EMPLOYMENT TRIBUNALS

Claimant: **Ms G**

Respondent: **BUPA Care Homes (BNH) Ltd**

Heard at: **London South Employment Tribunal (by CVP)**

On: **25.04.2022 – 29.04.2022**

Before: Employment Judge Dyal sitting with Mr Rogers and Dr Okitikpi

Representation:

Claimant: in person

Respondent: Mr Fitzpatrick

JUDGMENT

1. The claim for notice pay succeeds. The Respondent shall pay to the Claimant the sum of £642.37.

2. All other claims fail and are dismissed.

Review law and discussion and conclusions

REASONS

Introduction

The issues

1. We had a helpful discussion of the issues with the parties at the outset of the hearing through which the issues for adjudication were agreed.

2. The heads of claim are:

   2.1. Direct discrimination within the meaning of s.13 Equality Act 2010 (EqA) by reference to the protected characteristics of sexual orientation, marital status and race. She says she was perceived to be a lesbian woman (though

she is in fact heterosexual), was unmarried and was perceived to be a "Gypsy" or traveller (though is not and identifies her race as white, British).

2.2. Unfair dismissal both by reference to both s.103A Employment Rights Act 1996 (ERA) and s.98 ERA;
2.3. Notice pay;
2.4. Holiday pay.

3. The allegations of sexual orientation discrimination/marital status discrimination are as follows:

3.1. On 20 February 2020: Ms W falsely stated that the Claimant had been discussing her in the smoking area. The Claimant was forced to attend a meeting. Ms W accused the Claimant of spreading rumours about the Claimant.
3.2. On 20 Feb 2020 the Claimant was attacked having raised a grievance about workplace bullying:
- Ms W was verbally abusive.
- Ms W threated to harm the Claimant's 8 year old son including by raping him. Ms W said she was a member of the BNP.
- Ms W physically assaulted the Claimant.
- Ms W referred to the Claimant in a derogatory way as a 'single' parent and made comments about the Claimant's appearance and sexual orientation.

3.3. In around August 2020: Ms W tried to intimidate the Claimant at her home address. The Claimant lived on the same road as the workplace. Ms W did this by driving past the Claimant and slowing down and trying to intimidate her and by reporting the Claimant to the Home Manager.

4. The allegations of direct race discrimination are:

4.1. The Claimant was not given overtime.
4.2. The Claimant was not given the opportunity to work on Fridays 9am -3pm on a permanent basis. This was offered to an external candidate.
4.3. The Claimant was excluded from team meetings and feedback from take ten meetings was not discussed with her.
4.4. The Claimant was told to keep her presence in the admin office to a minimum for her own safety.
4.5. The complaints above about 20 February 2020.

5. In relation to the direct discrimination claims, the Claimant relies upon hypothetical comparators save that she additionally relies upon Ms JW in relation to the complaint about working on Fridays.

6. S.103A ERA: Unfair dismissal.

6.1. The Claimant says she made Public Interest Disclosures (PIDs) as follows:

6.1.1. 3 April 2020 (to R)
6.1.2. 14 April 2020 (to R)
6.1.3. on 3 April 2020 (to the CQC)

6.1.4. on a date in April 2020 (to the Met Police)

7. The gist of the information disclosed on each occasion was that she had been assaulted at work by Ms W on 20 February 2020.

8. The Claimant contends that the reason or principal reason for dismissal was that she made one or more PIDs.

9. S.98 ERA: ordinary unfair dismissal

   9.1. The Claimant contends that there was not a fair reason for dismissal and whether there was or not, the dismissal was unfair in all the circumstances.
   9.2. The Respondent says the Claimant was dismissed for 'conduct' namely making malicious and/or vexatious allegations about Ms W's conduct on 20 February 2020.

10. Notice pay

   10.1. The Claimant was summarily dismissed and was not paid in lieu of notice;
   10.2. She contents she is entitled to notice pay, the Respondent contends that she was not because she was guilty of gross misconduct.

11. Holiday pay: the Claimant contends that she had about 14 days annual leave accrued at the point of dismissal and was not paid for those days upon dismissal. The Respondent denies the same and contends that the Claimant had 35 hours of leave accrued on termination for which she was paid.

12. Employment Judge Dyal noted in the discussion of the issues that at one time the Claimant had indicated that she wanted to raise complaints of harassment. He asked if she still wanted to do so. She stated that she did not.

The hearing

13. *Documents before the tribunal*:

   13.1. Agreed bundle and index;
   13.2. An additional payslip;
   13.3. Email form Claire Miles to Occupational Health dated 18 June 2020 (it is the cover email to a referral for an Occupational Health report);
   13.4. Witness statement of the Claimant;
   13.5. Respondent's witness statements
      13.5.1. Ms B,
      13.5.2. Ms S,
      13.5.3. Ms W,
      13.5.4. Ms Hustwick,
      13.5.5. Ms Jetten.
   13.6. Chronology (drafted by the Respondent, the Claimant indicated it was agreed on day 1)

13.7. Cast-list (drafted by the Respondent, the Claimant indicated it was agreed on day 1);
13.8. Respondent's closing submissions
13.9. Claimant's closing submissions
13.10. Claimant's questions for Respondent's witnesses
13.11. Two emails from the Claimant indicating that following day 1 she wanted the hearing to continue in her absence. The second email indicated that she did not want to attend a ground rules hearing to discuss reasonable adjustments to the hearing itself (proposed by the tribunal in response to the first email).

Claimant's participation in the proceedings

14. On the first day of the hearing, after housekeeping matters had been dealt with, the tribunal adjourned to read into the case. It scheduled a restart at 3pm. At 3pm the hearing restarted and the Claimant's evidence commenced. She affirmed and swore that here witness statement was true to the best of her knowledge and belief. She was then cross-examined for around 50 minutes.

15. The cross-examination was as non-confrontational as a cross-examination could possibly be. It was conducted in a pleasant, polite tone and the questions themselves were put gently. The Claimant appeared to be dealing with the cross-examination very well in the sense that she clearly understood the questions, was able to process them and give the answers she wanted to give.

16. At 15.55, there was a discussion of when to break for the day (it having previously been indicated we would break between around 16.00 and 16.30). The Claimant asked to break for the day and we agreed. She said she was finding it difficult and she did look a little distressed.

17. The following events then occurred:

17.1. Overnight, the Claimant emailed the tribunal stating that she had been having panic attacks about the questioning and the case and that she wanted the case to continue in her absence, asking if that was permissible.
17.2. In the morning before proceedings began on day 2, the Claimant sent three emails repeating the above request, stating that her doctor had advised her not to participate in the trial because of the stress of doing so, providing 5 questions she wanted put to the Respondent's witnesses and providing a short closing statement.
17.3. In response, the tribunal wrote to the parties, stating that in principle a hearing could go ahead in the Claimant's absence but that there were many downsides to this. The tribunal notified that Claimant that there were adjustments that could be made to facilitate her participation in the hearing. It invited the parties to an impromptu ground rules hearing to take place at 10.45 am.
17.4. The Claimant did not respond to this email or a follow up call from the tribunal's clerk nor did she attend at 10.45 am (these are not a criticisms of her). A brief hearing went ahead with the Respondent's counsel in

attendance. It was agreed that since the notice of the ground rules hearing had been short and we could not be confident the Claimant had received it, it should be pushed back to 10am on day 3 (27 April 2022).

17.5. The tribunal then wrote to the parties again by email, inviting them to a ground rules hearing on day 3 at 10 am. The tribunal was concerned not to make the Claimant feel pressured to attend if she did not want to, but equally wanted to give her a full opportunity to attend if she did want to. It made this clear.

17.6. At 13.59 the Claimant emailed the tribunal and made clear that she wanted the hearing to proceed in her absence, to be decided based on the existing information and to be resolved as soon as possible.

17.7. The hearing resumed at 10 am on 27 April 2022. The Respondent submitted that the trial should proceed in the Claimant's absence. The tribunal agreed with both the Claimant and the Respondent that the hearing should proceed in absence. It was the Claimant had asked for (twice). There was no request for an adjournment, no medical evidence in support of one and no evidence that the Claimant would be better able to participate in the hearing were it adjourned to another occasion. In the circumstances, proceeding in the Claimant's absence was the appropriate course.

