden of proof does not shift. The claimant has not proved that she was less favourably treated than a hypothetical comparator with the same experience and qualifications would have been. She has not proved that her less favourable treatment than the successful candidate was on grounds of race or age. There was nothing whatsoever in the evidence which the Tribunal heard which provided the "something more" required to reverse the burden of proof for this allegation.

Indefinite nurse shift duties (q)

191. Allegation (q) was contained in paragraph 2.6 of the claimant's rewrite of her claims (4), being one for which leave to amend was granted. The claimant asserted that, in October 2017, Ms Allton requested that the claimant be rostered for an indefinite period to nurse shift duties in Preston Private. This was an allegation of direct race and direct age discrimination.

192. As is recorded in paragraph 59, the claimant conceded during cross-examination that she was not rostered for an indefinite period to nurse shift duties. The circumstances in which the claimant was asked to undertake nurse duties has already been addressed and the issues considered in relation to allegation (g) above, and this allegation added nothing to that allegation.

Peripatetic Manager (p)

193. Event/allegation (p) was that the claimant asserted: she was asked to travel to work as a manager at various locations between June and October 2017; when attending the sites initially she was not recognised as a manager and was asked to perform nursing duties in order to cover shortfalls in nurse allocations; and the Peripatetic Manager, Ms Dobson (who was younger, white and had been accountable to the claimant in her previous job) was paid more and treated differently. The full text of the allegation is recorded in the attached appendix. This allegation was paragraph 2.5 of the claimant's rewrite of her claims (40) for which leave to amend was granted.

194. Ms Dobson had applied for and been appointed to the post of Peripatetic Manager. The claimant was not employed as a Peripatetic Manager. The claimant was employed as a deputy manager, albeit one for whom the respondent had endeavoured to identify alternative responsibilities. The evidence heard by the Tribunal was that the role of Peripatetic Manager was a broader role and not simply a home manager. The reason for the difference in treatment and pay between the claimant and the person appointed as a Peripatetic Manager, was because that person was a Peripatetic Manager and the claimant was not (even if in practice her movement between roles might have meant that she was working peripatetically in practice).

195. The Tribunal does not find that the reason for the difference in treatment between the claimant and Ms Dobson was the claimant's race or age (and the Tribunal does not find that a prima facie case was made, which would have reversed the burden of proof). Ms Dobson circumstances were materially different to the claimant's, because of the role to which she had been appointed.

196. The other issues raised in this allegation regarding nursing duties and working at different sites, have already been addressed when degerming other allegations.

Incentive payment for acting up in Northern Ireland (h)

197. Event/allegation (h) in the List of Issues was that the claimant did not receive an incentive payment for taking on the acting-up role in Northern Ireland. The comparator was stated to be a white manager who was on maternity leave. This was an allegation of direct race discrimination. This was an allegation recorded by Employment Judge Feeney in the Case Management Order following the hearing on 4 July 2019 (33).

198. The claimant was paid a bonus as a result of taking up the management role at Apple Mews in Northern Ireland. As recorded at paragraphs 68-70 above, that was a bonus to be paid on a calendar month basis. It was not clear to the Tribunal whether this allegation addressed the non-payment of the agreed bonus or the bonus itself. However, in relation to the intention to pay the claimant a bonus, the claimant was not treated less favourably than a hypothetical comparator in the same circumstances would have been in the way alleged because it was intended that she should be paid a bonus each month while acting-up in Northern Ireland.

199. The Tribunal heard no evidence about a white manager on maternity leave who was paid an incentive payment for acting up in Northern Ireland.

200. If the allegation was intended to arise from the non-payment of the bonus that was due, that has been addressed for allegation (e) below.

The alleged "jungle drums" comment (b)

201. Allegation (b) was that, in November 2017 the claimant's manager, Mrs Wilson, described the gossip at a Home as the "*jungle drums*". This was brought as a claim for direct race discrimination and harassment on grounds of race.

202. The facts in relation to this comment are addressed at paragraphs 71 to 73 above. The Tribunal found that the comment was made by Mrs Wilson as a reference to gossip. The comment was made in a telephone conversation at a time when Mrs Wilson had not met the claimant and did not know her race.

203. In terms of the direct discrimination complaint, the Tribunal finds that the claimant was not treated less favourably than a comparator would have been, as the comment would have been made by Mrs Wilson to anyone on the telephone at the time, irrespective of the identity of the person to whom it was made.

204. In considering harassment, the comment was certainly unwanted as the claimant evidenced to the Tribunal. The Tribunal accepts the claimant's assertion that the comment related to her race, due to the subject matter of the comment and the obvious link which could be drawn,

205. In terms of the purpose of the comment, the Tribunal does not find that the purpose of the comment being made was to violate the claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for her. The Tribunal accepts Mrs Wilson's evidence that the comment was not intended to impact upon the claimant's environment or dignity, that was not why it was said. In any event, as the Tribunal has found, when the comment was made Mrs Wilson did not know the claimant's race and therefore would not have appreciated the impact the comment might have had on the claimant in particular (taking into account the lack of diversity in such roles evidenced by the claimant herself).

206. The Tribunal does find that the comment had the effect of creating an offensive environment for the claimant, based upon the evidence which she gave. The Tribunal does not find the effect was one of violating the claimant's dignity or creating an intimidating, hostile, degrading or humiliating environment, when taking account of the claimant's evidence and the fact that the claimant never raised the issue at the time or subsequently to Mrs Wilson (in circumstances where the claimant had previously felt able to raise a grievance which referred to an offensive environment).

207. Having determined that the comment did have the requisite effect, the Tribunal was required to consider whether it was reasonable for the comment to have the effect of creating an offensive environment for the claimant in the circumstances and in the context in which it was said. The Tribunal accepted that the expression is one that is in common use, albeit one that is probably used far less today than it used to be. The Tribunal also agreed with the claimant's assertion that it was an insensitive comment to be made (and it certainly would have been had Mrs Wilson known the claimant's race at the time it was said). However, the Tribunal has taken account of what was said by the Employment Appeal Tribunal in **Richmond Pharmacology** as cited above, and finds that this comment was one of the type which was addressed in that Judgment as being of a transitory nature which was not sufficient to amount to unlawful harassment. Accordingly, the Tribunal does not find that it was reasonable for the comment to have the prescribed effect, and on that basis does not find that it being said amounted to unlawful harassment.

Flight issues (j)

208. Allegation/event (j) was that there were difficulties with flights. The allegation as recorded by Employment Judge Feeney in her Order (34) was that the claimant was not given due respect and consideration. The claimant compared herself in the List of Issues to "*Paul*". The respondent's evidence was that there was no "*Paul*". Nonetheless it was accepted that there was a Mr Beattie (see paragraph 2.9 (page 41)).

209. The facts of this allegation are recorded at paragraph 76 above. This was an allegation of direct race discrimination and direct age discrimination, the claimant's evidence being that the manager was white and younger.

210. As recorded in the facts, the claimant's identified comparator was not in materially the same circumstances as the claimant. The comparator was a manager who lived in Northern Ireland who was going on holiday, and who had asked not to

attend the training in order to arrive at the airport well ahead of his holiday flight. The claimant was not in the same position as the comparator. The reason for the claimant needing to catch a flight was materially different. Most importantly, the claimant had not identified the need not to attend the training in order to catch her flight. Once the claimant requested to be able to leave the training early in order to ensure that she caught her flight, she was treated in exactly the same way by Mrs Wilson as the identified comparator.

211. Accordingly, the Tribunal finds that the claimant was not treated less favourably than a comparator in the same or materially similar circumstances, nor was she treated less favourably than a hypothetical comparator would have been.

212. It may be the case (in relation to this and other allegations) that Mrs Wilson could have acted more sensitively towards the claimant's unique circumstances of needing to travel between England and Northern Ireland for her working week, but the fact that she may not have done so did not amount to less favourable treatment on the grounds of race or age, and did not (of itself) provide the "something more" required to reverse the burden of proof.

Christmas travel and absence (z)

213. Event/allegation (z) is recorded in full in the List of Issues, but in summary related to the management of the claimant's perceived absence at Christmas 2017 and, in particular Ms Allton's approach to the claimant's perceived absence. Ms Abernathy was named as a comparator. This was an allegation of direct age discrimination and harassment on grounds of age. This allegation was recorded in paragraph 11.0 of the claimant's further particulars (46) for which permission to amend was granted.

214. The facts are recorded at paragraphs 77 to 79 above. The reason why the claimant was identified as being absent without leave was because: she was not in attendance at work when there had otherwise not been formal leave taken; there was some confusion between Ms Allton, Mrs Wilson and the claimant as to whom the claimant should report her movements over the Christmas period; and emails had been exchanged between the managers regarding where the claimant was. The issues were resolved in early January as recorded at paragraph 78 by Mrs Wilson, who identified various reasons for the claimant's absence and the overtime that she had accrued as a result of issues from travelling and working time she had needed to undertake.

