EMPLOYMENT TRIBUNALS

Claimant: **Miss N Woko**

Respondents: **1. Brooklands Care Home Limited**
2. Ms Katie-Anne Crane

Heard at: **East London Hearing Centre**

On: **8 – 10 June 2022 and (in chambers) 13 July 2022**

Before: **Employment Judge Scott**
Members: **Mrs G McLaughlin**
Mr M Rowe

Representation
Claimant: **In person, assisted by Miss Birks (friend)**
Respondent: **Mr Sutton (Consultant)**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that: -

1. **The claimant's claim of direct race discrimination against the first respondent contrary to s13 Equality Act 2010 is not well founded and is dismissed.**

2. **The claimant's claim of direct race discrimination against the second respondent contrary to s13 Equality Act 2010 is not well founded and is dismissed.**

3. **The claimant's claim of harassment related to race contrary to s26 Equality Act 2010 is not well founded and is dismissed.**

4. **The claimant's claim that the first respondent failed to provide her with a written statement of particulars of employment, contrary to s1 of the Employment Rights Act 1996, is well founded.**

REASONS

Introduction

1. The Tribunal convened on 8-10 June 2022 to hear the claimant's claims. The matter was listed for a full merits hearing. As Ms Woko was representing herself, the tribunal and the parties agreed that it would be sensible to determine liability first and consider remedy, if appropriate, thereafter. The Tribunal reserved its decision.

2. Ms Woko represented herself very ably, assisted equally ably by her friend, Miss Birks. We are grateful to them and Mr Sutton for their assistance.

3. At the outset of the Hearing the Tribunal and the parties agreed the final list of issues that the Tribunal were to determine on liability. It transpired during the hearing that the respondent had not seen Judge Reid's Preliminary Hearing summary. That is surprising, given that Judge Russell refers to it in her summary dated 5 January 2022. The respondent was content to proceed. One amendment was made to Judge Reid's list to include a second comparator (below) and one additional issue (whether Ms Woko was provided with a written statement of particulars of employment).

The issues

4. Ms Woko alleges that the respondents directly discriminated against her arising out of alleged acts/omissions in November 2020. Ms Woko relies upon the protected characteristic of race: she is a black woman. Ms Woko also alleges harassment related to race. The first respondent does not seek to rely upon the statutory defence.

Direct Race Discrimination:

4.1 Did the respondent(s) subject the claimant to the following treatment?

i. Ms Walker made up an allegation that the claimant had called a resident an offensive name?

ii. Ms Walker unnecessarily referred on the claimant's text to R2 on 9 November 2020 (the claimant accepts that it contains inappropriate language)?

iii. Ms Walker created a complaint that the claimant rushed residents, which is untrue?

iv. The second respondent unnecessarily treated the text sent on 9 November as a disciplinary issue?

v. The first respondent did not have grounds to report the claimant to the DBS regarding the comment about a resident?

vi. The first respondent failed to follow a fair disciplinary procedure?

vii. The first respondent dismissed the claimant for Gross Misconduct without notice without grounds to do so?

4.2 If so, was that less favourable treatment? Did the respondent(s) treat the claimant less favourably than it treated an actual comparator or would have treated a hypothetical comparator, where there was no material difference in circumstances compared with the Claimant. The claimant relies upon Ms Svoboda and Ms Young in relation to issues 3.1(v); (vi) & (vii). In other respects, the claimant relies upon a hypothetical comparator. In constructing the hypothetical comparator, she refers to the way that other employees were treated (1) Chloe and (2) Hope.

4.3 If so, in respect of each allegation, was the less favourable treatment because of the claimant's race?

4.3.1 Has the claimant proved facts from which the employment tribunal *could* conclude that the respondents treated the claimant less favourably because of the claimant's race?

4.3.2 If so, have the respondents shown that the matters complained of were not because of the claimant's race?

Harassment:

5. The claimant relies upon the following alleged act as an incident of harassment:

Ms Crane deliberately shouted at the claimant when quoting the swear words in the text message. The claimant says she felt humiliated and embarrassed.

5.1 Did the act occur?

5.2 If so, did the act constitute an act of harassment: -

5.2.1 Was the conduct unwanted? If yes:

5.2.2 Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading or humiliating or offensive working environment for Claimant?

5.2.2.1 Has the claimant established facts from which the Tribunal could so conclude? If yes:

5.2.2.2 Has the Respondent proved that the conduct did not have that purpose?

5.2.2.3 Should the conduct reasonably be considered as having that effect? If yes:

5.2.3 Was the unwanted conduct related to the Claimant's race?

5.2.3.1 Has the claimant established facts from which the Tribunal could so conclude? If yes:

5.2.3.2 Has the Respondent proved that the conduct was not related to race?

In deciding whether the alleged conduct has the effect above, the Tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect, pursuant to s26(4) EqA 2010.

