EMPLOYMENT TRIBUNALS

Claimant: Miss S Rziek

Respondent: Hertfordshire County Council

Heard at: Watford
On: 5-8 December 2022

Before: Employment Judge Caiden
Mr I Middleton
Mr L Hoey

Representation
Claimant: In person, supported by her sister also named Miss Rziek
Respondent: Ms J Shepherd (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The Claimant's complaint of holiday pay is dismissed upon withdrawal.

2. The Claimant's complaint of direct race discrimination is not well-founded and is dismissed.

3. The Claimant's complaint of victimisation is not well-founded and is dismissed.

4. The Claimant's complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

A) Introduction

1. By an ET1 presented on 6 September 2021, the Claimant ticked boxes indicating that she was claiming unfair dismissal, race discrimination and holiday pay.

2. On 7 March 2022, the Claimant who at the time was professionally represented by solicitors, attended a Preliminary Hearing at which further particulars were ordered and some clarification of the claim was provided but other aspects were subject to a requirement to provide further information in writing. This is dealt with in greater details at paragraph 8 below.

3. By the time of the hearing before the Tribunal on 5-8 December 2022, the Claimant was no longer professionally represented. She attended the hearing throughout with her sister, also called Miss Rziek, who cross-examined on her behalf and made the bulk of closing submissions on behalf of the Claimant. For clarity and to avoid confusion, throughout these Reasons they are referred to as "the Claimant" and the Claimant's sister as "Miss Rziek". The Respondent was represented by Ms J Shepherd of Counsel at the hearing. The Tribunal was provided with the following documents:
   3.1. Respondent's chronology;
   3.2. an agreed hearing bundle, the content of which was paginated 1 through to page 386ad (including the index it contained 439 pages). All page references in these Reasons relate to this bundle;
   3.3. witness statements on behalf of the Claimant, Liz Glasheen, Lorraine Taylor, and Colin Haigh;
   3.4. a two-page letter dated 10 June 2021 (invitation to an appeal meeting);
   3.5. a sixteen-page induction checklist dated April 2022 Issue 1;
   3.6. a letter from the Wellbeing Service of Hertfordshire Partnership NHS to the Claimant dated 2 June 2021;
   3.7. written closing submissions for the Claimant (which were supplemented by brief oral submissions);
   3.8. written closing submissions for the Respondent (which were supplemented by brief oral submissions).

4. In terms of witness evidence, the Tribunal heard from a total of four witnesses, namely all those who had provided witness statements: the Claimant, Mrs Saunders, Liz Glasheen, Lorraine Taylor, and Colin Haigh. The witness statements were all confirmed as being true to the best of the respective witnesses' knowledge and belief having taken an oath or affirmation.

5. The Tribunal confirms that it considered all the documents that had been provided and took particular care on pages within the hearing bundle which it was referred to during live evidence and were referred in the witness statements and in closing submissions.

B) Procedural matters and issues

6. At the commencement of the hearing on 5 December 2022, the Tribunal learned that the Claimant did not have a copy of Ms Glasheen's or Ms Taylor's witness statement, she only had Mr Haigh's. Ms Shepherd confirmed that an

email had been sent by her instructing solicitors with the statements and the Claimant stated that anything that was sent was not possible to open. The Tribunal ensured that the Claimant had been provided copies of Ms Glasheen's and Ms Taylor witness statement. The statements were four pages and seven pages respectively and the Tribunal having invited submissions from the parties resolved to start the hearing on 6 December 2022 to allow the Claimant and Ms Rziek to consider these documents and prepare questions in cross examination subject to it being confirmed that this was possible upon resuming the hearing. On 6 December 2022 Miss Rziek confirmed that she was in a position to cross-examine and so the witness evidence commenced on 6 December 2022 the Tribunal being satisfied that there was no prejudice remaining and it being within the overriding objective to continue with the case.

