EMPLOYMENT TRIBUNALS

Claimant: Mrs I Carpenter

Respondent: Caring Homes Healthcare Group Limited

Heard at: Croydon (By CVP) **On:** 13-17 and 20 December 2021

Before: Employment Judge Self
Mr M Cann
Mrs C Wickersham

Appearances
For the Claimant: Ms L Veale - Counsel
For Respondent: Mr N Caiden – Counsel

JUDGMENT

1. The Tribunal declares that the Claimant was unfairly dismissed but any compensation will be reduced by 80% on account of the Claimant's contributory fault.

2. The claims of Disability Discrimination and Religious Discrimination are not well-founded and are dismissed.

WRITTEN REASONS

(As requested by the Claimant)

1. The Claimant lodged a Claim with the Employment Tribunal on 28 April 2020 seeking compensation for what she contended were her unfair dismissal and acts of Disability and Religious Discrimination. ACAS Early Conciliation

was engaged between 13 March 2020 and 28 March 2020. The Respondent denied the claims when it responded.

2. This hearing was listed at a Case Management Hearing on 15 February 2021 and a List of Issues was produced that was very similar to the one that is included later on in this Judgment. After reading those parts of the bundle we were taken to or asked to consider, we heard oral evidence from the witnesses and that concluded on the afternoon of Day 4. On Day 5 we heard and read the parties' closing submissions and have delivered this judgment on the afternoon of Day 6 after due consideration.

3. We had before us a substantial number of documents and the bundle was regularly supplemented by disclosure from the Respondent. That was unfortunate, but in reality little turned on the additional documents produced. At the request of the parties we heard the evidence of the Respondent first and their three witnesses were:
a) Neema Clinton – Home Manager, line manager of the Claimant and investigator of the discipline issues
b) Arthur Tanare – Home Manager at another care home in the Region and adjudicator at the disciplinary hearing
c) Gary Briggs – Regional Manager and appeal adjudicator.

4. We heard oral evidence from the Claimant herself and had the statements of Mr Ross Flanagan and Ms Patricia Darvill who were both Trade Union Representatives. Counsel for the Respondent elected not to challenge their evidence.

5. We have considered the evidence that has been presented to us and read the thorough closing submissions of both parties. We would like to record our thanks to both advocates for their cooperation throughout the hearing in resolving issues and producing what the Tribunal required timeously.

6. Later in this Judgment I have set out the relevant statutory provisions. The parties provided a detailed analysis of the case law in their closing submissions and whilst not replicating the same in this already lengthy Judgment we confirm that we have considered and applied that law where appropriate. At the end of the evidence a number of the discrimination claims were withdrawn by the Claimant. The issues we were asked to consider are set out below and the withdrawn claims are represented below by dotted lines so as not to affect the consistency of the numbering.

Unfair dismissal
1. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (ERA)?:
The Respondent asserts that it was a reason relating to the Claimant's conduct which is a potentially fair reason.

2. If the principal reason for dismissal was a fair one, was the dismissal fair or unfair in accordance with section 98(4) ERA, and, in particular, did the

Respondent in all respects act within the so-called "band of reasonable responses"?

3. If the Claimant was unfairly dismissed and the remedy is compensation:
3.1 Should any compensation awarded be adjusted to reflect any failure on the part of the Claimant to take reasonable steps to mitigate her loss?
3.2 What adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would (i) still have been dismissed at the EDT or (ii) have been dismissed in time anyway? (Polkey v AE Dayton Services Ltd [1987] UKHL 8);
3.3 ACAS code:
(i) Did the Respondent unreasonably fail to comply with a relevant ACAS Code of Practice and, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to s207 Trade Union & Labour Relations (Consolidation) Act 1992?
(ii) Did the Claimant unreasonably fail to comply with a relevant ACAS Code of Practice and, if so, would it be just and equitable in all the circumstances to decrease any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to s207 Trade Union & Labour Relations (Consolidation) Act 1992?

Disability Discrimination
4. The impairments relied upon that were admitted as amounting to a disability under s.6 Equality 2010 are
4.1 Fibromyalgia
4.2 Depression
4.3 Diabetes
4.4 Anxiety
All other impairments that the Claimant raised and which were not admitted were not relied upon.

5. **Discriminatory dismissal: s39(2) EqA**
Did the Respondent discriminate against the Claimant by dismissing her? This is a claim of arising from Disability and Religion, see below.

6. **Discrimination arising from disability: s15 EqA**
6.1 Did the following thing(s) arise in consequence of the Claimant's disability?
(i) the cumulative effect of the Claimant's disabilities resulted in behaviours whereby the Claimant was overanxious, distressed or over emotional and unable to concentrate or follow the content of meetings or what is being said; and
(ii) the Claimant's sickness absences related to her disability.
6.2 The Claimant says the Respondent treated the Claimant unfavourably as follows:
(i) instigation of a disciplinary investigation against the Claimant and holding the disciplinary investigation meeting on 19 November 2019;
(ii)
……
(iii) dismissal of the Claimant.

Did the Respondent treat the Claimant unfavourably in either of those ways?
6.3 If so, did the Respondent treat the Claimant unfavourably because of the thing(s) arising in consequence of her disability?
6.4 If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?
The Respondent relies on the following as its legitimate aims:
The need to maintain an appropriate standard of care for its residents; to look after their health and safety; and to maintain professional discipline in its workforce.

7. **Reasonable adjustments: ss 20 & 21 EqA**
7.1 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP(s):
(i) the requirement to perform all contractual duties;
(ii)
……
….
(iii)
……
…
(iv) the requirement to attain a certain level of attendance at work in order not to suffer the risk of sanctions and/or dismissal.
7.2 Did either PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time in that she was more likely to:
(i) ……
(ii) be unwell;
(iii) signed off sick; and
(iv) seek medical attention.
7.3 If so, did the Respondent know, or could it reasonably have been expected to know, the Claimant was likely to be placed at any such disadvantage?
7.4 If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The burden of proof does not lie on the Claimant however it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows:
(i) Place the Claimant on light duties
(ii) Discount the Claimant's disability related absences;
(iii) Continue the Claimant's employment rather than dismiss her, potentially considering alternative sanctions to dismissal;
(iv)
…….
(v) amend the Claimant's shift pattern, for example so that the Claimant did not work two and/or three consecutive day shifts of approximately 12-hour length each;
(vi) ……
(vii) reduce the frequency of the Claimant's shifts; and
(viii) redeploy the Claimant.
7.5 If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

8. **Harassment related to disability : s26 EqA**
8.1 Did the Respondent engage in conduct as follows:
(i) instigation of a disciplinary investigation against the Claimant and holding the disciplinary investigation meeting on 19 November 2019;
(ii)
…….
(iii) dismissal of the Claimant; and/or
(iv) Mr Tanare's comment in his letter dated 19 December 2019 that the Claimant had not informed the Respondent of her disabilities when she had done so.
8.2 If so was that conduct unwanted?
8.3 If so, did it relate to the protected characteristic of disability?
8.4 Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Religious/philosophical belief discrimination
9. The Claimant identifies as Pentecostal Christian.
10.
……
….
11. Indirect discrimination: s19 EqA 2010
11.1 A "PCP" is a provision, criterion or practice. Did the Respondent have the following
PCPs?
(i) the requirement to work on Sundays; and
(ii) the practice of sudden alteration of agreed working hours without consultation.
11.2 Did the Respondent apply the PCP(s) to the Claimant at any relevant time?
11.3 Did the Respondent apply (or would the Respondent have applied) the PCP(s) to persons other than those of the same religion as the Claimant ("the comparator group")?
11.4 Did the PCP(s) put persons of the Claimant's religion at one or more particular disadvantages when compared with the comparator group in that persons of the Pentecostal Christian faith are:
(i) less likely to be able to attend the workplace on Sundays (or unable to practice their religious beliefs if they did attend);
(ii) more likely to be the subject of disciplinary and dismissal proceedings in the event of unauthorised absence as a result of sudden imposition of the requirement to work on Sundays through alteration of working hours.
11.5 Did the PCPs put the Claimant at those disadvantages at any relevant time?
11.6 Can the Respondent show it is a proportionate means of achieving a legitimate aim? The relied upon legitimate aim is the operational needs of the Respondent which in particular require an appropriate number of staff on shift, with relevant mix of seniority to deliver the service at an appropriate cost.

12. Harassment related to religion: s26 EqA

12.1 Did the Respondent engage in conduct as follows:
……
…..
Scheduling the Claimant to work on Sundays (from October 2017 onwards).
12.2 If so was that conduct unwanted?
12.3 If so, did it relate to the protected characteristic of religion?
12.4 Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

13. Discrimination: remedy s124(6) and s119(2) EqA 2010
13.1 If the tribunal finds that the Respondent discriminated against the Claimant, what remedy is the Claimant entitled to? The Claimant seeks compensation for injury to feelings and financial losses.
13.2 Should any compensation awarded be adjusted to reflect any failure on the part of the Claimant to take reasonable steps to mitigate her loss?
13.3 What adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would (i) still have been dismissed at the EDT or (ii) have been dismissed in time anyway? (Polkey v AE Dayton Services Ltd [1987] UKHL 8;
13.4 ACAS code:
(i) Did the Respondent unreasonably fail to comply with a relevant ACAS Code of Practice and, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to s207 Trade Union & Labour Relations (Consolidation) Act 1992?
(ii) Did the Claimant unreasonably fail to comply with a relevant ACAS Code of Practice and, if so, would it be just and equitable in all the circumstances to decrease any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to s207 Trade Union & Labour Relations (Consolidation) Act 1992?

The Facts

7. The Respondent is a substantial provider of residential care and specialist learning disability services across 143 sites, with approximately 3000 residents and 5000 staff, as at the date of the Response. Each home has a Manager and its own structure to provide the necessary care for residents and there is a centralised HR function from which the homes can draw support when required. The Claimant worked at Coppice Lea which had 51 beds. For the purposes of **section 98(4) Employment Rights Act 1996** the Respondent would be deemed a large organisation with support available to assist in disciplinary matters.

8. The Claimant was experienced in the care sector and had worked at the home since 2002. There were some extended breaks which may affect her continuity of service but those matters need not be resolved at this stage. The Claimant started as a Domestic Assistant and then moved to a Care Assistant

and was promoted to the role of Senior Care Assistant in April 2017. The original contract stated that she worked for 36 hours per week, but that was increased by agreement to 48 hours per week and we have seen a letter to that effect.

9. In order to undertake her contracted hours per week the Claimant would work four shifts of 12-hour duration. The contract states that a working pattern will be discussed and agreed but that any pattern could be changed to reflect changes in operational need. We were told that, at the material time for this claim, Mrs Clinton would mainly do the rotas and when they were published staff would go and check what their rota was. Swaps between staffs were permitted in the main so long as the work was covered. The Claimant asserted that from around September 2019 Mrs Clinton refused to permit her to swap her Sunday shifts.

10. The Claimant is a Pentecostal Christian and wished to attend church on Sunday. We accept that she would rather not work Sunday if possible. We are satisfied that this desire was well known to the Respondent both when the previous Home Manager was in charge and later when Mrs Clinton was in charge. We also find that the Claimant did work Sundays from time to time from 2015 onwards. There were times in the hearing when the Claimant insisted that she never worked any Sundays at any time but she often contradicted this statement by saying that she did work them from time to time to help out. There was corroborating evidence that she had worked Sundays from time to time and although we do not have all of the rotas and staffing logs we are satisfied that she had worked some Sundays every year since she had been promoted and worked 48 hours. We are satisfied that both Meera and Mrs Clinton were mindful of the Claimant's preferences and sought to assist with them for much of the Claimant's employment. We find that it is likely that Meera was more likely not to rota the Claimant on a Sunday than Mrs Clinton.

11. Given the nature of the contract we find that at all times the Respondent had the right to rota the Claimant to work on any day. We find that because of the efforts made to accommodate the Claimant's wishes re Sunday working especially when Meera was her manager the Claimant may have formed the view that she was not obliged to work Sundays if required. If she did then that was a mistaken view. She combined her desire not to work Sundays to the Respondent's latitude in that regard and came to an erroneous conclusion. We do not find that "not working Sundays" was either an express contractual term or became an implied contractual term, based on custom and practice, and so reject the Claimant's submissions on this point.

