Case Number: 2302286/2019

THE EMPLOYMENT TRIBUNAL

Claimant: Mrs Mildred Ononiwu

Respondent: Anchor Hanover Group

Heard at: London South Employment Tribunal

On: 6 – 9 June and 7 and 8 July 2022

Before: Employment Judge A. Beale
Mr P. Mills
Miss N. Styles

Representation:
Claimant: In person
Respondent: Mr M. Greaves, Counsel

RESERVED JUDGMENT

The Claimant's claims of:

(1) direct race discrimination;

(2) harassment related to race;

(3) unpaid holiday pay; and

(4) unauthorised deductions from wages,

fail and are dismissed.

REASONS

1. By a claim originally submitted on 16 April 2019, which was rejected by reason of an incorrect ACAS early conciliation reference number on 13 June 2019, and resubmitted and accepted on 24 June 2019, the Claimant brought claims of race discrimination and harassment related to race, and for holiday pay and arrears of pay.

The Hearing

2. The full hearing of this claim was conducted in person on 6 – 9 June and 7 July 2022, with a further day on 8 July 2022 during which the Tribunal reached its decision. The additional days were added at the end of the original listing on 9 June 2022, when it became apparent that it would not be possible to conclude the case that day.

3. The Claimant gave evidence on her own behalf, and called evidence from four witnesses: Pamela Omoruyi, Mandy Surin (who gave evidence via video link), Blessing Iwezuife and Paschal Ajuzieogu-Madu. All these individuals worked as care assistants at Linwood Care Home. The Claimant also provided a statement from Gracian McBean, who had at the relevant time been a Team Leader at Linwood Care Home, and who we were told was unable to attend the Tribunal hearing owing to a bereavement. The witness statements from the Claimant's witnesses had been served on the Respondent in January 2022 (and the statement of Ms Surin was served later still, although no point was taken on this), although the parties had been directed to exchange statements on 15 June 2020 ahead of a hearing originally listed for 29 June – 3 July 2020 by EJ Nash in an Order sent to the parties on 7 March 2020. The Respondent objected to these witnesses giving evidence. After hearing submissions from the Claimant and the Respondent's counsel, we decided that the interests of justice and the overriding objective favoured hearing from the Claimant's witnesses, for reasons we gave orally during the hearing. We were, however, able to place only limited weight on the statement of Ms McBean, who did not attend to give evidence, particularly given that the statement dealt with controversial issues and did not refer to any documentary evidence.

4. On behalf of the Respondent, we heard from Eva Trochim, formerly Home Manager at Linwood Care Home, Rebecca Michaels, formerly Administrator at Linwood Care Home and Michelle Reeves, Regional Support Manager for the London and Surrey area for the Respondent.

5. The Tribunal was provided with witness statements for each of these witnesses and with a bundle running to 280 pages. Following our decision to allow the evidence of the Claimant's witnesses, we were also supplied with a supplementary bundle from the Respondent, comprising 34 pages, which included documents relevant to some of the issues they raised in their witness statements.

The Issues

6. The issues for us to determine were as set out in the Case Management Order of EJ Nash. The parties addressed these issues in a slightly different order, which we set out below for ease of reference.

Race Discrimination

7. Were all the Claimant's claims for race discrimination presented within the time limits set out in sections 123(1)(a) and (b) of the Equality Act 2010,

taking into account the initial rejection of the Claimant's claim as set out at paragraph 1 above? Did the conduct alleged by the Claimant constitute an act/conduct extending over a period? If any claims have been brought outside the primary time limit, is it just and equitable to extend time?

8. Did the Respondent subject the Claimant to the following treatment?

    8.1 (through Eva Trochim) making discriminatory remarks on 28 September, 19 October, 30 October and 26 November 2019;

    8.2 not permitting the Claimant and other black staff to eat at work;

    8.3 requiring the Claimant to care for 10 – 11 residents (when other non-black staff did not have to care for so many) and not treating her complaints about this properly, including an incident on 16 October 2018 when she objected to an instruction;

    8.4 dismissing the Claimant on 22 January 2019 (this is admitted)?

9. If so, was that treatment "less favourable treatment", i.e., did the Respondent treat the Claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The Claimant relies on Maria Reeves (Team Leader) as a comparator. Other potential comparators were mentioned in the course of the evidence as detailed below.

10. If so, was this because of the Claimant's race?

Harassment related to race

11. Did the Respondent engage in the conduct set out at paragraph 8 above, save for paragraph 8.4?

12. If so, was that conduct unwanted?

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

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

Holiday Pay

15. Was the Claimant's claim brought within three months of the date on which payment should have been made, as extended by the early conciliation period? If not, was it reasonably practicable for the Claimant to bring her claim within the time limit? If not, over what period is it reasonable to extend time?

16. When the Claimant's employment came to an end, was she paid all the compensation to which she was entitled under regulation 14 of the Working Time Regulations 1998?

17. The Claimant contends that she was owed two weeks' holiday pay for a holiday booked but not taken owing to her being placed on suspension at the end of her employment.

Unauthorised deductions from wages

18. Was the Claimant's claim brought within three months of any deduction from her wages, as extended by the early conciliation period? If not, was it reasonably practicable for the Claimant to bring her claim within the time limit? If not, over what period is it reasonable to extend time?

19. Did the Respondent make unauthorised deductions from the Claimant's wages in accordance with ERA 1996 s. 13 as follows and if so how much was deducted? The Claimant alleges:

    19.1 on 24/4/18, it deducted 7 hours' wages in respect of holiday pay;
    19.2 on 3/9/18 it failed to pay for a day's training (7 hours) at Uxbridge.

Findings of Fact

20. The Claimant was employed by the Respondent from 1 June 2017 until 22 January 2019 as a care assistant at Linwood Care Home ('Linwood'). Linwood is a care home for the elderly, including those who suffer from dementia.

21. Eva Trochim started work as the manager of Linwood on 1 August 2018. It is agreed that Ms Trochim did not in fact meet the Claimant in person until October 2018.

22. In July 2018, the Claimant raised queries about underpayment for the month of May with the Respondent. In particular, she was concerned that she had been short paid for a work day (14 hours) and that she had 7 hours included as holiday pay for a day she had worked. The Claimant was told that she would be paid in respect of these hours; however, she did not receive the pay in July or August. On 3 September 2018, the Claimant attended a training day, in respect of which she later complained that she had also not been paid for 7 hours' work.

23. Having not been paid these sums, the Claimant contacted Linwood and was directed to speak to the manager of another home, Bob Oddy, to try to resolve her queries. The Claimant spoke to Mr Oddy by phone on 27 September 2018. She alleges that Mr Oddy refused to deal with her pay issues. It is not necessary for us to determine this point, but the phone call was a difficult one, because Mr Oddy subsequently emailed Ms Trochim to say that he had received a call from the Claimant about pay *"however the*

conversation started badly, and she ended up calling me a racist" (p. 58a). Mr Oddy said he had found this offensive. He said he had tried to ascertain why the Claimant was calling him and said he would try to call her back to understand the reason for the call.