Failure to provide a statement of employment particulars

6. When these proceedings were begun, was the first respondent in breach of its duty to give the claimant a written statement of employment particulars? If so:

6.1 Has the claimant succeeded with any of the claims brought under the EqA 2010? If so:

6.2 Are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

The evidence and the Tribunal's findings of fact

7. There was one bundle of documents. We were also provided with witness statements from the claimant (Ms Woko), the second respondent (Ms Crane) (Registered Manager) and Mr Nair (MD). During the course of the hearing, we were also provided with the Peninsula Report for Ms Svoboda [R1], a SET SAF 1 form [R2] and the claimant's supervision records [R3]. We read the witness statements and the documents we were referred to and we heard oral evidence from Ms Woko, Ms Crane, and Mr Nair. We have taken all the evidence into account in reaching our decision and refer in our reasons to the evidence which is relevant to our specific findings. We also took into account the parties' helpful submissions. References to page numbers [x] are to pages in the bundle/additional documents.

8. We made the following findings of fact relevant to the claimant's complaints.

9. The respondent is a registered provider of care. The respondent is regulated by the Local Authority and the CQC and is bound to follow relevant regulatory rules. Ms Crane (R2) is the Registered Manager for the first respondent. She worked at Ailsa House (another care home for which Mr Nair has responsibility) from August 2018 until September 2020. She moved to the Brooklands Care Home (R1) in September 2020.

10. Ms Woko started employment with the first respondent as a Health Care Assistant (HCA) on 18 December 2019. She worked nights. Her employment ended on 11 November 2020. Prior to working for the respondent, Ms Woko had worked in similar roles in care homes and hospitals for approximately 8 years. Ms Woko's shift with the first respondent started at 8pm and finished at 8am. When Ms Woko was on duty, she worked with three other HCAs and a qualified nurse. There are forty-eight residents' rooms spread over two floors. Two HCAs worked on each floor of the care home. Ms Woko often worked with Ms

Nair, the qualified nurse on duty, but not always (Ms Nair is not related to the first respondent's witness, Mr R Nair). Residents are free to leave their rooms as and when they wish. Fluid charts are maintained for residents. By the start of the second lockdown period, there were fewer residents (~32). The first respondent did not furlough any staff.

11. Ms Woko says that she was not provided with a written contract of employment (or any other document) setting out employment particulars). At [306], Ms Woko states that 'the respondent could not locate my contract of employment'. When asked about this in cross examination, Ms Woko stated that she was not provided with a contract, but she assumed that the respondent would have it. We accept that to be the case. At [59] there is no signature by '*contract issued*' and/or '*signed and returned'*. Ms Woko does sign at [60] but that declaration states that she '*accept[s] its contents as forming part of [her] contract of employment.*' We find as a fact that Ms Woko was not provided with a written contract of employment (nor any other document satisfying s1), although some of the matters set out in s1 of the ERA 1996 were discussed with her (e.g., holiday entitlement).

12. Ms Walker joined the respondent in late October 2020, not long before Ms Woko was dismissed. The date Ms Walker started is unknown. It is clear that she had started work with the respondent on or before 24 October 2020 [205]. Her employment began not long before she raised a complaint regarding Ms Woko (see below). Ms Woko and Ms Walker worked together on one floor of the care home on 4 or 5 occasions. Ms Woko and Ms Walker were in text contact with each other outside of work [205-218]. There was no known prior history of issues between Ms Woko and Ms Walker or Ms Nair.

13. On 2 November 2020, Ms Nair informed Ms Crane that Ms Walker had made a complaint to her about Ms Woko's conduct on the nightshift of 1-2 November 2020. Ms Crane asked Ms Nair to ask Ms Walker to put the allegation in writing [109]. In that handwritten statement, received by Ms Crane on 3 November 2020 under her office door, Ms Walker alleges that Ms Woko had called a resident a '*bastard*' and told him to '*shut up*' when he shouted out in pain and that Ms Woko thought that a '*few residents were bastards*'. Ms Woko has always denied and continues to deny the allegations made by Ms Walker.

14. When Ms Crane received the statement at [109] from Ms Walker, she spoke to Peninsula (HR advisor). They advised her to carry out an investigation. All and any allegations of abuse must be investigated.

15. On 6 November 2020, Ms Crane invited Ms Woko to an 'investigation' meeting [110]. The letter stated that the purpose of the meeting was to '*allow [the claimant] the opportunity to provide an explanation for the following matter(s) of concern:*

> *Alleged inappropriate conduct during shift.*
>
> *The meeting will be conducted by [Ms Crane]….*

Possible outcomes from our meeting are that we may decide that it is necessary to pursue a formal disciplinary procedure …or…that there are no grounds for this….'

The letter was received by Ms Woko on 9 November. Ms Woko was off work sick that night and did not work again before the meeting on 11 November (below).

16. Ms Nair provided a statement dated 7 November 2020 [111]. In that statement Ms Nair said that she had advised Ms Woko that it is not appropriate to '*talk to them loudly and to rush them back…. Advised to be more gentle and patient while she is caring for residents.*' Ms Woko denies this. If she spoke loudly, it was because a resident was hard of hearing. If a resident leaves their room at night, she may have to escort them back to their room.

17. We did not hear evidence from Ms Walker. Ms Crane told us that Ms Walker left the respondent company because of personal reasons that were explained to us, but we do not repeat here. We accept Ms Crane's evidence as to the reason Ms Walker left the respondent's employment.