12. As a Tribunal, we are aware and take notice of the fact that Sunday staffing is often difficult for employers and many employees do not wish to work on that day for a variety of reasons. There is a need for seven day working at a care home and it is reasonable to share out the burden of Sunday working across a range of skills and seniority especially where there are a number of employees who would wish to go to church. We accept that there were other staff that also wished to have Sunday mornings off to go to church and so there were limited staff who wanted to work at that time and accordingly in resolving

those conflicts it would not be fair to give preferential treatment to any specific individual.

13. There was a dispute of fact about whether the Claimant offered to work on Sunday afternoon. The Claimant states that she did make that offer and it was rejected. Mrs Clinton states that she asked the Claimant to do so as an alternative to the early shift on a Sunday but the Claimant refused because not only was Sunday her church day but it was also her family day.

14. We prefer the evidence of the Respondent on this point. We consider it unlikely taking into account the needs of the service that Mrs Clinton rejected the offer of help on a Sunday and the Claimant's position (outlined in her oral evidence for the first time) was that the relationship between them only deteriorated from September 2019 after the Claimant had spoken to Mrs Clinton about a health and safety matter involving a resident. The Claimant asserted thereafter she was punished for raising the matter. In addition, there is clear evidence that the Claimant did consider Sunday a family day which is consistent with the evidence of Mrs Clinton.

15. The Respondent had a number of policies which are relevant to this Claim. There was a Disciplinary Policy and also a Sickness Absence Management Attendance Policy and Procedure.

16. The effect and issue of absence is an important one in this case as ultimately the Respondent (Messrs Tanare and Briggs) considered the Claimant's unauthorised absences as gross misconduct and dismissed her on the first occasion the matter of unauthorised absence was considered in a disciplinary context all be it with other matters also being considered.

17. The Short-Term Frequent Absence Policy cited above starts as follows:

"The efficiency of the Company depends upon employees regularly attending work, and the stability and continuity of support to all residents and supported persons is of paramount importance to the Company. Long term or persistent absence jeopardises the Company's efficiency and negatively impacts our ability to deliver this and therefore, fair and appropriate procedures will be implemented to manage high levels of absence."

18. Similar sentiments were expressed in oral evidence by the Respondent's witnesses and the importance of attendance was also acknowledged and accepted by the Claimant. It is self-evident that failing to attend when scheduled to do so, for whatever reason, is likely to stretch the resources of the Respondent and could easily lead to a diminution in the quality of care for residents. It is important that such absence is managed via fair and appropriate procedures which are then set out in the Policy.

19. Once an employee reaches a stage where they have had 3 occasions of absence in a rolling 12-month period the following process should be followed:

Absence review meeting

When an employee reaches a stage where they have had 3 occasions of absence in a rolling 12-month period an absence review meeting will be held between the Manager and the employee. In usual circumstances the employee will be invited to attend the meeting in writing. When setting targets for improvement, Managers must take into account the individual circumstances of the case, the impact of any underlying medical condition or disability, and any reasonable workplace adjustments that need to be put in place to enable the employee to improve their attendance. If the employee fails to demonstrate improvements and further absences persist, the Manager will instigate the formal procedure.

20. The Policy provides a clear trigger for what is the first part of the Process to be engaged i.e. 3 occasions of absence. That is not an unreasonable policy as it sets a strict guideline as to what is deemed worthy of intervention and permits a meeting to take place where the circumstances can be taken into account and amendments put in place for the benefit of employer, employee and ultimately for the residents and clear expectations can be set in place as to the improvements that are required to avoid formal action being taken. It is a mutually beneficial process, or should be, if operated correctly and diligently.

21. Whilst the Tribunal accepts that on any given day there are countless tasks for a Home Manager to do and there needs to be a sense of prioritisation, it is the Respondent's case that absence and particularly unauthorised absence are serious matters and for unauthorised absence dismissal is warranted. It follows, in the Tribunal's view, that if not rigidly applied a reasonable expectation would be that any deviation from this policy would be relatively minor. That reasonable expectation is not met by the Respondent in this case as adherence to the policy was lamentable for a substantial period of time.

22. The Respondent disclosed very few Return to Work forms. We conclude that as they were relevant documents to the facts and issues in this case the fact that they have not been produced is because Return to Work meetings were not carried out after every sickness / absence as they should have been and, indeed, were not carried out most of the time with the Claimant. This means that an opportunity to gather and log information as to the causes of the absence and to establish any relevant trends was lost. Mrs Clinton said she would chat informally with the Claimant on her return. We do not accept that even if she did it would be sufficient to discharge her managerial duties.

23. The failures on the part of Mrs Clinton in this regard are all the more remarkable because she was fully aware of the Claimant's fibromyalgia, at the very least, at all material times and so should constantly have had in her mind that the absences may be disability related and so adjustments may be required. There are no allegations of disability discrimination relating to the operation of the Absence Management Procedure so having passed comment u[on that failing the Tribunal will move on.

24. Further as most of the absences, authorised or unauthorised, seemed to be of short duration and would leave the Respondent short staffed at late notice, it seems remarkable taking into account the Respondent's assertions as to the seriousness of absence, that steps were not taken to address the same earlier.

25. To place these general observations into the context of the Claimant in this Claim, there were 26 separate periods of absence between 12 January 2018 and 17 November 2019, of which only five required a GP certificate and of which the vast majority are single day absences logically called in just before the start of the shift. Most are ascribed for sickness absence reasons and so would be deemed to be authorised. The unauthorised absences are seven in number, the first being in October 2018 and the remainder from April 2019. All but one are, or includes, a Sunday.

26. The Absence Policy could have been brought in at virtually any time over this period to address the issue of short-term absence with the first stage of the Absence process i.e. the Absence Management Meeting. The Respondent's counsel sought to portray that failure as a benefit to the Claimant in that it was an indulgence to her. We do not agree. As stated earlier the benefits run both ways. Early intervention would have served to consider possible solutions that may have led to adjustments / changes that made matters better for both sides. It would certainly have served to show that regular attendance was required and expected and was a matter of real consequence to the Respondent. Doing nothing achieved nothing and bluntly the reality is that there is little point in having a Policy if you are not going to use it. We are satisfied that the reason why it was not used was because of shortcomings in Mrs Clinton's managerial ability.

27. The material period for calculating absence is the rolling year and so the absence period under consideration at the disciplinary ran from 19 November 2018. The parties' counsel, upon request, provided the Tribunal with a Table of the Claimant's recorded absences which tied in a number of disparate pieces of information in various reports. It disclosed that in that rolling year the Claimant had sixteen period of absence. That differs from the fifteen periods of absence on the main table relied upon at the disciplinary (p.322) because it did not include a single day absence on Monday 17 December for which we have an Absence Report form.

28. Of those sixteen absences, ten are authorised because they were for sickness either self-certified or with a doctor's note. There should be an absence report form for each period of authorised absence where a member of staff takes the call and records what they are told by the Claimant about her absence and we have only five of those. It is unclear why that is. It could be that the Claimant never phoned in on those days to report her absence but we consider in the absence of any action being taken, and/or the Claimant being taken to task over the same we do not consider that we can reasonably come to that conclusion.

29. Our preferred view and finding is that the Respondent's (Mrs Clinton's) attention to detail in respect of absence was just poor and proper records have not been kept or stored logically so they can be found.

30. Our conclusion of a lack of attention to detail in respect of the Absence Process generally is also supported by the absence of many Return to Work forms which, as previously stated, were meant to be filled out on every occasion when a person returned from absence. That was the responsibility of Mrs Clinton and we only have two. To the extent that Mrs Clinton suggested that the Claimant failed to follow procedures when calling in sick, we reject it. It was the Respondent (Mrs Clinton) who failed to follow due process in respect of Attendance Management.

31. We comment that the sickness absence record for the Claimant is not a good one and shows a lot of single day absences but is also perhaps not a surprising picture taking into account the nature of the Claimant's illnesses especially the fibromyalgia which, from our own knowledge of the condition has a tendency to flare up from time to time before subsiding. The reality is however is that we do not have a comprehensive list of each and every ailment that led to absence because of the Respondent's poor record keeping and so cannot ascribe a medical condition to each absence.

32. In the Policy there are two different specific pathways when dealing with absence after the Attendance Management Meeting. The policy reads as follows:

Formal Procedure Stage 1: Where an employee's attendance does not improve and they have a further occasion of absence in the rolling 12-month period following the absence review meeting consideration will be given towards inviting the employee to formally attend either a Stage One Capability Review Meeting or a Disciplinary Hearing

Persistent short-term absence due to illness (where there is no specific medical cause), unauthorised absence, non-conformance with absence notification requirements or persistent lateness will usually be dealt with as a conduct issue under the Disciplinary Policy and Procedure. Persistent short-term absence relating to an underlying medical condition will usually be dealt with as a capability issue. In all cases where attendance gives cause for concern, consideration will be given to all influencing factors before any action is taken.

33. We have received no good reason why the Respondent was so lax in its implementation of its Attendance Management Policy in 2018 and most of 2019 and as previously stated have attributed it to Mrs Clinton's managerial deficiencies. We are satisfied that the Respondent's inability to do anything under the policy was of no assistance to the Claimant or the Respondent and just permitted an unsatisfactory set of circumstances to continue to build.

34. There was finally an Absence Review Meeting and it took place on either 1 or 11 November 2019. It was long overdue. On balance we think that the

meeting was on 1 November as it refers to 11 absences which would tie in with the information at page 322 (in reality it was 12 absences because one was not recorded on the absence sheet as set out above but nothing material turns on that). Further the Claimant was on sick leave on 11 November.

35. The purpose of the Absence Management Meeting is as follows:

Absence review meeting

When an employee reaches a stage where they have had 3 occasions of absence in a rolling 12-month period an absence review meeting will be held between the Manager and the employee. In usual circumstances the employee will be invited to attend the meeting in writing. When setting targets for improvement, Managers must take into account the individual circumstances of the case, the impact of any underlying medical condition or disability, and any reasonable workplace adjustments that need to be put in place to enable the employee to improve their attendance. If the employee fails to demonstrate improvements and further absences persist, the Manager will instigate the formal procedure.

36. Extrapolating from that we make the following comments:

a) On the basis of the Policy this meeting was long overdue.
b) We have not been given an explanation as to why the Claimant was not given notice of the meeting in writing as per the Policy One reason could be the Claimant's inability to read but that was not proffered as a reason and in any event the Claimant's husband could have read it to her.
c) The purpose of the meeting was to try to gain an improvement in attendance assessing underlying medical conditions, disability and workplace adjustments.
d) In the event that improvements were not made then the formal procedure would be instigated.

37. It is noteworthy that at such a meeting there is, in the policy, no separation of authorised and non-authorised absence and reading the notes of the meeting we are satisfied that this meeting was called on account of all absences both authorised and non- authorised.

38. In the rolling year at issue there were six periods of unauthorised sickness absence as follows:

Sunday 21 April 2019
Monday 3 June 2019
Sunday 21, Monday 22 and Tuesday 23 July 2019
Sunday 13 October 2019
Sunday 3 November 2019
Sunday 17 November 2019.

39. Five of these are Sundays. The Claimant indicated that there was a major issue post-September in not being permitted to swap Sundays with

another member of staff but over half of the absences and 40% of the Sundays pre-date this alleged watershed. The Sunday absences appear to have arisen as follows. The rotas were completed and the staff look at them. The Claimant objects to working on the Sunday but no changes are made to the rota as contractually she is obliged to work if scheduled. Accordingly, the Claimant is expected in on the Sunday shift but does not attend. It is clear that such an action could leave the Respondent short of cover or having to engage Agency staff at short notice and as the Claimant herself accepted that could disadvantage the vulnerable individuals staying at the home. It is a deliberate refusal of the Claimant to attend work and thereby a failure to comply with a reasonable management instruction

40. There are no notes per se of the meeting save for those written on the prescribed form which would appear to be a summary. It identifies that there have been eleven absences which supports our finding that the meeting was about both authorised and unauthorised absence. The first thing the Form asks Mrs Clinton to do is to explore the absences and to look for any patterns. The Claimant responds that sometimes she is given shifts she cannot do. She raises the question as to whether there is anything in her contract that obliges her to work Sunday and then states that she cannot do Sunday because of both church and family reasons.