17.8. The tribunal duly put the questions the Claimant had posed (there were only 5) to the relevant witnesses.

17.9. The tribunal paid careful attention to the Claimant's closing submissions. They were short and in writing. It also paid careful attention to the Respondent's closing submissions which were more lengthy (they were both in writing and oral).

Chronological narrative

18. The tribunal made the following finds of fact on the balance of probabilities.

19. The Respondent is part of a group of companies that operate in the health and care sector. Among other things it operates an older adult's care-home in South London ('the Home'). The Respondent is a relatively large employer and has significant administrative resources.

20. From 17 July 2017 to 21 August 2020, the Claimant was employed by the Respondent to work as a Receptionist at the Home. Her initial primary working pattern was office hours on Tuesdays and Thursdays. However, she also worked some overtime.

21. Ms W was appointed as a full-time receptionist at around the same time as the Claimant. The Claimant and Ms W were initially close friends and socialised outside of work.

22. The receptionists were part of a small administration department. During the Claimant's employment a number of managers line managed the reception staff, including Ms J and then from November 2018, Ms B. At the relevant times the Home Manager was Ms S.

23. On 27 September 2018, Ms W and the Claimant jointly wrote to Ms S. Ms W asked to reduce her working hours so as to no longer work on Fridays. The Claimant asked to increase her hours so as to work on Fridays from 9am to 3pm (p139). This request was acceded to.

24. Ms B's employment commenced in November 2018. At this point, she discovered that there was shortage of keys to the administration office. The administration office was where Ms B's and Ms W's desks were. It was also where a lot of files in relation to residents were kept. The Claimant's desk was outside the administration office but she needed to go into the office in the course of her work. Ms B was informed by the maintenance team that no more keys could be cut for the administration office main door because it was a security door with a controlled number of keys. She therefore asked the Claimant for her key. This meant that at times the Claimant would be put to the minor inconvenience of having to ask someone else to lock or unlock the administration office. However, Ms B's reasoning, we accept, was that she needed the key more than the Claimant did. That is because she worked full-time so was in more often, because she worked in the administration office itself and because the hours she worked meant it was more likely that she would be present when no-one else with a key was to hand than the Claimant.

25. There were long running concerns about the Claimant's performance at work. We accept the Respondent's evidence that she was often seen using her phone at times when she ought to have been working, that she made frequent errors and that she was inconsistent in turning around the work that she was supposed to. Over time this became a particular concern to Ms W who ended up with a greater workload.

26. These performance issues led to simmering workplace tensions.

27. On 22 March 2019, the Claimant had an appraisal with Ms B. Her rating was '*work to do*' and was the lowest rating. The notes of the appraisal show that it was conducted with care and that the criticisms of the Claimant were rooted in specific examples, as is good practice when making criticism.

28. Ms B endeavoured to be fair in her management of the Claimant and tried not to single her out for poor performance. For example, on 25 April 2019, she emailed the whole reception team (the Claimant, Ms W and Ms JB who worked weekends) and thanked them for their hard work in recent times. She passed on some positive feedback that had been received from a visitor. She also reminded all of them not to use their mobile phones during work time when on reception. She made the reminder perfectly general when in fact it was directed at the Claimant.

29. On 10 May 2019, the Claimant's performance was reviewed and it was noted that her performance had improved.

30. In May 2019, The Claimant agreed to work some overtime to cover Ms JB's annual leave in July.

31. On 5 June 2019, Ms B wrote to the Claimant and picked her up on some specific aspects of her performance and gave clear guidance about what had been wrong and what was expected.

32. On 10 June 2019, Ms B wrote to Ms S expressing concern about the Claimant's performance and implied this was creating an unfair burden on Ms W.

33. On 18 June 2019, there was a supervision meeting between the Claimant, Ms B and Ms J. There was a frank discussion of performance concerns about the Claimant. Ms B raised concerns about aspects of the Claimant's recent performance such as, post not being taken, drawers being left unlocked and work not being finished. We accept that these concerns reflected the reality. The Claimant answered the concerns essentially by complaining that she had too much work to do.

34. On 20 June 2019, the Claimant emailed Ms JB and Ms B stating that she was no longer able to cover Ms JB's annual leave on the dates in July she had previously agreed to do so. Ms B objected to this as annual leave arrangements had been made based upon the Claimant's agreement to provide cover. The Claimant stated that she would only deal with Ms S in relation to this matter.

35. On 25 June 2019, the Claimant complained to Ms S that Ms B was bullying her. Although we accept that the Claimant perceived Ms B to be bullying her, in our view, the right analysis is that Ms B was line managing the Claimant in a reasonable way albeit one that pulled the Claimant up on shortcomings in her performance. Ms B did not do this gratuitously but rather because the reception team was very small and Ms W was bearing unfair burden.

36. On 27 August 2019, there was a meeting between the Claimant, Ms S, Ms B and Ms W. The purpose of the meeting was to clear the air and establish a clear understanding of who was expected to do what in the reception team. The meeting however, also included a lot of open discussion of concerns about the Claimant's performance. To this extent it was perhaps ill-advised given that one of the Claimant's peers, Ms W, was present.

37. Unfortunately, the meeting did not have the effect that was intended. The Claimant took umbrage and felt that Ms W was now against her. It proved a watershed in their relationship. They ceased to be friends and relations between them become tense and frosty.

38. At some stage after the meeting but before 27 September 2019, the Claimant asked to amend her contract so as to reduce her hours from 24 to 18 per week and in particular to stop working on Fridays. On 27 September 2019, Ms S wrote to the Claimant and notified her that she agreed the Claimant's application. Thus the claimant ceased to work on Fridays shortly thereafter.

39. As a result of this, the Respondent needed to recruit someone to work on Fridays. A colleague told Ms B that a former Bupa receptionist, Ms JW, was looking for work. Ms JW was therefore interviewed, considered a suitable candidate and appointed to the role albeit on a zero hours contract. In practice

her job was to cover reception on Fridays. Ms JW is relied upon as an actual comparator and it is therefore relevant to note something of her protected characteristics. She is white British, heterosexual and married.

40. In November 2019, Ms W had been told by a colleague that the Claimant was gossiping about her and spreading false rumours, including that Ms W had reported the managers to '*Speak Up*', the Respondent's anonymous whistleblowing service. Ms W was really upset by this.

41. On a date that is unclear, Ms B was struggling with her mental health. She had minor disagreement with the Claimant. She felt the Claimant was insinuating that she had been unsympathetic to some family members of a resident and she took this very hard and became upset. She cried and started having a panic attack. Ms S came and helped to calm her down.

42. The Claimant's case is that Ms S said to her that she should avoid the admin office at this time for her own safety. Ms S's evidence is that she did not make this comment to the Claimant. She did say to the Claimant that it was better that she did not go into the admin office because of the tension in there. This related in context to that particular day whilst Ms B was upset rather than applying as a general instruction thereafter. We prefer Ms S's evidence on this matter. We had the benefit of hearing her oral evidence on this matter and found it credible. We also think her account of the conversation is the more plausible as it fits the facts better. There does not appear to have been any reason to think that Ms B posed any danger to the Claimant's safety, nor any reason for Ms S to think she did, and it is implausible that Ms S would have expressed herself by reference to 'safety'. On the other hand, there clearly was a lot of tension in the admin office and it is very plausible that Ms S would advise the Claimant not to enter at that time for that reason.

43. One of the Claimant's allegations is that she was excluded from team meetings and was not given feedback from Take 10 meetings. Take 10 meetings were meetings between senior management and department heads. They dealt with matters of the day and, for instance, learning points from previous days. Ms B's evidence is that much of what was said at these meetings had no relevance to reception staff. Where there was something of relevance she fed it back, generally orally, to her team. We accept Ms B's evidence on this point. It is something she gave oral evidence about and we found it credible. We also thought it was consistent with the documents that we have seen which tend show that she had an inclusive approach to her department. Sometimes feedback was provided by email, and we have seen evidence of this in the bundle which shows that the whole reception team was copied in.

44. Team meetings were carried out at approximately monthly intervals. The difficulty was that there was no day of the week on which all members of the team could attend given the working patterns that they had. This did indeed mean that there meetings that the Claimant could not attend. However, we accept Ms B's evidence that she endeavoured to rotate the day of the week on which she held the team meetings so that if someone had not been able to attend the previous meeting she could attend the next.