215. In terms of the named comparator, Ms Abernathy was a member of the finance team. There was limited evidence given to the Tribunal about her working arrangements, but it appeared that as a member of the finance team she was able to work from home (at least on occasion) in a way which differed to the position of staff responsible for or working in a Home. Her circumstances materially differed to the claimant's. As a Home manager at that time the claimant needed to be in the Home to work for most of her working time and therefore her absence from the Home was treated differently to Ms Abernathy. The claimant's absence from where she had been expected to be on dates when she was not on authorised absence also differed from Ms Abernathy's circumstances (or at least the circumstances about which

evidence was heard). Ms Abernathy was not an appropriate comparator – her circumstances were completely different.

216. In any event, the Tribunal found that the issue being raised with the claimant about her whereabouts during December 2017 had nothing whatsoever to do with age and was because the claimant was perceived to be absent without authorisation. The confusion between management in Northern Ireland and England during the claimant's absence also contributed to the issue being raised in the way that it was. The reason why it was raised was not on grounds of age nor did it relate to her age. Having reached this decision, the Tribunal did not address the other steps required when considering a harassment claim.

The P45 (aa)

217. Event/allegation (aa) was that the claimant said that she had not offered her resignation, but a P45 from the Priory Group was posted to her home address arriving in January 2018. This was contended to be a claim for harassment on grounds of race and/or age only.

218. As is recorded at paragraph 80 above, the claimant was sent a P45. It is accepted that being sent a P45 was unwanted conduct which had the effect for the claimant of creating an offensive environment for her.

219. The Tribunal did not accept the respondent's submission that this applied to others, as there was no evidence that it did so. The reason why the P45 was sent to the claimant was unique to her circumstances. The Tribunal finds that the reason for the P45 being sent to the claimant was an administrative error. The purpose of sending the P45 was not to create an offensive environment for her, whatever the effect might have been.

220. The Tribunal does not find that the error was related to the claimant's race or age. There was no evidence heard by the Tribunal that demonstrated it was or could have been (and the Tribunal does not find that a prima facie case was made which would have reversed the burden of proof).

Conversation in January 2018 (bb)

221. Allegation (bb) was that the claimant alleged that in January 2018, she was told by Mrs Wilson that the claimant's services were no longer required in Northern Ireland and that Mrs Wilson would inform Ms Perez to find the claimant a post in England. This was an allegation of direct race discrimination and direct age discrimination. The allegation had been made in paragraph 13.7 of the claimant's further particulars (47) for which leave to amend had been granted.

222. This allegation relates to the end of the claimant's time at Apple Mews, her first post in Northern Ireland. It is addressed at paragraph 83 and findings in relation to the claimant's move to Northern Ireland and its temporary nature are at paragraph 65. Mrs Wilson understood the claimant to be fulfilling the role on a short-term basis. The reason the claimant was told the things alleged was because Mrs Wilson understood the claimant to be coming to the end of the assignment for which she

had been sent to Northern Ireland. In fact, Mrs Wilson identified the alternative role for the claimant to move to at Shaftsbury Mews.

223. The reason why Mrs Wilson addressed the issue with the claimant was because of Mrs Wilson's view of the claimant's position. In relation to the claimant not being appointed to the management role at Apple Mews, that arose from the fact that the claimant had not applied for the role, formally notified Mrs Wilson that she wished to be considered for the role, or been interviewed for the role, as was required under the fair employment provisions evidenced by Mrs Wilson and addressed at paragraph 82 above. The Tribunal finds that the reason why the claimant was informed what she alleged was not because of her race and/or age.

Being passed over for manager's roles (l)

224. Event/allegation (l) covered a number of different elements. In the List of Issues it was recorded as being that the claimant was passed over for manager's role in respect of managing homes where she acted up. The dates were confirmed by the claimant in answers to a question from the Tribunal. The roles were: Rose Lodge (Southport) in June/July 2017, Addison Court (Accrington/Chorley) in July 2017, Preston in March 2017 and Apple Mews (Northern Ireland) in January 2018. The list also referred to Longridge (Northern Ireland), but the claimant confirmed she was not alleging she was passed over for a role at that location. The claimant alleged that all those that she observed obtaining those management posts were white. This was an allegation identified by Employment Judge Feeney at the preliminary hearing on 4 July 2019 (34). The claim was one of direct race discrimination and direct age discrimination.

225. The position in relation to Apple Mews has been addressed in relation to allegation (bb) above (and in paragraph 82). The Tribunal does not find that the reason why the claimant was not appointed to the Apple Mews role was because of her race and/or age. The reason why the claimant was not appointed was because she did not apply for the job, indicate in writing that she wished to formally be considered for the job, and the respondent complied with its fair employment obligations to advertise and appoint to the role as evidenced by Mrs Wilson.

226. The issue in relation to Preston Private has been addressed in relation to allegation (k). That was the first Home at which the claimant worked, and the date identified was the start of her employment with the respondent. The claimant was not appointed to the role of manager of Preston Private but she was not passed over for it. The claimant was appointed as a deputy manager.

227. Of the other two roles relied upon: Rose Lodge where the claimant worked between 12 June and 12 July 2017; and Addison Court which was a home close to where the claimant lived. The claimant's evidence is that white managers who were younger than her were appointed to those roles. In alleging that she was passed over for those roles, the claimant has identified potential less favourable treatment and a difference in race and age.

228. The Tribunal heard no positive evidence whatsoever about why the claimant was not appointed to management roles in either of the Homes identified. The

respondent did not explain why the claimant was passed over. If the burden of proof were to have reversed, the claimant would succeed in her claim as the respondent would not have proved that it did not commit the alleged discriminatory act.

229. As with allegations (o) and (dd) the Tribunal has addressed whether the burden of proof was reversed collectively for these allegations (as they apply to Rose Lodge and Addison Court) at paragraph 283 below.

Payment for Carlingford Lodge (i)

230. Event/allegation (i) was that managers of larger homes were paid extra, the claimant contending that when she managed a larger home (72-bed) she was not paid extra. The comparator was identified as a white manager of a larger Home. This was an allegation of direct race discrimination and direct age discrimination. This was an allegation identified by Employment Judge Feeney following the preliminary hearing on 4 July 2019 (34).

231. In the course of the claimant's evidence it was confirmed that the Home referred to, being a 72 bed home, was Carlingford Lodge, being the last home which the claimant managed in her time in Northern Ireland. As is recorded at paragraph 95 above, Mrs Wilson gave evidence about the rates paid to managers of the homes in Northern Ireland. Her evidence was that it was not simply the size of the home which determined the amount paid but it was also complexity, and Carlingford Lodge was not considered to be one of the more complex homes. It was also not the largest home. The claimant's pay agreed when she moved to Carlingford Lodge was £47,000 per annum, which was near the top of the range paid for managers in Northern Ireland.

232. The Tribunal finds that the claimant’s pay was changed around the time she became responsible for managing Carlingford Lodge. No actual comparator paid more for managing a larger home (or a home comparable to Carlingford Lodge) was identified or evidenced. The Tribunal does not find that the claimant was treated less favourably than either an actual comparator or than a hypothetical comparator (who was younger or of a different race). The rate of the claimant's pay at Carlingford Lodge was determined by the size of the home and the complexity of those living in it, it was not because of the claimant's race and/or age.

Supervision/appraisals (s)

233. Allegation/event (s) in the List of Issues was that Ms Allton and Mrs Wilson did not hold regular supervisions or an appraisal with the claimant, but this was achieved with other managers in Ms Bales region. It was not in dispute that the appraisal was due by 31 March 2018. This was recorded at paragraph 2.13 of the claimant's rewrite of her claims (41) and was an allegation for which amendment was granted. It was an allegation of direct race and/or age discrimination.

234. It did appear to the Tribunal that Ms Allton did conduct some supervisions with the claimant, as records had been provided. Some details of those meetings have been recorded in the findings of fact above. Those supervisions may not have been

as regular as the claimant would have hoped. Those supervisions were not recorded on the formal supervision form.

235. Whilst being managed by Mrs Wilson, Mrs Wilson's evidence was that she did meet regularly with the claimant and talked to her regularly on the telephone. Mrs Wilson considered those meetings to amount to supervision. Mrs Wilson's evidence was that she took the same approach to all managers and indeed because the claimant was a recent appointee met with her more frequently than others. The Tribunal accepts Mrs Wilson's evidence and find that the claimant was not treated less favourably by Mrs Wilson in the supervision conducted with her in her time in Northern Ireland.

236. In terms of comparators on supervision, the only evidence the claimant provided was about her own supervision of her staff. The Tribunal does not find the claimant's approach to her supervisees to be evidence of someone in materially the same circumstances as the claimant. Accordingly, in relation to supervisions, the Tribunal does not find that the claimant was treated less favourably than any named comparator and/or that she was treated less favourably than a hypothetical comparator would have been.

237. The position in relation to appraisals was different. The facts regarding appraisals are recorded at paragraph 86 above. The claimant did not have a formal appraisal completed for 31 March 2018 (or thereafter). The failure to complete an appraisal was a failure by Ms Allton. The respondent has put forward no positive evidence about why an appraisal was not conducted, other than the emails referred to which show some debate about who should conduct the appraisal. The evidence was that completing appraisals was considered important (and would therefore have been completed for others).