18. Ms Crane states in her evidence in chief that she 'spoke to other employees' as part of her 'investigation' [WS para 7]. Ms Crane told us when questioned that all she had done was to speak to Ms Nair again. Ms Nair provided a statement on 7 November 2020 (above). Ms Crane also states that '*as part of our investigation we found that numerous members of staff reported Ms Woko for use of bad language in and around the home, as well as towards residents*' [WS para 8]. However, Ms Crane did not speak to other staff as part of *her* investigation. Those statements were secured in February 2021 as part of the appeal process [133, 134, 135, 136], notwithstanding that Ms Crane's statement might suggest that they were secured by her before she invited Ms Woko to the 11 November meeting [paras 8 & 9 WS]. When asked which residents she spoke to, Ms Crane said that she could not recall but that she did not go into many rooms and that none of the residents recalled Ms Woko [119]. Ms Woko told us that if she had abused residents, they would have remembered her.

19. Ms Crane spoke to Peninsula after receiving Ms Nair's statement. They did not advise suspension because there was no allegation of physical abuse. We accept that is why Ms Crane did not suspend Ms Woko as part of the process.

20. Ms Walker and Ms Woko exchanged texts outside work on 9 November [214-218]. One of Ms Woko's texts is at [204]. Ms Woko accepts that the language used was inappropriate and is sorry that she used the language. Ms Walker referred the text on to Ms Crane. Ms Crane did not see the text thread that we have in the bundle.

21. Ms Crane did not elaborate on the allegations to be considered at the investigatory meeting prior to the meeting. All the claimant had was the invitation to the meeting (above), which simply stated *'Alleged inappropriate conduct during shift'.* She was not aware *what* conduct was to be investigated. She was not aware that Ms Nair had provided a statement. She was not aware that Ms Walker had referred the text to Ms Crane. She was not aware that the allegations could result in dismissal. She was not advised of a right to be accompanied (to a disciplinary hearing).

22. Ms Woko attended the 'investigatory' meeting at 10am on 11 November (Ms Woko did not work between 9-11 November – she called in sick on 9 November). Ms Woko had not been advised that she could be accompanied to the meeting (because she had been invited to an 'investigatory' meeting). The handwritten notes of the meeting are at [112, 112a, 113]. Ms Woko maintained that the allegation made by Ms Walker about shouting/swearing at residents was a lie. The notes record that Ms Woko was '*shocked*' and '*abrupt*', stating that she is '*not a threat to any resident and does not rush them'*. The notes refer to Ms Woko having had '*supervisions with nurses on shift who advised to be more gentle and calm with residents. She remembers these'*. Ms Crane did not advise Ms Woko

that she considered the allegations, if established, to amount to gross misconduct. So, although Ms Woko signed the notes, she was not aware how serious the matter under investigation was considered. The notes refer to Ms Woko being asked about the text that she sent to Ms Walker [204]. We think that having been sent the text, it reasonably formed part of Ms Crane's investigation. Ms Woko apologised (as she did before us) and said that she was unwell when she wrote the text, as well as being agitated because she had been reported. Ms Woko told us during the hearing that the notes are '*reconstructed*' and that the notes she signed were much shorter. We find as a fact that the notes are an accurate record. We have no reason to doubt the accuracy of the handwritten notes. But we also record that Ms Woko signed the notes before she was aware that the allegations were considered to amount to gross misconduct and/or that she was at risk of dismissal. The notes do not reference gross misconduct or that dismissal was a possible outcome.

23. We were taken to [103-108] (Social Care Institute for Excellence 'Types and Indicators of Abuse'). The 'indicators of abuse' were not put to Ms Woko at the investigatory meeting.

24. We were provided with Ms Woko's supervision records during the hearing. Ms Crane had told us that the claimant had been 'warned' in supervisions. There is no record of the claimant being warned in the records. There is no supervision record of Ms Woko being asked to be 'gentler' or 'calmer' [R3]. Ms Crane was, we concluded, referring to Ms Nair's statement dated 7.11.20 [above, 111].

25. Ms Woko alleges that Ms Crane 'deliberately shouted at [her] when quoting the swear words in the text message'. Ms Crane denied raising her voice and, on balance, we find that Ms Crane did not raise her voice during the meeting. We reach that conclusion because Ms Woko did not make the allegation until 17 May 2021, in response to a request from the Tribunal for further information [43]. She did not raise the issue in her grievance/appeal letter, nor at the appeal hearing. We think that she would have done so if it had happened. We think that Ms Woko mis-remembered the event. We do not think she is lying.

26. Ms Crane did not speak to anybody else as part of her investigation. She did not speak to Ms Walker as part of the investigatory process. She did not speak to other members of staff who worked with Ms Woko (i.e., other HCAs or qualified nurses). The claimant had worked with other nurses and HCAs. Ms Crane concluded that as Ms Walker and Ms Nair (the claimant's manager) had provided statements (above), there was no need to speak to other nurses/HCAs. We find that surprising given that the allegation, if established, amounted to gross misconduct in Ms Crane's view, but we accept that is what she thought. Ms Crane told us that the resident concerned would not recall and that she did not speak to him for that reason. But she did not check. She did not access the CCTV (cf Ms Svoboda (below)). There were no complaints about Ms Woko until Ms Walker's statement. At the very least, the so-called investigation was, we think, wholly inadequate.