7. On the afternoon of 6 December 2022, having heard evidence from both Ms Glasheen and Ms Taylor, Miss Rziek indicated that she had to leave and would be unable to cross-examine Mr Haigh. The Tribunal asked the Claimant if she was prepared to cross-examine Mr Haigh and she stated that she would prefer if her sister, Miss Rziek, would do it. Having considered matters the Tribunal invited Ms Shepherd to address it on whether she was in a position to commence cross-examination of the Claimant, whether Mr Haigh would be able to return the following day in the afternoon, and in effect if the evidence could be taken out of order. Ms Shepherd confirmed that she was in a position to cross-examine, Mr Haigh would be able to return the following day and was prepared to be pragmatic and consent to any suggestion to take evidence out of turn. The Tribunal having considered the matter decided that in the interest of fairness, to ensure that all the evidence could be concluded, and in light of any lack of prejudice and Ms Shepherd consenting to the approach that evidence should be taken out of turn adopted such a course. Accordingly, the Claimant gave evidence on the afternoon of 6 December 2022 and morning of 7 December 2022, with Mr Haigh giving evidence in the afternoon and being cross-examined by Miss Rziek who was able to return from her other commitment.

8. Although no evidence could be heard on 5 December 2022 and the Tribunal effectively used it as a reading day, the Tribunal was able to consider in detail the ET1 (pp.1-13 and pp.16-18), ET3 and amended response (p.19-24 and pp.39-43), the Record of a Preliminary Hearing of Employment Judge AMS Green of 7 March 2022 which included some issues (pp.26-34), the Claimant's response to ordered further information in relation to her race discrimination claim (pp.35-38), and thereafter have a detailed discussion with the parties in terms of the issues. The result was there was agreement as to what the issues of liability that would be determined, in addition to considerations of 'Polkey' and contributory fault, and the Claimant confirmed she was withdrawing a claim of holiday pay (she indicated she had no intention to pursue such a claim and after discussions confirmed with the Tribunal confirmed it was formally withdrawn, hence the judgment of the Tribunal that indicates the claim of holiday pay was dismissed upon withdrawal). The agreed issues are set out below

Direct race discrimination

8.1. The Claimant at p.38 [6.4] of her particulars states she is "*a Moroccan Arabic Muslim whose native language is Arabic*". For the purposes of her claims, she wished to compare herself with White and/or British colleagues.

Accordingly, her race under s.9 Equality Act 2010 ("EqA") for the purposes of her claim was non-White and/or Non-British. In terms of comparator, for her specific complaints she did not have an actual comparator and so a hypothetical comparator within the meaning of s.23 EqA needed to be considered as appropriate.

8.2. Was the Claimant subject to less favourable treatment? The Claimant alleged the following five acts of less favourable treatment:

8.2.1. On a date near the commencement of employment, Fiona Saunders told the Claimant that she could not speak in Arabic on the phone and that the Respondent's language at the workplace is English ["Phone incident"];

8.2.2. Circa 4 weeks after employment commenced, Fiona Saunders told the Claimant that she needed to leave the room where the Claimant was praying ["Prayer incident"];

8.2.3. In March 2020, Fiona Saunders told the Claimant to remove the PPE that she was wearing and told her just to use an apron, mask and gloves ["PPE incident"];

8.2.4. In or around March 2020, Deborah Watt shouting at the Claimant ["Shouting incident"];

8.2.5. On date unknown, Sadie shouted at the Claimant when she was delivering medication ["Medication incident"].

8.3. If the Claimant was treated less favourably, was this because of her non-British and/or non-White race?

Victimisation

8.4. Had the Claimant done, or the Respondent believe the Claimant had done or at the time might do, a protected act as defined by s.27 EqA ["Protected act issue"]? The Claimant alleged that the following two matters amounted to a protected act relying upon s.27(2)(d) EqA in particular:

8.4.1. A written email complaining of bullying to Ms Glasheen of 19 April 2019 at pp.65-66;

8.4.2. A complaint to Ms Glasheen during a meeting of 23 April 2019, which is recorded in writing at pp.67-69.

8.5. If the Claimant had done a protected act, was she subjected to a detriment of this ["Causation issue"]? The Claimant alleges the following two detriments:

8.5.1. Circa 4 weeks after employment commenced, Fiona Saunders told the Claimant that she needed to leave the room where the Claimant was praying ["Prayer incident"];

8.5.2. In Autumn 2020, Jan and Debbie calling the Claimant a "*fucking bitch*" and using other inappropriate terms about her ["Inappropriate comments incident"].

Time limits

8.6. In relation to all the direct race discrimination and victimisation claims, given ACAS early conciliation took place between 5-9 August 2021 and the ET1 was presented on 6 September 2021, whether matters before 6 May 2021 were out of time under s.123 EqA? It was acknowledged by the parties that all matters complained fell before that date and that there was no allegation that the dismissal itself was an act of direct race discrimination or victimisation in the ordered further particulars or issues agreed at the commencement of the hearing.

Unfair dismissal

8.7. Was the reason or principal reason for dismissal the conduct of the Claimant ["Reason for dismissal issue"]?

8.8. If the dismissal was because of the Claimant's conduct, was such a dismissal fair or unfair within s.98(4) Employment Rights Act 1996 ("ERA") ("s.98(4) issue")? Without detracting from the statutory wording, the Tribunal had to consider as part of this assessment (a) the reasonableness of the grounds of belief in misconduct (which includes consideration of any investigations undertaken) (b) the procedure used (c) the sanction of dismissal.

Remedy issues being considered at liability stage

8.9. If the dismissal is found to have been unfair the following two issues of remedy also needed to be addressed at this stage:

8.9.1. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason ["Polkey issue"]?

8.9.2. Did the Claimant cause or contribute to her dismissal by blameworthy conduct, and if so by how much? ["Contributory fault issue"].

9. Before setting out our "Findings of fact", the Tribunal wishes to record that it spent considerable time explaining the different types of discrimination to the Claimant and Miss Rziek. As set out above, the list of issues was agreed after this detailed discussion with the parties, but the Tribunal was initially concerned whether in fact the first alleged act of direct discrimination, being told in essence not to talk a language other than English, was in fact an act of indirect discrimination. It invited submissions form the parties on this and from Ms Shepherd in particular. Ms Shepherd indicated that she had not understood or been prepared for the claim being run as indirect discrimination, she pointed out that the response to further particulars (pp.35-38) on the face of it was signed by solicitors and prepared at a time when the Claimant was legally represented but made no mention of indirect for this allegation (it did for other allegations but as evident from the above these were incorrect labels to the facts), more evidence and potential witnesses may be necessary for the Respondent to defend such claims. The Tribunal considered these matters

and the overriding objective. It was concerned as to the prejudice argument and on balance did not believe that the hearing would be able to conclude fairly within the time allocated. The Claimant indicated that she wanted matters to be resolved within the trial window and accordingly the Tribunal concluded that no indirect claim could be brought in regard to this allegation (in fact none for any allegation as there was no practice, provision or criterion, and the Claimant explained that she was not relying upon anything being neutral that applied to all but that she was being "picked on").

C) Findings of fact

10. The Tribunal heard and considered much evidence. It made the following findings of fact on the balance of probabilities of those areas that were material to the decision it had to make.

11. The Claimant commenced employment with the Respondent on 5 December 2018. She was employed as a Residential Support Worker at Elara House which is a supported living facility for adults with learning disabilities ("service users"). Elara House is made up of 14 individual flats which is staffed 24 hours a day. The Respondent also operates a site called Gadebury Heights which is made up of 5 individual flats providing support to adults with learning disabilities. Although Elara House and Gadebury Heights have their own dedicated staff members, on occasion member of staff would assist at the other site. This applied to the Claimant who would occasionally do a shift at Gadebury Heights. With respect to shifts undertaken by the Claimant at the material time these were 'early shifts' 07:30-14:30 and late shifts 14:00-22:00, although sometimes the precise times may alter and sometimes, she would do a double shift (that is an early followed by a late shift).