238. In those circumstances, the claimant has identified potential less favourable treatment when compared to a hypothetical comparator of a different race and age (there being no actual named comparator). If the burden of proof were to have reversed, the claimant would succeed in her claim as the respondent would not have proved that it did not commit the alleged discriminatory act. As with allegations (o), (dd) and (l) the Tribunal has addressed whether the burden of proof was reversed collectively including this allegation (as it applies to the appraisal) at paragraph 283 below.

Registration manager (r)

239. Allegation/event (r) is recorded in the List of Issues as being: the claimant asserts when she was allocated an interim post by Mrs Wilson in May 2017 she was not asked not involved in registering her position with the registered authority as was normal procedure with her other white younger managers registration. In fact, this allegation related to May 2018 (the claimant not having been in Northern Ireland in May 2017). May 2018 was when the claimant commenced working at Carlingford Lodge. The Tribunal considered this allegation for the registration of that role only based upon the allegation recorded in the list of issues as it was alleged for May only, albeit that the claimant argued during the hearing that it applied to two posts in Northern Ireland. This was an allegation of direct race and/or age discrimination.

240. The evidence regarding the approach to registration of homes and managers in Northern Ireland is addressed in the findings of fact above at paragraph 88. The Tribunal accepted Mrs Wilson's evidence that the way that she approached registration for the claimant in a temporary role at Carlingford Lodge was consistent with the way she would have approached registration for any other manager appointed on a short-term or temporary basis, that is someone in materially the same circumstances as the claimant irrespective of their race and/or age. Accordingly, the claimant was not less favourably treated than a comparable employee would have been (who was younger or of a different race). The reason for the claimant not being involved in the registration of her position with the registration authority in Northern Ireland was not because of, or on grounds of, her race or age.

The move to Carlingford Lodge (cc)

241. Allegation/event (cc) was that: the claimant asserts that in April 2018 following a successful inspection by the registering authority at a home where the claimant had worked as the manager since February 2018 the claimant was told that she had to increase her travel to provide maternity, management cover to Carlingford Lodge. This was brought as a claim of direct race discrimination, direct age discrimination and harassment on grounds of race and/or age. This was based upon paragraph 13.8 of the claimant's further particulars (47) for which leave to amend had been granted.

242. The circumstances surrounding the claimant's move from Shaftsbury Mews to Carlingford Lodge are address in the facts at paragraph 87 (in the context of Mrs Wilson's understanding of the claimant's role in Northern Ireland as addressed at paragraph 65). The claimant had been fulfilling a short-term management role which had been identified at the end of her short-term management role at Apple Mews. She wished to remain in Northern Ireland. An alternative cover role was identified at Carlingford Lodge for the claimant to cover a period of maternity leave. The claimant herself accepted that there were reasons why others were not asked to cover that role. Whilst the claimant was asked to move sites with limited notice, that reflected the fact that she was fulfilling roles on a temporary basis. It was a detriment for the claimant to be asked to move to Carlingford Lodge because the travel time was longer. The reason why the claimant was asked to move had nothing to do with race and/or age and therefore was not direct discrimination; a hypothetical comparator of a different race or who was younger in materially the same circumstances as the claimant (fulfilling assignments in Northern Ireland on a temporary basis) would have been treated in the same way.

243. In terms of harassment, nothing about the request or any office moves at Shaftesbury Mews were related to the protected characteristics of the claimant's age or race (and in any event the request did not have the purpose or effect prescribed).

Management safeguarding training (v)

244. For issue (v) the claimant asserted that in May 2018, when attending management safeguarding training, two members of her staff from Shaftesbury Mews (where she had worked shortly before) congratulated her saying "*you are a*

good manager…you keep us on our toes". The claim arose from the claimant's contention that Mrs Wilson seemed aggrieved when she heard the comment and stated that "*I thought it was me who did that*". This allegation had been recorded at paragraph 12 of the claimant's further particulars (46) and was an allegation for which leave to amend had been granted. This was an allegation of direct race and/or age discrimination.

245. This conversation is addressed at paragraph 90. The Tribunal did not find the comment made to be less favourable treatment of the claimant at all. It also did not find that the comment made was treatment on the grounds of race and/or age. In the event that this had been pursued as a harassment claim, the Tribunal certainly would not have found it reasonable for the effect of such a comment to be that it undermined the claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for her.

Spot checks (w)

246. Allegation (w) was that, in June 2018, Mrs Wilson instructed the claimant to apply tactics of spot checking to the claimant's work, as it had been reported in a regional meeting by staff that this worked. In the list of issues it was recorded that the claimant informed Mrs Wilson that the claimant was aware that it was Meghan who had stated this and that the claimant was the instigator of these tactics as Meghan described them as being applied in Shaftesbury Mews. This was an allegation of direct race discrimination, direct age discrimination and harassment on the grounds of race and/or age. This was also part of the matters recorded at paragraph 12 of the further particulars (46) for which leave to amend was granted.

247. As with the previous allegation, the Tribunal did not find that what was alleged amounted to less favourable treatment of the claimant at all. In any event such an instruction was not made on the grounds of race and/or age. In terms of the harassment claim, there was no evidence that the comment was related to race or age. The comment did not have the purpose or effect required (in the prescribed effects), nor would it have been reasonable for it to have had such an effect even if it had.

The relatives' meeting (x)

248. Allegation/event (x) related to the relatives meeting at Carlingford Lodge in June 2018 and what the claimant contended Mrs Wilson said to her following that meeting. The precise allegation is recorded in the List of Issues. This was an allegation of direct race discrimination and direct age discrimination. This was also part of paragraph 12.0 of the further particulars (46) for which leave to amend had been granted.

249. In the same way as for the two previous allegations, the Tribunal does not find that what was alleged to have been said amounted to less favourable treatment of the claimant in any event. The Tribunal found nothing whatsoever to suggest that any response to the relatives meeting was because of, or on the grounds of, race or age. In any event, this allegation was not put to Mrs Wilson.

Holiday (m)

250. Issue (m) was recorded as being that the claimant believed that she was given less holiday than other managers. The respondent denied this and said that no extra holidays were given when a deputy manager became a manager; but the claimant said managers at Carlingford Lodge were given an extra week's holiday as an incentive. This was an allegation of direct race and/or age discrimination. This was recorded in the Case Management Order following the preliminary hearing heard by Employment Judge Feeney on 4 July 2019 (34).

251. The Tribunal heard no evidence whatsoever that proved that the claimant was given less holiday than any other manager. The only evidence heard which suggested she might have been was the evidence given by Mrs Wilson about holiday entitlement given to managers in a predecessor company (paragraph 92) which provided a reason other than race or age for any difference had it been proved. The claimant did not prove that she was treated less favourably than any identified comparator or than any hypothetical comparator in materially the same circumstances would have been. The claimant provided no evidence which supported this allegation.

The allegation that Mrs Wilson did not correct payments to the claimant (c)

252. This allegation was recorded in the Case Management Order made by Employment Judge Feeney following the hearing on 4 July 2019 (33). What she recorded as being the alleged discrimination was: failing to authorise the correct payments to the claimant by Mrs Wilson. This was an allegation of direct race discrimination and direct age discrimination.

253. As is addressed in the findings of fact above and in relation to allegation (e) below, the respondent did fail to pay the claimant the sums due to her throughout the time for which she was employed by the respondent. The respondent failed to: correct the errors that it had made; failed to pay the claimant the bonus payments for working in Northern Ireland to which it had committed; and failed to pay the claimant the expenses to which she was entitled either when due or, in some cases, at all.

254. This specific allegation appeared to differ from those addressed at (e) below, was that it focussed upon Mrs Wilson and the contention that Mrs Wilson failed to correct the payments due to the claimant.

255. As the claimant herself identified, the failures by the respondent to make the payments due started from when she commenced employment in England and continued throughout her employment. Mrs Wilson was neither responsible for, nor necessarily able to, rectify the shortfalls relating to the claimant's time in England or the course which she attended which addressed English requirements. The emails in which matters were later addressed, also showed other employees of the respondent endeavouring to rectify the issues (albeit failing): Ms Abernathy; Ms Cammock; and Ms Stutt. The period over which the failings continued and the fact that the attempts to resolve the matters were undertaken centrally (albeit unsuccessfully) suggested that the main failing was not one which resulted from the actions or inactions of Mrs Wilson.

256. As recorded in the findings of fact above at paragraph 97, there was an email on 10 May 2018 in which a payroll administrator recorded that a delay in payment was as a result of Mrs Wilson failing to sign relevant forms. Ms Robinson also confirmed in answering questions that, from her perspective, failures to pay were usually the responsibility of the manager. Mrs Wilson's evidence was that when she was requested to do so she signed off the documents required. She said she signed off her payroll every month. Her evidence was that she did what she could to make sure that the claimant received the payments that were due, albeit Mrs Wilson accepted that payment of the sums due did not occur. Towards the end of the claimant's employment, Mrs Wilson identified that more senior people in Payroll, Finance and Human Resources were involved, and she identified that they were the people responsible for payments not being made.