27. At the end of the short meeting (10.33am), Ms Crane asked Ms Woko if she was happy to wait whilst she spoke to her HR advisors for advice. Ms Crane sent the notes, text, and Ms Walker's/Nair's statements to Peninsula and spoke to them on the phone to seek their advice. Ms Crane states in her evidence in chief that '[*she*] *came to the conclusion that Ms Woko's conduct amounted to psychological or emotional abuse in line with SCIE's definition'* [105], having considered '*the statements of Ms Walker and Ms Nair, [the claimant's] admission of previously being advised to be more calm and gentle and the claimant's lack of an explanation as to why she thought the allegation by Ms Walker was a*

lie' [WS para 12]. It is not clear what explanation Ms Crane thought the claimant could provide of that. Ms Crane did not speak to Ms Walker.

28. Ms Woko was dismissed for gross misconduct on 11 November 2020, following the 'investigatory' meeting [114]. Ms Crane signed the letter. She uses the word '*I*' throughout the letter. Ms Crane states that having heard Ms Woko's explanation that the '*incidents did not happen and you denied the use of language at work …admit the use of inappropriate language in a text message to a fellow staff member….I considered your explanations to be unsatisfactory as we have statements….The appropriate sanction is summary dismissal'.* Ms Crane told us that she relied upon Peninsula's advice as to the appropriate course of action. We accept her evidence that she did not take the decision but rather relied upon Peninsula's advice, notwithstanding the use of 'I'. Ms Woko was advised of a 5-day appeal period.

29. Ms Crane did not invite Ms Woko to a disciplinary hearing and did not therefore advise Ms Woko that she had a right to be accompanied to such a meeting, prior to a decision to dismiss being taken. Ms Crane told us, and we accept her evidence, that she was advised by Peninsula that no disciplinary hearing was needed. We accept the claimant's evidence that she did not swear at the resident as alleged by Ms Walker. Ms Crane did not show the claimant supervision records during the meeting. Moreover, there are no supervision records supporting the allegation that the claimant rushed residents. If we had been asked to determine whether the claimant was wrongfully dismissed in breach of contract, we would have concluded that she was, because we would have concluded that the claimant's action of sending the text to Ms Walker outside work amounts did not amount to gross misconduct. The text was, as the claimant accepts, inappropriate, but it was a private text sent to a colleague outside work hours. However, we accept that Ms Crane considers and considered the actions of Ms Woko to amount to gross misconduct – she concluded that the claimant did swear at a resident (she considered that the text sent to Ms Walker supported that allegation) and that that conduct was 'psychological or emotional abuse' [105]. She also concluded that the claimant had rushed residents. The claimant did not deny sending the text. Ms Crane acted upon Peninsula's advice. That is why she took the decision to summarily dismiss, albeit following an inadequate investigation and in the absence of a disciplinary hearing. The first respondent subsequently paid Ms Woko in lieu of notice and paid outstanding accrued holiday pay.

30. Ms Crane alerted a safeguarding concern to the local authority on 11 November 2020 [R2/115-6]. We found it very surprising that the *SET SAF 1* form refers to a '*whole home*' referral. The allegation referred to Ms Crane by Ms Walker referenced one resident. The reference to 'whole home' was therefore a gross exaggeration. The SET SAF references '*psychological abuse*'. On 12 November, the Local Authority asked whether Ms Crane had submitted a DBS referral [115-116]. A DBS referral was later submitted by Ms Crane dated 12 November 2020 [117-20]. We find as a fact that Ms Crane had to submit a DBS referral, having dismissed the claimant for the reasons relied upon. The DBS outcome letter (of August 2021) records that '*having reviewed all the information … it is* ***not*** *appropriate to include [the claimant] in the barred lists*' [183].

31. Ms Woko raised a (late) complaint with Mr Nair dated 13 January 2021 [126-30]. In her complaint, she says that she believes that Ms Walker had begun '*a discriminatory campaign against me because I was the only black member of staff on the night shift*…' [127]. Mr Nair wrote to Ms Woko by letter dated 21 January 2021. He said that her 'appeal' would be conducted by Peninsula. We record that claimant does not allege that Mr Nair did

anything wrong or discriminatory. He did not have to take the appeal forward, given the late submission, but he did so nonetheless. A hearing was held on 28 January 2021. As part of the appeal investigation, statements were obtained from staff [133-136 (dated 1 February 2021)]. Ms Woko was not shown the statements taken from other staff at [133-136]. They were taken after Ms Crane spoke to Peninsula as part of the appeal process and are referenced in the report. The report is at [137-176]. Following receipt of the report, the dismissal was upheld by Mr Nair, although a decision was made to pay Ms Woko 4 weeks' pay in lieu of notice because no disciplinary hearing had been held [177]. Ms Woko told us that she thinks that the appeal process was fair and that the reason Peninsula did not get all the facts was her 'own fault'. The claimant does not allege that Mr Nair treated her less favourably because of race or at all.

32. Ms Woko believes that the statements at [133-136] were all constructed after she brought legal proceedings. But they are all dated 1 February 2021 which is before she issued her claim form on 15 February 2021.They are, however, all dated after Ms Woko appealed Ms Crane's decision. We find as a fact they were taken from staff as part of the appeal process, although they were not put to the claimant during the appeal.