45. On 4 February 2020, the Claimant had a meeting with Ms S in which she was given a key to the side-door of the administration office. The responsibilities of having a key were explained to her. She was also told that Ms JB and Ms JW were also being given keys. The meeting came about because Ms S learned of the shortage of keys and thought of a solution: keys to the side-door.

46. On 20 February 2020, the Claimant raised a grievance in writing to Ms S. She sent it from her private email address to her work email address at 7.37 am. She then sent it to Ms S at 10:27 am.

47. At some stage in the course of the morning on 20 February 2020, Ms W was in the smoking area. She was told by another colleague that the Claimant had been spreading a rumour that Ms W had been keeping a record of the Claimant's smoking breaks and had been bullying the Claimant and that the Claimant was raising a grievance about it. We infer that the Claimant had told colleagues that she was going to raise a grievance.

48. Ms W was extremely concerned by this and went to Ms S. She demanded a meeting with the Claimant to sort things out and demanded that it happen immediately. Within about half an hour, a meeting took place on 20 February 2020. Present at the meeting Ms S, the Claimant, Ms W, Ms J who attended at Ms W's request in order to support her. The Claimant felt bounced into attending the meeting.

49. It is relevant to note (because of the nature of what the Claimant says happened at the meeting) that Ms J is of mixed heritage that is in part black. It is also relevant to note (for the same reason) that Ms S has brown skin. (We use this rather guarded language as it was not clear from the evidence more specifically what racial background those two individuals have).

50. The Claimant's accounts of the meeting are extraordinary. They include the following allegations about Ms W's conduct:

    50.1. physically assaulted the Claimant by punching her in the face and the back of the head;
    50.2. tried to bite the Claimant's genitals;
    50.3. tried to sexually touch the Claimant;
    50.4. said that she had joined the British National Party at the age of 18, did Nazi salutes, said she hated black people, told Ms J to get her 'black hands' off of her, used the 'n' word, said that black people looked the same and could not swim;
    50.5. said that she had carried out attacks on children, performed sexual offences on them and had chopped children up into small pieces;
    50.6. threatened the Claimant's son eight year old so with rape and described a depraved plan to be carried out in conjunction with Ms B in relation to him (essentially that they would get him put into care, then somehow get custody of him and abuse him);
    50.7. performed 'sex acts' on residents in the care home;
    50.8. called the Claimant a single, lesbian traveller;

50.9. commented jealously on the Claimant's breasts.

51. The Claimant says that she was left with bruising to her face from the assault and that Ms S took photographs of it.

52. Nobody took notes in real time during the meeting. At some point after the meeting the Claimant made a note of the meeting. Her notes are in the bundle.

53. The Claimant was cross-examined about her account of this meetings on the first day of the hearing and she maintained that it happened as she had described.

54. As set out further below the Claimant's account of the meeting was the subject of two internal processes in which her account was investigated: a grievance process and then a disciplinary process against the Claimant. In the course of those processes everyone who was in attendance at the meeting was interviewed and asked for their account of events. Ms S, Ms J and Ms W each gave an account of the meeting that bore no relation at all to the Claimant's account and each denied that there was any truth in any of the exceptionally serious allegations the Claimant made. In broad terms, their account was that it was a difficult meeting in which the Claimant and Ms W were both upset, both spoke in raised voices (short of shouting) and in which both expressed that they did not like the other. However, that was the height of it.

55. We have considered the matter very carefully. On the evidence we have no hesitation in preferring the Respondents' witness account of events and we find that the meeting did not happen in the way that the Claimant says:

    55.1. The account of the meeting that the Claimant gives is inherently implausible;
    55.2. Ms W has no history of making remarks of this sort;
    55.3. It makes no sense that Ms W would say what she is alleged to have said, or behave in the way that she is alleged to have behaved in a meeting of this sort (or at all) in front of two managers;
    55.4. It makes no sense that Ms W would invite Ms J to the meeting to support her and then overtly racially abuse her;
    55.5. It makes no sense that Ms W would state that she had committed, and wanted to commit further, heinous crimes totally unrelated to the subject of the meeting;
    55.6. We heard from Ms W and we heard from Ms S and found their accounts of the meeting credible;
    55.7. Ms S did not take any photographs of the Claimant at or after the meeting not least because the Claimant had not been assaulted. If the Claimant had been assaulted and had bruising as a result it seems likely that she would have taken photographs herself and she did not;
    55.8. The Claimant's own notes of the meeting do refer to Ms W being aggressive and shouting but they do not record any of the exceptionally serious matters that the Claimant alleges happened at the meeting;
    55.9. If Ms W had behaved in the manner alleged, it is inconceivable that Ms J and/or Ms S would cover that behaviour up absent some form of remarkable reason. There is no evidence of any such reason before us.

56. On 1 April 2020, Mrs Crowther, Regional Support Manager, acknowledged the Claimant's grievance and invited her to a meeting on 3 April 2020 to discuss it. A grievance meeting took place on 3 April 2020.

57. It was at this meeting that the Claimant raised the exceptionally serious allegations against Ms W for the first time. The notes record the following:

> *Claimant: Stated that during the meeting on 20th February, [Ms W] was very aggressive which caused Claimant to have a panic attack. [Ms W] said she hated Claimant and made threats towards her son. She also said she had paid for an upgrade on a holiday Claimant had taken so it seemed like she had a secret admirer and that she had been following her around, so it seemed like she had a stalker. She also made racist remarks and got physical and started hitting her. CS took photos of this.*
>
> *Claimant: Stated that [Ms W] said she hates all black people and that she had joined the BNP when she was 18. [Ms W] also told BJ to "get her black hands off her".*
>
> *LC: Asked if anyone intervened*
>
> *Claimant: Stated that both CS and BJ intervened and CS took pictures of her face. [Ms W] tried to hit her in the back of her head.*
>
> *Claimant: Stated she had a panic attack and was verging on hysterical. [Ms W] had punched her on the right side of the face, there was bruising, and she was hit on the back of her head…*

58. On 6 April 2020, the Claimant commenced a period of sickness absence. Thereafter she was consistently signed off of work by her GP with stress.

59. On 7 April 2020, Ms Crowther wrote to Ms S and among other things asked for an account of the meeting of 20 February 2020. Ms S responded with an account of the meeting. To say the least, her account did not support the Claimant's.

60. Ms J was also asked for and gave Ms Crowther a written account of the meeting of 20 February 2020. She gave one and again, to say the least, her account did not support the Claimant's. However, Ms J stated that the preceding week the Claimant had asked her if anyone had shouted at the Claimant or hit the Claimant during the meeting of 20 February 2020. The Claimant said in that context that she was doubting her own sanity. We find that this conversation between the Claimant and Ms J did indeed happen as Ms J has reported. We see no cogent reason at all why Ms J would fabricate it and her account is plausible.

61. Ms Crowther asked the Claimant for a written account of the meeting of 20 February 2020. The Claimant provided one on 14 April 2020 in which among other things she said as follows:

> *[Ms S] was present at the meeting and took photographs of my injuries*

Ms W made threats against my son and threatened to rape him.

She also threatened to get my son put into care and be taken away from me. ON the basis you wanted herself and [Ms B] to raise him. Where they would both carry out abuse on my child. (My son is 8).

[Ms W] also stated she hates black people and made a number of very extreme racist comments including stating she joined the BNP when she was 18.

She told [Ms J] and [Ms S] to go back where they came from.

That [Ms J] should get her black hands away from her…. All black people look the same; Black people cant swim; She proudly said heil Hitler sign [sic].

[Ms W] was incredibly aggressive in her manner and stated that she had carried out attacks on children and was very graphic and stated she had killed children and performed sex acts on children and residents in the care home.

[Ms W] also stated she chopped children up into several pieces and had been to prison.

I was shocked and stunned by the attack and the fact that a co- worker was trying to perform a sex act on me in an official meeting!

[Ms W] also accused me and stated she hates me for the following reasons: I'm a traveller, I'm a lesbian, I'm a single parent. I explained I'm not and if I was this is irrelevant to my performance.

[Ms W] also kept on trying to touch my private parts and wanted to perform a sexual act on me and stated that she was a lesbian and is in a sexual relationship with Ms B the financial administrator.