41. In the next section Mrs Clinton was to consider underlying health issues and what adjustments could be made. The Claimant repeats she cannot work Sundays due to church attendance and that other absences are caused by her own health issues and appointments and taking her husband to health appointments.

42. The next section details circumstances where there is no underlying health issues and what else needs to be considered and the Claimant states that her husband is unwell and she provides child-care for her children. The final section states that Mrs Clinton was to tell the Claimant what she needed to do to improve her attendance and seek to agree the steps that were required to bring it about. Under this is written ***"Flexible Hours Working – Meeting Invitation to be sent"***. Under that is written that Mrs Clinton should inform the Claimant that it there is another occasion of sickness absence in the next 12 months either the Capability Process or the Disciplinary Process may be engaged. On a separate piece of paper is written:

"Request to not work Wednesday, Thursday and Sunday. Not sure what contract states. Sunday absences are down to going to church. Other absences due to doctor's absences or taking husband to appointments."

43. The Claimant refuses to sign the document and this would perhaps indicate that all was not well between Mrs Clinton and the Claimant. In the witness statement Mrs Clinton does not go into any detail about this meeting at all save to say that she handed a Flexible Working Form to the Claimant and asked her to fill it out. The Claimant says that she recalls being handed a form at some point although she says she has no recollection of the specific meeting

where that happened. In her statement she said her Husband filled it in but does not say she ever handed it in.

44.. Our conclusions over this meeting are as follows:

a) For reasons given above the meeting took place on 1 November 2019 and not 11 November 2019.

b) Whilst a positive step taking into account the poor attendance record of the Claimant, it was hideously overdue and we have been provided with no reason as to what had triggered the step. We find it had been delayed through a lack of managerial competence.

c) This review was intended to cover all absences authorised and unauthorised.

d) Mrs Clinton does not appear to have been particularly inquisitorial and there is no resolution about what might improve the authorised sickness absences at all.

e) The issue in relation to the unauthorised absences is canvassed however and the Claimant makes it quite clear it is down to her desire not to work on a Sunday and that appears open for further discussion and consideration by way of a Flexible Working application which appears from the notes to going to be by way of a meeting.

f) The need for a Flexible Working form is somewhat puzzling as the Claimant sets out clearly at that meeting that she wants to not work on three days of the week and that only leaves 4 days she can work her 12 hour shifts on. The application is that she wants to work on a fixed rota on Monday Tuesday Friday and Saturday. That coalesces with what the Claimant says at this hearing that she wanted a rota that did not include a Sunday and did not mean she worked three consecutive days.

g) We have received no evidence that the Claimant was specifically told that she would need to improve and was given a target and nor do we accept that she was told that disciplinary action might follow. It was written on the form but there is no evidence it was read to her and she would have been unable to read it herself. We find that it was a matter of common sense to be aware that the Claimant could possibly be in trouble if she simply did not turn up for a Sunday shift in the future.

h) There is no evidence as to precisely how the situation was left and the evidence was confused on this point on both sides. On the balance of probabilities, the next step was to consider the Claimant's flexible working proposal which was clearly made at the meeting.

i) There was no express point made that the unauthorised absences were deemed to be potentially gross misconduct by Mrs Clinton and that the Claimant's job was at risk. This was the informal stage of a formal process and in fact there is no evidence at all of the Claimant ever told about, read or been given a copy of the policy at around the time of the meeting, where, in effect, solutions were being considered. Having said that the Claimant should have been fully aware that the Respondent's tolerance about the Claimant simply not turning up for a scheduled shift on a Sunday was being seriously tested and common sense and prudence would have indicated that not turning up for a shift would be wholly inadvisable and could well lead her into trouble.

44. It should be noted that the Claimant had worked seven Sundays between April 2018 and September 2019. The Claimant perceived she was "helping out" by doing them. The Respondent perceived that she was contractually obliged to do the shift if asked to do so. The Respondent was correct.

45. Following on from the Meeting on 1 November the Claimant had an unauthorised absence on Sunday 3 November and Sunday 17 November and also had several days off from 5 November to 12 November as sickness absence. The unauthorised absences were unwise and courted trouble. There is no evidence of anything being said to the Claimant about the unauthorised absences, although there was limited time before the first absence and her sick leave and then the second absence and the thickener incident. There was also no evidence of any return to work meetings as was expected after such absences, save that there was a return to work meeting after the sickness absence which was on account of "stress at work" according to the GP's Fit Note. We do not accept that Mrs Clinton prevented the Claimant from swapping shifts over this period.

46. At the Return to Work meeting on 12 November the Claimant explained that she had stress at work because of the way Mrs Clinton spoke to her and treated her and that the Claimant had had enough. She raised her fibromyalgia and Mrs Clinton stated that if the Claimant's doctor was saying that she could not do the job then it was time for the Claimant to find a new one. The Tribunal accepts that such a comment was made by Mrs Clinton are far from sure that such a comment indicates that the concept of needing to consider reasonable adjustments was well known to Mrs Clinton.

47. There was further discussion between them. Mrs Clinton pointed out the potential problem with other staff if the Claimant was given preferential treatment and that she was only concerned with the absences and not the Claimant's performance. The meeting ended with the Claimant indicating that she did not feel that Mr Clinton was ***"treating her right"*** and asked to speak to somebody ***"high"*** from Head Office. That could have been taken as a request to raise a grievance but the Claimant was not signposted to anybody to take matters any further by Mrs Clinton.

48. It is also noteworthy that at this Return to Work meeting there was no mention of the unauthorised absence on 3 November. After the meeting there was a further unauthorised absence on 17 November.

49. Pausing there we have the following situation prior to the working day starting on 18 November ("Thickener" Day):

a) Mrs Clinton and the Claimant's relationship is in poor shape and the Claimant has asked to speak to somebody at head office.
b) The reason for the unauthorised absences has been established (the Claimant's desire not to work Sundays) and there should be imminent

consideration of whether or not the Claimant's request can be accommodated.

c) That issue is getting worse not better possibly reflecting the poor interpersonal relationship that is in place.
d) The Respondent is concerned over absence not performance.
e) There has been no express indication to the Claimant that any of her absence might specifically be deemed to be misconduct or gross misconduct, but she must have been aware that the Respondent had serious concerns about her simply not attending for her shift and so needed to be wary about doing the same again.

50. Before moving onto the events of 18 November and the aftermath there is one further matter from the back story to detail. In September 2018 the Claimant was disciplined for failing to follow an instruction from SALT in respect of eating and drinking care. That was heard by Mr Tanare. During a CQC inspection the Claimant was observed feeding a resident with a large spoon as opposed to a teaspoon and it was asserted that this placed the resident at risk of choking. Mr Tanare gave the Claimant a final written warning that would remain live for 12 months. The Claimant appealed that decision and it was rejected by Mr Briggs. Whilst that warning was "spent" by the time of the disciplinary process in 2019 it is still a relevant background fact.

51. On 18 November 2019 Mrs Clinton asserted (and was not challenged on it) that she heard from her office that a resident was coughing and when she attended on the resident she found that the drink before the resident did not contain the appropriate thickening agent which had been recommended to reduce the risk of the resident choking. It was never established that the coughing was because of the unthickened drink, but it could have been. There was the Claimant and one other member of staff dealing with that resident on that day and Mrs Clinton discovered and it was accepted that it was the Claimant who prepared the drink.

52. Mrs Clinton decided that there was a potential disciplinary matter and that she needed to investigate further and she conducted a meeting with the Claimant on the following day. In that meeting Mrs Clinton raised the concerns as being:

a) High record of unauthorised absences.
b) Failure to follow SALT instruction for the resident.

53. We received no explanation as to why it was decided that any disciplinary enquiry was going to include the unauthorised absences the causes of which had already been discussed in recent meetings without any suggestion of any impending escalation to a disciplinary. The policy reads as follows after the Attendance management meeting:

Formal Procedure Stage 1: Where an employee's attendance does not improve and they have a further occasion of absence in the rolling 12-month period following the absence review meeting consideration will be given towards inviting the employee to formally attend either a Stage One Capability Review Meeting or a Disciplinary Hearing

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Persistent short-term absence due to illness (where there is no specific medical cause), unauthorised absence, non-conformance with absence notification requirements or persistent lateness will usually be dealt with as a conduct issue under the Disciplinary Policy and Procedure. Persistent short-term absence relating to an underlying medical condition will usually be dealt with as a capability issue. In all cases where attendance gives cause for concern, consideration will be given to all influencing factors before any action is taken.

Prior to arranging a Disciplinary Hearing or Stage One Capability Review Meeting the Manager must provide a summary of the employee's attendance record from the previous rolling 12 months, and discussions held thus far, including copies of return to work notes/absence review meeting notes, to Human Resources, so that guidance can be provided. Where appropriate the Manager will invite the employee to the Disciplinary Hearing or Stage One Capability Review Meeting. For each meeting, the manager will write to the employee setting out the Capability or Disciplinary issue and the circumstances which have led the Company to contemplate taking action.

The employee will be provided with written particulars of the issue and any evidence prior to the meeting taking place (i.e. a full list of absences, copies of any return to work discussions, any relevant supervision notes). The employee will also be offered the opportunity to be accompanied by a work colleague or authorised trade union representative. After the Disciplinary Hearing or Stage One Capability Review Meeting the Chairperson (or the Panel) will consider what action to take. Where the employee's attendance is being considered in line with the Disciplinary Policy and Procedure, in cases where a reasonable belief in the employee's misconduct is established on the balance of probabilities, appropriate disciplinary action will be considered to be taken against the employee. Where it is decided that disciplinary action is justified, consideration will be given, before making any decision, to the employee's disciplinary and general work record, actions taken in any previous similar cases against other employees, the explanations given by the employee and generally whether any intended disciplinary action is reasonable under the circumstances. Possible disciplinary actions that might be taken include a Verbal Warning, First Written Warning, Final Written Warning or Dismissal.

At Stage One, a likely outcome is a First Written Warning (where it is deemed appropriate to take formal action); although other factors (i.e. failing to follow the correct absence reporting procedure) may lead to a higher sanction being considered. Where the employee's attendance is being considered in line with the Capability Policy and Procedure, possible outcomes include a first written warning, final written warning or dismissal. Throughout all stages, the Manager should consider all options available to support and assist the employee to improve. In most cases, the stages will be applied sequentially, and a stage one meeting

will usually lead to a First Written Warning (where it is deemed appropriate to take formal action). However, in cases, it may be appropriate to skip or accelerate steps. At each stage except for dismissal, the Manager will issue attendance targets which clearly define the improvements required along with timescales for achieving the objectives.

54. From the Policy we can take as follows:
a) Stage 1 could be instigated if there was no improvement and in this case between 1 November 2019 and 18 November 2019 there were three periods of absence, two unauthorised and one authorised. As previously stated that was unwise on the part of the Claimant even in the absence of any express warning that she may be disciplined for it. The risk of escalation was obvious.
b) There were two different paths (under the policy) that could be followed a disciplinary path for unauthorised absence and a capability path for authorised sickness absences. The Respondent elected the disciplinary path and so it should be the unauthorised absences that are the subject of enquiry. There was, of course, a third path, which was to continue along the discussions that had started belatedly on 1 November to see whether a flexible working request could be accommodated and to look at solutions to a reasonably clear and long-standing problem.
c) The Absence Policy does not seem to countenance an investigation meeting but in the disciplinary policy (which would be the right place for unauthorised absences) it is said that in normal circumstances there will be an invite in writing to such an investigatory meeting. The Tribunal have not been given any reason why there was no such invitation in writing in this case.