257. As has been recorded, the Tribunal found Mrs Wilson to be a genuine and credible witness and accepted her evidence as being true. Accordingly, with regard to pay, the Tribunal did not find that Mrs Wilson failed to authorise the correct payments to the claimant. There was no document identified (save for the email referred to in which an administrator explained the respondent's ongoing failings by blaming Mrs Wilson) which proved that the failure to pay what was due was the fault of Mrs Wilson. The Tribunal did not find that Mrs Wilson failed to authorise the correct payments, the systemic failings of the respondent were wider than that and not attributable to any short comings by one manager. The Tribunal also did not find that any failure to authorise any specific payment by Mrs Wilson was because of (or on the grounds of) the claimant's race and/or age.

The allegation that Mrs Wilson was persistently patronising (d)

258. Allegation (d) was the claimant's allegation that Mrs Wilson was persistently patronising on the basis of her age. This was a direct age discrimination allegation. It was recorded in the Order made by Employment Judge Feeney following the preliminary hearing on 4 July 2019 (33).

259. The evidence regarding the matters around the claimant's use of hotels while in Carlingford Lodge and related events has been addressed at paragraph 93 above in the findings of fact. The Tribunal found it difficult to understand why the claimant asserted that Mrs Wilson was being persistently patronising as alleged. For example, the suggestion by Mrs Wilson that the claimant's partner visited Northern Ireland while the claimant was working there was one that was perfectly sensible and acceptable. Mrs Wilson was also perfectly entitled to raise issues regarding hotels that the claimant used and to discuss matters with the claimant about her own safety. The Tribunal did not find that: Mrs Wilson was persistently patronising; there was any less favourable treatment of the claimant; or that the matters alleged were because of, on the grounds of, or had anything whatsoever to do with, the claimant's age or age more generally.

The allegation that the claimant was sneered at regarding past experience (f)

260. Allegation (f) was recorded in the Case Management Order made by Employment Judge Feeney on 4 July 2019 (33) and was recorded as being that Mrs

Wilson sneered at the claimant's past experience. This was alleged to be direct race discrimination and direct age discrimination.

261. The matter upon which the claimant relies for this allegation was that Mrs Wilson referred to the claimant as a "*business woman*" in a conversation when the claimant and Mrs Wilson were discussing authorisation for payment. The claimant evidenced that this statement was said, Mrs Wilson could not recall it.

262. The claimant's evidence was that she had previously owned and run a home. She accepted that Mrs Wilson knew of the knew of the claimant's employment history and that she could fairly be described as a business woman. The Tribunal does not find that any reference to the claimant being a businesswoman to be a pejorative statement. It does not find that Mrs Wilson sneered at the claimant. It does not find the statement to be less favourable treatment of the claimant. It does not find that the comment was made because of or on the grounds of the claimant's age or race.

Pay (e)

263. Allegation (e) is also one that is recorded in the Case Management Order following the preliminary hearing on 4 July 2019. What was recorded was that the respondent, Mrs Wilson in particular, failed to resolve the claimant's pay enquiries. The comparators were identified as white staff who were not subjected to such a delay in having their pay queries resolved; specifically Unit Managers had their arrears resolved by Mrs Wilson in June 2018. This was contended to be direct race discrimination.

264. As the role of Mrs Wilson has been addressed in relation to allegation (c) above, in considering this allegation the Tribunal focussed upon the respondent's failure generally to resolve the claimant's pay issues. The Tribunal did hear evidence that arrangements were made for the unit managers at Carlingford Lodge to be paid sums due, which appeared to have arisen from the pay freeze. The claimant asserted that this was achieved due to Mrs Wilson raising it. In the light of the findings provided for allegation (c) the Tribunal does not find that there was any less favourable treatment of the claimant by Mrs Wilson, albeit it appears that Mrs Wilson's involvement in facilitating payment for the unit managers was more successful than it was for the claimant.

265. In considering allegation (e) the Tribunal has considered the respondent's failures to pay the claimant the sums which she was due throughout her employment. As the claimant contended during the hearing, in practice her allegation was that the respondent had failed to pay the claimant what she was entitled to at any time from the start of her employment in April 2017 until it terminated in August 2018, and she contended that failure was direct race discrimination. The Tribunal considered this allegation as explained by the claimant, even though it went beyond what was recorded in the list of issues.

266. In their evidence, both of the respondent's witnesses accepted that pay had not been processed correctly and apologised. The Tribunal also noted the two full and categoric apologies provided by the respondent's Payroll Manager, Ms

Cammock, in emails in July (410) and August 2018 (419) (see paragraph 100 and 101). The Tribunal finds that the respondent was entirely right to sincerely apologise for the errors which had been made. It also notes that even having apologised the respondent failed to rectify the errors and failed to pay the payments due.

267. The Tribunal finds that the respondent fundamentally failed to ensure that the claimant was paid what she was entitled to at any time during her employment. The Tribunal finds the respondent's approach to payments to the claimant to be utterly shambolic. The Tribunal accepts the evidence of the claimant and Mr Donaldson-Ellison that the payments made were incorrect throughout the whole time during which she was employed and (as found in relation to the claims for unlawful deductions from wages and breach of contract below) remained incorrect even after her employment had terminated.

268. There is no doubt at all that the failure to ensure that the claimant was paid what she was due (both in wages and expenses) over such an extended period of time, fell well short of what would be expected of any employer, but certainly fell short of what would be expected from a large employer such as one in the same group of companies as the respondent.

269. There appeared to be a number of issues with pay which caused or exacerbated the respondent's failings: the claimant commencing work as a deputy manager and then taking on work as a manager when paid at an hourly rate; the claimant moving between locations in England; when moving to Northern Ireland, the claimant moved between payrolls; the claimant undertook three different roles in Northern Ireland; confusion about where the claimant's costs were paid from and how they were recharged, with an initial arrangement for re-charge which appears to have had some problems; the bonus for taking the management role in Northern Ireland which the respondent appears to have struggled to administer; and the pay freeze (which, for the claimant, appeared to have amounted to little more than the respondent failing to adhere to its contractual commitments for a period when a move to a salary had been agreed). There appears to have been issues with the large amounts of expenses and an audit of expenses (as well as issues between England and Northern Ireland about the payment and allocation of specific training expenses), although there was notable absence of any recorded explanation being given to the claimant about her expenses and the refusal to make payment. Most surprisingly, having issued a counterclaim for one amount, the only witness called by the respondent who was employed at the time of the hearing, identified during the hearing that the amount counterclaimed was incorrect and reduced the figure in the light of consideration of the issues. None of these factors provided a genuine explanation for the failures to pay the claimant what she was due, but they are highlighted because they show the reasons such as they were, for the respondent's shambolic approach to the claimant's pay and expenses.

270. Ms Robinson's evidence was that the extent of the pay failures were unique to the claimant; they were not what was normally faced by the respondent's other employees. As a result, the Tribunal finds that the claimant was treated less favourably than others. There was a difference in race between the claimant and most of the respondent's other employees.

271. The difficult question for the Tribunal was whether those failings were because of or on the grounds of the claimant's race. The claimant's evidence was that the failures continued for so long, that, ultimately, she reached the conclusion that they must have been because of her race. The Tribunal can understand why she reached that conclusion and accepts that it was honestly held. However, the Tribunal has particularly taken account of what is said in relation to the case of **Zafar** referred to above, that poor treatment is not of itself evidence of race discrimination. The fact that the claimant was treated shambolically does not prove race discrimination, even if she was one of a very limited number of black employees in the respondent's employ in management roles. The pay failings continued throughout the period of the claimant's employment and were not specific to decisions made by one person, manager or group of managers. The issues were not even resolved when other senior managers became involved. The Tribunal accepts that the claimant's circumstances were complex, when compared to other employees in a single role or location. Having considered all of the evidence heard, the Tribunal has concluded that the reason for the shambolic failure to pay the claimant the sums due was not as a result of the claimant's race. The Tribunal has found the respondent's approach to the claimant's pay to be a matter of administrative incompetence (albeit in complex circumstances).

272. One element of the claim which the claimant particularly emphasised was the lack of diversity in the respondent's organisation. The Tribunal finds that a lack of diversity does not prove race discrimination. It is quite right that the claimant was treated unfavourably in relation to pay and expenses, but, based on the evidence heard, the Tribunal finds that it was due to administrative failings and was not because of the claimant's race.

273. The Tribunal would add that, had this been a claim for constructive dismissal, the Tribunal would have had no hesitation in finding that the respondent fundamentally breached the claimant's contract of employment by failing to pay her the sums due (which were particularly significant by August 2018). As a result of the respondent's fundamental breach of contract, the claimant was fully entitled to resign with immediate effect. However, those findings are not determinative of the claimant's discrimination claims.