24. Ms Trochim spoke to Mr Oddy about this email and decided to discuss the situation with the Claimant, which she did by telephone on 28 September 2018. It is agreed that this was not a working day for the Claimant. It is also agreed that there was a conversation on this date and that it concerned the Claimant's call with Mr Oddy. The Claimant has alleged that, during this conversation, Ms Trochim said *"you shout like blacks"* and *"stop shouting Mildred, you are shouting at me"* (ET1, p. 8). In her further and better particulars and her witness statement, the Claimant alleges that Ms Trochim said *"words to the effect that blacks are always shouting, so my family would be used to this"* (in response to a concern from the Claimant that this conversation was taking place in front of her children). Ms Trochim denies using such words, although she accepts that she may, in this or other calls, have asked the Claimant to stop shouting, as she did raise her voice. We make findings on whether these words were used in our conclusions below.

25. The Claimant wrote a letter to Ms Trochim on 1 October 2018 (p. 59) to say that she was unable to come to see Ms Trochim during the week as she said had been requested during the phone call on 28 September. In this letter, the Claimant gave an account of the conversation in which she said Ms Trochim had accused the Claimant of shouting at her but did not mention that Ms Trochim had referred to her race. The Claimant asked for her underpayment issues to be resolved.

26. On 5 October 2018, the Claimant wrote a letter to Anchor HR (p. 60 – 61) requesting payment for her annual leave on 24 April 2018, a long shift on 19 May 2018, and for her training on dementia at Uxbridge on 3 September 2018. She said as a result of the underpayment she had been unable to pay her rent or travel expenses. She asked for a response and payment within 5 working days. We have seen no written response to this letter.

27. Ms Trochim says, and we accept, that on starting at Linwood, she was concerned about some aspects of the culture. In particular, she was concerned about persistent lateness, and staff preparing food for themselves during work time before starting their work; lengthy breaks leaving residents unattended; failures by Team Leaders to supervise staff; staff refusing to care for residents on the basis that they were eating whilst on shift and disrespect between staff members.

28. In early October, Ms Trochim wrote a letter to all staff setting out a number of these concerns (p. 127 – 130) and explaining that she had set up a meeting to take place on 11 October 2018, at which she would explain all these points in person and would give staff an opportunity to ask any questions. In particular, the letter addressed lengthy breaks, food, attendance and punctuality and disrespect towards colleagues. In relation to food, the letter stated:

"I believe that previous management have allowed staff to have meals with the residents, it should be nice dining experience for Residents, unfortunately staff treats this as additional break and not paying attention to residents. On few occasions I have witnessed resident asking to go to the toilet, and staffs has replied in a minute, I'm eating. This is unacceptable. Therefore, as of 09/10/2018, till further notice, staff is not permitted to eat in dining rooms or lounges. If there are any food left over after resident have finished their mealtimes, staff can save this for later and eat in staff room on their breaks. I have bought you kettle, toaster and microwave for your staff room to be able to reheat your meals or made toasts...."

29. The meeting took place as planned on 11 October at 2 p.m. It is agreed that both black and white staff members were present at the meeting, although the Claimant and her witnesses were not present. The notes of the meeting at p. 131 – 137 reiterate that staff members were not to eat in the dining room with residents. Some further rules are added below (p. 132), including:

    29.1 *"Staff can sit and have a cup of tea/coffee/etc. with our residents, ensuring it is WITH the resident/s. No staff to be sitting, having a drink with colleagues during shift and residents sat by themselves."*

    29.2 *"Once residents have had their meals, staff are welcome to keep food by, to take to the staff room and eat on break."*

    29.3 *"If you have to take medication with food, that is understandable, however please try and do this before coming to work, on your way to work or before you start your shift."*

30. The notes record that all attendees agreed to these statements.

31. Ms Trochim gave evidence, and we accept, that after the meeting she instructed the Team Leaders to ensure that all staff who were not at the meeting were supplied with, and familiarised themselves with, the minutes of the meeting. She asked the Team Leaders to get staff to sign to say they had received minutes and was told that staff had done so, although she did not specifically check that all staff had signed. Whilst we note that the only signature on the sheet with which we have been supplied is the Claimant's, we do not accept that the Claimant was the only staff member asked to sign for the minutes. We think it likely that the Team Leaders had different sheets that were signed by other staff members.

32. The Claimant says that she was told about the new rules by Tracy Williams, Team Leader, verbally on 13 October 2018. In her witness statement, the Claimant says that she was told staff were banned from eating and drinking with residents and that any eating or drinking (including water) could only be done whilst on break. The Claimant says that she asked to see the rules written down, and that she was required to sign to show she had seen them before they were provided. The Claimant agrees that she was given a copy of the rules, which were as set out at paragraph 29 above, and that she did read them later. She said she told Tracy Williams that if she was in any doubt, she would seek advice. The written rules make it clear that drinks can be

taken with residents and that medication may be taken with food if necessary. However, the Claimant said that Tracy had already told her different rules which she had to take from her as Team Leader. The Claimant said she did not seek further advice about this, which she initially said was because she had no opportunity before other issues came up, but then said it was because none of the new restrictions was applicable to her.

33. We do not accept that Tracy Williams told the Claimant that she could not eat or drink at all outside of breaktimes. Either the Claimant misunderstood, or she has given us an inaccurate account. We consider that if Tracy Williams had expressed the rules in this way, the Claimant would have sought clarification once she read the different rules contained in the meeting minutes. In any case, the Claimant was provided with a copy of the rules in writing, which were applicable to all staff.

34. On 13 October 2018, the Claimant was working a shift for the first time since the new rules had come into effect. The Claimant was working on the first floor, which is split into two corridors, Valentino and Garbo. The Claimant was working on the latter. We were told by the Respondent that the usual staffing levels would be two care assistants on one of the two corridors, one on the other, a floating member of staff who could attend either and a Team Leader.

35. The Respondent did not dispute the Claimant's evidence that on 13 October 2018, there was no second staff member working with the Claimant on Garbo. The Claimant accepted that another employee had been rostered to work with her, but that individual did not attend work that day. The Claimant's evidence, which again was not contradicted, was that Tracy Williams took an agency member of staff from another floor and asked him to float between Garbo and Valentino. The Claimant told Tracy Williams that this agency staff member could not assist her with female residents who needed double-up care, because he was male. The Claimant alleges that Tracy Williams told her Ms Trochim wanted her to work alone. We do not accept that Tracy Williams told the Claimant that Ms Trochim wanted her to perform care requiring two employees alone. We find that if a remark of this kind was made, the intention would have been to say to the Claimant that she was not working alone because she had access to a floater or the Team Leader and could carry out such work as she could do without an additional female staff member. This is supported by comments made by Ms Williams in her later interview with Ms Trochim on 17 October 2018 (p. 111), where she said she explained to the Claimant that she was not working on her own because there was a floater who was helping. Indeed, the Claimant herself says that Ms Williams told her she would get another person to help. In the event, the Claimant found another female member of staff to assist her with double-up care.