62. On 16 April 2020, Mrs Crowther produced a grievance investigation report. In most respects the Claimant's grievance was rejected. However, the Claimant's complaint that Ms JW's role had not been advertised was upheld and it was recommended that vacancies be advertised internally and externally. The report also recommended mediation between the staff.

63. On 16 April 2020, a referral was made to Occupational Health in light of the Claimant's sickness absence. Advice was sought on the following matters:

- The exact nature of the condition(s) (if any) from which the employee is suffering, how long (approximately) have they been suffering from the condition, and how long would you expect it to last?
- What are the likely causes of the condition(s) and could it be aggravated by workplace issues?
- What treatment (if any) is the employee currently receiving for the condition(s)? In your opinion, given the medical history, how effective is the current treatment likely to be?
- Is it possible that the employee's condition could deteriorate further?
- What medication (if any) is prescribed for the condition(s)? What is the effect of the medication and in your opinion, given the medical history, how effective is the current treatment likely to be?
- Do you have any specific recommendations or observations that you wish to make which would either help in managing the employee's employment with us?
- Is there any other relevant information or advice you feel will help us to deal with the current situation by managing the employee's on-going employment and assisting in getting them back to work?

64. On 20 April 2020, the Claimant appealed the grievance outcome.

65. The Clamant was seen by OH in a telephone consultation on 22 April 2020 and a report of that date was sent to the Respondent:

    65.1. The report recorded that the Claimant had a history of anxiety and was on medication from her GP in relation to that. There had been no recent changes and no side effects;
    65.2. It referred to the Claimant suffering from workplace stress and recommended what could be summarised in our own words as low-level adjustments and a stress risk assessment.

66. On 4 May 2020 there was a grievance appeal meeting chaired by Helen Casson, Head of Employee Relations. At this meeting the Claimant repeated some of the allegations previously made about Ms W's conduct on 20 February 2020 and added that Ms W had cut 10 children up into tiny pieces. She was asked for an account of what Ms W had said in the meeting and she stated: "*I hate you, I think you are a traveller, look at your hair you think you are perfect, your boobs are all perky, really vile stuff. Then she said she had been a member of the BNP since she was 19… She also threatened to rape [a the Claimant's son] …* She then alleged that Ms W had shouted in the meeting "*N***** get your black hand off me, she was doing the whole Hitler Hale sign"*. She then alleged that Ms W had punched her in the face in the presence of Ms J and Ms S.

67. The grievance appeal was dismissed. On 12 May 2020. Also on 12 May 2020, the Claimant was suspended from work upon allegations that she had made malicious and baseless allegations about Ms W (12 May 2020). A disciplinary investigation into that commenced.

68. On 27 May 2020, Ms Lowe interviewed Ms J, Ms W and Ms S. They each gave accounts of the meeting of 20 February 2020. On their accounts the matters the Claimant said had happened at that meeting simply had not. Ms W also said that the Claimant appeared to her to be bipolar and that she thought the Claimant genuinely believed what she was saying. She said that at the meeting of 20 February 2020 the Claimant had oscillated between hysterical laughter one moment and tears the next.

69. On 1 June 2020, the Claimant was interviewed by Ms Lowe. The Claimant maintained her allegations about the meeting of 20 February and added that Ms W had tried to bite her genitals at the meeting.

70. Ms Lowe asked the Claimant what support she was having from her doctor and whether had been any change in her medication. She asked if the Claimant would like to speak to her GP/OH again. The Claimant responded: "*no, I am fine. I want it brought to an end"*. The conversation went on:

> *"If the business wanted to refer you to OH again would you give your consent for this?*
> *I am absolutely fine.*
> *But if the business wanted to do this, would you give consent?*
> *I am fine, I am seeing my doctor and don't want anything else at the moment.*
> *So you wouldn't consent to another OH referral?*
> *No."*

71. Ms Lowe produced and Investigation summary in early June 2020 (it is misdated 13 May 2020). It summarises the Claimant's allegations about the meeting of 20 February 2020 and recommends that disciplinary charges are brought.

72. On 4 June 2020, the Claimant was invited to a disciplinary meeting to take place on 9 June 2020 with Ms Sandra Hustwick, Regional Director. The disciplinary charges were as follows:

    72.1. during the period 3 April 2020 to date, the Claimant made malicious and or vexatious allegations of a physical assault by Ms W;
    72.2. during the period 3 April 2020 to date, the Claimant made malicious and or vexatious allegations of racially abusive and derogatory language by Ms W; and
    72.3. on 14 April 2020 the Claimant made malicious and or vexatious allegations via email to Louise Crowther which contained allegations that Ms W had threatened the Claimant's son, that she had killed children and performed sex acts on children and residents in a care home and that Ms W had tried to touch the Claimant inappropriately and attempted to perform a sex act.

73. The Claimant was sent a bundle of documents with the letter including the following:

- Anti-harassment and bullying appendix
- Bupa Code
- Investigation Summary
- Email of 6th April 2020 from Mary Caroline Soriano
- Email of 7th April 2020 from Bryony Johns
- Email of 15th April 2020 from Mary Caroline Soriano
- NG investigation interview 1st June 2020
- SW investigation interview 27th May 2020
- BJ investigation interview 27th May 2020
- Mary Caroline Soriano investigation interview of 27th May 2020
- Grievance submission of 20th February 2020
- Grievance minutes from 3rd April 2020
- Email of 14th April 2020 sent by NG
- Grievance investigation report
- OH, report from 22nd April 2020
- Photo of chairs in the room where meeting of 20th February took place
- Disciplinary policy
- Disciplinary policy appendix
- Anti-harassment and bullying policy

74. On balance, we find that despite some suggestions to the contrary from the Claimant in the disciplinary and appeal hearings that followed, she was as this letter suggests, sent the materials set out above. The letter itself states that the documents are enclosed. Ms Jetten made specific inquiries of HR as to whether the documents had been enclosed and she was told that they had.

75. On 12 June 2020, Ms Hustwick wrote to the Claimant and noted that if the Claimant changed her mind regarding seeing OH the Respondent would be happy to set up a meeting.

76. It is clear that at some point, probably around April 2020, the Claimant complained to the Police about Ms W's alleged conduct in the meeting on 20 February 2020, but unclear exactly when. On 14 June 2020, Ms Arnak of the Metropolitan Police wrote to the Claimant and stated *"…I have concluded that at this time unfortunately there is insufficient evidence to proceed… I have spoken to Melissa Lowe and informed her that from a policing perspective we do not have substantial evidence to investigate your allegation any further. This due to the witnesses that were present in the meeting with you and [Ms W] that day have come forward stating that the allegations made by yourself did not happen."*

77. The Claimant, wrote to the Respondent shortly thereafter confirming that she was happy to have an OH referral. A further referral was made on 8 June 2020. The matters upon which advise were sought were as follows:

- Can the employee participate in a formal disciplinary hearing via telephone?
- Would any reasonable adjustments to the disciplinary procedure enable the employee to participate in the disciplinary hearing?
- When would you advise that the employee will be fit to participate in the disciplinary hearing?
- Are there any other underlying medical conditions impacting on the employee's ability to participate in the disciplinary hearing that should be considered within the context of the disability provisions of The Equality Act?
- To what extent would the pending disciplinary hearing be impacting on the employee's health?
- If unable to participate in a disciplinary hearing by telephone, with any adjustments in place, would she be fit to respond to the allegations by providing written responses?
- Do you have any specific recommendations or observations that you wish to make which would either help in managing the employee's disciplinary hearing?

78. When making the OH referral, Ms Miles included Ms Lowe's disciplinary investigation report. This document prominently set out the allegations which the Claimant made in relation to the meeting of 20 February.

79. On 17 June 2020, the Claimant's GP wrote to the Respondent stating that she had been seen at the surgery since 16 March 2020 for bullying/stress and anxiety associated with a work colleague. The GP said that the Claimant was on antidepressants and was coping well on them.

80. In June 2020, the Claimant began writing to the Respondent asking for lots of information the relevance of most of which was unclear (e.g. fires alarm details from the 20 February 2020, Ms B's mental health and sickness record).