The investigation issues (a)

274. Allegation/issue (a) was recorded in the Case Management Order following the hearing on 4 July 2019 (33). It was dated as occurring on 26 August 2018 in what the claimant said in paragraph 1 of box 8.2 of the claim form (8). The allegation was that the claimant was criticised for leaving the premises without permission (although the claimant says that she did inform her manager and was not told not to leave). The claimant states that other managers would not require such permission. This was a claim for direct race discrimination and direct age discrimination.

275. This allegation arose from what was said in the letter inviting the claimant to an investigation meeting on 14 August 2018 (585), with the relevant allegation being restated in the letter sent following the claimant's resignation on 26 August 2018 (472). The contention was that the claimant had been absent from work without prior authorisation or permission. The reason why that contention was made, was

because the claimant had been absent from work without prior authorisation, as addressed at paragraph 102. The claimant had decided, for entirely understandable reasons, not to travel to undertake her duties in Northern Ireland whilst the significant sums due remained outstanding. However, in doing so, the claimant had put herself in a position where she had not attended work at the site in Northern Ireland where she was expected to be. The claimant had not obtained authorisation from Mrs Wilson, her manager.

276. The Tribunal accepted Mrs Wilson's evidence as to why she raised this issue. The allegation was in practice true. It certainly would have been advisable for the claimant's absence from Carlingford Lodge to have been handled more sensitively and less robustly, arising as it did from the circumstances where the respondent had failed to pay the claimant considerable sums due. However, the Tribunal finds that any hypothetical comparator in materially the same circumstances would have been treated in the same way as the claimant, if they had also not returned to work in a home in Northern Ireland and had been due to do so. This allegation was not made against the claimant because of race or age.

277. During her evidence, the claimant provided considerable detail about managers, and their ability to leave the premises to undertake tasks, visit potential residents, and deal with regulators. The Tribunal entirely accepts that other managers would not have been subject to investigation had they left the premises for which they were responsible, in those circumstances. However, the reason why Mrs Wilson raised the issue with the claimant was not because she had left the premises for periods of time to undertake those type of tasks or because of her working hours, but rather because the claimant had simply failed to return to the home for which she was responsible when she had been due to return.

The time given for attending a meeting (ee)

278. Allegation (ee) was recorded as being that: Mrs Wilson did not follow the code of conduct and procedure as stated in the employee handbook regarding the period of notice necessary for an investigation meeting, allowing the claimant only two days' notice to arrange travel to Northern Ireland to attend an investigation and not acknowledging the claimant's reasonable request to arrange a suitable time, date and venue. The list of issues went on to allege that Mrs Wilson further noted in the acknowledgement to the claimant's resignation letter that the result of the Investigation hearing was already predetermined resulting in an automatic disciplinary hearing where poor conduct and a breach of contract would be found, validated and stated in any reference to future employers thereby attempting to sabotage the claimant's career. This was an allegation of direct race discrimination, direct age discrimination and harassment on grounds of race and/or age. This allegation was recorded at paragraph 13.12 of the claimant's further and better particulars (48) for which leave to amend was granted.

279. The respondent's disciplinary policy does record that at least five calendar days' notice should be given of a disciplinary hearing, with the full written details and documents to be provided that far in advance (189). Mrs Wilson gave the claimant only three calendar days' notice. However, the meeting to which the claimant was being invited was clearly a formal investigation meeting, it was not the disciplinary

hearing. Mrs Wilson's evidence was that this was an investigatory meeting as she had been unable to obtain any explanation from the claimant for her non-attendance and she was trying to get to the bottom of the claimant's position.

280. After the claimant herself had identified the difficulties she had in travelling to Northern Ireland, Mrs Wilson offered to meet the claimant in England at the Home closet to the claimant's home address. Unfortunately, the claimant did not see that offer until after the time when the meeting was due to take place. The claimant resigned with immediate effect on 18 August, which meant that the investigation meeting did not go ahead and there was no longer felt to be a need to meet with the claimant about her non-attendance at Carlingford Lodge.

281. The Tribunal does not find that the response sent to the claimant following her resignation (472) noted that the investigation had already been predetermined, as alleged. The letter sent by Mrs Wilson did not do so. What it did was record two things (which are relevant to this allegation): that the investigation would not proceed; and that, because the claimant had not worked her notice, that would be confirmed in any reference. Neither statement said that the investigation had been predetermined or demonstrated that was the case. Whilst it may have been inadvisable or unnecessary for the respondent to the statement about the reference in the letter, as is recorded in the findings of fact above the Tribunal accepts that statement about the notice period and reference was included because of the standard precedent which was used by Mrs Wilson (and boxes which were ticked when it was prepared).

282. Accordingly, the tribunal does not find that these actions were because of the claimant's race and/or age. In terms of the notice given of the investigation meeting, it was because Mrs Wilson was endeavouring to investigate matters where the meeting was an investigatory one (and not a disciplinary hearing). The other matters reflect the process followed and the respondent's standard form response to the resignation. In relation to the harassment allegation, the conduct was not related to either race or age. Having reached that conclusion, the Tribunal has not needed to consider the purpose or effect of the conduct described, but would confirm that it does understand why the claimant could have found the content and wording of the post-resignation letter to be unnecessary and lacking in empathy.

Burden of Proof

283. As recorded above, in relation to four of the allegations/events the Tribunal has identified that critical to its decision in the claims for race and age discrimination was whether on the balance of probabilities the claimant had proved facts from which the Tribunal could conclude (in the absence of an adequate explanation from the respondent), that the respondent had committed the unlawful discrimination alleged, and the Tribunal has decided that the allegations should be considered together. That is whether the claimant had shown the something more or the prima facie case (see, in particular paragraphs 127, 128(i), 131 and 132 above for the test being applied). The allegations/events for which the burden of proof has been considered collectively were:

> (o) - IT access at the IT management Induction Training in Bristol on 30 May 2017;

(dd) - the commitment made by Ms Perez in July 2017 that the claimant would receive a salary equal to Ms Allton and only that part of the allegation;

(l) - being passed over for roles at Rose Lodge and Addison Court, but only for those roles/locations; and

(s) - the failure of Ms Allton to undertake an appraisal with the claimant by 31 March 2018.

284. The question which the Tribunal has considered in some detail is whether or not the "something more" had been identified to reverse the burden of proof.

285. In relation to age discrimination, the finding identified by the Tribunal which it was considered might have had the impact of reversing the burden of proof was the claimant being told in 17 July meeting by Ms Allton, that Ms Allton was under the impression that the claimant had taken a less demanding role at the end of her career (see paragraph 47 and this has also been addressed in detail in relation to allegation (ff) at paragraphs 174 to 177 above). The Tribunal has already explained why it did not find the comments to have been made on the grounds of age. The Tribunal also does not find that that comment alone was sufficient to reverse the burden of proof and provide the something more required for age discrimination for the allegations in question. The comment was simply Ms Allton explaining why she thought the claimant had taken on a deputy manager role in the light of the claimant's experience. Accordingly, the Tribunal does not find that the burden of proof was reversed in relation to age discrimination and the claimant's complaint of age discrimination for the relevant allegations does not succeed.

286. In relation to race, the Tribunal particularly considered whether two of the findings made might have had the impact of reversing the burden of proof, being: the "*jungle drums*" comment made by Mrs Wilson (see paragraphs 71-73 and which is addressed in relation to allegation (b)); and the comment made by Ms Allton in November 2017 that *"You have to be white and middle class to succeed in the Priory"* (see paragraph 66). The latter comment was not of itself relied upon as constituting discrimination or harassment, but was something which the claimant herself highlighted at the start of the proceedings and which has been found to have been made as recorded at paragraph 66 above.

287. The Tribunal has concluded that the "*jungle drums*" comment did not of itself reverse the burden of proof or provide the "something more" required to show that the respondent's conduct was on the grounds of race. The reason for that conclusion is explained in more detail at paragraphs 202 and 207 in the Tribunal's findings that the comment did not amount to unlawful harassment. The use of the phrase by Mrs Wilson may have been an insensitive one, but the Tribunal finds that it is a phrase which is (or at least has been) in common usage and its use alone does not reverse the burden.

288. In all elements of the Judgment recorded to this point, the Tribunal has unanimously agreed what has been found and recorded. However, with regard to the burden of proof and whether it has been reversed for these specific allegations as a result of Ms Allton's comment in November 2017, the Tribunal has not been able to agree.

289. The majority of the Tribunal find that such a comment, reflecting as it did a single employee's view of the respondent's organisation generally, which was not directed at the claimant in a specific or pointed way, nor was it a statement of how the speaker would treat the claimant but rather it was being given as an explanation of one employee's view of the claimant's prospects, did not reverse the burden of proof. It was not, of itself, sufficient to show that there was sufficient in all the circumstances for the Tribunal to find that it could conclude that the allegations being made were on the grounds of race (that is it was not sufficient to make the prima facie case). As a result, these claims for direct race discrimination do not succeed.