33. Ms Woko made an anonymous safeguarding alert complaint to the CQC in July 2021 [178-181]. The outcome is at [184-190].

34. Ms Woko relies upon two named comparators, in addition to a hypothetical comparator:

1. Ms Svoboda [262-297]
2. Ms Young [222-251].

35. Ms Woko says that Ms Svoboda was dismissed with notice (the allegation being a conduct issue - hitting a resident), that a referral to the DBS took 6 weeks (Ms Woko accepts that a report was made (cf the list of issues)) and says that Ms Svoboda had a fair dismissal process applied to her. Ms Woko says that Ms Young was previously warned about her language by Ms Crane, that she put her hand over a resident's mouth, and that a referral to the DBS took 2-3 weeks.

36. Our findings are that:

- Ms Svoboda is a white woman. Ms Svoboda began work with the first respondent on 20 November 2019. She was subject to a final written warning issued in November 2020. She was suspended on full pay by letter dated 7 December 2020 because there was an allegation of physical abuse. She was accused of physical abuse towards a resident (slapping a resident on the arm, grabbing a resident by the arms instead of shoulders/knee/hip when supporting a resident) [262]. Statements were provided by Chloe [263], Ivelina [264-265], Ibolya [266]. Ms Svoboda was invited to an investigatory meeting by letter dated 9 December [267-277]. The meeting took place on 14 December [273-277]. Mr Nair spoke to Divya on 6 & 8 January 2021 [279], Chloe on 18 January [280], Nikola on 5 January and again 18 January [281], Ivelina on 6 January and again on 18 January [282], Ibolya on 19 January [283], Klapana on 6 January and 19 January [284]. CCTV footage was reviewed. A letter inviting Ms Svoboda to a disciplinary hearing is dated 8 January 2021 [276-277]. The allegations were that Ms Svoboda slapped a

resident on the arm, was rude to colleagues, grabbed a resident by the arms instead of shoulders/knee/hip when supporting a resident, belittling a resident, and accessing the first respondent's system from her computer. The letter enclosed statements from Mr Nair's meetings with Kalpana, Nikola, Ivelina (above) and a note of a telecon between Mr Nair and Ms Svoboda on 8 January 2021 [278] and the CCTV footage. The disciplinary hearing took place on 26 January 2021 [285-291]. Ms Crane did not ask Ms Svoboda to wait for a decision at the end of the meeting because it was an online meeting. The outcome letter is dated 1 February 2020 (should be 2021) [292-293]. Ms Crane concluded that Ms Svoboda's 'explanations [were] unsatisfactory'. She spoke to Peninsula and Ms Svoboda was dismissed for gross misconduct and advised of a 5-day appeal period. The appeal was conducted by Peninsula [R1]. The outcome letter is dated 12 March 2021 [294-296]. The decision to dismiss for gross misconduct was upheld. A DBS referral was made on 18 March 2021 [297]. before the latest allegations. Ms Woko alleges that Ms Svoboda was subsequently reinstated, but we have not seen any evidence of that and do not accept that.

- Ms Young is a white woman. She began work with A H Care Home Ltd at Ailsa House on 3 September 2018. Ms Crane accepted that Ms Young had previously been warned about her language in supervisions, but the language was not directed at residents. A resident raised an allegation of physical abuse on 12 June 2019. Ms Crane wrote a note dated 12 June 2019 concerning allegations raised in respect of Ms Young [222]. Ms Young was suspended on full pay on 12 June because there was an allegation of physical abuse [229]. The resident's next of kin was informed and Ms Crane spoke to the 'access team' and the police. The resident was checked by a doctor [226-227]. Ms Young was invited to an investigatory meeting by letter dated 13 June 2019. The allegations were of physical abuse, sleeping on duty, not following instructions, rushing residents, inappropriate use of work equipment, inappropriate use of language during work time (not directed at residents) and using a mobile phone at work [228]. A SET SAF 1 form was completed by Ms Crane on 13 June 2019 (it does not name the resident but does not refer to 'whole home referral' [230-236]. It references physical abuse. It states that Ms Young had been suspended. A statement was taken from Jodie, Deputy Manager, on 15 June 2019 [237]. An investigatory meeting took place on 20 June 2019 [238-243]. Ms Young admitted all the allegations except those of physical abuse. The notes of the meeting were sent to Peninsula after the meeting and Ms Young was told on the phone on 25 June 2019 that she was dismissed for gross misconduct (there was no disciplinary hearing). A letter dated 25 June 2019 confirming dismissal was sent [251]. A DBS referral was completed [244-30]. It is not clear when the form was completed or sent to the DBS – but it must have been after 5 July 2019 [248]. Ms Crane did not ask Ms Young to wait for her to telephone Peninsula at the end of the meeting because Ms Young had childcare responsibilities.

37. In constructing a hypothetical comparator, Ms Woko refers to the way that other employees were treated (1) Chloe and (2) Hope.