81. On 23 June 2020, the Claimant wrote to the Respondent and asked "*why her sanity has been criticised*".

82. On 26 June 2020, Ms Miles, wrote to the Claimant and said that the OH nurse had been trying to contact the Claimant to finalise some details prior to completing the OH report. Ms Miles also asked for an explanation as to the relevance for some of the information that the Claimant had requested.

83. On 2 June 2020, the Claimant emailed a complaint to the CQC. It read, simply, *"I would like to make a complaint regarding the treatment of staff at the Sidcup care home and feel an investigation should be carried out for safeguarding of staff and residents*." It gave no further detail.

84. On 29 June 2020 the Claimant wrote to Ms Miles. Among other things she confirmed she had seen OH and seemed to be asking Ms Miles for sight of the report.

85. On 9 July 2020, Ms Miles wrote to the Claimant stating that the OH report was sent to her (i.e., the Claimant) on 30 June 2020 and that the OH service were awaiting her consent to release the report to Ms Miles. She went on "*Please be advised that if your consent is not received by the OH service by 14 July a decision on how to proceed with you disciplinary hearing will be made in the*

absence of your report, which we would wish to avoid, if possible". On 12 July 2020, the Claimant responded stating "*I would also like sight of this report".*

86. On 16 July 2020, the Claimant emailed Ms Rowe, complaining that Ms W had driven past her house while she was putting some rubbish out. She alleged that Ms W had stopped opposite her for no good reason and stared at her to intimidate her. She also referred to Ms W reporting to the home manager that she had seen the Claimant outside her home and that Ms W had threatened to grab her on several occasions.

87. We find that Ms W had not behaved as alleged but rather:

    87.1. Ms W had driven past the Claimant fairly slowly on her road on occasion but this was not to intimidate her. It was because the Claimant lived on the same road as the Home and sometimes the Claimant was on the street when Ms W drove too and from work. The layout of the residential street meant that she had to drive slowly;
    87.2. Ms W had not stared at the Claimant or tried to intimidate her;
    87.3. Ms W had once referred to grabbing the Claimant but the context was going to get the Claimant for her to attend a meeting, much as one might say 'let's grab a coffee'. She did not mean literally physically, grabbing the Claimant.
    87.4. Ms W did report something to the home manager but it was not that she had seen the Claimant. Rather, it was that she had been told by the Police that the Claimant had alleged that she had arranged for two men dress in black, with balaclavas on, to knock down the Claimant's front door. Ms W, had not done anything of the sort, but on the advice of the police she told the Home Manager that this was the Claimant's allegation.

88. On 20 July 2020, Ms Miles wrote to the Claimant and invited her to a rescheduled disciplinary meeting on 28 July 2020, the previous date having been postponed at the Claimant's request. In the letter Ms Miles:

    88.1. Told the Claimant she could be accompanied by a trade union representative, a BUPA employee or in the absence of the same a family member.
    88.2. Stated that the Claimant had participated in an OH assessment on 23 June 2020 and that the Claimant confirmed receipt of the report on 30 June 2020. However, the Claimant had not consented to the report being released. She warned the Claimant that if she did not consent then its contents could not be taken into account in the disciplinary process. She gave the Claimant the contact details for OH should the Claimant wish to consent to the release of the report. She included a telephone number and the options to select once the telephone was answered and further an email address.
    88.3. She notified the Claimant that the Respondent had a 'Healthy Minds' helpline which was available to all Bupa employees, was free and confidential and provided emotional support including some counselling.

89. Also on 20 July 2020, Ms Miles responded to the Claimant's complaint of 16 July 2020 asking for further details.

90. The Claimant asked to further postpone the disciplinary hearing because her representative was not available. On 27 July 2020, Ms Miles emailed the Claimant and asked her for the dates of her trade union representative's availability for a yet further rescheduled meeting.

91. On 27 July 2020, the Claimant wrote to Ms Miles and complained that she had not been sent documentation from her file, witness statements from the assault she had endured on 20th February and notes of her supervisions. She stated that her union representative was not available until the week commencing 17th August 2020. The Claimant suggested she was entitled to attend the Home to gather evidence.

92. On 28 July 2020, Ms Miles wrote to the Claimant. She acknowledged that the Claimant had complained about documents but said that the relevance of the documents sought were unclear. The Claimant could raise the matter further at the disciplinary hearing. She suggested that the Claimant contact her union and seek a different representative. She told the Claimant that she was not able to attend the Home to gather evidence because of Covid restrictions and that if the Claimant wanted further investigation she could raise this at the disciplinary hearing.

93. On 31 July 2020, the Claimant complained that she was being forced to attend a disciplinary meeting whilst on stress leave and complained she had not been given a proper opportunity to provide evidence. She said she had raised her concerns with the CQC and the ICO. She ended by stating "*I have also given my consent and a doctors letter for occupational health".*

94. We find as a fact that, although she may have thought she had done so, the Claimant never at any time in fact gave consent for the OH report to be released to the Respondent. There is mixed evidence on this. However, we think the best evidence of this are the emails from the OH service itself dated 26 August 2020 which make the position clear.

95. The disciplinary meeting finally commenced on 4 August 2020 but was adjourned due to technical issues. The disciplinary hearing was reconvened on 6 August 2020 by telephone.

    95.1. The Claimant was not accompanied at the meeting. It seems her trade union representative (if she had one) was unable to attend.
    95.2. The notes of the meeting record Ms Hustwick stating that the Claimant had not given consent for the OH report to be provided to the Respondent. The Claimant appears to state that she had given consent. Ms Hustwick said she would follow the matter up. Ms Hustwick later followed this up and was told by HR that the Claimant and not consented.
    95.3. Ms Hustwick endeavoured to deal with each of the points that the Claimant had raised in advance of the meeting.

96. As a result of representations that the Claimant made, Ms Hustwick conducted some further interviews after the meeting. None of these took matters materially further.

97. The Claimant was summarily dismissed by letter dated 21 August 2020. In essence, Ms Hustwick found that the Claimant had no factual basis for the allegations that she had made, they were false and had been made maliciously and/or vexatiously.

98. The Claimant appealed against her dismissal and the appeal was heard on 10 September 2020 by Andrea Jetten, Regional Director. The hearing was initially scheduled for 4 September 2020 but was pushed back in order to allow the Claimant a better opportunity to secure trade union representation. However, the Claimant attended the meeting alone. The appeal was dismissed by a letter dated 14 September 2020. In the appeal outcome letter Ms Jetten dealt with each ground of appeal and responded generally to the key point that the Claimant had made. For instance, the Claimant had requested CCTV footage of the meeting of 20 February 2020. But there was none because there was no CCTV in the Home.

Law

Public interest disclosures

99. A protected disclosure is a qualifying disclosure made by a worker in accordance with any of sections 43B to 43H. A qualifying disclosure is defined by section 43B, as follows:

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> *[…]*
> *(d) that the health and safety of any individual has been or is likely to be endangered.*

100. In ***Williams v Michelle Brown AM*****,** UKEAT/0044/19/OO at [9], HHJ Auerbach identified five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

> *'It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.'*

101. Dealing with the first of those matters, as for what might constitute a disclosure of information for the purposes of s.43B ERA, in ***Kilraine v London Borough of Wandsworth*** [2018] ICR 1850 CA, Sales LJ provided the following guidance:

> *'30. the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the Judgment below at [30], set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other […]*
> *31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.*
> *[…]*
> *35. In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).*
> *[…]*
> *36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a Tribunal in the light of all the facts of the case.*
> *[…]*
> *41. It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in in the Cavendish Munro case [at paragraph 24], the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "You are not complying with health and safety requirements", the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim under the protected disclosures regime in Part IVA of the ERA, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the Claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner.'*

102. We reminded ourselves of what the Court of Appeal's guidance as to the 'public interest' test in ***Chesterton Global Ltd v Nurmohamed*** [2018] ICR 731 and the

further guidance of the EAT in ***Dobbie v Felton (t/a Feltons Solicitors)*** **[2021] IRLR 679**.

103. Dealing with the fourth and the fifth matters identified in ***Williams*** a number of points need to be made.

103.1. A worker can make a qualifying disclosure even if the content of the disclosure is in fact wrong ***Darnton v University of Surrey*** [2003] I.C.R. 615.

103.2. The worker must subjectively hold the belief in question. This was described as a fairly low threshold: ***Korashi v Abertawe Bro Morgannwg University Local Health Board*** 2012 IRLR 4 at [61].