55. At the investigatory meeting Mrs Clinton asked the Claimant whether she was aware that the resident required thickened fluids in his drinks and the Claimant responded that she did but she had forgotten the previous day. She sought to excuse it by saying that it was human error and that ***"people can forget."*** The Claimant then asserted that other staff had done the same on the same day and that she had reported it to the Deputy Manager after the conversation between Mrs Clinton and the Claimant the previous day. There is no written evidence of that point being raised with other staff or there being any enquiry to what would have been a more concerning and widespread error.

56. The Claimant was then reported as raising her voice and saying ***"I told you, for God's sake, I forgot. I know it's you, always behind me. I am fed up. I am going, you just do whatever"*** and she then walked out of the office terminating the discussion. It seems to the Tribunal that comment and conduct needs to be looked at in the context of the whole factual nexus and in particular the poor relationship between the Claimant and Mrs Clinton at that time. We accept that the Claimant held a genuine belief that she was being victimised and picked on by Mrs Clinton. We can understand the Claimant's frustrations and whilst being frustrated does not fully excuse her reaction we believe it does go a long way towards so doing. The Claimant in the previous meeting had indicated that she was being victimised she had asked to be referred to Head Office so she could air her grievances and here was she at the end of further complaint from Mrs Clinton.

57. The highest the allegation gets is the Claimant raising her voice. She does not threaten Mrs Clinton; she does not swear at Mrs Clinton but simply raises her voice and then she leaves. Whilst technically insubordination it is at the very lowest end and the Tribunal find it inconceivable that any reasonable employer would consider it worthy of a disciplinary charge let alone considering that it constituted an act of gross misconduct as suggested by Mr Tanare. We do not accept however that outburst had anything to do with the Claimant's disability. Any employee who felt they had been victimised, disabled or not, is highly likely to have acted in the same way.

58. We consider it to be an example of Mrs Clinton seeking to load the Claimant with as much of a disciplinary burden as possible. Mrs Clinton appears to have completely failed in her obligations as a manager in respect of the absence issues. Her adherence to policy was lamentable and she allowed an unacceptable situation to drift on without taking any steps. As stated previously earlier intervention would have benefitted both parties in this case.

59. She perceived that the Claimant was becoming increasingly difficult and inflexible in what she wanted to work. That culminated in the Claimant asking for what in effect was a fixed working week over set days. Consideration of that would make the rota process more difficult and other staff would be likely to complain about the certainty the Claimant had and their need for flexibility. We have no doubt that Mrs Clinton saw the Claimant as a problem employee and we have seen in the`12 November meeting notes that she was already making comments stating that the Claimant should find another job. We have no doubt that Mrs Clinton's job is and was a hard one and we have no doubt that she believed that the Claimant was just making it harder.

60. It was never suggested to Mrs Clinton that she did not, in fact, find the resident coughing and so we accept her account of 18 November. We accept that she had a genuine concern about what had taken place and the Claimant herself accepted at a later point (the disciplinary hearing) that it would have presented a risk of the resident choking but we do consider that Mrs Clinton was quite content to seize the incident as an opportunity to exit the Claimant, a perceived difficult employee, from the Respondent and it was for that reason that she decided to load the charges up upon her as she did not wish to leave anything to chance.

61. The Claimant was not suspended. In the disciplinary policy it states that suspension will be carried out if there is, inter alia, a risk to residents. Whilst the unauthorised absence would not merit a suspension we find it very difficult to understand, with all the risks that the Respondent alleged were caused by the Claimant's actions, why she was not suspended. This matter was raised during submissions and the position of the parties is as follows:

"The parties agree that between 19 November and 19 December 2019, the Claimant was not suspended and did shifts. However, there is disagreement as to the work she did:

The Claimant's position is she worked unsupervised as usual although she was told not to give food or drink to the relevant male resident. She continued all other duties for him, including washing him, and all duties (including SALT duties) with other residents.

The Respondent's position is she worked under supervision and did not deal with any SALT risk residents.

62. We prefer the Claimant's account as there is nothing in the Respondent's evidence that would suggest that there was any modification of the Claimant's duties. In the circumstances we feel quite sure that prudence would have dictated a very clear understanding of any restrictions to which the Claimant was made to work and if there had have been any we would have been told about them.

63. The options that present themselves are either that the incident was not that serious or that there was a level of incompetence / carelessness on the part of Mrs Clinton. The Claimant herself stated that it was potentially serious in the disciplinary hearing and as we accept that the Respondent would try to keep their residents from harm or potential harm, incompetence / carelessness would appear to be the most likely reason why the Claimant was not suspended.

64. On 20 November around lunchtime Mrs Clinton sent through a draft report to HR for their consideration and later that afternoon HR asked for any minutes of meetings / statements. Mrs Clinton also told us that she spoke with HR on the telephone. The following day HR sent back the report with what they describe as being a large number of changes to the wording and some additional parts added in. In that email HR states that:

"Unfortunately, all the info about her previous final written warning will need to be removed as this has now expired ….. sorry."

65. Although we have not heard evidence from HR to explain this comment it is hard to consider this other than a strong indication that Mrs Clinton had expressed a desire or wish to HR for the Claimant to be disciplined and sanctions applied and wanted to use all ammunition at her disposal to achieve this end. We consider that that also fits in with Mrs Clinton's decision to add in to the mix the alleged unauthorised absences which had, even on the Respondent's case, been going on for a long period without sanction plus the decision to add in the Claimant's conduct at the investigation meeting, which we consider to not have been a serious issue at all.

66. When conducting her investigation Mrs Clinton interviewed Kim Chapman the Deputy Manager who stated that the Registered Nurse on shift on 18 November had specifically mentioned that the resident required thickeners and a member of care staff had asked to what degree and received an answer. "A" was the carer on duty with the Claimant and she also confirmed that the direction re the resident's drinks had been made clear at the start of the

shift and that it was the Claimant who had given the resident the drink. When the Claimant was asked about it the Claimant indicated she had forgotten.

67. The Tribunal considers that at this particular stage so far as the resident issue was concerned there was no more to investigate so far as the Claimant's actions were concerned as the facts were clear:

a) There had been an express declaration as to what the resident's needs were;
b) The Claimant had forgotten to comply with what she had been told;
c) The matter was brought to the attention of Mrs Clinton when she heard the resident coughing.
d) When confronted with the allegation the Claimant admitted she had forgotten.

68. What is more puzzling is why there was no enquiry into whether others were also failing to thicken this resident's drink as suggested by the Claimant. The whole issue here was to ensure compliance with the resident's care plan and to ensure he was safe. The Respondent's case was that this was so serious ultimately that only dismissal would do. Even if the Claimant did not reveal who she had seen do it surely there was a limited pool of other staff who had worked with the resident on that day or on the few days before. The Tribunal are troubled at the disconnect between the desire to investigate and prosecute the Claimant and the seemingly blasé attitude to wider failings of care which would have been as worrying.

69. The investigation report was completed with the assistance of HR and with a recommendation of a disciplinary hearing. There is no evidence of any additional investigation into the issue of the unauthorised absences which had been tagged onto the 18 November incident. There had been no discussion at the investigation meeting because it had not been reached by the time the Claimant walked out.

70. In the introduction of the report the absence allegation is put as follows:

"Allegation of high levels of unauthorised absence whereby you have failed attend for your shifts on 12 occasions in the last rolling 12 months".

As can be seen from earlier in this Judgment that is simply wrong. No proper explanation has been given for indicating that there were less unauthorised absences than set out in the report. Later in the report there is the following which does seem to focus on the unauthorised absences only:

"An absence review meeting was held with SC on 1st November 2019 as there were high levels of absence. SC responded by saying that she was sometimes given shifts that she was unable to work as she cannot do Sundays as she goes to church and spends the day with her family. SC has been advised to submit a flexible working application however this is yet to be received and has had a further two Sundays off whereby she has failed to come in for her shift on this day due to going to church".

71. The Claimant was invited, by letter, to a disciplinary hearing before Norah Davey with Charlotte Fitzhugh, Home Administrator, in attendance to take notes. She was told that the purpose of the hearing was to consider whether disciplinary action should be taken against her in respect of the conduct set out below:

a) Allegation of Professional misconduct whereby on 18th November 2019 you failed to follow recommendations of Speech and Language Therapist (SALT) and gave resident water without thick and easy powder and put him at risk of choking which is in his nutritional care plan.
b) Allegation of high levels of unauthorised absence whereby you have failed to attend for your shifts on 12 occasions in the last rolling 12 months.
c) Allegation of misconduct whereby on 19th November 2019 during your investigatory meeting you raised your voice at the Home Manager and walked off before the meeting was concluded.

It can be seen that the error in respect of the number of unauthorised absences has seeped into the disciplinary invitation letter.

72. The basis for the first allegation was set out in some detail. So far as the second allegation was concerned the Claimant was told that records from the payroll system, Fourth Hospitality, showed that the Claimant had fifteen periods of absence within the last twelve months which included a further three periods since the investigation commenced. It did not identify that many of the absences were for sickness absence. The third allegation stated that the voice raising had been witnessed by the administrator of the care home.

73. With the letter was enclosed a summary of the findings of the investigations and copies of relevant witness statements and other documents which were to be used at the disciplinary hearing. If there were any further documents the Claimant wanted to be considered at the hearing, she was advised to either identify them or bring them.

74. She was told that the purpose of the hearing was for her to give the opportunity to state her case and for the Respondent to consider whether it is appropriate to take disciplinary action against her in accordance with the Disciplinary Policy and Procedure and that if she was found guilty of misconduct the Respondent may decide to issue her with a written warning, final written warning, or dismiss her with notice or pay in lieu of notice. If she was found guilty of gross misconduct, she could be dismissed without notice or pay in lieu of notice. The appropriate sanction, if any, would depend upon the Claimant's explanation of the situation and/or any mitigating circumstances she may wish to put forward to explain her actions. The disciplinary procedure was also enclosed and she was told of her right of accompaniment.

75. The invitation letter was typical of its type and we are satisfied that it complied with what we would expect save for the lack of detail in relation to the absences in that it was not clear from this letter precisely what the misconduct alleged was in relation to this allegation. The letter also did not distinguish between authorised and unauthorised absence.

76. Mr Tanare dealt with the disciplinary hearing and he was brought in at the last moment. He told us that he did have discussions with the investigating officer but there is no note of those discussions. We have already identified that Mrs Clinton was perfectly at ease with the Claimant being dismissed and indeed we find that it was her preferred outcome and so we have little doubt that anything she did say would have been negative towards the Claimant. The Claimant was accompanied by her Trade Union representative Mr Flanagan. Mr Tanare explained to the Claimant that there were three allegations and he was going to go through them individually.

77. He first dealt with the water thickener incident on 18 November. In the notes the Claimant accepted that she had been told about the thickener on October 1 but that she had not been told about it on the morning of the incident. Mr Tanare reminded the Claimant that there were witnesses who contradicted this and the Claimant made no comment on that but simply said that she had forgotten and had apologised. It seems to the Tribunal that Mr Tanare had evidence from which he could reasonably prefer the account of others to the Claimant on this point.

78. Later in the meeting the Claimant stated that she had forgotten again and ascribed the reason for this as stress at work. The Claimant accepted that there was a risk of the resident choking and that she had failed to protect the resident. We do not accept that there is any evidence that any aspect of the Claimant's ill health caused her to make the error she did. It was just one of those errors that will happen from time to time in the workplace.

79. Factually what the Claimant had done was clear as was the possible consequence of her failure. Mr Tanare did not appear to look at whether there was an actual risk or whether the individual was actually caused problems by the Claimant's act

80. The second allegation was then discussed and the Claimant was asked to explain why there were so many absences. She was not specifically asked about unauthorised absences. Both parties had before them the Claimant's absence sheet which was at p.322 of the bundle. The Claimant explained that she had a number of health conditions that had led to absence and explained that if the absences are on a Sunday it's because she did not work Sundays.

81. Mr Tanare asked the Claimant whether she had specific workdays in her contract and the Claimant said she did. Mr Tanare expressed the view that weekends need to be shared by all staff and raised the point that the Respondent had tried to discuss matters with her by considering a flexible working hours request but the Claimant had not filled out the required form. As we have stated earlier the issue of precisely what the Claimant was meant to do vis a vis any flexible working request is shrouded in mystery but the fixed days that she wanted to work were known to Mrs Clinton and were available in Mr Tanare's papers.