12. In terms of the racial make-up of staff members at Elara House, Ms Glasheen (Group Manager) stated in live evidence, and was unchallenged and accepted by the Tribunal, that of the about 40 members of staff there were:
    12.1. 10 Non-White (ie 25% non-White), meaning logically 30 were White (ie 75% White);
    12.2. 8 Non-British (ie 20% non-British), meaning logically 32 were British (ie 80% British);
    12.3. 1 non-White member of staff who was British.

13. As part of induction, staff are told not to make personal calls in areas near service users and not to converse to others in a language that is different to that of service users. Whilst in live evidence the Claimant stated she did not remember if told not to make personal phone calls, and denied being told of this preclusion of speaking other languages, the Tribunal accepted the Respondent's live evidence on these issues which was corroborated with an Induction Checklist (although the Tribunal notes it was dated April 2022 Issue 1, so after the event, it supports that these were general policies stated on induction) and make sense given the needs of the service users.

<u>Phone incident</u>

14. On 16 March 2019, the Claimant was reprimanded by Fiona Saunders (Team Manager) for using her mobile phone on site. The Claimant was speaking

Arabic and explained to Ms Saunders that she was on the phone to her mother who was sick. Ms Saunders told the Claimant that she should not be speaking in the lobby on her phone and should not be speaking a language other than English which is what should be spoken on site. Accordingly, the Tribunal find that the material facts set out in the allegation at paragraph 8.2.1 above did occur. Whilst Fiona Saunders did not give any evidence to the Tribunal, there was a signed document provided at the time that is dated 16 March 2019 setting out what she says she witnessed "*on shift this evening*", namely the Claimant "*on her phone in the lobby and she was not speaking English*" and she "*reminded Samira that she should not be on her phone in a public area*". This contemporaneous document is consistent with the material parts of the allegation in question, namely Ms Saunders telling the Claimant not to be on the phone and speaking another language. Whilst the document does not expressly confirm her telling the Claimant not to speak Arabic and that the Respondent's language at the workplace is English, it does note the Claimant was "*not speaking English*" which is a detail that seems irrelevant if Ms Saunders at the time did not orally remark on the requirement to speak only English on site. Moreover, this is consistent with the Respondent's own case in live evidence and the Induction Checklist document provided that sets out that one needs to discuss with an inductee "[12] *discuss….personal mobile phone use*" and "[16] *Staff must not converse with each other in their own language at work if this is a different to the language used by people we support*". Additionally, the record of the meeting with Ms Glasheen of 24 April 2019 records that Ms Saunders had been "*disrespectful towards you. You said you were in the foyer with service users and that your mobile had rung and that It was your mother who only speaks Moroccan. You said you had to answer it and Fiona had told you to leave the foyer and not to take phone calls In front of service users*" (p.68). This too is consistent with Ms Saunders she should not be on the phone at the workplace and presumably the detail of her mother only speaking English is only relevant if some remark was made about the use of non-English language by Ms Saunders.

Medication Incident

15. On 19 April 2019, the Claimant was offering service user epilepsy medication when Sadie Novak intervened stating "*what are you doing?*", "*he shouldn't have them now,* [service user] *has his medication at 18:00ish*". Ms Novak reported the incident that same day and completed a report which she signed the following day (p.64, which is where the above quotations come from). The result was the Claimant was banned from dispensing medication for a period. The Tribunal accept that it is important for medication to be given with an appropriate time period between doses. It was common ground that the medication did not state however a particular time or the time between doses, it only had "tea-time" and it is therefore understandable that such a medication error occurred. However, the crux of the matter of dispute is whether Ms Novak "*shouted*" at the Claimant as alleged at paragraph 8.2.5 above. On this the Tribunal found that she did not shout. This is because in the record of the meeting that occurred on 23 April 2019 it is stated (p.67):

    I asked what you meant by "bullied", you said staff should respect each other in a team and health each other and not talk about confidential things in front of service users. You said Sadie should have spoken to you alone, not in front of other staff and services users. I asked if Sadie was shouting,

you said Sadie's voice was "high". You said you felt scared that your "head was going". You said you felt stressed in your head and shoulders.