103.3. The belief in question be objectively reasonable. In ***Korashi*** the EAT suggested that this requires "requires consideration of the personal circumstances facing the relevant person at the time" and thus that, e.g. in relation to a disclosure about a surgical matter, in assessing what is objectively reasonable it would be important to take into account whether the person making the disclosure was surgeon or a lay person.

103.4. In ***Phoenix House Ltd v Stockman*** [2017] ICR 84, [27], Mitting J said this:

> "if by that the tribunal meant that the claimant's subjective belief alone sufficed, it would, in my judgment, have been a clear error of law. In ***Korashi v Abertawe Bro Morgannwg University Local Health Board*** [2012] IRLR this tribunal, in a panel presided over by Judge McMullen QC, observed correctly that what is a reasonable belief under section 43B "involves … an objective standard". So it does. <u>There is no such creature, in my judgment, as a subjective reasonable belief</u>. On the facts believed to exist by an employee, a judgment must be made as to whether or not, <u>first, that belief was reasonable and</u>, secondly, whether objectively on the basis of those perceived facts there was a reasonable belief in the truth of the complaints. In circumstances in which the claimant was personally involved in all of the events that gave rise to her complaint, the reasonableness of her belief can be judged by reference to objective facts. It was, in my judgment, the duty of the tribunal to do that" [emphasis added].

104. In a case of this kind, in which the Claimant makes disclosures about a meeting that she was at and has first-hand knowledge of, the tribunal must among other things:

104.1. identify whether or not the Claimant truly believes the material parts of the account of the meeting of 20 February 2020 (a subjective test).
104.2. if so, identify whether her beliefs about what happened at the meeting are reasonable (this is an objective not a subjective test – given that 'there is no such creature as a subjective reasonable belief').

<u>Automatically unfair dismissal</u>

105. S.103A ERA provides:

> *An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.*

106. There is an important distinction between detriment cases, where it is sufficient that the disclosure is a material factor in the treatment, and dismissal cases, where it must be the sole or principal reason (***Fecitt v NHS Manchester*** [2012] ICR 372 CA).

107. The approach to the burden of proof in section 103A claims was summarised by Mummery LJ in ***Kuzel v Roche Products*** [2008] ICR 799 as follows:

> '[…]
> [52] Thirdly, the unfair dismissal provisions, including the protected disclosure provisions, pre-suppose that, in order to establish unfair dismissal, it is necessary for the ET to identify only one reason or one principal reason for the dismissal.
> [53] Fourthly, the reason or principal reason for a dismissal is a question of fact for the ET. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.
> […]
> [57] I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.
> [58] Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.
> [59] The ET must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, it is not necessarily so.
> [60] As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the Tribunal to find that, on a consideration of all the evidence, in the particular case, the true reason for dismissal was not that advanced

> by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.'

Ordinary unfair dismissal

108. There is a statutory right not to be unfairly dismissed. There is a limited range of potentially fair reasons for dismissal (s.98 Employment Rights Act 1996). It is automatically unfair to dismiss an employee for making a protected disclosure (s.103A).

109. The 'reason' for dismissal is the factor operating on the decision-maker's mind which causes him/her to take the dismissal decision (***Croydon Health Services NHS Trust v Beatt*** [2017] ICR 1420). The net could be case wider if the facts known to, or beliefs held by, the decision-maker had been manipulated by another person involved in the disciplinary process with an inadmissible motivation, where they held some responsibility for the investigation. That person could also have constructed an invented reason for dismissal to conceal a hidden reason (***Royal Mail Ltd v Jhuti*** [2020] All ER 257.)

110. If there is a potential fair reason for a dismissal, the fairness of the dismissal is assessed by applying the test at s.98 (4) ERA.

111. In ***BHS v Burchell*** [1980] ICR 303, the EAT gave well known guidance as to the principal considerations when assessing the fairness of a dismissal purportedly by reason of conduct. There must be a genuine belief that the employee did the alleged misconduct, that must be the reason or principal reason for the dismissal, the belief must be a reasonable one, and one based upon a reasonable investigation.

112. However, the ***Burchell*** guidance is not comprehensive, and there are wider considerations to have regard to in many cases. For instance, wider procedural fairness, the severity of the sanction in light of the offence and mitigation are important considerations.

113. In ***Iceland Frozen Foods v Jones*** [1982] IRLR 439, the EAT held that the tribunal must not simply consider whether it personally thinks that a dismissal was fair and must not substitute its decision as to the right course to adopt for that of the employer. The tribunal's proper function is to consider whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

114. The range of reasonable responses test applies to all aspects of dismissal. In ***Sainsbury's v Hitt*** [2003] IRLR 23, the Court of Appeal emphasised the importance of that test and that it applies to all aspects of dismissal, including the procedure adopted.

115. The nature of the allegations against the employee are relevant to the standard of investigation:

115.1. As Elias P (as he was) said in ***A v B*** 2003 IRLR 405, EAT, [57]: '*We accept the submission of Mr Galbraith-Marten, for the Appellant, that the relevant circumstances do in fact include a consideration of the gravity of the charges and their potential effect upon the employee*';

115.2. ***Salford Royal NHS Foundation Trust v Roldan*** 2010 ICR 1457, CA [13]: *'…it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite*'.

Direct discrimination

116. Section 4 Equality Act 2010 identifies protected characteristics including:

116.1. Marriage and civil partnership (further defined at s.8 EqA);
116.2. Sexual orientation (further defined at s.12 EqA);
116.3. Race (further defined at s.9 EqA).

117. Section 13 EqA provides: *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

118. Section 23 EqA makes detailed provision in relation to comparison by reference to circumstances.

119. S.24 EqA is important here because it provides that "for the purpose of establishing a contravention of this Act by virtue of s.13(1), it does not matter whether A has the protected characteristic". This means (among other things) that there can be a contravention of s.13 where the person discriminated against is perceived to have a protected characteristic which she in fact does not.

120. In ***Nagarajan v London Regional Transport*** [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, '*why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?*'.

121. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'

122. Since ***Shamoon***, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in ***Martin v Devonshire's Solicitors*** [2011] ICR 352 at [30]:

'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, e.g., D'Silva v NATFHE [2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'

<u>The burden of proof</u>

123. The burden of proof provisions are contained in s.136(1)-(3) EqA:

(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.

124. The effect of these provisions was summarised by Underhill LJ in ***Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 at [18]:

'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy.[1] He explained the two stages of the process required by the statute as follows:
(1) At the first stage the Claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):
"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material

[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.

57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"

(2) If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

125. In ***Deman v Commission for Equality and Human Rights*** [2010] EWCA Civ 1279, Sedley LJ observed at [19]: *'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'*

126. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

127. In ***Hewage v Grampian Health Board*** [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

<u>Holiday pay</u>

128. There is a statutory right to paid holiday in regs 13 – 16 Working Time Regulations 1998 and this includes pay in lieu of accrued leave upon termination.

129. In principle, holiday pay rights can also arise under contract although the Claimant's contract did not make any provision for pay in lieu of accrued holiday upon termination.

<u>Notice pay</u>

130. The Claimant was entitled to notice pay in accordance with her contract unless the Respondent was entitled summarily dismiss her. It was only entitled to summarily dismiss her if she was in repudiatory breach of contract.

Discussion and conclusions

Direct discrimination: sexual orientation and marital status

On 20 February 2020: Ms W falsely stated that the Claimant had been discussing her in the smoking area. Ms W accused the Claimant of spreading rumours. The Claimant was forced to attend a meeting.

131. Ms W did allege that the Claimant had been discussing her in the smoking area. The reason why Ms W did this was that it had been reported to her by a colleague that this is what the Claimant had done. And in particular, it was reported to her that the Claimant had been spreading a rumour that Ms W had been bullying the Claimant and that she was going to raise a grievance about it. No part of the reason why Ms W made this allegation was anything whatsoever to do with the Claimant's protected characteristics.

132. The Claimant was required to attend a meeting, the meeting of 20 February 2020. This was to discuss Ms W's allegation that the Claimant was spreading rumours about her. The requirement to attend, which came about because Ms W asked for it and Ms S considered it to be appropriate, had nothing whatsoever to do with the Claimant's protected characteristics. Ms W wanted the meeting because she wanted an urgent resolution. And Ms S called the meeting because she believed it to be the appropriate way of managing the dispute. The Claimant did feel that she had been bounced into attending the meeting a short notice and without a representative. She was right about those things but they just had nothing to do with her protected characteristics.