290. The minority of the Tribunal (Mr McCaughey) disagreed. In doing so he highlighted the following: Ms Allton was not just a colleague, she was the claimant's line manager; Ms Allton was the line manager of the claimant for Preston Private where the claimant was based; and Ms Allton was a person to whom the claimant had raised a grievance. In that context, where the manager had expressed the view which it has been found she did, Mr McCaughey's view is that the comment was sufficient in all the circumstances to reverse the burden of proof for the relevant allegations, that is for the prima facie case to have been made. Mr McCaughey's minority view was that, as a result of this comment together with the other matters found in relation to allegations (o), (dd), (l) and (s), the burden of proof was reversed and therefore the claimant would have succeeded in the aspects of those claims identified at paragraph 283.

Time/Jurisdiction

291. The Tribunal only considered the issue of time/jurisdiction after it had made all the findings already recorded in the Judgment and therefore it was not necessary for the Tribunal to go on and reach a decision on those issues (1 and 2 in the List of Issues) as the claimant's discrimination and harassment claims have not succeeded.

292. However, in the light of the decisions reached, the Tribunal also considered whether or not the claim had been entered in time and/or whether it would be just and equitable to extend time, for the matters identified at paragraph 283, being the issues for which the minority of the Tribunal had found unlawful discrimination on grounds of race.

293. The dates upon which each of the allegations occurred were:

(o) – IT training on 30 May 2017;

(dd) – salary commitment by Mrs Perez made in July 2017 and not applied shortly thereafter;

(l) – being passed over for roles at Rose Lodge in July 2017 and Addison Court some time in 2017 (prior to the move to Northern Ireland); and

(s) - failure to complete the appraisal by 31 March 2018.

294. It is not clear whether all of these the matters were a continuing act and it is notable that (dd) was a decision made by Ms Perez whereas (o) and (s) were specifically actions of Ms Allton, but nonetheless for the purposes of determining the

issue of time/jurisdiction, the Tribunal first considered whether the claims were brought in time and whether it was just and equitable to extend time, on the basis that they were all a continuing act culminating in the failure to undertake an appraisal by 31 March 2018. On that basis, the continuing act ceased on 31 March 2018 (or possibly shortly thereafter).

295. Considering only those matters being addressed in this part of the Judgment as recorded at paragraph 283, the claim was entered significantly out of time. The last date of the period for which this conduct extended was 31 March 2018. A claim should have been entered (or ACAS Early Conciliation have been commenced) by 30 June 2018. The claim was not entered at the Tribunal until 22 January 2019 (with ACAS Early Conciliation not being commenced until 15 November 2018). That is the claim was entered over six months after it should have been. On that basis the claim in relation to these matters was entered outside the primary time limit.

296. The Tribunal has therefore gone on to consider issue 2 in the List of Issues, that is (in summary) whether it would have been just and equitable to extend time in relation to these allegations. The Tribunal has considered and applied the law explained at paragraphs 146-149 above and will not reproduce all of the law in this part of the Judgment.

297. The respondent's representative in his submissions contended that the following features were relevant to the application of this test: that the claimant could not say that she was either ignorant of her rights or unaware of the rules on time limits as she was a member of a trade union and would have been able to seek advice from them as well as other sources; the length of the delay; the reasons for the delay, in the respondent's submission involving no good reason for the delay; and the strength of the claim. The Tribunal accepted these all as being relevant factors, albeit the strength of the claim was only a relevant factor in considering the balance of prejudice. The claimant had been able to approach the RCN during her employment when she had obtained counselling and had sought employment law advice from the RCN in July 2018 (when her claims for these issues would have only been out of time by a limited extent and approximately six months before a claim was entered).

298. The Tribunal also considered the prejudice to the parties: for the claimant, if an extension of time was not given she would not be able to succeed in otherwise potentially meritorious claims; for the respondent, no specific prejudice was identified from an extension of time being granted albeit all delay results in a reduced recollection and, of course, the respondent might have been found to have discriminated if time was extended and the claims succeeded.

299. As with the issue of the application of the burden of proof, the Tribunal was not able to reach unanimous agreement on its decision about whether it would have been just and equitable to extend time.

300. The majority of the Tribunal has concluded that it would not be just and equitable to extend time balancing all of the above factors. In particular, the majority has taken account of what is said in relation to the case of **Robertson v Bexley Community Centre t/a Leisure Link** quoted above, and the fact that the time limits are there for a good and sensible reasons. This claim being entered involved a

significant delay which was only really explained by the claimant's wish not to allege discrimination but not by any reason which explained the delay aside from a wish not to claim. The claimant had access to legal advice through the RCN throughout her employment and she did access such advice in July 2018 six month before she claimed. Whilst the balance of prejudice was a factor which supported an extension being granted, taking account of the other factors it would not have been just and equitable to extend time in the circumstances of this case (considering these allegations)

301. The minority of the Tribunal (Mr McCaughey) disagreed. He believes that it would have been just and equitable to extend time, focussing in particular on the prejudice to the parties and in particular the lack of prejudice to the respondent (particularly when contrasted with the significant prejudice to the claimant).

302. As already explained it was not strictly speaking necessary for the Tribunal to determine the issue of jurisdiction/time, but by a majority the Tribunal has determined that it would not have been just and equitable to extend time and therefore the Tribunal would not have had jurisdiction to determine these allegations even had the majority of the Tribunal agreed with the minority on the allegations recorded at paragraph 283 and on the application of the burden of proof.

Unlawful deductions from wages – bonus payments

303. As part of her unlawful deduction from wages claim the claimant contended that she had not been paid all of the bonus payments due to her for her time working in Northern Ireland (see paragraphs 69 and 70). It was the claimant's submission that she had been paid only four bonus payments in the time when she was in Northern Ireland, when she should have received eight. Each bonus payment was/should have been £750 gross.

304. In his submissions the respondent's representative accepted that three of the bonus payments were not shown on the payslips and therefore remained due. He contended that the fourth bonus payment claimed, that is for April 2018, was paid in May 2018. The Tribunal identified only four bonus payments which were paid to the claimant for her time in Northern Ireland.

305. The Tribunal accepts the claimant's submission that she received four payments and eight were due. The Tribunal finds that only four were paid, evidence of the other four not having been found. Accordingly, the Tribunal finds that the respondent did fail to pay the claimant four bonus payments of £750 (out of the eight due). The failure to make such payments was an unlawful deduction from the claimant's wages. As the bonus payments were each £750 gross, the Tribunal finds that the respondent has made an unlawful deduction from the claimant's wages of £3,000.

Unlawful deduction from wages – pay increase

306. The claimant claimed that she was due a 3% pay increase for the period June to August 2018 and that this sum had not been paid to her, which therefore amounted to an unlawful deduction from wages.

307. In his submissions the respondent's representative referred to a salary increase in 2017, but that did not appear to have been the one that was in dispute.

308. As recorded at paragraph 120 above, Ms Robinson gave evidence on this issue and she confirmed that there was a 1.5% pay increase for the year which should have applied to all employees and applied from July 2018. No evidence was heard as to why the pay increase was not paid to the claimant or why it was not otherwise due to her.

309. On the basis of Ms Robinson's evidence, the Tribunal finds that the claimant was entitled to have her basic pay increased by 1.5% for pay in July and August 2018. No such increase was paid to the claimant. The failure to pay the sums due was an unlawful deduction from wages. Applying 1.5% to the £47,000 per annum salary which was paid to the claimant, the Tribunal finds that a deduction was made of £58.75 in each calendar month and therefore the claimant was entitled to £117.50.

Unlawful deduction from wages – holiday pay

310. The claimant claimed that she was due pay for accrued but untaken annual leave of £948.01 (as a net figure). Ms Robinson, in the course of her evidence during the hearing, gave evidence that the claimant was entitled to £1,416.02 as a gross sum payable for the holiday accrued but not taken. That had not been paid to the claimant as it should have been. The failure to pay was an unlawful deduction from wages. Accordingly, the Tribunal finds that the respondent unlawfully deducted £1,416.02 from the claimant's wages in respect of annual leave (being the figure that the respondent accepted was due).

311. The Tribunal would also highlight that the respondent fundamentally failed to address the issue of outstanding holiday pay due at the time that the claimant's employment terminated. It appeared that no endeavours were made to pay what was due or to confirm to the claimant how much was due. When counterclaiming the respondent also failed to account for the holiday pay that was clearly due and it was only as a result of the honest evidence of Ms Robinson during the hearing that the amount due was calculated.

Unlawful deduction from wages – the final week's salary

312. The claimant asserted that she had not been paid the salary due for her final week of work. Ms Robinson recorded that the claimant was due £1,010.75 as gross pay for the work undertaken which should have been paid in September 2018. This resulted from the periods of work undertaken for which payment was made (see paragraph 32).

313. In fact, the claimant was paid £2,813.27 in September 2018. As a result, there was no unlawful deduction from the claimant's wages because the claimant was paid more than she was entitled to for the period of work undertaken.

314. It is however important to record that, as with the holiday pay, there appeared to have been no attempt by the respondent to calculate this amount or to confirm to the claimant what was due (prior to Ms Robinson's evidence at the hearing). When demanding repayment of the sums paid and in entering the counterclaim the

respondent did not confirm that this sum had been due. The payslip which appeared to reverse the September payment (556) was fundamentally incorrect. When account is taken of the payments made to the claimant in September 2018 (as the respondent is entitled to do when making the payments otherwise due as a result of this Judgment), the respondent must not endeavour to reduce other payments by the £1,010.75 gross paid to the claimant which was the salary correctly paid to her in September 2018.