16. This near contemporaneous record therefore does not expressly record shouting, despite it being asked in the meeting. The Claimant stated in live evidence the record was not accurate in evidence, although at p.69 she signs the meeting notes on 15 May 2019. The Claimant explained on that issue that she did not read it. On that point the Tribunal noted that the Claimant's name was actually misspelt it being said to be "*Reizk*" which may support that the note was not properly read. However, setting aside the signature and the accuracy on the "*shouting*" point, the balance of the note dealt with the Claimant asserting that she should not have been discussed in front of others but taken aside and the matter treated as a learning point. This, in the Tribunal's view, supports that there was objectively no shouting as it would not make sense for the main complaint to be about being taken to one side if Ms Novak was shouting. One would expect that to be featured more prominently and it was not. In any event, the incident occurred a long time ago, the issue of the accuracy of the note was not mentioned in the Claimant's witness statement, and it is more likely that a near contemporaneous note is going to be accurate than recollections some three years post event. Taking all these matters on balance the Tribunal therefore rejects the allegation at paragraph 8.2.5 above as whilst the Claimant was challenged as to the medication, Ms Novak did not shout at her.

Prayer incident

17. In circa May 2019, the Claimant asked Ms Glasheen if she could use a room to pray in. Ms Glasheen directed the Claimant to use a particular room and lock the door. The Claimant during the course of praying was interrupted by Ms Saunders who told her to leave as she needed to use the room to work. There was dispute before the Tribunal as to whether or not the door had been in fact locked but that is not material to the allegation that has been put forward at 8.2.2. Ms Glasheen accepted in live evidence that she had been asked for a prayer room and whilst there is no document in the bundle that evidences the event occurring accepts the Claimant's account of it. In terms of the timing of it, it was the Claimant's own case in her further particulars drafted by her solicitors that it occurred "*some 4 weeks after the above incident*" (which is the one at 8.2.1) and she was alleging that it had been caused in part by the discussion the Claimant had with Ms Glasheen (or more plainly what the Claimant believed was a complaint) which occurred on 23 April 2019. This means the event had to occur after this discussion and after the now found 16 March 2019 incidents, which amounts to circa May 2019. Accordingly, the Tribunal the find that the material facts set out in the allegation at paragraph 8.2.1 above occurred, that is Ms Saunders told the Claimant that she needed to leave the room where the Claimant was praying but this happened circa May 2019.

Shouting incident

18. In or around March 2020, the Claimant alleges that Deborah Watt shouted at her. There was no evidence in the bundle that related to this incident that the Tribunal could find nor that was drawn to its attention. None of the Respondent's witnesses could provide any specific evidence on this save a general observation from Ms Glasheen that she believed there was an issue with communal lunches being served too early, that service users would only leave rooms at 10:00 and so it made sense to have lunch at 13:00-14:00 rather than 11:00-12:00 and that may explain why Deborah Watt may have spoken to the Claimant at that time. The Claimant's witness statement did not provide any detail on this incident either although she referred in live evidence to being consoled by colleagues saying that Deborah speaks like that to all so not to take it personally. On balance therefore the Tribunal cannot conclude that Deborah Watt shouted at the Claimant in March 2020 as is alleged and so the factual basis for allegation at paragraph 8.2.4 above is not made out.