82. At this point the representative for the Claimant at the meeting, Mr Flanagan, raised the issue that he was surprised that the Claimant had not been referred to OH. This contribution only makes sense in relation to the ill health days off and Mr Tanare responds that the absences were for reasons of religion and not health. This seems to show that the Claimant's Trade Union representative was clear about precisely what was being characterised as misconduct which was brought about by the wrong number of absences being bandied about. On the other hand, we are satisfied from this that for Mr Tanare he was only interested in the unauthorised absences from a disciplinary perspective.

83. The Claimant is asked if she wants to be referred to OH and she replies in the affirmative. With respect whilst such a referral may have been helpful in considering the general absence picture through ill health that was not the point of this meeting for Mr Tanare and the parties allowed themselves to be side-tracked for a moment and fell away from focussing on what the true issues were.

84. Whilst the Tribunal are satisfied that the only misconduct being considered by Mr Tanare was the unauthorised absences we do consider that the following led to the focus not being specifically on those unauthorised absences and a lack of clarity about the scope of the disciplinary enquiry:

a) The reference to the wrong number of absences in the invitation letter
b) The failure to focus on the unauthorised absences in the meeting at the outset.

85. At this point of the meeting the Claimant returns to Allegation 1 and asserts that other staff members forgot to put thickener in the water but she is unwilling to disclose which staff these were. There is also, at this stage no indication that she is referring to the same resident either.

86. The discussion then returns to Allegation 2 and Mr Tanare suggested that the Claimant did not follow the Respondent's policy when reporting sick and that she had had 12 absences since January 6 for sickness and 6 for unauthorised absence and he sought an explanation. The Claimant explained again that she was not well but she was asked to account for the unauthorised absence to which she replied that she did not have any answer but agreed they were unacceptable. It is not understood why Mr Tanare asked about not following the policy when absent (and his evidence did not make the situation any clearer) as firstly there is no positive evidence that the Claimant did fail when she was sick to follow process and the focal point was the unauthorised absence. The Tribunal considers that this was a further failure to focus on the specific issues at hand.

87. The cause of the unauthorised absences on a Sunday were known and the Claimant did believe that she had a good reason and that was on the papers before Mr Tanare. The Claimant did not force that point home and neither did the TU Rep. We do not accept that she failed to do so because of her disability. There is no credible evidence linking her failure and her disability.

88. The meeting then moved onto the third allegation which was the raising of the voice. The Claimant explained that she was stressed because Mrs Clinton was always calling her into the office about absences and she felt frustrated. The Claimant accepted that her behaviour had been unprofessional when it was put to her. The Claimant went on to explain that she felt that Mrs Clinton hated her and picked on her.

89. The Claimant was supported throughout the meeting by her Trade Union representative and was given the opportunity to give her account about each of the allegations in the invitation letter. At the end of the meeting she had:

a) Stated that she had forgotten to thicken the resident's water and accepted that there was a risk of choking and that she had failed to protect the resident;
b) Accepted that her unauthorised absence was unacceptable and could give no explanation for it;
c) Accepted that her behaviour in the 19 November meeting was unprofessional.

90. The Absence Policy and Procedure states that:

The employee will be provided with written particulars of the issue and any evidence prior to the meeting taking place (i.e. a full list of absences, copies of any return to work discussions, any relevant supervision notes). The employee will also be offered the opportunity to be accompanied by a work colleague or authorised trade union representative. After the Disciplinary Hearing or Stage One Capability Review Meeting the Chairperson (or the Panel) will consider what action to take. Where the employee's attendance is being considered in line with the Disciplinary Policy and Procedure, in cases where a reasonable belief in the employee's misconduct is established on the balance of probabilities, appropriate disciplinary action will be considered to be taken against the employee. Where it is decided that disciplinary action is justified, consideration will be given, before making any decision, to the employee's disciplinary and general work record, actions taken in any previous similar cases against other employees, the explanations given by the employee and generally whether any intended disciplinary action is reasonable under the circumstances. Possible disciplinary actions that might be taken include a Verbal Warning, First Written Warning, Final Written Warning or Dismissal.

At Stage One, a likely outcome is a First Written Warning (where it is deemed appropriate to take formal action); although other factors (i.e. failing to follow the correct absence reporting procedure) may lead to a higher sanction being considered. Where the employee's attendance is being considered in line with the Capability Policy and Procedure, possible outcomes include a first written warning, final written warning or dismissal. Throughout all stages, the Manager should consider all options available to support and assist the employee to improve. In most

cases, the stages will be applied sequentially, and a stage one meeting will usually lead to a First Written Warning (where it is deemed appropriate to take formal action). However, in cases, it may be appropriate to skip or accelerate steps. At each stage except for dismissal, the Manager will issue attendance targets which clearly define the improvements required along with timescales for achieving the objectives.

91. The obligation on Mr Tanare was to consider whether misconduct was made out and to consider a reasonable sanction and at Stage One the likely outcome would be a first written warning unless there were other factors that might lead to a higher sanction being considered. There were clearly unauthorised absences and the Claimant had admitted them. Another factor was Mrs Clinton's abject failure to manage the Claimant and it would be reasonable to consider whether a solution could be found to the issue of Sunday working and rotas generally by consideration of the flexible working for which a meeting could be held in short order and a resolution to the clear difficulties to see if a resolution could be found. The Claimant's length of service would have been a factor and not an immutable shield as the Respondent's counsel put it.

92. Following on from the meeting Mr Tanare stated that he spoke with HR to sense check his findings and conclusions and then produced a letter dated 19 December 2019 wherein he dismissed the Claimant on the grounds of misconduct which were detailed as follows:

a) "On 18th November 2019 you failed to follow recommendations of Speech and Language Therapist (SALT) and gave a resident water without thick and easy powder and put him at risk of choking which is in his nutritional care plan.

b) You have high levels of unauthorised absence whereby you have failed to attend your shifts on 12 occasions in the last rolling 12 months.

c) Misconduct whereby on 19th November 2019 during your investigatory meeting you raised your voice at the Home Manager and walked off before the meeting was concluded.

d) You have witnessed that there was drink given by other staff without thick and easy powder and you failed to report the incident to the DM/Nurse in charge to stop the wrong practice and therefore you failed to protect the resident from risk of choking".

93. Mr Tanare set out his findings of fact as follows after he had set out what the Claimant's position had been:

"I believe that you put a vulnerable adult at risk of choking despite being told in the handover that morning. You have previously been involved in an incident regarding a recommendation of the SALT team and this demonstrates that your behaviours have not changed and as a senior carer you should be setting an example to the team.

When reviewing your absences, it is evident that there is a pattern; you have not been working Sundays despite being rostered on. You are contracted to work Monday to Sunday and your Rota varies each week,

you do not have a set Rota and you do not work the same days each week, Therefore you are expected to work Sundays as per the schedule of the Rota.
You have made us aware that you cannot attend as you go to church on Sundays, we provided you with a flexible working application form via email on 31st October 2019 however you have not completed this request and as such have continued to be absent on these days without authorisation and without following the absence reporting policy procedure.
You questioned why we have not referred you to Occupational Health , we are not aware of any medical conditions and you have not brought any medical conditions to our attention. The efficiency of the Company depends upon you regularly attending work, your persistent absence, therefore, jeopardizes the Home's efficiency and consistency of care for the residents. Where possible we arrange agency cover but this is not possible at short notice especially on Sundays when you have failed to report your absences, as you are aware agency cover not only has a detriment to the homes finances it also does not ensure the consistency of care for our residents and at times has left the home unsafe due to not being able to get agency cover.
Furthermore, your misconduct during your investigatory meeting with the Home Manager displays unsatisfactory and negative behaviour, whilst we accept that these meetings can be difficult, your behaviour was unacceptable. As a Senior Carer you have a responsibility to lead by example and act professionally which you failed to do."

94. This letter requires careful analysis in respect of each of the findings of misconduct.

95. **Thickener Incident** – Factually it is not possible to quibble with the conclusion set out in the dismissal letter at paragraph 84(a) above. Although involving SALT, the incident the previous year was of a slightly different nature but we accept that although the warning had expired it was reasonable for the Respondent to weigh it as a matter for consideration as was the Claimant's seniority. The findings were reasonable ones for Mr Tanare to come to on the evidence we have.

96. **Absence Issues** – The conclusion is factually incorrect as the Claimant had only seven unauthorised absences in the rolling year. It is likely that this letter was written by HR following Mr Tanare telling them his conclusions and then Mr Tanare failed to check the numbers on the letter. It is evidence of a general lack of care that permeates much of what we have seen with this Respondent. Whilst there is a risk that the Claimant's absence would have caused the Care Home to be understaffed we have seen no evidence that it actually did and there was no such evidence before Mr Tanare.

97. In fact, based upon the fact that Mrs Clinton took no action at all as far as we can see to address the issue over many months we are left with two options. Either the Claimant's actions did leave Care Home unsafe and if that is the case failing to address it instantly is a massive dereliction of duty on Mrs

Clinton which would be deserving of close scrutiny or alternatively the situation whilst irritating was manageable and the effects have been exaggerated in the disciplinary letter.

98. Mr Tanare identifies the root cause of the unauthorised absence as being Sundays and identifies that the Claimant's contract means that she can be scheduled to work on any day. The issue about there being an implied or express contractual right not to work a Sunday had not been put to Mr Tanare. He raises the issue that the formal flexible working request had not been made but does not reflect that he must know what days the Claimant wants to work without the formal request as the Claimant has said it is Monday, Tuesday, Friday and Saturday and that is on the paperwork he has before him (or should have).

99. Mr Tanare speaks about the effects of the absences and in a general sense it would be inconvenient to cover at short notice and potentially expensive to do so if agency staff are called in. There is however no evidence to say how each absence was covered and nor was the Claimant given an opportunity to challenge the same.

100. **Investigatory Meeting Incident** – The Claimant's conduct is described as unsatisfactory, negative and unacceptable. There is no attempt to contextualise or even consider the complaints that the Claimant had made even before this incident that she herself was being victimised by Mrs Clinton. We consider that Mr Tanare did not even pause to consider that part of the issue could be Mrs Clinton and was not minded to delve deeply into the full picture.

101. **The Fourth Finding** – This was not a matter that had been put to the Claimant and it came up from what she raised in the meeting. Mr Tanare did not at any point indicate to the Claimant that the disciplinary allegations were being extended to include this matter. He should have done so. The comment is made that others give unthickened water. Mr Tanare asks who and the Claimant says she will not say and that it is it. There is no further discussion as to the risks / ramifications of her maintaining that position.

102. It is strange that it is the only thing that she says that Mr Tanare believes and remarkable that faced with a potential serious systemic failure in the Home which places many residents at the very risk which is intolerable for the Claimant, Mr Tanare does absolutely nothing about it. In fact, he does exactly what he considers is misconduct on the Claimant's part and does nothing. His explanation that without names an investigation is not possible is arrant nonsense. At the very least there needs to be an investigation into the matter and a reiteration of what is required re SALT residents and an enquiry into any possible wrongdoing. Nothing less would safeguard the residents.

103. The summary paragraph reads as follows:

"After reviewing all of the available evidence as a Senior Carer you have a responsibility to lead by example, your continuous absences and failure to follow the correct reporting procedures have led to home operating

unsafely and sets the wrong example to your colleagues. You have failed on occasions before to ensure that residents drinks have thickener, you are aware of the consequences to the residents, yet you continually put residents at risk, which has resulted in a gross breach of trust, resulting in the company losing faith, trust and integrity in your role as Senior Carer".

104. The Respondent is entitled to take into account that the Claimant is a Senior Carer and that she should set an example for others. It does not seem accurate to call the Claimant's absences "continuous" and we have been given no clear example of a failure to follow the correct reporting procedure. She told people when the rota was done she could not work on a Sunday and then did not attend for work on that day. There were times when she was able to swap and whilst we are satisfied that the relationship between Mrs Clinton and the Claimant became more strained we have no specific evidence that would lead us to accept that in November there was a deliberate policy to prevent such swaps. We do not demur from the findings that the absence was unauthorised and could constitute misconduct but the Respondent did not consider the wider picture of what happened in the past and why and what might be able to happen in the future with continued discussions.