36. The Claimant's next shift was an early shift on 16 October 2018. The rota for that day (we do not have the rota for the 13th) shows that the Claimant was to work the early shift on the first floor with Patricia Amara, who is agreed to have been a white employee. The Claimant says she had a conversation with Tracy Williams on arrival in which she asked who would be working with

her as she could not be expected to work alone. The Claimant says Ms Williams responded by saying someone else would attend but asked why she could not work alone because Ms Trochim had said she should work alone. Again, we find that if a comment to this effect was made, it was in the context set out at paragraph 35 above. The Claimant says that Ms Williams told the Claimant she would assist her, but went away to deal with other matters, so she was left alone albeit with the possibility of calling an agency member of staff from Valentino to assist (she later said this member of staff floated between the two corridors). The Claimant says this was an individual named Jeremy; it is the Respondent's case that Jeremy was not at work on this day. However, for present purposes we find that the Claimant did have access to a floating member of staff as well as Ms Williams on this day.

37. Later that day, there was a dispute between the Claimant and Tracy Williams regarding her break time. The Claimant says she sought permission to go outside to hand a key to her family, and this was granted. Subsequently the Claimant says she came down to the foyer and was about to have her break when Ms Williams interrupted her. Ms Williams said in a statement made on the same day that she had realised at this point that it was 1 p.m. and the Claimant should not be on a break because it was the residents' lunch time. There appears to have been a heated discussion between the two. The Claimant agreed in oral evidence that she had not told Ms Williams that she needed her break to eat or take medication with food; nor had she sought permission to eat from Ms Williams and had it refused.

38. Shortly after this, during the residents' lunch time, it is alleged that an incident occurred between the Claimant and Maria Reeves, another Team Leader, whilst the Claimant was manoeuvring a resident, FJ, in their wheelchair.

39. Later on, 16 October 2018, Tracy Williams and Maria Reeves both wrote notes about the Claimant's behaviour. Ms Williams' note (p. 139) was written at Ms Trochim's request, after Ms Williams relayed the Claimant's reaction to the new rules on 13 October and the altercation about break time on 16 October. Ms Reeves' file note (p. 108) recorded that the Claimant had pushed resident FJ's wheelchair with their feet on the floor, and that when Maria Reeves had raised a concern about this, the Claimant had tilted the wheelchair back onto the two back wheels. Ms Reeves continued that when she had stopped the Claimant and told her to use the footplates, the Claimant had said Ms Reeves should come and do it and had argued with her.

40. Ms Trochim's evidence, which we accept, was that she spoke to the Respondent's employee relations advice team, Manager Direct, about the allegations, and was advised to hold meetings with Ms Williams, Maria Reeves and the Claimant. Ms Trochim went to speak to the Claimant about this on 16 October 2018 itself, but the Claimant had finished her shift and was about to leave to pick up her children, so said she was unable to speak at this point.

41. The next day, 17 October 2018, Ms Trochim spoke to Tracy Williams (p. 111) about the incidents she had reported. Ms Trochim also asked Ms WIlliams

about the FJ incident and the note of the conversation records that Ms Williams corroborated Ms Reeves' account.

42. Ms Reeves repeated her account in an in-person meeting on 18 October 2018 (p. 107).

43. Ms Trochim's evidence, which we accept, is that she tried to call the Claimant on 17 and 18 October. The Claimant says she did not receive these calls, but we note that she did not dispute that they had been made in the transcript of the call on 19 October 2018 (see below). There is no dispute that the two did not speak on these days. The Claimant was due to work on 20 – 21 October 2018. We accept Ms Trochim's evidence that she spoke again to Manager Direct and that they advised her to hold an in-person meeting and suspend the Claimant, either with pay if she did attend and without pay if she did not, in order to safeguard residents.

44. Ms Trochim tried to call the Claimant again on Friday 19 October 2018, and on this occasion, the Claimant called her back when Ms Trochim was driving with Ms Michaels. Part of this phone call was recorded, Ms Trochim says because she wanted evidence she had spoken to the Claimant as the call had come through with no caller ID, and she was intending to suspend the Claimant. We have listened to the recording of the call, which is poor quality, and read a transcript (p. 270 – 271). In her further and better particulars, the Claimant does not allege that Ms Trochim referred to her race but does say she accused her of being rude and shouting "as usual" (p. 36). In her witness statement, the Claimant says that she tried to avoid Ms Trochim accusing her of shouting and "the labelling" but does not say that such accusations were made. In oral evidence, the Claimant said that Ms Trochim had referred to her colour again, and that she had raised this in the further and better particulars by the reference to "as usual". Ms Trochim denies referring to the Claimant's race but accepts she may have asked the Claimant to stop shouting.

45. The transcript shows that Ms Trochim told the Claimant that there was an allegation against her; that they needed to do an investigation meeting, and that the Claimant should not attend for her shifts on Saturday and Sunday. At this point the phone call ended. There is no dispute that the call was ended by the Claimant, whether deliberately or because she had run out of credit. The transcript does not contain any reference to the Claimant's colour or race, and Ms Trochim does not ask the Claimant to stop shouting, although it is only a partial transcript of the call.

46. Ms Trochim wrote to the Claimant suspending her on 19 October 2018 (p. 77). The Claimant says she did not receive this letter. It is not necessary for us to determine whether it was received for the purposes of this claim, but on balance, the Claimant's subsequent emails to the effect that she had not received it (see p. 92) suggest that she did not. On the same day, the Claimant raised a grievance against Ms Trochim (p. 81 – 83). The grievance covered the phone calls with Mr Oddy and Ms Trochim on 27 – 28 September 2018, and the phone call on 19 October 2018. The Claimant did not allege in her grievance that Ms Trochim had referred to her race or colour during these

calls, although she did say that Ms Trochim had accused her of shouting in the call on 28 September. The Claimant also complained about Ms Trochim alleging that she had not completed her training when she was off sick in August 2018; the new rules relating to food (which she said were *"discriminatory by definition as [they] were addressed mainly to staff of black origin*") and alleged comments by Ms Trochim that the staff could look for jobs elsewhere. She said she was concerned when invited to Ms Trochim's office that she would make accusations of something the Claimant had not done, or *"make me disappear in her office and claim fist fighting"*.

47. As a result of the submission of the grievance, Ms Trochim ceased to be the investigating manager in relation to the FJ incident, a role taken over by Sean Robbie, ER Investigator.

48. The Claimant alleges that she had a further telephone conversation with Ms Trochim on 30 October 2018. Ms Trochim does not recollect this phone call. The Claimant's case in her further and better particulars (p. 36) is that Ms Trochim again accused the Claimant of shouting at her like a black person, and then told her that she was suspended. We accept that a conversation did take place on 30 October 2018 because it is referred to in the Claimant's contemporaneous email to Shelley Rabbitt of 31 October 2018 (p. 91). This email records that Ms Trochim accused the Claimant of shouting at her but does not suggest that Ms Trochim referenced the Claimant's colour or race.