- Chloe is a white woman. She was performance managed by Ms Crane. There were no allegations of abuse or use of bad language against Chloe. But there

were concerns about her productivity/conduct on the night shift. Ms Crane told us that Chloe was accused of being lazy and not completing her work properly (e.g., laundry). She was also off sick more than other staff. As a result, she was moved to the day shift for observation [298].

- Hope is a black woman. She began work for the respondent as a qualified nurse on 1 April 2020. Her employment ended on 5 October 2020. She was employed on a work visa which the respondent paid for. On 22 September Kelly provided a statement in respect of Hope's behaviour at work [252]. Neneh also provided a statement [254]. Hope was invited to an investigatory meeting to take place on 1 October by letter dated 22 September 2020 [253]. The allegations were of rude behaviour towards staff in front of residents and Ms Crane, giving medication to an unqualified member of staff to give to a resident, being late to work, drag lifting a resident. Hope was invited to a probationary review meeting to take place on 5 October by letter dated 2 October 2020 [255]. The notes of the investigatory meeting are at [256-259] and those of the probation review meeting at [260-261]. The respondent decided that Hope had not passed her probation period by reason of being late to work. Hope was not referred to the DBS.

38. Ms Walker left the respondent for a serious personal reason that we heard about, but do not feel necessary to say more about in these reasons. We accept the reason provided by Ms Crane for Ms Walker's departure from the respondent and that for that reason they did not ask her to attend the Tribunal as a witness.

Submissions

39. Both parties had the opportunity, which they took, to make oral submissions to the Tribunal at the end of the evidence. The respondent also provided written submissions. We had regard to those submissions in reaching our decision.

Law

The claimant complains of direct discrimination because of race and harassment related to race and failure to provide a written statement of particulars of employment. Employers are vicariously liable for the acts of their employees done in the course of employment (Equality Act 2010 ('EqA 2010') s109).

Direct discrimination

40. Race is a protected characteristic (ss 4 and 9 of the EqA 2010). Race includes colour.

41. Section 13(1) of the EqA 2010 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."*

42. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator is or would be. Section 23(1) of EqA 2010 states *"On comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case."* If the circumstances of a named comparator are

materially different to those of the complainant, that person is not a valid comparator. However, we may also consider how a hypothetical comparator would have been treated, and in so doing can consider the evidence of how other people were treated (even if they are not valid comparators under s23(1)).

43. The Equality and Human Rights Commission: Code of Practice on Employment 2011 ('the Code of Practice') sets out helpful guidance for carrying out the comparator exercise. As to the identity of the comparator, paragraph 3.23 of the Code of Practice states: "*The Act says that, in comparing people for the purpose of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator".*

44. As to the comparison exercise for a hypothetical comparator, paragraph 3.27 of the Code of Practice states: "*Who could be a hypothetical comparator may also depend on the reason why the employer treated the Claimant as they did. In many cases, it may be more straightforward for the Employment Tribunal to establish the reason for the Claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the Claimant to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can be found".*

45. In *Shamoon v Chief Constable of Royal Ulster Constabulary* [2003] IRLR 285, Lord Nicholls referred to the question of whether the Claimant had received less favourable treatment than the appropriate comparator as "*the less favourable treatment issue*" and the question of whether the less favourable treatment had been on the relevant proscribed ground as "*the reason why issue*". At paragraphs 7 and 8, he observed:

> "7. *Thus, the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.*
>
> *8. No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined."*

46. At paragraph 11, he continued:

> *"[…] 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 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."

Harassment

47. Under section 26 of the EqA 2010, 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."

48. In deciding whether conduct has the effect referred to, the tribunal must take into account: "*a) the perception of B; b) the other circumstances of the case; c) whether it is reasonable for the conduct to have that effect*." There are therefore subjective and objective elements but overall, the criterion is objective. The tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for them to do so (*Richmond Pharmacology v Dhaliwal* [2009] IRLR 336). By ss 39 & 40 EqA 2010 it is unlawful for an employer to discriminate by subjecting a person to any detriment or to harassment. Section 212(1) of the EqA 2010 provides that detriment does not include conduct which amounts to harassment. Therefore, any conduct which amounts to harassment cannot also amount to a detriment for the purpose of a direct discrimination claim.

49. We note that "related to" in s26 has a potentially wider reach than the direct discrimination (s13) test of "because of" *(EOC v Secretary of State for Trade and Industry* [2007] ICR 1234 (though see too *Unite the Union v Nailard* [2018] IRLR 730 CA). Conduct which is because of a protected characteristic will always be related to the protected characteristic. However, conduct may be found to be related to a protected characteristic, even though it is not because of the protected characteristic.

Burden of proof

50. Sub-sections 136(2) and (3) of the EqA 2010 provide for a reverse or shifting burden of proof:

"(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) This does not apply if A shows that A did not contravene the provision."

This means that if there are facts from which the tribunal could properly and fairly conclude that a difference in treatment was because of the protected characteristic, the burden of proof shifts to the respondent.