105. There was no evidence of the Claimant failing to put thickener in drinks before and it is suggested that it is the fact that the Claimant "continuously" placed residents at risk meant that the trust had gone and the Claimant had to be dismissed. There is no evidence that the Claimant continuously placed residents at risk and it was accepted as late as the 12 November that the Claimant's performance was not in issue.

106. In questions from the Tribunal Mr Tanare asserted that each of the allegations individually was in his view an act of gross misconduct. The Tribunal had difficulty in seeing how the unauthorised absence in the circumstances described above and particularly the raising voice incident could possibly amount to gross misconduct in any circumstance.

107. The Claimant did appeal on 12 January 2020 which appears to be some time outside the appeal deadline but the Respondent took no issue on that at the time and permitted the appeal to be heard. The appeal was on the following grounds:

a) The Claimant stated that in Allegation 3 the reason she raised her voice was caused by her anxiety and depression and that because of this she should not be penalised for it. She also raised the spectre that there was some form of cultural reason for it but that allegation was not pursued at this hearing nor indeed at the appeal. It would appear that the Claimant was seeking to cover more than one possible base from a protected characteristic perspective.

b) The Claimant asserted she should have been sent to Occupational Health and as a result insufficient consideration was given to the Claimant's disabilities which she asserted the Claimant knew or ought to have known about.

c) She asserted that she had never worked on a Sunday due to the fact that her faith and religious beliefs were a very important part of her life. She

stated that when she increased her hours to 48, Meera (her line manager at the time) respected those beliefs and did not expect her to work on a Sunday to enable me to attend church. When Mrs Clinton started line managing me she did not accept this as a reason to not work on a Sunday. She asserted she normally worked from 8am to 8pm every Monday, Tuesday, Friday and Saturday to satisfy her 48-hour contract. She did not consider that there was any reason in those circumstances for any change to her contract. She asserted that she had always offered to work on a Sunday afternoon once she had attended church which was refused. She further asserted that there was an agreement with Meera that she would work the days detailed above and that would also take care of her grandparent duties.

d) She questioned whether the failure to add thickener constituted an act of gross misconduct. She asserted that there was no specific mention of the resident's needs in the handover and that she replaced a glass of unthickened water for a glass of unthickened water. She stated that this posed the question of who made the original mistake.

e) The Claimant asserted that her dismissal was too harsh a sanction due to the above-mentioned points, my long service and my previous exemplary disciplinary record.

108. The appeal was acknowledged and the Claimant was invited to an appeal hearing with Mr Briggs and she was accompanied by her TU Representative. The meeting started with the Claimant giving a further account of the 18 November thickening incident. The Claimant repeated her position from the appeal notice that all she did was to replace like with like and she did not remember that thickener was required as it was not mentioned in the handover meeting. She was reminded that two witnesses had a different view of whether it was mentioned. She stated that she had apologised for the incident. The TU rep asked if this was a first offence and Mr Briggs recalled the spoon / SALT issue during the CQC inspection in 2018. The TU rep questioned the level of sanction for that matter.

109. The appeal meeting then moved on to the issue of the alleged high level of unauthorised absences. Mr Briggs stated that ***"records show that there were 12 absences"*** (which was of course still wrong) and the Claimant responded by saying she did not work Sundays due to her religion and that she always called early to let them know she was going to be off. The HR representative stated that the Claimant had actually worked seven Sundays in 2019 and the Claimant explained that she gave in as she wanted to help but it was not in her contract one way or the other as to Sunday working. The Claimant stated that she had not filled in the Flexible working Form as the disciplinary had intervened.

110. Mr Briggs asked about why the Claimant had been off sick on 12 occasions. This is a puzzling question as the Claimant's capability was not an issue in the appeal as it was dealing with the conduct issue of unauthorised absence. The TU rep raised the issue that the Claimant had a disability on account of her fibromyalgia but did not mention other conditions. The TU Rep asked what the 28 October 2019 absence meeting was related to and was told it was sickness and unauthorised absence but there was no follow up letter to

the Claimant as to any outcome from that meeting. The meeting on 1 November was also discussed. The Claimant indicated that she did not sign the last Return to Work form because she did not agree with it and that every time she was absent she was called into the office by Mrs Clinton.

111. The parties then moved onto the third allegation about the Claimant raising her voice and leaving the meeting before it concluded on 19 November 2019. The Claimant stated that she got up because she got frustrated as she felt she had already apologised for the thickener and she was feeling victimised. Mr Briggs asked if there was anything to add and the TU Rep stated that the raising of the voice and walking out of a meeting was caused by anxiety which was out of her control and the incident not merit a misconduct hearing. Mr Briggs responded by saying that raising the voice to a senior staff member could be classed as insubordination.

112. The Claimant raised incidences about others not putting thickeners in residents' drinks but that nothing had been done on those occasions. The Claimant was not prepared to name names and said that she would normally deal with it by correcting the carer and then moving on.

113. Mr Briggs stated that he considered all the matters that the Claimant had raised in her appeal and at the appeal hearing. There is no evidence that he made any further investigations into anything that he had been told by the Claimant. Potential strands of investigation that flowed from the meeting were:

a) The issue of substituting like water for like water. That would have necessitated who else could have put water before the resident on the day. It may have opened up further evidence about whether or not there was a clear instruction in the handover and whether the failings were more widespread than the Claimant so needed broader action to be taken. That was not done and nor was the issue re a more widespread failings in SALT tasks. Like Mr Tanare before him Mr Briggs did nothing about this disclosure and if the issue was so serious to dismiss the Claimant we find his inaction in the point to consider if others had acted dangerously puzzling in the extreme. It indicates that the threshold to find against the Claimant was a low one

b) The unauthorised absences could have led to some enquiries as to precisely what the contractual terms were and whether there was anything that would support the Claimant's contention that she did not work Sundays and was not obliged to. It is accepted that there would have been nothing in writing to support the Claimant's position and it is not known if Meera was contactable.

c) The unauthorised absences were not looked at individually at all in the meeting and there was no consideration of what effect each absence had actually had. Was Agency cover obtained? Did the Home run short staffed? Why had Mrs Clinton allowed matters to drift so badly? Sickness absence was raised but for no reason at all as it was not relevant to the disciplinary issue in hand.

114. The findings were as follows:

"a) Raising your voice to a Home Manager is not acceptable conduct in the workplace. You state this was due to anxiety however you also admitted that this was because you got frustrated as you had already apologized for the thickener. The Home Manager was however giving you the opportunity to give your account of the events to be put forward which is normal practice in an investigation.
b) When reviewing your high levels of absence which was 12 occasions in a 12-month rolling period it is clear that the reasons for absence are that you will not work Sundays as you go to church, your husband has been unwell and you needed to provide childcare for your grandchildren. None of these absences are reasons for us to refer you to an Occupational Therapist. An Occupational Therapist report would be obtained if there was an underlying condition or persistent absence for similar illnesses whereby workplace adjustments may need to be put in place after consulting with a medical expert.
c) You are contracted to work Monday to Sunday and your Rota varies each week, you do not have a set Rota and you do not work the same days each week, therefore you are expected to work Sundays as per the schedule of the Rota. You have made us aware that you cannot attend as you go to church on Sundays, we provided you with a flexible working application form via email on 31st October 2019 however you have not completed this request and as such have continued to be absent on these days without authorisation and without following the absence reporting policy procedure. You stated that you had discussed flexible working with Neema Clinton and that forms were given however you did not submit the forms to apply for flexible working.
d) You stated that you believed another member of staff had given the drink however I cannot find any evidence to confirm this".

Having taken the above into account, the outcome of the appeal is to uphold the original decision made on 19th December 2019. You should be advised that there is no further right to appeal and my decision is final."

115. These findings have been considered and our findings are as follows:

a) Of 114 (a) the finding that raising the voice was unacceptable was a finding open to Mr Briggs but he did not look into the context of the outburst at all.
b) Of 114 (b) again the figure of 12 occasions is bandied about and that is just wrong so far as unauthorised absences are concerned. We accept that in the context of unauthorised absences they were not linked to the Claimant's health and so Occupational Health would not have assisted. It may well have done for the authorised absences but that is not relevant for the issues we have to consider.
c) Of 114 (c) Mr Briggs is correct in terms of the Claimant being able to be scheduled to work on any of the seven days of the week but he is wrong to focus on the Claimant's failing to put in a formal application when the rota she wanted had been made quite clear at one of the meetings. There was an unreasonable emphasis on the Claimant to take the next step. Lest we forget

the only written documentation about flexible working, and so perhaps the best evidence, was that a meeting was to be set up which would have been the Respondent's obligation to organise.
d) Of 114 d) we have no evidence that Mr Briggs made any enquiries into this aspect at all.

116. The overall impression we got from Mr Briggs was that his approach to the appeal was somewhat perfunctory. We do not consider that the process was a sham but Mr Briggs was well aware of the difficulties the Claimant was allegedly causing Mrs Clinton as he had updates whenever he spoke with her as part of his Regional Manager duties. We consider that knowing the Claimant was causing issues meant that he approached the appeal with a view that was heavily influenced by what he had been told outside of the disciplinary process by Mrs Clinton whose view he was minded to accept. We find that the reality was that the Claimant faced an uphill struggle to succeed on the appeal from the start.

117. The relevant statutory provisions for unfair dismissal are as follows. Under section 94(1) Employment Rights Act 1996

(**1) An employee has the right not to be unfairly dismissed by his employer.**

118. Under section 98 ERA so far as is relevant:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-**
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
> **(2) A reason falls within this subsection if it—**
> **(b) relates to the conduct of the employee,**
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

119. The relevant statutory provisions for the Equality Act 2010 (EqA) claims are as follows:

Section 15 EqA

(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Section 19 Indirect discrimination
(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.
(3)The relevant protected characteristics are—
… religion or belief…

20 Duty to make adjustments
(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

21 Failure to comply with duty
(1) A failure to comply with the first …… requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

26 Harassment
(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B……..
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.
(5)The relevant protected characteristics are—
….disability;….
religion or belief.

Section 136 EqA Burden of Proof
(1)This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

120. The parties' advocates have provided to the tribunal a thorough exposition of the case law that has flowed from the statutory provisions set out above and we are unable to detect any material divergence between them on it. We do not consider that there is a need to repeat the same in these reasons but have that case law in mind when applying that law to the facts

121. So far as the unfair dismissal claim is concerned we remind ourselves that it is not for the Tribunal to substitute its own findings for those of the Respondent. We have to ask ourselves whether the dismissal fell within a band of reasonable responses available to a reasonable employer.

122. As the dismissal is a conduct dismissal we will need to consider whether there was a genuine belief on reasonable grounds after a reasonable investigation. We will also need to consider whether or not the processes used were fair and reasonable.

120. Our conclusions on each of the specific heads of claims are as follows. We have retained the numbering from the List of Issues itself for the discrimination claims even where other claims have been withdrawn:

Unfair Dismissal

121. The Claimant was dismissed for matters which the Respondent considered to be misconduct. There were four matters raised in the dismissal letter. The thickener was deemed to be negligence by the Respondent, the unauthorised absences were also conduct (unauthorised) and not capability (which would be authorised for sickness reasons) and the last two matters are self-evidently conduct. We reiterate that Mrs Clinton had already formed the view that the Claimant was a thorn in her side but the Claimant still committed

acts of misconduct which was a mechanism by which the Claimant could be eased out of the organisation. By acting in the way that she did the Claimant gave Mrs Clinton the ammunition to bring about a process where she could secure an outcome that would be satisfactory to her. Ultimately it was the Claimant's conduct for which she was dismissed and the Respondent has discharged the burden of demonstrating a potentially fair reason for dismissal.