49. On 26 November 2018, the Claimant discovered that she had not been paid. The Claimant went to Linwood to speak to Ms Trochim about this and her earlier concerns about pay. In her further and better particulars (p. 36), the Claimant alleges that she was with Ms Trochim in Ms Michaels' office, and that Ms Trochim told the Claimant to stop shouting. In her witness statement, the Claimant alleges that Ms Trochim yelled at her. Ms Trochim denies telling the Claimant to stop shouting and says her interaction with the Claimant on this occasion was only short. Ms Michaels recalls that the Claimant raised her voice but does not recall Ms Trochim telling the Claimant to stop shouting, although she gave evidence that Ms Trochim may have told the Claimant to calm down. Ms Michaels went through the Claimant's pay queries with her. Ms Michaels then took the pay queries forward with payroll between 30 November and 4 December 2018 (p. 93 – 95). Our conclusions on the payments that were made to the Claimant are set out in the conclusions section below.

50. On 26 November 2018, the Claimant was invited by letter (sent by email) to an investigation meeting with Sean Robbie on 3 December 2018, which was said to be *"with regard to your suspension from work"*. The Claimant agreed during the investigation meeting on 3 December that she had received this letter. Although the letter should have been clearer (in particular, we consider that it should have set out the allegation to be investigated), we find that it was reasonably clear that the meeting was to be about matters arising from the Claimant's suspension, rather than her pay grievance.

51. The investigatory meeting took place on 3 December 2018 (notes p. 113 – 123). The Claimant alleged in her witness statement and oral evidence that

Mr Robbie had recorded some of the meeting but switched off the recorder when she spoke about race discrimination. The Claimant also alleged in oral evidence that the notes were inaccurate. She accepted that she had signed under a statement on the final page of the notes *"Read over to Mildred. I agree this is a correct record of our conversation and this meeting was conducted fairly"* (p. 123). She did not raise any specific inaccuracies in the notes in her subsequent disciplinary and appeal meeting. We find that the notes, albeit not verbatim, are an accurate account of the meeting.

52. During the meeting, the Claimant agreed that she had received sufficient training for her role. She suggested Maria Reeves and Ms Williams would have reason to fabricate allegations against her. When asked whether Ms Reeves had seen her with FJ on 16 October 2018, the Claimant responded "no comment. It's rubbish". She said she did not remember and did not know what Ms Reeves was talking about. She accused Ms Reeves of telling lies, and said she was racist. However, when asked whether she had shouted at Ms Reeves after she stopped the Claimant moving FJ, the Claimant said "*she was correcting me. I was not going down to that level. She is not an expert. She doesn't know her job. I don't want to continue".* The Claimant denied moving FJ without the footplates. She denied shouting at Ms Reeves, saying "*Assuming she was correcting me why would I shout at her?"* She said she had reported Ms Trochim, Ms Reeves and Ms Williams for discrimination and asked why the Respondent had not looked into this and agreed to forward relevant documents to Mr Robbie. The Claimant says she forwarded the emails at p. 174 – 176 to Mr Robbie, but his investigation report records that he received nothing further. These emails refer only to Maria Reeves, and do not allege discrimination.

53. On 7 December 2018, Mr Robbie spoke to Maria Reeves by telephone (p. 109 – 110). The note of the meeting includes more detail about the incident, with Ms Reeves explaining that the Claimant was moving FJ from the lounge to the dining room and had done so without the footplates so FJ's feet were dragging on the floor. In this account, Ms Reeves said that the Claimant made the comment "you do it" before she tilted the wheelchair back. She said the Claimant had subsequently put the footplates down and moved the resident correctly.

54. Mr Robbie also spoke to Esther Bennett, the receptionist at Linwood, who had been named by the Claimant in her interview. Ms Bennett could not recall anything of relevance (p. 140).

55. Mr Robbie produced an investigation report dated 7 December 2018 in which he concluded that the allegations relating to FJ should proceed to a formal disciplinary hearing (p. 104 – 106). He noted that the Claimant's grievance should be considered at the disciplinary hearing.

56. The Claimant was invited to a disciplinary meeting to take place on 4 January 2019, to be chaired by Michelle Reeves (p. 103). Michelle Reeves said in oral evidence, and we accept, that she was no relation to Maria Reeves. The allegations to be considered were that the Claimant had breached the Respondent's Moving and Handling Policy by moving FJ in an inappropriate

manner by (a) failing to place his feet on the footplate when manoeuvring him in his wheelchair and (b) attempting to move him in his wheelchair with it tilted back on two wheels (FJ was incorrectly referred to in this letter as male). The Claimant was provided with the investigation report and appendices and informed of her right to be accompanied.

57. The disciplinary hearing in fact took place on 10 January 2019, and the Claimant was accompanied by her union representative. Michelle Reeves informed the Claimant that the disciplinary allegations and the grievance would both be dealt with at this hearing. The minutes of the hearing (p. 178 – 194) were taken by Ms Michaels. The Claimant has again alleged that the notes of this hearing are inaccurate, but again did not raise any specific inaccuracies in the notes during her appeal or appeal hearing, after they were sent to her with the outcome letter. Ms Michaels confirmed that the notes were accurate. We accept that the notes are an accurate, albeit not verbatim, account of the hearing.

58. During the hearing, the Claimant accepted that she had moved FJ without putting the footplates down on her wheelchair, albeit she said this was in different circumstances from those described by Maria Reeves:

"On 16th October 2018 I got caught trying to reposition FJ by the dining table because it was lunchtime. I was just trying to make her comfy to be near the table and able to eat her lunch. What I did, there was 2 footplates, one each side, her feet have to be on the floor when she is at the table because her knees would be sore as the table isn't high enough. If I had pushed her in with footplates on her knees would have bumped the table and also would have to get under the table to remove her feet to rest on the floor. I would not and never have attempted to drag any resident."

59. The Claimant denied tilting FJ's wheelchair backwards and denied any interaction with Maria Reeves. The Claimant said there had been a male member of agency staff named Jeremy present who would have witnessed any discussion in the dining room had it taken place. The Claimant also said that Tracey Williams would not have witnessed the incident as she was elsewhere at the time. The Claimant confirmed that she knew it was inappropriate to drag a resident. The Claimant alleged that Maria Reeves had a grudge against her owing to the issues she had raised about her in emails from April – July 2018 (p. 174 – 176), which she supplied.

60. The Claimant's grievance was then discussed. Michelle Reeves asked whether the Claimant's pay complaints had been resolved, to which the Claimant initially replied that they were in progress with just a little bit to go. When asked to clarify, the Claimant said Ms Michaels had done her job, and it was in hand, and then when asked again whether the matter had been resolved, said yes.

61. The Claimant went on to discuss the phone calls that had taken place on 27 and 28 September 2018. The Claimant said Ms Trochim had accused her of shouting at her, and that she was not happy to have the conversation in front of her children but did not say that Ms Trochim had referred to her colour or

race. The Claimant said the same had happened (accusations of shouting) during the call on 19 October 2018. The call on 30 October was also discussed (p. 187), and again the Claimant did not suggest Ms Trochim had referred to her colour or race. There was a discussion of racism (p. 188), where the Claimant referred to a remark said to have been made by Ms Trochim that staff could go and work at Tesco's, *"and things like 'I'm not Gavin or Sullamain' or you can't eat at 5 p.m.", always to black staff".* Later, Michelle Reeves asked the Claimant whether the Tesco comment was directed personally to the Claimant or to a group, and the Claimant responded *"Yes, group and generalisation. But they were all black. Like saying every black member of staff shouts"*. Ms Reeves asked if Ms Trochim had said *"every black member of staff shouts"* directly to the Claimant, and the Claimant responded *"I don't want to go into it".* Ms Reeves reminded the Claimant that this was her opportunity to explain the situation, but the Claimant did not return to this point. At p. 190, the Claimant again said that the comments Ms Trochim had made were "generalised" rather than aimed at her.