Breach of contract -expenses

315. The evidence in relation to the expenses is addressed at paragraphs 109 to 114 above. The claimant claimed that £607.42 remained outstanding. The Tribunal fully understood the claimant and Mr Donaldson-Ellison's difficulties in identifying precisely what hadn't been paid and why, in the complete absence of any breakdown or record having been provided by the respondent (something which the Tribunal would have expected to have been made available to any employee, but in any event to have been prepared and provided to the Tribunal for the hearing).

316. In relation to the journeys undertaken by the claimant's partner in returning from the airport after dropping the claimant off, the Tribunal finds from the respondent's emails that this related to £478.80 of the unpaid expenses. The Tribunal has focussed upon what was stated to be required for expenses to be paid according the respondent's relevant policy (see paragraphs 29 and 30). The requirements were that the expenses were: reasonable; actually and necessarily incurred while on the respondent's business; reasonable costs of necessary travel; and the policy had been complied with. The respondent did not contend that a policy had not been complied with. The Tribunal did not find that clause 3.6.2 of the handbook assisted with determining the claimant's claim, as it applied to journeys when a colleague was transported by another colleague, which was not the circumstances of this case. There was certainly nothing in clause 3.6.2 which meant that the claimant had not complied with the policy in incurring these expenses.

317. The tribunal finds that the costs incurred were: reasonable, as they saved the respondent money when compared to parking and leaving the vehicle at the airport; actually and necessarily incurred whilst on the respondent's business (the car either needed to be parked at the airport or driven back by the claimant's partner); and no element of the policy with which the claimant had not complied has been identified. As a result, the respondent was contractually obliged to reimburse the claimant the expenses incurred and it was a breach of contract when it failed to pay the claimant the £478.80 due.

318. The Tribunal has reached this determination applying the terms of the respondent's policy. However, in doing so, the Tribunal also agreed with the views of the respondent's Human Resources Director as recorded in the email of 16 August 2018 (447) detailed at paragraph 111 above, that is that the amount was due. The claimant arranged travel to the airport and made a claim which resulted in lower cost to the respondent than it would have cost had she left her car at the airport parked for the week. The claimant was entitled to be reimbursed for those expenses. It is unfortunate and regrettable that the respondent did not act on what the Human Resources Director so clearly explained in August 2018.

319. The evidence available to the Tribunal on the remainder of the expense claims was less than satisfactory. The Tribunal does not understand why or how it was not provided with more documentation relating to those expenses, as such documentation must have been in the respondent's possession or control and it was clearly relevant to the issues in the claim. In the absence of any evidence to the contrary, the Tribunal accepts the claimant's own evidence about the amount of expenses claimed and (subject only to what is said below) accepts that those sums were validly due.

320. The one exception to what was said in the previous paragraph, relates to a claim for one meal. Mrs Wilson and the claimant both appeared to agree in their evidence that there was one meal for which the claimant claimed approximately £40 but was only entitled to £25. Ms Robinson's evidence was that the maximum subsistence per day payable was £25, rather than what was recorded in the policy shown to the Tribunal. However, the policy limits the maximum claim for expenses for food and beverage to that amount per day. The claimant was not entitled to aggregate her entitlements and claim a greater amount for a day on the basis that she had not claimed for other days. The policy was clear that the maximum per day applied to lunch, evening meal and beverages for that day. As a result, as the claimant was limited to claiming £25 for the day and the evidence was that she had on one occasion claimed £40, there was £15 of the total amount claimed for expenses which the Tribunal finds was not contractually due.

321. Accordingly, based upon the evidence heard by the Tribunal, the respondent was in breach of contract when it did not reimburse the claimant for expenses otherwise claimed and validly incurred in the sum of £113.62.

322. The expense claims cannot be awarded as part of an unlawful deduction from wages claim as a result of Section 14 of the Employment Rights Act 1996 (explained at paragraph 151 above). As recorded, they have however been awarded as damages for breach of contract. The total awarded to the claimant (adding together the sums at paragraphs 317 and 321) as damages is £592.42, being the damages arising from the respondent's breach of contract in failing to pay expenses due.

The counterclaim

323. The respondent brought a counterclaim for £1,558.27 net which it claimed it had overpaid to the claimant when it should not have done so. As explained, the amount counterclaimed was thoroughly misconceived and took no account of the claimant's acknowledged entitlements to one weeks unpaid salary and to pay in lieu of accrued but untaken annual leave. In the course of the hearing the respondent accepted that it had counterclaimed the wrong amount and that it was only entitled to £916.21 net.

324. In the light of the Tribunal's findings in the claimant's claims for unlawful deductions from wages and breach of contract, the respondent's counterclaim fails. The sums identified which were due to the claimant and which have not been paid, significantly exceed the amount which the respondent erroneously paid to the claimant. As a result, the claimant was not in breach of contract in not repaying sums which were in any event due to her and the respondent's claim for breach of contract

does not succeed. The claimant is not required to make any payment to the respondent.

325. It is however appropriate to record in this Judgment that when the respondent pays to the claimant the sums due as a result of the respondent's unlawful deductions and contractual breaches, the net payment already made to the claimant can be taken into account (but only to the extent that it exceeded the amount to which the claimant was entitled as a net payment for the week worked for which pay was due).

326. The Tribunal expects that the respondent will make payment to the claimant of the sums due as soon as possible. As a result of the awards being made gross and the previous payment having been contended to have been made net, the Tribunal is unable to record a precise figure due to be paid to the claimant as it is unable to address any tax or NI which may be due. In the light of the respondent's shambolic history of payments evidenced in this case, the Tribunal has little confidence that the respondent will in fact pay the claimant what is due, but hopes that it will on this occasion take particular care to ensure that the payment made is correct.

Summary

327. For the reasons explained above, the Tribunal found that the respondent made unlawful deductions from the claimant's wages and breached the claimant's contract of employment. The respondent's counterclaim did not succeed. The claimant's claims for discrimination on the grounds of race and/or age and for harassment on the grounds of race and/or age did not succeed.

328. The Tribunal would add that it has no doubt that the claimant believed that the way that she was paid (which led to her employment terminating) was entirely inappropriate and was not to the standard that would be expected of this respondent or any large organisation. The claimant was entirely right to do so and to feel aggrieved. The way that the claimant's wages and expenses were addressed by the respondent fell a very long way short of what would be expected from any organisation. However, for the reasons explained, the Tribunal has not found that the claimant's claims for unlawful discrimination and harassment succeed.

Employment Judge Phil Allen

Date: 8 December 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
9 December 2021

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Appendix to the Judgment – List of Issues

INTRODUCTION

1. Were all of the Claimant's complaints presented within the time limit set out in sections 123(1)(a) and (b) of the Equality Act 2010?

2. In respect of the Equality Act 2010, the ET will have to consider whether there was an act or conduct extending over a period or a series of similar acts or failures and whether time should be extended on a just and equitable basis if the claim is out of time, and deciding when the treatment complained of occurred.

DIRECT DISCRIMINATION

3. Was the C treated less favourably because of age or race?

4. The less favourable treatment in respect of age or race is identified below.

HARASSMENT

5. Did the R engage in unwanted conduct related to age or race?

6. The unwanted conduct is identified below.

7. If so, did the unwanted conduct have the purpose or effect of violating the C's dignity?

8. If not, did the unwanted conduct have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the C?

9. In determining questions (7) & (8) above, the ET will take into account:
    a. The perception of the C;
    b. the other circumstances of the case; and
    c. whether it is reasonable for the conduct to have that effect.

FACTUAL EVENTS

10. The events that the Claimant relies on are:

    a. That the Claimant was criticised for leaving the premises without permission (although the Claimant says that she did inform her manager and was not told not to leave). The Claimant states that her comparators would not have been so treated. She has not specified any particular comparators at this stage but she states that other managers would not require such permission. *Direct race discrimination, Direct age discrimination*

b. "Jungle drums" comment: the Claimant states that in November 2017 her manager, RW, described the gossip at a Home as the "jungle drums". *Direct race discrimination, Harassment (race)*

c. Failing to authorise the correct payments to the Claimant by RW. *Direct race discrimination, Direct age discrimination*

d. RW was persistently patronising on the basis of her age *Direct age discrimination*

e. R, RW in particular, failed to resolve her pay enquiries. Comparator: white staff were not subjected to such a delay in having their pay queries resolved; specifically Unit Managers had their arrears resolved by RW in June 2018. *Direct race discrimination*

f. RW sneered at her past experience. *Direct race discrimination, Direct age discrimination*

g. Asked to work nursing shifts. C says: no white managers were asked to do this, only black managers were asked to do this. *Direct race discrimination*

h. Not receiving an incentive payment for taking on acting-up role in Northern Ireland. Comparator: white manager who was on maternity leave. *Direct race discrimination*

i. Managers of larger homes were paid extra. However, when C managed a larger home (72-bed) she was not paid extra. Comparator: white manager of a larger home. *Direct race discrimination, Direct age discrimination*

j. Not being given due respect and consideration regarding flying to see her family when there were difficulties with flights. Comparator: "Paul", a white male. *Direct race discrimination, Direct age discrimination*

k. When recruited, C was told she would get the next manager's role that came up, but this did not happen. *Direct race discrimination, Direct age discrimination*

l. C was passed over for manager's role in respect of managing homes where she acted up: Rose Lodge (Southport), Longridge (Northern Ireland), Addison Court (Accrington/Chorley), Preston and Apple Mews (Northern Ireland). C says: all those that she observed obtaining these management posts were white. *Direct race discrimination, Direct age discrimination*

m. C believes that she was given less holiday than other managers though at present she does not have any actual proof. R says: no extra holidays were given when a Deputy Manager became a Manager. C says: managers at Carlingford Lodge were given an extra week's

holiday as an incentive. *Direct race discrimination, Direct age discrimination*

n. In September 2017, C asserts she unsuccessfully attended an interview for a Quality Lead post. Sarah Perez, on the interview panel, informed C that C required more experience in order to fulfil the role. C says: the post was given to a younger white new recruit known to Sarah Perez.