122. We had grave reservations of Mr Tanare's consideration of what might amount to gross misconduct and what might not, to the extent that either his judgment was seriously impaired or he was not telling us his true views so as not to damage his position and conclusions. Of course, some insubordination can amount to gross misconduct but the Claimant's actions fell so far short of gross misconduct that Mr Tanare's insistence that it was bordered on the absurd. To consider it so, falls substantially outside what a reasonable employer could have done. At most a reasonable employer's sanction would not exceed a relatively mild rebuke.

123. We considered that the Respondent did all they could to paint each of the allegations in as dark as light as possible but their position did not reflect the reality of what was also going on and was reflective of a Respondent that was not accepting a balanced view of the evidence.

124. There is, self-evidently, a risk if SALT procedures are not followed. We were not given any evidence about what the specific threat level was to this particular resident. There is a risk to any action or inaction but that does not mean it is dismissible. Mr Tanare said the risk was grave but we are not convinced that his assessment is reliable and so look to other factors to see how seriously the risk was taken.

125. We note with surprise that the Claimant was not suspended. The Claimant was dismissed because no trust could be reposed in her because of her error which she had already admitted at the point of the consideration of the suspension. We do not accept that strict restrictions were placed upon her as there is no evidence to support the same and a very clear audit trail would be required.

126. We note with further surprise that when the Claimant suggested that there were others who were failing in the same way as her no steps were seemingly taken to investigate and/or take steps to deal with this systemic failing which on the Respondent's case should have such grave consequences.

127. We conclude from this that the Claimant's thickener failing whilst properly characterised as an act of misconduct was insufficiently serious to warrant dismissal on its own and to do so would be a finding that would fall outside a band of reasonable responses available to a reasonable employer.

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128. We come to a similar view in respect of the unauthorised absences. If so serious why was such latitude given for a substantial period of time? Why was due process not followed? The primary answer to that is Mrs Clinton's incompetence in managing the absence process. We do not accept the

suggestion of the Respondent that it worked to the Claimant's advantage. Had expectations and consequences been clearly spelled out at an appropriate time matters may never have got to the point. That is a major procedural failing. There is nothing about it that suggests that the normal sanction when it is first addressed of a written warning and a discussion as to expectations and consequences of future failings would not have been the appropriate course. Any decision that it amounted on its' own to gross misconduct and the appropriate sanction was dismissal falls outside of the band of reasonable responses.

129. We have already addressed the incident at the investigation meeting and why that does not come close to an act of gross misconduct.

130. In fact, the only thing Mr Tanare believes the Claimant about is that other people have also not been putting thickeners in drinks and she has not reported them. Whilst the Claimant understandably does not wish to name them it would be vital for the safety of the residents for enquiries to be made and if necessary training undertaken. The Claimant specifically names a date when Mrs Clinton was said to have failed. We do not accept that anybody made any enquiry at all. The totality of all of this makes us believe and find that there was not a great deal of interest in any exculpatory evidence and that the responsibility on the Respondent to properly investigate matters was not sufficiently carried out.

131. We reject the Respondent's suggestion that dismissal was within a band of reasonable responses for any of the individual heads of misconduct. But were they within that band when combined? We consider that the failure to investigate what became the fourth allegation is a material failure. Mr Tanare believed almost nothing the Claimant said but was prepared to accept without question or enquiry something that provided a fourth allegation without any investigation. Had he investigated he may well have found other important information.

132. The reasons for dismissal are set out in the letter but many of the allegations are not supported by fact and do not balance the whole picture. We have gone through them earlier but we do not accept that a conclusion that the Claimant's conduct had resulted in a gross breach of trust, resulting in the company losing faith, trust and integrity in the Claimant's role as Senior Carer was one that a reasonable employer could have come to taking into account all the circumstances of the case and what was known and so did not fall within a band of reasonable responses.

133. The Claimant was a long serving, competent, member of staff who as at 11 November had no performance issues to be concerned about. The fact that she made two errors fifteen months apart does not indicate continuous failings and more than that her absences which had been tolerated for so long were not continuous. Having said that there was culpable and blameworthy conduct from the Claimant that did contribute to her dismissal and we will return to that later in this Judgment.

134. The motive for the dismissal was far more that the Claimant had become a thorn in Mrs Clinton's side and she let all know about it. The Respondent were happy to ease her out and we consider that the dismissal was unfair. We do not believe that Mr Tanare did have a genuine belief and if he did it was on a wholly unsustainable view of what dismissible misconduct is. Mr Briggs' appeal did nothing to correct matters and was in our view merely a rubber stamp to that which had gone on before without proper enquiry.

135. This is not a case where a Polkey reduction is appropriate. From investigation via disciplinary hearing to appeal whilst there were two discipline matters that were right to be investigated (thickener and absence) all parts of the process demonstrated a closed mind to anything exculpatory that the Claimant might bring up. It is not possible to say what the outcome would have been had there been a proper investigation and minds had not been closed. In such circumstances it would be pure speculation to say what an open mind and proper investigation might have brought about.

136. Section 123(6) of the Employment Rights Act 1996 (ERA) states that:
"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."
This ground for making a reduction is commonly referred to as 'contributory conduct' or "contributory fault".

137. There is an equivalent provision for reduction of the Basic Award contained in S.122(2) ERA. The statutory language used in respect of that reduction differs from that used in S.123(6) regarding reductions in the compensatory award and it was held in Optikinetics Ltd v Whooley 1999 ICR 984, EAT, that S.122(2) gives tribunals a wide discretion whether or not to reduce the basic award on the ground of any kind of conduct on the employee's part that occurred prior to the dismissal and that this discretion allowed a tribunal to choose, in an appropriate case, to make no reduction at all.

138. This contrasts with the position under S.123(6) where, to justify any reduction at all on account of an employee's conduct, the conduct in question must be shown to have caused or contributed to the employee's dismissal.

139. Once the employee's conduct has been shown to have caused or contributed to the dismissal for the purpose of S.123(6), however, a tribunal has no option but to make such a reduction, since the relevant provision stipulates that the tribunal 'shall reduce the amount of the compensatory award'. Its discretion lies only in the amount of the reduction, which must be 'such proportion as it considers just and equitable' having regard to the finding that the employee caused or contributed to his or her dismissal.

140. In **Nelson v BBC (No.2) 1980 ICR 110, CA,** the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

a) the conduct must be culpable or blameworthy

b) the conduct must have actually caused or contributed to the dismissal, and
c) it must be just and equitable to reduce the award by the proportion specified.

The first two factors focus on the nature of the conduct that is said to have caused or contributed to the unfairly dismissed employee's dismissal. The third factor deals with quantum i.e. by how much should the tribunal reduce the compensatory award once it has found that such a reduction is appropriate?

141. Dealing with each of these questions in turn:

a) **Was the conduct culpable or blameworthy?** The Claimant was dismissed for four alleged acts of gross misconduct according to the letter of dismissal. We have found as a fact that the Respondent considered the Claimant at this point to be a "difficult" employee and were quite happy for the Claimant to be dismissed and utilised these alleged acts to facilitate that. Having said that the Claimant did:
i) Provide an unthickened drink to the resident contrary to a clear instruction potentially placing that resident at harm and accepted that;
ii) Deliberately fail to turn up for work when she was scheduled to thereby potentially causing the Respondent to be short staffed and potentially reduce the capacity to meet the needs of the residents.
We are satisfied that these acts do constitute conduct that is both blameworthy and culpable.

b) **Did these acts cause or contribute to the dismissal?** We are satisfied that they did. Whilst they were the catalyst for achieving the removal of a "difficult" member of staff we are quite satisfied that the Respondent was entitled and indeed obliged to consider the first matter as it pertained to the safety of a resident and entitled to consider the Claimant's deliberate failure to attend work on Sunday. The fact that the misconduct was not unwelcome to the Respondent in the sense that they had found a mechanism to potentially dismiss the Claimant does not derogate from the fact that the misconduct caused / contributed to the Claimant's dismissal.

c) **Is it just and equitable to reduce the compensatory award?** We are satisfied that it is. The Claimant deliberately failed to attend on shift knowing the complications it would cause. She was fortunate that the matter had not been dealt with at an earlier time. We consider that where the actions of the Claimant in ignoring / forgetting instructions which are necessary to obviate risk to a patient's safety and a deliberate failure to attend work where scheduled in order to prioritise her own needs (church and family) demands a substantial reduction and we fix that reduction at 80%.

142. Whilst we recognise that we have greater latitude in respect of the Basic Award we can see no logical basis for not making the same reduction on that award as well.

143. **Discrimination arising from disability: s15 EqA**

6.1 Did the following thing(s) arise in consequence of the Claimant's disability?
(i) the cumulative effect of the Claimant's disabilities resulted in behaviours whereby the Claimant was overanxious, distressed or over emotional and unable to concentrate or follow the content of meetings or what is being said; and
(ii) the Claimant's sickness absences related to her disability.
6.2 The Claimant says the Respondent treated the Claimant unfavourably as follows:
(i) instigation of a disciplinary investigation against the Claimant and holding the disciplinary investigation meeting on 19 November 2019;
(ii)
……
(iii) dismissal of the Claimant.
Did the Respondent treat the Claimant unfavourably in any of those ways?
6.3 If so, did the Respondent treat the Claimant unfavourably because of the thing(s) arising in consequence of her disability?
6.4 If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?
The Respondent relies on the following as its legitimate aims: The need to maintain an appropriate standard of care for its residents; to look after their health and safety; and to maintain professional discipline in its workforce.

144. **Conclusions re Section 15 EqA Claims**

a) At the outset we remind ourselves that the Claimant's disability status stems from the impairments of fibromyalgia, diabetes, anxiety and depression.

b) We reject the claims pursuant to section 15 of the Equality Act 2010. We consider solely the issues put to us for determination by the Claimant and we will deal with them in the precise terms asked of us.

c) Dealing with the first of the two "things "arising in consequence from the disability the Claimant would have to satisfy us that she was unable to concentrate or follow the content of meetings or what was being said; that she was over-anxious, distressed or over emotional at those meetings and it was that emotional state which led to her participating in the way suggested and arose from a combination of her impairments / disability.

d) As a matter of fact, we do not find having looked at the notes that there is any evidence that she was unable to concentrate or follow what was being said at the meetings. She was asked questions and she answered them to the best of her ability. We note that at no point does this issue seem to have been picked up by her representative or raised by them at the disciplinary meetings and we feel sure it would have been had it truly been the case.

e) The investigation meeting was short and the Claimant appears fully able to understand what was being put to her and formed the view that the conduct was a further incident of being singled out for criticism unjustly. That was a rational conclusion to come to and one that did not flow from her disability.

f) We do not accept that the Claimant was over-anxious or over emotional at either meeting or unduly distressed. We accept that there would have been a normal level due to the nature of the meetings but see no trace in the notes of these matters being any more than would be normal in such meetings.

(g) Even if the Claimant did display any of these traits we have no evidence to suggest, on the balance of probabilities, that the behaviour arose from a combination of her disabilities or any one individually. It is, of course, possible but there is nothing we have seen that suggests it actually did in this case.

h) Whilst we accept that it is highly likely some of the Claimant's sickness absences were caused by disability related absences we do not know which ones. In any event we do not accept that any of the unauthorised absences for which the Claimant was disciplined and ultimately dismissed were on account of her disability. The Claimant's own evidence is that they were related to her desire to go to church and to have family time.

i) We accept that when summarising the absences in letters there was a tendency to include sickness absences but we are satisfied that ultimately despite these errors when setting out the number of absences Mr Tanare dismissed the Claimant because of the unauthorised absences which were linked to her desire to not work on a Sunday.

j) For those reasons the section 15 claims fail.

144. **7. Reasonable adjustments: ss 20 & 21 EqA**

7.1 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP(s):
(i) the requirement to perform all contractual duties;
(ii)
……
….
(iii)
……
…
(iv) the requirement to attain a certain level of attendance at work in order not to suffer the risk of sanctions and/or dismissal.
7.2 Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time in that she was more likely to:
(i) ……
(ii) be unwell;
(iii) signed off sick; and
(iv) seek medical attention.
7.3 If so, did the Respondent know, or could it reasonably have been expected to know, the Claimant was likely to be placed at any such disadvantage?