62. Following the hearing, Michelle Reeves undertook further investigations, in that she reviewed the rota and staff allocation sheet and found that there were no male carers on duty on 16 October 2018. Ms Reeves also spoke to Tracy Williams, who confirmed she had witnessed the FJ incident as set out in her witness statement, and that she and Maria Reeves had been the only staff members present other than the Claimant.

63. Ms Reeves also spoke to Eva Trochim about the Claimant's grievance.

64. Ms Reeves decided to dismiss the Claimant. She attempted to speak to the Claimant by telephone but was unable to get through. She therefore informed the Claimant that she would be dismissed for gross misconduct by email on 11 January 2019 (p. 195) and that a full letter would be sent shortly. The letter was sent to the Claimant by email on 22 January 2019 (p. 196 – 200) and set out the reasons for the Claimant's dismissal – namely the allegations in respect of FJ, which Ms Reeves found proven. She detailed her investigations and said that she did not accept that Maria Reeves had been making false accusations because Tracy Williams had also witnessed the incident. Ms Reeves did not uphold any part of the grievance. The Claimant was informed of her right to appeal.

65. The Claimant submitted an appeal (p. 202 – 203). In relation to dismissal, the Claimant reiterated that she had only repositioned FJ, and that "Jeremy" would have been a witness to events. She suggested some other witnesses including the second Team Leader on shift, and other agency/ permanent staff members. She alleged that Tracey Williams may have fabricated the allegation with Maria Reeves because the Claimant had raised concerns about working alone that morning. Regarding the grievance, the Claimant reiterated some of her allegations, including the calls on 28 September and 19 October (she again did not say Ms Trochim referred to her colour/race in these emails), and Ms Trochim's alleged refusal to permit black staff to eat their own food when she herself ate from the Respondent's kitchen. The

Claimant also mentioned for the first time that Ms Trochim would instruct one black staff member to do work requiring three staff.

66. The Claimant was invited to an appeal to be conducted by Matthew Anstee Brown, District Manager, on 19 February 2019 (p. 204). She was again informed of her right to accompaniment. The appeal hearing notes are short (p. 210 – 212). The Claimant was again accompanied by her union representative. Mr Anstee Brown went through the appeal letter with the Claimant. The Claimant did not suggest that Ms Trochim had referenced her colour or race in any of the relevant phone calls. The Claimant's representative confirmed that it had been thought the pay issues were resolved at the last hearing but said the Claimant had not received the payslips. Mr Anstee Brown undertook to have the payslips sent to the Claimant and agreed to check who was on shift on 16 October 2018 again.

67. Mr Anstee Brown (from whom we did not hear) upheld the disciplinary and grievance decisions in a letter dated 21 March 2019 (p. 208 – 209). He had also reviewed the staff rota and shift plan and the care plans for 16 October 2018, which showed both permanent and agency staff, and Jeremy did not appear, although he had worked the previous day. He confirmed that the chiropodist (also said by the Claimant to have been present) could not recall this day.

Submissions

68. We heard oral submissions from the Claimant and from the Respondent, who also produced comprehensive written submissions. Those submissions are referred to where appropriate in our findings below.

The Law

Direct Race Discrimination

69. Section 13 Equality Act 2010 provides that a person (A) discriminates against another (B) if because of a protected characteristic, A treats B less favourably than A treats or would treat others. Race is a protected characteristic (s. 9).

70. In a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case (s. 23 EqA 2010).

71. Employers must not discriminate against employees in the way they afford them access, or by not affording them access to opportunities for promotion, transfer, or training or for receiving any benefit, facility, or service; by dismissing them or by subjecting them to any other detriment (s. 39(2((b) - (d) EqA 2010).

72. Section 136 EqA 2010 provides that, where there are facts from which the court could decide, in the absence of any other explanation, that person A contravened a provision in the Act, the court must hold that the contravention occurred, unless A shows that A did not contravene the provision.

73. The Court of Appeal in *Madarassy v Nomura International Plc* [2007] ICR 867 explained what is meant by "could decide" (referring to the words in a previous version of this section, in the Sex Discrimination Act 1975):

> *56. The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> *57. "Could conclude" in section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.*
>
> *58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim.*

74. The Supreme Court confirmed in *Royal Mail Group Ltd v Efobi* [2021] 1 WLR 3863 that this approach continues to apply following the passing of the Equality Act 2010, which contains slightly different wording as to the burden of proof (see paragraph 30).

Harassment

75. Section 26 EqA 2010 provides that a person (A) harasses another (B) if (a) A engages in unwanted conduct related to a relevant protected characteristic and (b) the conduct has the purpose or effect of (i) violating B's dignity or (ii)

creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether the conduct has the proscribed effect, the court must take into account the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

76. Section 40 EqA 2010 provides that employers must not harass their employees.

77. The burden of proof provisions set out above also apply to complaints of harassment.

Time Limits: Equality Act 2010

78. Section 123(1)(a) EqA 2010 provides that a complaint may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates. Where the complaint is of conduct extending over a period, the act is treated as having been done at the end of that period (s. 123(3) EqA 2010). If a complaint is brought out of time, the Tribunal may hear the complaint if it is brought within such other period as the Tribunal thinks is just and equitable (s. 123(1)(b)).

79. The Court of Appeal in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 held that in considering the "just and equitable" discretion to extend time, it will almost always be relevant to take into account (a) the length of and reasons for the delay; and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

80. In *Secretary of State for Justice v Johnson* [2022] EAT 1, the EAT held that, where granting an extension of time, even if it is of a relatively brief period, will require the Tribunal to make determinations about matters which occurred long before the hearing, that is a relevant factor to take into account in exercising the discretion. That is the case even where the delay prior to the hearing is not the fault of either party (see paragraph 23).

Holiday Pay

81. Regulation 14 of the Working Time Regulations 1998 provides that, where (a) a worker's employment is terminated during the course of the leave year and (b) the proportion of the leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make a payment in lieu of the leave. This payment is to be calculated in accordance with regulation 14(3).

82. Such a claim must be brought before the end of the period of three months beginning with the date on which it is alleged the payment should have been made, subject to any early conciliation extension, or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it is not reasonably practicable for the complaint to be presented before the end of that period (regulation 30(2)).

Unauthorised deductions from wages

83. Section 13(1) ERA 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract; or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

84. Section 13(3) ERA 1996 provides that where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated as a deduction made by the employer from the worker's wages on that occasion.