51. In *Igen v Wong*[1], the Court of Appeal held that it is for the claimant who complains of discrimination to prove, on the balance of probabilities, facts from which the tribunal could

[1] The *Barton* guidance, as approved in *Igen* (subject only to minor amendments), is as follows:
"(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that

conclude, in the absence of an adequate explanation, that the respondent has committed an act of unlawful discrimination. In deciding whether the claimant has proved such facts, it is important to remember that the outcome, at this first stage of the analysis by the tribunal, will usually depend on the inferences which it is proper to draw from the primary facts found by the tribunal. The tribunal is looking for primary facts to consider what inferences of secondary fact might be drawn. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. "*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*". (*Madarassy v Nomura International plc* [2007] ICR 867; *Laing v Manchester City Council* (2006) ICR 1519). Whilst something else is therefore needed to reverse the burden "not very much" needs to be added to a difference in status and a difference in treatment in order for the burden to be on the respondent to prove a non-discriminatory explanation (see, for example, *Veolia Environmental Services UK v Gumbs* UKEAT/0487/12).

52. Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably because of race, it is then for the

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the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in SDA 1975 s 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 74(2)(*b*) of the SDA 1975 from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA 1975.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

respondent to prove that it did not commit that act. In order to do so, it must prove, on the balance of probabilities, that the treatment was in no sense whatsoever because of race. That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but, further, that it is adequate to discharge the burden of proof, on the balance of probabilities, that race was not a ground for the treatment in question. The respondent must prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of the protected characteristic. The respondent would normally be required to produce "cogent evidence" of this. If there is a prima facie case and the respondent's explanation for that treatment is unsatisfactory, then it is mandatory for the tribunal to make a finding of discrimination.

53. As the Court of Appeal held in *Ayodele v Citylink Ltd and Anor* [2018] ICR 748, at paragraph 106, the principles in *Igen v Wong* remain good law in relation to s136 EqA 2010. The change in wording from the predecessor provisions simply makes clear that what should be considered at the first stage is all of the evidence, and not simply the evidence adduced by the claimant. In *Royal Mail Group Limited v Efobi* [2021] UKSC 33, the Supreme Court emphasised that tribunals are free to draw, or decline to draw, inferences in the case before them using their common sense. In deciding whether to draw an adverse inference from the absence of a witness, relevant considerations will include whether the witness was available to give evidence, what evidence the witness could have given, what other evidence there was bearing on the points on which the witness could have given evidence and the significance of those points in the context of the case as whole.

54. Section 136 has nothing to offer where the Tribunal is able to make positive findings on the evidence. If so, it can simply state its reasoned positive conclusion. See: *Hewage v Grampian Health Board* [2012] ICR 1054 (SC).

Statement of Employment Particulars

55. Workers have the right to a written statement of terms and conditions under s1 ERA. Under s38 of the Employment Act 2002 successful claims brought under any of the jurisdictions listed in Schedule 5 to that Act entitle the claimant to recover compensation where the employer has failed to provide the claimant with a statement of his or her employment particulars as required under S.1 of the Employment Rights Act 1996 (ERA).

Conclusion

56. We begin with a comment. We have no doubt that Ms Crane's investigation was inadequate and that Ms Woko's dismissal was unfair at that stage. However, Ms Woko does not have two years' continuous employment, so she is not eligible to bring an unfair dismissal claim. If we had been asked to reach a conclusion upon whether Ms Woko was wrongfully dismissed, we would have found in Ms Woko's favour. The Tribunal would have concluded, contrary to Ms Crane's conclusion, that Ms Woko did not commit gross misconduct.

57. Dealing now with the issues we have to decide, we begin with the direct race discrimination complaint in respect of issues 4.1(i)-(iii).

- **Whether the claimant was treated less favourably because of race:**

- **Ms Walker made up an allegation that the claimant had called a resident an offensive name**
- **Ms Walker referred on the claimant's text to R2 on 9 November 2020**
- **Ms Walker created a complaint that the claimant rushed residents, which the claimant says is untrue.**

58. There are two issues. The first is: was there 'less favourable treatment', in accordance with sections 13 and 23 of the EqA 2010. The claimant has to show that she was treated less favourably than others in materially the same circumstances – "comparators" – were or would have been. The second issue is: if the claimant was less favourably treated than a comparator, was this because of the protected characteristic of race. The key issue is not what happened, but *why* it happened. We begin with the second, on the assumption, for the moment, that there was less favourable treatment.

59. Ms Crane did not speak to Ms Walker about the allegation/the text referral as part of her investigation, nor did Peninsula speak to Ms Walker as part of the appeal process. At no stage has her account been investigated. We did not hear evidence from Ms Walker either. Ms Walker was not asked by the respondent to attend the Tribunal hearing to give evidence by the respondent. The claimant could have requested a witness order to secure Ms Walker's attendance at the Tribunal. We understand why she did not. She assumed that the first respondent would call Ms Walker to give evidence. But they did not do so. Ms Walker did not refuse to give evidence to the tribunal; she was not asked by either party to do so.