133. For completeness, Ms S and Ms W did not perceive the Claimant to be a lesbian woman, they understood the Claimant to be heterosexual and they did not perceive the Claimant to be from a "Gypsy" or traveller background. They understood the Claimant to be single, heterosexual, white British woman.

Complaint: On 20 Feb 2020 the Claimant was attacked having raised a grievance about workplace bullying in that:

- *Ms W was verbally abusive.*
- *Ms W threated to harm the Claimant's son.*
- *Ms W said she was a member of the BNP.*
- *Ms W physically assaulted the Claimant*
- *Ms W referred to the Claimant in a derogatory way as a 'single' parent and made comments about the Claimant's appearance and sexual orientation.*

134. This complaint fails on the facts. The matters alleged did not, as set out in our findings of fact, happen. Nor did anything similar or close to them happen.

135. The complaint also fails because, no part of Ms W's treatment of the Claimant had anything at all to do with sexual orientation and/or marital status and/or race.

In around August 2020: Ms W tried to intimidate the Claimant at her home address. The Claimant lived on the same road as the workplace. Ms W did this by driving past the Claimant and slowing down and trying to intimidate her and by reporting the Claimant to the Home Manager.

136. This allegation fails on the facts, albeit that there is an element of truth in part of what is said. Specifically, Ms W did drive past the Claimant at a low speed and she did report the Claimant to the Home Manager.

137. However, she did not slow down because the Claimant was there, she drove slowly because of the nature of the residential street and she did not attempt to intimidate the Claimant. She did report the Claimant to the Home Manager, but what she reported was that the Claimant had told the police that she (Ms W) had arranged for men in balaclavas to kick down the Claimant's door. Ms W had not done this, but it was a serious allegation which she perfectly properly thought it appropriate to tell the Home Manager and she was advised to do this by the Police.

138. No part of the reason for Mr Wilson's conduct had anything whatsoever to do with protected characteristics.

<u>Direct race discrimination</u>

- *The Claimant was not given overtime;*
- *The Claimant was not given the opportunity to work on Fridays 9am -3pm on a permanent basis. This was offered to an external candidate.*
- *The Claimant was excluded from team meetings and feedback from take ten meetings was not discussed with her.*
- *The Claimant was told to keep her presence in the admin office to a minimum for her own safety*.

139. Each of these allegations fails first of all on its facts:

139.1. The Claimant was given the opportunity to work overtime and she often did so;

139.2. The Claimant was given the opportunity to work on Fridays and for a long period of time, in fact did so. She only ceased doing so because she asked to cease doing so. Once the Claimant ceased to work on Fridays, it was necessary to appoint someone else to do so. The Claimant was not offered the chance to apply for that work and the role was not advertised, but the very reason that the vacancy arose was because the Claimant said she no longer wanted it. If the Claimant had wanted the role, she could have it, she just needed to say. However, her contemporaneous position was that she did not want it. The complaint is therefore a peculiar one.

139.3. The Claimant was not excluded from team meetings. They sometimes fell on her non-working days. That was true for everyone. And the day of the week on which the meeting was scheduled was rotated to ensure fairness.

139.4. The Claimant was not excluded from feedback from take ten meetings the same was discussed with her.

139.5. The Claimant was not told to keep her presence in the admin office to a minimum for her own safety. However, she was asked to avoid the office on a particular day when Ms B was having some personal problems and there was tension. This had nothing to do with Claimant's safety and was not expressed in those terms. It was also limited to a particular day on which Ms B was struggling.

140. None of this conduct had anything at all to do with race or perceived race. Nobody in any event perceived the claimant to be a "gypsy" or a traveller.

141. We do not think that a relevant comparison can be made between the Claimant and Ms JW who was appointed to work on Fridays. There is a material difference in their circumstances, namely, that the Claimant's position at the time was that she did not want the work on Fridays, whereas Ms JW's position was that she did want the work. Further, this complaint is put as race discrimination complaint and the Claimant and Ms JW are and were perceived to be of the same race. Namely, white British.

The allegations in relation to 20 February 2020 are repeated as complaints of race discrimination

142. The analysis above is repeated and the claims must fail.

Automatic unfair dismissal

143. The first issue is whether the Claimant made a protected disclosure. She says that on the following dates she disclosed that she had been assaulted at work by Ms W on 20 February 2020:

143.1. 3 April 2020 (to the Respondent)
143.2. 14 April 2020 (to the Respondent)
143.3. on 3 April 2020 (to the CQC)
143.4. on a date in April 2020 (to the Metropolitan Police)

144. It is clear that she did make such disclosures to the Respondent. It is clear that she made such a disclosure to the Police albeit that we have not seen the disclosure itself. It is clear from police correspondence such a disclosure was made. There is no evidence of what if anything the Claimant disclosed to the CQC on 3 April 2020. We cannot therefore find that she made a disclosure to the CQC on this date.

145. There are many elements to the test for whether an employee has made a protected disclosure. There firstly needs to be a qualifying disclosure. We will limit ourself to dealing with two aspects of the test.

146. The first question we deal with is whether the Claimant had a genuine belief in the truth of what she disclosed about the meeting of 20 February 2020, and in particular that she was assaulted by being punched by Ms W.

147. We have thought extremely carefully about this matter and found it difficult to resolve. We could see compelling arguments going both ways. On the one hand:

147.1. The Claimant certainly had a motive for making up allegations against Ms W. Their friendship had broken down. Their professional relationship was breaking down and they had reached a point where they did not like each other. Ms W had initiated a meeting to complain about the Claimant.
147.2. There is certainly a possibility that the Claimant has made these allegations against Ms W, knowing that they were false, and lashing out at her in the most vindictive way possible.
147.3. There was no reasonable basis for the Claimant to form the beliefs about the meeting she says she did and that has an evidential bearing on what her beliefs actually were.

148. However, on balance we find that the Claimant does, and at time of her disclosures did, genuinely believe the truth of what she was disclosing:

148.1. Firstly, she was cross-examined in these proceedings and our strong impression from the oral evidence itself, taking account of the Claimant's answers and the way she gave the answers, was that she was telling us what she understood to be the truth.
148.2. Secondly, a very powerful factor is the nature and content of the allegations themselves, of which the assault was only one part. They are so incredibly extreme. They go to the boundaries of evil in what they allege. The combination of heinous criminal offences alleged is bizarre enough but the suggestion that someone volunteered that they had done these things, in front of witnesses, at a meeting that had nothing to do with any of it, is beyond bizarre. It seems incredibly implausible that someone in the Claimant's position who may have that wanted to hit back at Ms W would make these allegations knowing them to be untrue because, objectively, they are so obviously false.
148.3. Thirdly, the Claimant checked with a colleague whether or not her recollection of the meeting of 20 February 2020 was sound (Ms J). We think it is extremely unlikely she would have done this if she was making the allegation maliciously. It would simply serve to undermine it. It is much more consistent with the Claimant double checking with someone else whether her perception of the meeting was correct.

149. The second issue is whether the Claimant had a reasonable belief in the truth of the allegations, and in particular, the assault. Objectively the Claimant's beliefs were not reasonable. She was at the meeting of 20 February, and what she says happened, simply did not happen. Nor did anything similar happen nor did anything that could be reasonably mistaken for the Claimant's account happen. There was absolutely no reasonable basis for the belief. It is, with the greatest of respect and with no offence intended, a delusional belief.

150. The Claimant did make some disclosures but they were not qualifying or protected disclosures. The s.103A ERA complaint of unfair dismissal must therefore fail.

Ordinary unfair dismissal

151. The starting point is to identify the reason for the dismissal. We find that the statutory label for the reason is 'conduct'. In particular, there was a genuine belief that the Claimant had committed the misconduct alleged in the disciplinary charges. We find that Ms Hustwick did believe that the Claimant had committed the misconduct alleged in the disciplinary charges. For her, the key factors were that the allegations the claimant made were false and that there was no explanation as to why false allegations had been made.