85. Claims for unauthorised deductions from wages may be brought under s. 23 ERA 1996. Section 23(2) ERA 1996 further provides that (subject to the early conciliation extension) a complaint under s. 23 must be brought before the end of three months beginning with the date of payment of the wages from which the deduction was made. That time may be extended where it was not reasonably practicable to bring the complaint within that time (s. 23(4) ERA 1996).

Conclusions

Direct Race Discrimination

86. We have considered the allegations of direct race discrimination in the order set out in the list of issues above, before stepping back to consider them as a whole, both to determine whether the claims should succeed, and also to consider the issue of time limits. For this reason, we have dealt with the question of time limits at the end of this section.

Issue 8.1: discriminatory comments on 28 September, 19 and 30 October and 26 November 2018

87. As we have set out in our findings of fact above, the Claimant's evidence in relation to these allegations was inconsistent. The Claimant's case now is that Ms Trochim used words to the effect that the Claimant was *"shouting like blacks"* or that *"blacks are always shouting"* in the phone calls on 28 September and 19 and 30 October, and in a meeting on 26 November 2018 accused the Claimant of shouting.

88. Although the Claimant raised a grievance about two of these phone calls on 19 October 2018, she did not mention that Ms Trochim had referred to her colour or race in either call. The Claimant said in oral evidence that this was because raising this would have been inflammatory. However, the Claimant raised other matters which she said explicitly amounted to race discrimination in her grievance dated 19 October 2018. We think it likely that, if Ms Trochim had made the discriminatory comments alleged on 28 September and 19 October 2018, the Claimant would have included these in her grievance.

89. The only point at which the Claimant mentioned Ms Trochim saying that black members of staff shouted was during her grievance hearing with Michelle Reeves on 10 January 2019 (p. 189). However, she did not allege that Ms Trochim had used these words to her; instead she said Ms Trochim had made a generalised comment that if staff did not want to work at Linwood they should go to work at Tesco's; that these staff had all been black, and that it was *"like saying every black member of staff shouts"*. Ms Reeves asked the Claimant whether this had been said directly to her, and the Claimant refused to say any more.

90. On the balance of probabilities, given that the Claimant was explicit about alleged racism by Ms Trochim in her grievance, we find that had Ms Trochim used the words alleged, the Claimant would have included them in her grievance and told Michelle Reeves about them during her grievance hearing. The Claimant has not proved on the balance of probabilities that the alleged remarks were made on 28 September and 19 and 30 October.

91. We accept that Ms Trochim probably did ask the Claimant to stop shouting during one or more of these conversations, although we do not find that she did so on 26 November 2018, given that Ms Michaels did not hear this said. We find that Ms Trochim did this because the Claimant was raising her voice. Ms Michaels confirmed in her evidence that the Claimant's voice was raised on 26 November 2018, and we noted that the Claimant at times raised her voice (although we would not describe it as shouting) during the hearing before us. The Claimant also interrupted on numerous occasions. There is no evidence before us to the effect that Ms Trochim would have behaved differently had a white employee been shouting, nor do we consider that there are any facts on the basis of which we could draw that inference.

92. We therefore find that the Claimant has not proved facts from which we could conclude, in the absence of an adequate explanation, that Ms Trochim made the discriminatory remarks alleged, or that she told the Claimant to stop shouting because of her colour or race.

Issue 8.2: not permitting the Claimant and other black staff to eat at work

93. In her cross-examination and submissions, the Claimant's case on this point emerged as being that white staff were still permitted to eat whilst not on their break despite the new rules introduced by Ms Trochim on 9 or 11 October, whereas black staff were not. The issue was therefore the way in which the new rules were implemented, not the fact of the rules themselves.

94. It is clear that the rules set out by Ms Trochim in the letter of 9 October and 11 October applied on their face to all staff members, and that both black and white staff members were present at the meeting on 11 October 2018 when the rules were confirmed.

95. In cross-examination and questioning from the Tribunal, the Claimant was asked which white staff members had been permitted to take food from the kitchen. The Claimant referred to Maria Reeves, another staff member called Maria, and staff members called Hayley, Thomas, and Annie. However, on

further questioning, it appeared that these staff members had been seen by the Claimant eating food prior to the change in the rules. The Claimant had done only two shifts after the rule change before her suspension. She was asked whether she had seen any white staff members eating food when not on their break after the rule change, and named Tracy Williams, who was eating in the staff room, and another staff member called Jessica who she said was eating whilst "hiding in the cupboard". The Claimant acknowledged that she did not know whether either of them was on their break.

96. We did not consider that there was any credible evidence before us that white staff members had been treated differently from black staff members following the change in rules. The Claimant's evidence as to which staff members had been eating food was not consistent, and she herself acknowledged that she could not say that the staff members she finally identified were eating food at a time other than their break. We have been unable to find facts from which we could conclude that the Respondent discriminated against the Claimant in this respect.

97. The Claimant also alleged during her evidence that black members of staff were refused permission to eat food outside of their breaktimes, in particular when they needed to do so in order to take medication. The Claimant initially alleged this had happened to her on 13 and 16 October 2018, but as set out in the factual findings above, ultimately accepted that she had not in fact requested permission to eat food on either of these occasions.

98. We have also considered the evidence of the Claimant's witnesses on this issue. Pamela Omoruyi acknowledged that she had never asked, or been refused, permission to eat food other than during breaktimes, or with her medication. Ms Omoruyi explained that she did not always need to take her medication with food, and that she had taken it during her breaktimes.

99. Blessing Iwezuife said in her oral evidence that she had asked "2 or 3 times" for permission to take medication with food during working hours and that this had been refused. Ms Iwezuife did not say who had refused her permission, in what circumstances this had happened, or when it had happened. The allegation that permission had been asked and refused was not included in her statement and when asked why not, Ms Iwezuife said maybe she had forgotten. Ms Iwezuife said she had been told that she should take the medication before she came to work, which is in line with the rules set out in the note of the meeting on 11 October 2018. On the balance of probabilities, we do not accept that Ms Iwezuife was refused permission to take her medication when she asked. We note that she raised a grievance against Ms Trochim (p. 7 – 8 of the supplementary bundle) where this concern is not raised. We consider it more likely that Ms Iwezuife was advised that where possible she should take medication that needs to be taken with food before attending work, but not that she was refused permission to do so. We do not consider that there is evidence before us from which we could conclude that white members of staff would have been treated differently, or on the basis of which we could draw an inference to that effect.

100. In oral evidence the Claimant also alleged that a black member of staff named Anne had been prevented from eating food. The Claimant was not able to give any details of this incident, including when it had taken place, and we are not able to find on the balance of probabilities that it occurred.

101. We are therefore unable to find that black staff were not permitted to eat at work, or that they were treated differently from white staff in this respect.

Issue 8.3: requiring the Claimant to care for 10 – 11 residents (when other non-black staff did not have to care for so many) and not treating her complaints about this properly, including an incident on 16 October 2018 when she objected to an instruction

102. As set out in our findings of fact above, we have not found that the Claimant was required to care for residents on Gabor alone on 13 and 16 October 2018 as she alleges. We have found that on each occasion the Claimant had available to her a floating member of staff and a Team Leader. The Claimant was able to locate another female member of staff to assist her with residents who required two-on-one care. We have found as a fact that Ms Williams did not, on the balance of probabilities, tell the Claimant that Ms Trochim wanted her to work alone, and we accept Ms Trochim's evidence that she did not say this.