60. We must decide whether there is evidence from which we *could* conclude that the allegations/text referral were less favourable treatment *because of race* (in the absence of an adequate explanation from the first respondent), as the claimant alleges. The authorities require an explanation of conduct only where there is a basis for thinking that the conduct is potentially discriminatory. Direct evidence of discrimination is, of course, rare and tribunals frequently have to infer discrimination from all the material facts. However, in our view the claimant has failed to prove facts from which we could conclude that there was less favourable treatment because of race. We have decided that we do not draw an adverse inference from the absence of Ms Walker at the tribunal hearing, because we accept the respondents' evidence that Ms Walker left their employment for a valid serious personal reason and that is why the first respondent did not ask Ms Walker to give evidence at the Tribunal. We also conclude there are no other findings of fact from which we might infer that the less favourable treatment at issues (i)-(iii) was because of race. Put another way, there is simply insufficient evidence from which we could conclude that Ms Walker did what she did because of the claimant's race. As we do not draw an adverse inference from Ms Walker's absence and there are no other findings of fact from which we might infer that the treatment relied upon at issues (i)-(iii) was because of race, the claimant's claim that the first respondent treated her less favourably because of race in respect of the issues 4.1(i)-(iii) fails and is dismissed.

61. Continuing with the direct race discrimination complaint in respect of issues 4.1(iv)-(vii).

- **Whether the claimant was treated less favourably because of race:**

- **The second respondent unnecessarily treated the text sent on 9 November as a disciplinary issue**

- **The first respondent did not have grounds to report the claimant to the DBS regarding the comment about a resident**
- **The first respondent failed to follow a fair disciplinary procedure**
- **The first respondent dismissed the claimant for gross misconduct without notice without grounds to do so.**

62. It is not always necessary to adopt a rigid two stage burden of proof approach. It is not necessarily an error of law for a tribunal to move straight to the second stage of its task under section 136 of the EqA 2010 (see, for example, *Pnaiser v NHS England* [2016] IRLR 170 EAT) on the assumption that the first stage has been satisfied. The claimant will not be disadvantaged by that approach since it effectively assumes in her favour that the first stage has been satisfied. The risk is to a respondent who then fails to discharge a burden which ought not to have been on it in the first place (see *Laing v Manchester City Council* [2006] ICR 1519 EAT, approved by the Court of Appeal in *Madarassy*).

63. At the second stage of s136, the respondents have the burden of proving on the balance of probabilities that the claimant's race formed no part whatsoever of the reason for the failure to follow a fair disciplinary procedure and/or the decision to dismiss (without notice) and/or to treat the text as a disciplinary matter and/or to make a DBS referral. The respondents are required to show a non-discriminatory reason for the treatment in question. An employer who is seeking to offer an explanation for what could be seen as discriminatory conduct need not show that he acted reasonably or fairly in relying on such a reason (*Griffiths-Henry v Network Rail Infrastructure Ltd [2006] IRLR 865).* However, if an explanation is unsatisfactory, it might be difficult for a respondent to satisfy the tribunal that the conduct in question was nothing whatsoever to do with the protected characteristic. That said, the credibility of the purported reason will be relevant in establishing whether or not it is genuine

64. We find that the respondents have discharged the burden. Having heard the evidence, the Tribunal is satisfied that the reason for the Respondents' treatment of the claimant was that Ms Crane relied upon the advice of Peninsula when making the decision to proceed to investigate the allegation, when making the decision to summarily dismiss the claimant following the investigatory meeting (in the absence of a disciplinary hearing and without speaking to Ms Walker or other HCAs/nurses). The advice from Peninsula was the *reason* Ms Crane investigated the allegation that the claimant had sworn at a resident and was the reason why the respondent summarily dismissed the claimant after the investigatory meeting without following a fair process. She was simply communicating a decision. The Tribunal is satisfied that Ms Crane was not motivated, consciously or unconsciously, by the claimant's race. Ms Crane relied upon Peninsula's advice. It will already be clear that we conclude that the claimant was treated unfairly and unreasonably by Ms Crane, but we do not think that race played a part in the treatment of the claimant by the first or second respondent in any way whatsoever. A finding of unreasonable treatment cannot by itself justify an inference of discrimination. We did consider whether it was simply too convenient for Ms Crane to hide behind Peninsula's advice and that reliance on their advice was not the real reason for her actions. We concluded it was not and that she did genuinely rely upon their advice; reliance upon the advice was why she took the actions she did. She reported the allegation to Peninsula. She was advised to investigate. She advised of the outcome of the investigation by providing Peninsula with the notes of the meeting. She was advised to dismiss the claimant without notice. She did not question the advice. She simply followed it. We also conclude, in respect of the referral to the DBS, that having dismissed the claimant, the first respondent had no option but to report the matter to the

DBS under the relevant regulatory rules. Indeed, the Local Authority checked with Ms Crane whether she had made a referral. The referral was not made because of the claimant's race.

65. This means that the claimant's claim of direct race discrimination against the first and/or second respondents has not succeeded.

66. In respect of the harassment complaint, given our finding of fact that Ms Crane did not shout at the claimant as alleged, the claimant's claim that the second respondent harassed her for a reason related to race does not succeed.

67. Finally, the claimant's claim that the first respondent failed to provide her with a written statement of particulars of employment, contrary to s1 of the Employment Rights Act 1996, is upheld. We found as a fact that the claimant was not provided with a contract of employment (the first respondent did not suggest that any other document that was provided to the claimant satisfied the s1 requirements). However, because we have not found in the claimant's favour in respect of the Equality Act claim, we cannot award the claimant compensation under section 38 Employment Act 2002.

Employment Judge Scott
Dated: 8 August 2022