o. In order to develop skills C asserts she applied and attended IT management Induction Training in Bristol on 30.05.2017. During the course having fulfilled necessary training towards the completion of the course, the trainer – M.Featherstone confirmed with the homes sites of attendees that course participants could gain access to management systems. At Preston Private, the other Deputy Manager already had access, C says she was the only attendee whose access was publicly denied at the training event by her line manager, Sara Allton.

p. C asserts she was asked to travel to work as a manager in Rose Lodge in June 2017, Riddrie House and one in the Lake District in July-October 2017 (this role had also been performed by Julie Dobson during the same month who was paid as a peripatetic manager), however when attending the sites initially, I was not recognised as a manager and was asked to perform nursing duties in order to cover shortfalls in nurse allocations (This was not the case for Julie Dobson who was younger white and had been accountable to me in our last employ) I did not receive the equivalent pay of a peripatetic manager.

q. C asserts in October 2017, Sara Allton requested that C be rostered for an indefinite period to nurse shift duties in Preston Private

r. C asserts when she was allocated an interim post by Roberta Wilson in May 2017 she was not asked nor involved in registering her position with the registered authority as was normal procedure with her other white younger managers registration.

s. Sara Allton and Roberta Wilson did not hold regular supervisions or an appraisal with C, but this was achieved with other managers in Nicola Bales region.

t. C asserts that in June 2017 Sara Allton (line manager) informed C that the Operations Director, Sarah Perez would like C to attend any training possible in order to develop C's nursing skills. C asserts that she had already successfully completed the revalidation of her specific nursing speciality management and learning disabilities for the regulator, NMC. C asserts that she had observed that there were a number of black nurses in long unit managers or nurses roles who were performing peripatetic nursing cover at several sites throughout Nicola Bales' region, including: Preston Private, Rose Lodge, Ridderie House and Dalton Court. *Direct race discrimination, Direct age discrimination*

u. C asserts that in August 2017, whilst C was providing management support to Ridderie and meeting the then manager of Dalton Court (whose home C says she managed in August 2017). She stated: "you entered the company in a deputy role" in order to justify her approach and in her effort to maintain her deputising role under her direction. This manager was younger than C and had less experience and qualifications, but was paid as a manager. C says she was not paid the incentive managers salary offered by Sarah Perez (prior to C travelling) to complete this role. C asserts that the Deputy in post of Ridderie asked C to meet with her and told C that Sarah Perez had informed her to direct C to leave Ridderie (Glasgow) and drive to the Lake District home for nursing duties. C says she was also instructed to provide instruction to the night nurses during the night shift when both the manager and deputy were in post at Ridderie and working office hours in that instance (August 2017). *Direct race discrimination, Direct age discrimination, Harassment*

v. C asserts that in May 2018 when attending management safeguarding training, C's previous staff present from Shaftesbury Mews (Tania – unit manager of male and challenging behaviours unit and Meghan and the nurse with whom she jointly shared the management of the ladies unit) congratulated C saying "you are a good manager…you keep us on our toes." Roberta Wilson also attending heard this and seemed aggrieved and stated that "I thought it was me who did that".

w. In June 2018, R. Wilson instructed C to apply tactics of spot checking to C's work as it had been reported in a regional meeting by staff that this worked. C informed R. Wilson that C was aware that it was Meghan who had stated this and that C was the instigator of these tactics as Meghan described them as being applied in Shaftesbury Mews. *Direct race discrimination, Direct age discrimination, Harassment*

x. In June 2018, C successfully conducted a relatives meeting at Carlingford Lodge where the last one had taken place a year ago due to relatives displaying angry and confrontational attitude to management. Roberta Wilson did not acknowledge this as successful and stated "you were let off easy" and requested that C provide "staff witnesses to the event?" as if RW did not believe C's account. The existing manager currently on maternity leave had not conducted another relatives meeting during her period of work, because of relatives anger and had documented this fact. *Direct race discrimination, Direct age discrimination*

y. When invited to a meeting on 17.07.2017 and told by Sara Allton that "it is not working for me and Sara Perez" C immediately handed Sara Allton her pre-prepared written grievance. *Direct race discrimination, Direct age discrimination, Harassment*

z. Whilst working as a manager C says she accumulated extensive overtime hours due to travel, delayed and cancelled flights in snow and ice conditions. Working at home was normal procedure for management staff who travelled, for example Lynn Abernathy- younger than C with a younger family than C. C says she had authorised similar work patterns for her staff including the leisure organiser at Apple Mews and for Unit Managers who were accountable to C. However, in December 2017, C says that whilst fulfilling her management duties to Apple Mews, she was invited to a meeting by Sara Allton to answer allegations of being AWOL as C says Sara Allton expected C to work in Preston Private as a Deputy when in England, the email was also sent to Nicola Bales *Direct age discrimination, Harassment (age)*

aa. C says that she had not offered her resignation but a P45 from the Priory Group was posted to her home address arriving in January 2018 *Harassment*

bb. C says in January 2018, C was told by RW that C's services were no longer required in Northern Ireland and that RW would inform Sarah Perez to find C a post in England *Direct race discrimination, Direct age discrimination*

cc. C asserts that in April 2018 following a successful inspection by the registering authority at a home where C had worked as the manager since February 2018 C was told that she had increase her travel to provide maternity, management cover to Carlingford Lodge. C says that the manager who had told C that C was allocated to do this maternity cover moved into C's vacating office at Shaftesbury Mews. *Direct race discrimination, Direct age discrimination, Harassment*

dd. C asserts that she was told by Sara Perez in July 2017 that C would receive a salary equal to Sara Allton (as an incentive), prior to commencing management support in Nursing homes, Riddrie and Dalton Court. Sarah Perez stated that (together with Nicola Bales) she would support C's application for the Quality Lead role and the manager's role would also be supported, C could choose which. C says that this was never received at any point in her employment. *Direct race discrimination, Direct age discrimination*

ee. RW did not follow the code of conduct and procedure as stated in the employee handbook regarding the period of notice necessary for an investigation meeting, allowing C only two days' notice to arrange travel to Northern Ireland to attend an investigation and not acknowledging C's reasonable request to arrange a suitable time, date and venue. RW further noted in the acknowledgement to C's resignation letter that the result of the Investigation hearing was already predetermined resulting in an automatic disciplinary hearing where poor conduct and a breach of contract would be found, validated and stated in any reference to future employers thereby attempting to

sabotage C's career *Direct race discrimination, Direct age discrimination, Harassment*

ff. C asserts that on 17 July 2017 in the meeting with S Allton when she expanded on the description of the temporary slot allocated to her as deputy (as pointed out to her during their introductory meeting in March 2017 conducted by the departing deputy manager who had pressed the M.D.s Nicola Bales and Justine ? to interview her for the managers post because of her experience and informed Sarah Allton of this in the same meeting in her presence) Sarah Allton told me that she was under the impression that she had taken a less demanding role at the end of her career (and had hitherto treated her appropriate to SA's assertion). *Age and race discrimination*. [*This issue was not recorded in the respondent's list but was added as explained in the Judgment*]

BREACH OF CONTRACT / UNLAWFUL DEDUCTION FROM WAGES

11. Has the C suffered an unlawful deduction from wages in respect of the following:

    a. Bonus payments of £750 (net) for the months November 2017, February 2018, March 2018 and April 2018;

    b. Company salary increase (average 3%) for 3 months June-Aug 2018;

    c. Outstanding holiday pay, £948.01;

    d. Unpaid final week's salary, £649.22; and

    e. Unpaid expenses, £607.42.

RESPONDENT'S COUNTERCLAIM

12. Was the C overpaid salary in the sum of £2.905.92 (gross) / £1,558.27 (net)?

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2401709/2019**

Name of case: **Ms E Donaldson-Ellison** v **Parkcare Homes Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 9 December 2021

"the calculation day" is: 10 December 2021

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.