103. We agree with the Claimant that these circumstances were not ideal, and that Linwood was understaffed over this period. We also accept that on occasions, rostered staff would not attend work, leaving some units short-handed, and that this probably happened on 13 October 2018 (it is not clear who the floating member of staff was on 16 October 2018).

104. However, having considered all the evidence before us, there are no facts from which we could conclude that, insofar as Garbo was understaffed on 13 and 16 October 2018, that was because of the Claimant's race. We note that the Claimant's witnesses, in particular Mr Ajuzieogu-Madu, alleged that they were frequently required to work alone on units, including where residents required double-up care. The same evidence was given by Mandy Surin, one of the Claimant's witnesses, who is white. Ms Surin gave evidence that she had been left alone on a floor to care for 16 people, some of whom had dementia. In oral evidence she said that Team Leaders would often not be available and that on one occasion a resident had fallen out of bed and she was alone on the floor and unable to assist them. She said the home was understaffed; that this had been a problem both before and after Ms Trochim joined Linwood and that she did not consider it to have anything to do with race.

105. The evidence before us therefore suggests that both black and white staff were sometimes left in less than ideal circumstances, having to deal with residents' care on their own. There is no basis on which we can conclude that there was less favourable treatment of the Claimant, or of other black staff, in this respect.

106. Further, we do not consider, on the basis of the evidence we have seen, that Ms Williams responded inappropriately to the Claimant's complaint about "working alone" on 16 October 2018. We have found that the Claimant was not expected to work alone, as a floater was available to assist, and Ms Williams also agreed to assist herself (although she was called away on other matters). There is no evidence from which we can conclude that Ms Williams' response was based on the Claimant's race.

Issue 8.4: Dismissal

107. We accept the Respondent's case, and Michelle Reeves' evidence, that the Claimant was dismissed because of the allegations in respect of FJ. We accepted that, as Ms Reeves explained in response to questions from the Tribunal, she dismissed the Claimant because of the totality of the incident, namely that the Claimant had pushed FJ in her wheelchair without the footplates down and had argued with Maria Reeves when she told the Claimant not to do this, before tilting the wheelchair back. We accepted that Ms Reeves regarded the evidence from Maria Reeves and Tracy Williams as consistent, whereas the Claimant's account was inconsistent, and indeed we observed this ourselves.

108. We were concerned by Ms Reeves' evidence that she considered the Claimant's conduct "sufficient enough to dismiss". This suggested to us that Ms Reeves was looking for a reason to dismiss the Claimant, rather than looking for evidence that might point away from dismissal. We also felt the sanction of dismissal, given the Claimant's clean disciplinary record, was potentially harsh. Ms Reeves gave evidence that she had dismissed other employees, including white employees, for similar wheelchair incidents in the past.

109. We also took into account the evidence from the Claimant and from her witnesses about other incidents within the home for which the alleged perpetrators were not dismissed.

110. The primary incident on which the Claimant relied was an occasion where, she alleged, Maria Reeves and Tracy Williams had left medication out on the table for a resident on 18 October 2018 and had gone out for a break before the medication was taken. The medication had then fallen on the floor and was picked up by Pamela Omoruyi. The Claimant alleged that this incident was reported by Ms Omoruyi to Ms Trochim, and that no action was taken against Maria Reeves or Tracy Williams, whereas Ms Omoruyi was dismissed. Having reviewed the evidence, we reached the following conclusions in relation to this incident:

110.1 Ms Trochim requested a written account of this incident from Ms Omoruyi after she had reported it. This was provided the next day (p. 17, supplemental bundle).

110.2 Ms Reeves denied the incident when asked about it.

110.3 Ms Trochim attempted to discuss this issue further with Ms Omoruyi on 24 October 2018, but Ms Omoruyi said she did not wish to do so (p. 20, supplemental bundle), and the matter was not taken further as a disciplinary action, although Maria Reeves was given a competency assessment.

110.4 We questioned Ms Trochim as to why this incident had been treated differently from the Claimant's case. Ms Trochim said that she had been given different advice by Manager Direct in the two cases and had not been advised to suspend Ms Reeves. She also said that there was a general problem with medication administration at the time, with all Team Leaders behaving inappropriately in this respect, meaning that there was a general coaching and training effort underway. This was supported by the CQC report dating from November 2018, which referred to a similar incident on the date of the inspection. We accepted this evidence from Ms Trochim.

110.5 Ms Omoruyi was not dismissed because of this incident and indeed no action was taken against her in respect of it, because she had done nothing wrong. We accepted that Ms Omoruyi had been dismissed for the reasons set out in her dismissal letter (p. 23 – 24, supplemental bundle).

110.6 There was no dispute that Michelle Reeves had no involvement in the medication incident, or how it was dealt with.

111. The Claimant also raised an incident where a resident had been injured whilst on a trip outside the home. We reviewed the evidence in relation to this, and there was nothing to suggest that this had been anything other than an accident. An AIMS form had been completed (p. 84 – 5). There was no basis on which action should have been taken against any staff member in respect of this incident. Insofar as the Claimant alleged that Ms Omoruyi was dismissed because of this incident, we found that this was not the case and that Ms Omoruyi had been dismissed for the reasons set out in her dismissal letter.

112. Finally, the Claimant alleged that two white members of staff had given a resident, AT, an overdose of Warfarin on 1 February 2019. The Claimant alleged that AT had been hospitalised following this event, but we were provided with his personal care records (p. 172) which showed that he had remained at Linwood during this time. There was no evidence on the basis of which we could find that this incident had occurred as the Claimant alleged.

113. We considered whether any of this evidence constituted facts from which we could conclude that the Claimant's dismissal was because of her race. We decided that there were no such facts. Although we were concerned by Ms Reeves' approach to the disciplinary hearing, which we felt was to try to find reasons to dismiss the Claimant, this is a claim for race discrimination, not unfair dismissal. We were satisfied that Ms Reeves would have acted in the same way regardless of the Claimant's race. There was no

evidence whatsoever to suggest otherwise. We did consider it possible that Ms Reeves could have been influenced by a perception of the Claimant as a troublemaker, given her grievance, but again we considered that this would have been the case regardless of the Claimant's race.

114. Ms Reeves had no involvement in the other cases described by the Claimant and thus we do not think they can be used to illustrate her approach to white staff. Further, we consider that even if the medication incident could raise a case that the Claimant was treated more harshly than white staff by Eva Trochim in instigating the investigation (if not by Ms Reeves in reaching her conclusion), we are of the view that Ms Trochim has provided a clear and full explanation for the different treatment of Maria Reeves, which has nothing to do with race.

115. For these reasons, we do not find the Claimant's dismissal to have been an act of race discrimination.

116. We have taken a step back and considered these alleged incidents as a whole, and we remain of the view that the Claimant has not proved facts from which we could conclude that the Respondent discriminated against her because of her race. The Respondent has also provided clear, non-discriminatory explanations for any detrimental treatment of the Claimant, which we accept.