7.4 If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The burden of proof does not lie on the Claimant; however it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows:
(i) Place the Claimant on light duties
(ii) discount the Claimant's disability related absences;
(iii) continue the Claimant's employment rather than dismiss her, potentially considering alternative sanctions to dismissal;
(iv)
…….
(v) amend the Claimant's shift pattern, for example so that the Claimant did not work two and/or three consecutive day shifts of approximately 12 hour length each;
(vi) ……
(vii) reduce the frequency of the Claimant's shifts; and
(viii) redeploy the Claimant.
7.5 If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

145. **Conclusions on Reasonable Adjustments Claims**

a) The Tribunal accepts that both PCPs were applied by the Respondent to the Claimant.

b) We do not accept that the first of the two PCPs placed the Claimant at the substantial disadvantages identified as required by the statute. The first PCP focusses upon the Claimant's duties. We are satisfied that the Respondent on a day to day basis had no issue with the Claimant's performance of her contractual duties and we have no evidence that the Claimant's contractual duties caused her to be unwell, to take time off or seek medical attention. Further the Claimant has at no point identified what contractual duties were causing her a substantial disadvantage and in actual fact Mrs Clinton although at odds with the Claimant made it quite clear in November that the Claimant was doing fine from a performance perspective. Historically on the return to work forms there were no relevant issues identified about undertaking day to day tasks.

c) Over half of the absences were caused by the Claimant not wishing to work on a Sunday and then not arriving for her scheduled rota and that has nothing to do with her sickness absence. The precise cause of the other absences are not clear but at least some of those were linked to her husband's medical condition and the Claimant has not sought to bring an associative claim. Those absences which were in relation to the Claimant's own sickness absence were not because of the Respondent's requirement that the Claimant undertook all contractual duties.

d) In any event the evidence was very clear that the Claimant was placed on lighter duties when she was partnered with another on the shift. For

all the above reasons there is not the required disadvantage shown from the first PCP and that claim is dismissed.

e) We do not accept as a matter of fact that the Claimant with her range of conditions actually did suffer a substantial disadvantage compared to a non-disabled person in that she was more likely to be unwell, signed off sick and seek medical attention. As stated above there were a number of reasons for the absences of the Claimant which included her decision not to attend on some Sundays, her husband's ailments and appointments and some sickness herself. The causes of her sickness absences are not always clear and it has not been demonstrated to our satisfaction either which absences were disability related and whether or not she was at a disadvantage compared to a non-disabled person. We accept that it would have the potential to place her at a substantial disadvantage but we have not been provided with the evidence to say that it did.

f) On that basis the claim fails because the Claimant has failed to show that there was any substantial or indeed any disadvantage to her compared to a non- disabled person, the reasonable adjustment claim is dismissed.

g) In any event we do not accept or find that the reasonable adjustments proposed would have eliminated or ameliorated the disadvantage stated.

h) The Claimant was placed on lighter duties than the norm on the evidence we heard and as explained above. There is no evidence that anything the Claimant did at work in terms of day to day tasks caused her any disadvantage because of her disability.

i) The Claimant has not established to our satisfaction what absences were caused by a disability related illness and so therefore we are unable to discern what effect such discount would have. In any event as we are satisfied that the absences which gave rise to sanctions / dismissal were solely the absences that were unauthorised i.e. were not caused by disability but rather the claimant's preferences discounting disability related absence would have made no difference at all.

j) On our findings the Claimant was not dismissed for anything relating to her disability absences but for conduct reasons and so we cannot see how the adjustments set out at 7.4.(iii), (v), (vii) and (viii) would have made any difference to any disadvantage caused by the disability.

k) The reasonable adjustments claims are not well-founded and fail.

146. **8. Harassment related to disability : s26 EqA**

8.1 Did the Respondent engage in conduct as follows:
(i) instigation of a disciplinary investigation against the Claimant and holding the disciplinary investigation meeting on 19 November 2019;
(ii)
…….
(iii) dismissal of the Claimant; and/or
(iv) Mr Tanare's comment in his letter dated 19 December 2019 that the Claimant had not informed the Respondent of her disabilities when she had done so.
8.2 If so was that conduct unwanted?
8.3 If so, did it relate to the protected characteristic of disability?
8.4 Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

147. **Conclusions on Disability Harassment Claims**

a) The instigation of the disciplinary and the holding of the meeting was not related to the Claimant's disability at all. We accept that it was to deal with the thickener incident, the unauthorised absence and the Claimant's insubordination as set out in the meeting notes. The insubordination was a conduct matter but of the most minor kind. The other two matters were however such that it was entirely appropriate for them to be investigated and considered in a disciplinary context. The safeguarding matter was one that required enquiry because of the need to protect residents and one of our criticisms of the Respondent is that they did not investigate widely enough. We would not have criticised the respondent had they instigated an investigation into the unauthorised absence long before they did and the absence came about because of the Sunday working. We are satisfied that the instigation of the 19 November investigation and the holding of the meeting was not linked to the Claimant's disability in any way at all. That claim is dismissed.

b) We do not accept that the dismissal was related to her disability in any way either. The Claimant was dismissed for the reasons given none of which are linked to her disability or any of the impairments for the reasons given previously in these Reasons.

c) The Claimant has not satisfied us that any part of Mr Tanare's comment amounted to statutory harassment. We are not satisfied that the Claimant has demonstrated via her evidence that it was unwanted or that it had any of the effects set out within the harassment provision. We are satisfied that it was not Mr Tanare's intention to cause any of those effects too. In the context of this claim, the statement which is the subject of this allegation was not objected to strenuously or indeed at all at the time nor was it explored at the appeal and in the circumstances

could not reasonably have caused the Claimant the required effect. We reject her evidence that it did.

148 **Religious/philosophical belief discrimination**

The Issues for this claim are:
11. The Claimant identifies as Pentecostal Christian.
…….
11.1 A "PCP" is a provision, criterion or practice. Did the Respondent have the following
PCPs?
(i) the requirement to work on Sundays; and
(ii) the practice of sudden alteration of agreed working hours without consultation.
11.2 Did the Respondent apply the PCP(s) to the Claimant at any relevant time?
11.3 Did the Respondent apply (or would the Respondent have applied) the PCP(s) to persons other than those of the same religion as the Claimant ("the comparator group")?
11.4 Did the PCP(s) put persons of the Claimant's religion at one or more particular disadvantages when compared with the comparator group in that persons of the Pentecostal Christian faith are:
(i) less likely to be able to attend the workplace on Sundays (or unable to practice their religious beliefs if they did attend);
(ii) more likely to be the subject of disciplinary and dismissal proceedings in the event of unauthorised absence as a result of sudden imposition of the requirement to work on Sundays through alteration of working hours.
11.5 Did the PCPs put the Claimant at those disadvantages at any relevant time?
11.6 Can the Respondent show it is a proportionate means of achieving a legitimate aim? The relied upon legitimate aim is the operational needs of the Respondent which in particular require an appropriate number of staff on shift, with relevant mix of seniority to deliver the service at an appropriate cost.

149. Conclusions on Indirect Religious Discrimination

a) The Respondent admits there was a PCP to work some Sundays for the Claimant and it is further admitted that placed the Claimant at a substantial disadvantage. The only issue on that PCP is whether those actions can be said to be a proportionate means of achieving a legitimate aim.
b) The Tribunal does not accept that the second PCP is made out factually as we do not accept that there was actually any agreed hours to be altered with or without consultation. We are satisfied that staff would be scheduled to work via a rota system and that the Claimant and other staff would know their hours well in advance. There was no practice of a sudden alteration of agreed hours without consultation.

c) The legitimate aim put forward for the first PCP relates to the operational needs of the Respondent which requires an appropriate number of staff

on shift, with relevant mix of seniority to deliver the service an appropriate cost.

d) We accept that there was a legitimate aim and we adopt and accept the analysis of the Respondent in that the business operates in the care sector and runs 7 days a week with an operational need for ensuring it is adequately staffed with appropriate numbers on shift on every day of the week and with relevant mix of seniority. There is no other option. We accept that it cannot rely on agency staff to fill this less popular period as that compromises both continuity of care and significantly increases costs. The most important aspect, however, is the need for continuity of care if possible. The aim is a legitimate one.

e) The key part of this claim is the extent to which the Respondent can show what they did as being proportionate. Whilst not identical, the case of **Mba v London Borough of Merton (2014) 1 WLR 1501 (CA)** is of some assistance in gauging the issue of proportionality.

f) We need to weigh the discriminatory impact on the Claimant against the reasonable needs of the employer. It is clear to the Tribunal from the evidence that Sunday was a problem day for the Respondent re staffing and that there were a number of individuals who did not wish to work it for a variety of reasons which included the same reasons as the Claimant, i.e. the desire to go to church. All had no contractual reason not to work but all had preferences.

g) We consider that the Respondent genuinely tried to assist those who did not wish to work Sundays and allocated Sunday's on a rota system designed to ensure the burden was shared and borne by all. This was a genuine attempt to mitigate the problem and they had sought to do so for a substantial time. Also, we are satisfied that there was a system in place where voluntary swaps could be undertaken between staff and that this was permitted by the Respondent.

h) We find that the Claimant was rota'd to work for a comparatively small proportion of Sundays and was not disproportionately affected. Of particular importance is that the Claimant wanted to attend church on Sunday morning. Mrs Clinton put forward a proposal to the Claimant that she could be scheduled to work on the later shift on a Sunday which would have allowed her to go to church in the morning but the Claimant was not prepared to do this for a wholly understandable but completely non-religious reason i.e. she wanted to spend time with family, children and grandchildren.

i) It is the Tribunal's view that the issue of Sunday working had a workable solution available with the Claimant working the later shift as it would have meant the Claimant could have gone to church and the Respondent would have had the Claimant's assistance to cover Sundays which was always difficult.

j) In all the circumstances we find that the Respondent had a proportionate approach which was to share the burden of Sunday working around and it would not have been acceptable to ostensibly give the Claimant a permanent informal arrangement would have likely led to tension amongst other Christian members of staff who would have demanded the same treatment and, in all likelihood have made the rota unworkable. This was especially the case when the Claimant had objected to working the late shift.

k) We accept that it is up to the Respondent how it reasonably assesses its business needs and uses its resources, it is not the case that it should have to potentially incur high costs of agency staff or cover when contractually there are enough hours in its existing workforce to cover the Sunday shifts.

l) A Flexible Working process was in play when the Claimant was dismissed.

m) In all the circumstances we are satisfied that the steps the Respondent took by seeking to balance out Sunday working, allowing swaps and in particular offering the Sunday afternoon shift to the Claimant was a proportionate means of achieving a legitimate aim and the Claim is dismissed.

150. **12. Harassment related to religion: s26 EqA**

12.1 Did the Respondent engage in conduct as follows:
……
…..
Scheduling the Claimant to work on Sundays (from October 2017 onwards).
12.2 If so was that conduct unwanted?
12.3 If so, did it relate to the protected characteristic of religion?
12.4 Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

151. Conclusion on Religious Harassment Claim

a) We do not accept that there was a difference from October 2017. The Claimant was obliged to work Sundays if rota'd to do so from the outset and efforts were made to try and minimise the Sundays the Claimant worked but the Claimant still worked Sundays from time to time.

b) In any event we do not consider that it is linked to her religion in the required sense. The Claimant, as stated, was obliged to work Sundays and at no point was she rota'd to do so for any other reason than to

adequately cover her shift and the decision to do so was based on solely operational grounds and needs.

c) Whilst we accept that working Sunday was unwanted by the Claimant but we do not accept that the effect on the Claimant was to produce a hostile environment or any of the other prescribed environments at all. In fact, the Claimant simply ignored the fact that she was rota'd from time to time and did not turn up. Further we do not consider that even if the conduct did have the prescribed effect it would be reasonable for the conduct to have that effect. The Claimant was simply being asked to do what she was contractually obliged to do. The requirement to work was not linked to her religious faith at all.

d) The Claim is rejected.

Employment Judge Self
25 March 2022