152. The next questions are conveniently dealt with together: *whether the belief was a reasonable one based on a reasonable investigation and whether more generally the dismissal was procedurally fair.*

152.1. Putting to one side the issue of medical evidence, which merits separate consideration, in our view the investigation was clearly in the band of reasonable responses, even though, a high standard of investigation was required (given that the allegations were so serious).

152.2. All of the people whom it was important to interview, were indeed interviewed. That included all of the participants at the meeting of 20 February. In the course of the disciplinary process, the Claimant was given sight of what the other participants at the meeting of 20 February 2020 had said. The Claimant was given multiple opportunities to give her own account and to respond to the accounts of others.

152.3. It is true that the Claimant was not given all of the documents that she asked for. However, in our view she was given all of the documents that mattered. Other materials, such as CCTV footage, did not exist. And other materials, such as Ms B's mental health records, were irrelevant.

152.4. It is true that the Claimant was not allowed to come to the Home in order to gather evidence. However, there were good reasons for this. Firstly, covid precautions - and we note that this was a care home for older adults and the events in question took place in the summer of 2020 (i.e. during the pandemic and prior to covid vaccines). Secondly and moreover, there was no evidence to be gathered at the Home in any event. There was no physical evidence in relation to the meeting of 20 February 2020. It was simply a matter of witness evidence, and the Claimant was given the accounts of all relevant witnesses.

152.5. A further issue is that the Claimant felt it inappropriate to proceed with the disciplinary and appeal hearings because she was on sick-leave and because on each occasion she was unrepresented. However, the disciplinary hearing was rescheduled several times including so as to enable the Claimant to obtain representation and we are satisfied she had a full opportunity to be represented. Likewise at the appeal stage (the hearing was rescheduled once for the same reason.) In relation to the issue of whether the Claimant was fit to attend a disciplinary/appeal hearing, the Respondent did all it reasonably could to obtain specific medical advice about this. However, the Claimant did not consent to the OH report being released to the Respondent and therefore the Respondent could not have the benefit of the report. Such evidence as did exist, did not say or imply

that the Claimant was unfit to attend. In the circumstances we think it was reasonable to proceed, not least because the issues were extremely serious and it was important they be resolved quickly.

153. We turn now consider the issue of medical evidence in more detail. In our view the allegations that the Claimant was making were so extreme and so bizarre in their content and in their context, that it would have screamed out to any reasonable employer that there was a ***possibility*** that the allegations were the product of a mental health problem.

154. An important matter, then, is whether the Respondent considered this possibility and if so whether it took reasonable steps to investigate it and think it through.

155. We find that the Respondent did consider this possibility. It did so in a relatively subtle way but we think there is a good reason for that. Circumstances made it very difficult to deal with this issue and it was necessary to proceed with great sensitivity. There was no pre-existing medical evidence that implied the Claimant had a mental health problem of the sort that might generate such allegations and it was also plain that the Claimant herself deeply resented any hint that she may have such a problem. To compound the difficulty, there indeed was some medical evidence, including in relation to mental health, but that evidence did not indicate a mental health problem that might generate delusional allegations. The evidence was:

155.1. The Claimant's sick notes which referred to work stresses;
155.2. The 22nd April 2020 occupational health report at identifies the Claimant as suffering from '*stress*' and a pre-existing history of '*anxiety*' and that her anxiety '*has been well controlled*';
155.3. The Claimant provided a letter from her GP dated 17th June 2020, which refers to '*stress at work*', '*stress and anxiety*', and '*I can confirm that Natalie is on antidepressants and is coping well on these*'.

156. The Respondent dealt with the matter (subtly/sensitively) in three ways:

156.1. Firstly, throughout the disciplinary process it encouraged the Claimant to seek medical assistance, speak to her GP and speak to the Healthy Minds service.
156.2. Secondly, it asked the Claimant questions about her health like whether there had been any recent changes to her medication.
156.3. Thirdly, the Respondent sought a second OH report and repeatedly tried to get the Claimant's consent for it to be released once it had been produced.

157. We have set out in our findings of fact, the matters upon which the Respondent sought advice in its OH referrals. It is fair to say that it did not in terms ask for advice as to whether or not the allegations the Claimant was making about Ms W might be the product of a psychiatric/other medical issue. This gave us significant pause for thought. Did the employer do enough to inform itself of the possibility that there may be a medical issue underlying the allegations the Claimant was making?

158. On balance we think it did:

158.1. Ms Miles sent the disciplinary investigation report along with the OH referral. It lays bare the allegations the Claimant was making. It would have been apparent therefore to the OH advisor that the Claimant was making allegations that screamed out the *possibility* of a mental health problem. One approach would have been to put this information in the referral itself and ask the question directly. But that obviously would have upset and alienated the Claimant and was not the only way of bringing the information to the OH advisor's attention.

158.2. The specific matters that the Respondent sought advice upon are, if taken entirely literally, focussed upon the Claimant's ability to attend a disciplinary meeting and not much else. However, the reality is that a question such as *"are there any other underlying medical conditions impacting on the employee's ability to participate in the disciplinary that should be considered within the context of the disability provision of the Equality Act?"* is quite a searching question. It requires an assessment of whether there is an underlying condition. *If* there was an underlying condition of a sort that had a role in generating the Claimant's allegations, it would no doubt feature in the answer to this question. *If* there were a difficulty in distinguishing reality from delusion it would be relevant to both the making of the allegations in the first place and answering the disciplinary allegations at the disciplinary hearing.

158.3. We therefore think that the medical evidence that the respondent sought was, in fact, apt to generate medical advice about the key issue (whether the allegations might be the product of a mental health problem) and was intended to do that. It is true that the advice was requested in something of an oblique way; however, in our view this reflects the sensitivity of the issue and the sheer difficulty in directly asking about the possibility of a difficult mental health issue where the claimant was hostile to it, the existing medical evidence did not speak to it, but where there were facts that suggested it as a possibility.

159. We therefore think that the Respondent did take reasonable steps to consider and investigate whether there was a possible medical explanation for the Claimant's allegation. The Claimant did not consent to the OH report being released and the process therefore had to complete without further input from OH.

160. All in all we conclude that there was a reasonable investigation, even taking into account the heightened standards that a reasonable employer would apply in a case of such seriousness as this one.

161. Based upon all of the materials generated by the investigation, in our view Ms Hustwick had a reasonable belief that the Claimant had made false allegations and had done so maliciously and vexatiously. Of course, our own view, is that the Claimant believed in the truth of her allegations, however, that was a very finely balanced finding, and it is a matter on which views can reasonably differ. We have no doubt that Ms Hustwick's belief, was within the range of reasonable responses which what is important at this juncture.

162. In our view the sanction of dismissal was in the band of reasonable responses. Ms Hustwick considered the Claimant's track record and was alive to the fact she

had no prior disciplinary warnings. However, she concluded that the matter was so serious no sanction short of dismissal was appropriate. The Claimant maintained the allegations that Ms Hustwick considered to be malicious and vexatious and showed no remorse. In those circumstances, dismissal was within the band.

163. In conclusion then, the dismissal, was fair.

Notice pay

164. The defence to the claim for notice pay is put only on the basis that the Claimant's conduct amounted to gross misconduct. The gross misconduct is the making of malicious and/or vexatious allegations against Ms W.

165. Unlike in the case of unfair dismissal, the essence of this complaint is not the employer's beliefs about the Claimant's conduct, but our own.

166. We find that the allegations were false. However, we do not accept that they were made maliciously or vexatiously. Our finding is that the Claimant genuinely believed that the allegations were true and that she maintains that believe. We do not think she raised the allegations maliciously or vexatiously but rather she raised them because she genuinely believed she had been seriously wronged and something should be done. That is not gross misconduct nor even misconduct.

167. The Respondent has not pleaded or argued any alternative basis that the claimant was in repudiatory breach than the above.

168. The claim for notice pay therefore succeeds. The Claimant was entitled to 1 month's notice. A month's gross pay was £642.37.

Holiday

169. There is no evidence before us that the Claimant had more accrued leave outstanding upon termination than she was paid for. It is clear that she was paid some holiday pay on termination and the Respondent says that she was paid for all she accrued. The Claimant did not give evidence on this matter and there are no documents supporting her case. Overall, there is no basis upon which we could find that any holiday pay is outstanding.

_____

Employment Judge Dyal

_____

Date 2 May 2022