Harassment

117. We can state our conclusions on harassment shortly as in this case they largely mirror our conclusions on direct race discrimination.

118. For the reasons given above, we do not find that the Claimant was subjected to the unwanted conduct she alleges in issues 8.1 - 8.3. The Claimant was not subjected to the alleged discriminatory comments; she was not refused permission to eat at work, and she was not made to work alone with 10 – 11 residents.

119. Further, insofar as the alleged conduct did occur, we find that it was not related to race, for the reasons given above in respect of direct race discrimination. We are mindful that the "related to" test implies a looser connection than "because of", but we have concluded above that there was no connection between the Claimant's race and the conduct of which she complains. In particular, we find that:

119.1 whilst Ms Trochim probably did ask the Claimant to stop shouting on one or more occasions, she did so because the Claimant had raised her voice, and would have done the same had the Claimant been white;

119.2 the rules relating to eating outside of breaktimes applied to all staff, and staff were permitted to take medication with food if required;

119.3 Linwood was understaffed and both white and black staff, including the Claimant's own witness, Mandy Surin, had to work with fewer staff available than would normally have been the case.

Time Limits: Equality Act 2010

120. In view of the conclusions we have reached above, it is strictly unnecessary for us to consider the issue of time limits. However, as we have heard argument on the issue and in case we are wrong in our primary conclusions, we briefly set out our decision on this issue here.

121. Had we found the dismissal to be an act of discrimination, we would have found that the claim had been brought out of time, owing to the rejection of the Claimant's initial claim form submitted on 16 April 2019, and the fact that the claim was not re-submitted until 24 June 2019. However, we consider that it would have been just and equitable to extend time in respect of the dismissal. The Claimant is a litigant in person who attempted to submit her claim in a timely manner, but in error recorded the wrong ACAS certificate number on the claim. Once this error was pointed out to the Claimant on 13 June 2019, she resubmitted her claim in short order, and there was a delay of only two months as a consequence. The information relating to the dismissal was largely set out in documentary evidence, meaning there was limited prejudice to the Respondent in dealing with this claim even though the case was heard over three years after the Claimant's dismissal. The explanation for the delay in submitting the claim was clear from the documents (although the Claimant gave no evidence on it) and balancing all the relevant factors, we feel it would have been appropriate to extend time.

122. Different considerations apply to the earlier complaints of direct discrimination and/or harassment. As we have found no acts of discrimination, there cannot be a continuing act. Considering the claims individually, we agree with the Respondent's counsel's submission that, as the Claimant only attempted to submit her claim for the first (ineffective) time over a month after the early conciliation certificate was issued (16th April 2019), anything occurring on or before 17 December 2018 would have been out of time even when that first submission was made. That comprises all the non-dismissal discrimination and harassment claims. We have decided that were these claims to have stood alone, we would not have considered it just and equitable to extend time in respect of them. This is because these claims rest largely on the testimony of the Claimant. Ms Trochim was unable to recall a number of the conversations raised by the Claimant and Ms Michaels' memory was also not fully clear. The Respondent is therefore prejudiced in responding to the claims. The Claimant's account of the various conversations has been inconsistent. Although much of the delay has not been the fault of the parties, it is nevertheless a factor we should take into account following *Johnson.* Further, the Claimant has not explained why she did not bring these claims before 16 April 2019, given that they would already have been out of time as at that date.

Holiday Pay

123. The Claimant made a claim for unpaid holiday pay, the basis of which was set out in her Further & Better Particulars at p. 36. The claim was in respect of the period 14 – 29 November 2018, which the Claimant said she had booked as holiday, but it was not authorised and thus not taken. There was no dispute between the parties that, in fact, the Claimant was suspended between 14 and 29 November 2018, and that she was paid in full for that period of time. The Claimant also agreed in oral evidence that the summary of her outstanding holiday balance on termination of her employment set out at p. 201 of the bundle was correct, and that she had been paid for this. We therefore understood that the Claimant had been paid in full for 14 – 29 November 2018, and that these dates had not been deducted from her accrued holiday allowance, which was paid in full on the termination of her employment. The Claimant is not, therefore, owed any holiday pay.

124. In view of this finding, it is not necessary for us to consider the time limit issues in respect of the holiday pay claim. However, had it been necessary, we would have decided that, in view of the matters set out at paragraph 121 above, it was not reasonably practicable for this claim to have been brought in time, and that the Claimant brought it within a reasonable further period. This claim only arose on dismissal. The Claimant was not aware that she had made an error with her ACAS certificate number until it was brought to her attention by the Tribunal, and she corrected it within a reasonable further period. The situation is very similar to that in *Adams v British Telecommunications plc* [2017] ICR 382, where the EAT substituted a decision that time should be extended, applying the "reasonably practicable" test.

Unauthorised Deductions from Wages

125. The Claimant claimed that the Respondent had deducted 7 hours from her annual leave entitlement in respect of 24 April 2018 without payment. The Claimant raised this in her letter to the Respondent's HR department on 5 October 2018 (p. 60), and again (when it had not been resolved) with Ms Michaels on 26 November 2018. Regarding this aspect of the Claimant's complaint, Ms Michaels sent an email to Mark Black on 30 November 2018, noting that the Claimant said she was owed 7 hours for 24 April, but that whilst three days were shown as taken for annual leave with only two paid:

"it looks like two days were paid annual leave and she had one of the days paid as basic rate (but she wasn't at work that day) so essentially it has been paid for all 3 but we need to add 7 hours annual leave to her remaining allowance."

126. Ms Michaels' evidence was that she had ensured that 7 hours of annual leave was put back into the Claimant's entitlement, and the Claimant confirmed that the total annual leave balance for which she was paid on termination was correct (see p. 201). We therefore accept that the Claimant was not owed any holiday pay in respect of 24 April 2018.

127. Finally, the Claimant alleged that she had not been paid 7 hours' wages in respect of a training day undertaken on 3 September 2018. This was also raised in her letter dated 5 October 2018 (p. 60) and remained outstanding when she spoke to Ms Michaels on 26 November 2018. We accepted Ms Michaels' evidence, supported by the emails between Ms Michaels and Mr Black at p. 94 – 95, that the Claimant had been wrongly recorded as on unpaid leave that day, and that Ms Michaels therefore arranged for payment of the outstanding 7 hours' pay, confirmed by Mr Black. The sum of £65.80 under the heading "Training (Back Pay)" appears in the Claimant's pay details for 26 December 2018 (p. 223), and the Claimant confirmed that she agreed this sum had been paid. We therefore find that the Claimant is not owed any wages in respect of the training day on 3 September 2018.

128. Again, given the findings we have reached, the question of time limits does not arise. However, had it been necessary, we would have found that it was reasonably practicable for the Claimant to have submitted these claims within time, and thus that time should not be extended. These claims arose well before the termination of the Claimant's employment. The Claimant has provided no explanation as to why they were not brought earlier.

Employment Judge A. Beale
Date: 15 July 2022