Inappropriate comments incident

19. In Autumn 2020, the Claimant alleges Jan and Debbie called her a "*fucking bitch*" and using other inappropriate terms about her. There was nothing in writing before the Tribunal on this matter, but it was explored in oral evidence between the parties. The Claimant clarified that it was not Jan who was using the words, but it was Debbie speaking to Jan, and the Claimant overheard. It was put to the Claimant during cross-examination that the reason there was no complaint was that upon discussion it was clarified that the individuals were not talking about the Claimant but another person. In the circumstances whilst the Tribunal accepts that some inappropriate language may have been used by staff the material part of the allegation is that it was directed at the Claimant and there is insufficient evidence for the Tribunal on balance to come to such a factual conclusion. On balance therefore the Tribunal cannot conclude that Deborah Watt shouted at the Claimant in March 2020 as is alleged and so the factual basis for allegation at paragraph 8.5.2 above is not made out.

PPE incident

20. In November 2020, the Claimant was having to assist a service user who had suspected Covid. She accordingly went to put on protective equipment. The Tribunal finds that she selected a full body 'Hazardous Material' type suit which it was informed had been purchased during the pandemic initially but was later boxed up as a decision was made that it was inappropriate equipment in this particular service user context that applied at Elara House and Gadebury Heights. Ms Saunders saw the Claimant and told her that she should remove that and instead use gloves, apron and face mask. Accordingly, the Tribunal find that the material facts set out in the allegation at paragraph 8.2.1 above but that the event was in November 2020 and not March 2020. The reason for the different date is that the first wave of Covid at Elara House, or rather case was in November 2020 (it is notable that even in the Claimant's witness statement she says that this was the date of the first positive test) and so it is likely that it would be at this time that the Claimant would be searching for such equipment. Moreover, March 2020 was at a very early stage in the Covid pandemic in England and so it would be surprising if such a variety of personal protective equipment was already at the disposal of the Respondent. In contrast, by November 2020 one can appreciate why the Respondent may

have a 'choice' in both gloves, apron and mask and the full body type suit (its case being that the latter was inappropriate despite having purchased it and not then removing it from site) .

Claimant contracting Covid

21. As noted in the paragraph above, the first case of Covid at Elara House occurred in November 2020.

22. On 15 December 2020, the Claimant had a bad headache whilst at work. She was doing a shift at Gadebury Heights from 12.30-22:00, which was slightly longer than the usual rostered time which would be 14.00-22.00 (p.77). The Claimant told the Tribunal, and it accepts, that she suffers from chronic headaches and even takes medication for this. At the time the Claimant believed this was simply her usual condition occurring.

23. Whilst on shift on 15 December 2020, she mentioned feeling unwell to her colleagues Shireen Bonsor and Kathleen Harvey. The exact content of these discussions was in dispute between the parties. It was agreed that the Claimant had expressed feeling unwell in the sense of being cold, there was specific reference to a headache, and that she was advised to go home if unwell. The disagreement however centred around whether the Claimant said, "*I think I have Covid*" (or words to that effect). This was what the Respondent had been informed by Ms Bonsor by way of a statement of 12 January 2021 (p.100) and in an oral telephone conversation on 8 January 2021 (p.98). The Claimant denied this at the time and also before the Tribunal. On this issue the Tribunal prefers the Claimant's account and finds that whilst the phrase covid in general may have been used during discussion, the Claimant did not expressly state she had it or thought she had it. The reasons for this are that it found her live evidence credible, and this is supported by what occurred at the time. The Claimant's entire case was she never believed she had Covid, that her only symptom was a headache. If she did state that she 'had it' and did not go home, it made little sense that no one escalated that particular issue at that time. Even if it was just gossip, the Tribunal would be surprised that no one else other that Ms Bonsor would be aware of this allegation.

24. On 16 December 2020, the Claimant was not rostered to work and did not work.

25. On 17 December 2020, the Claimant was due to do a late shift at Gadebury Heights but in fact did both an early and late shift.

26. On 18 December 2020, the Claimant was due to be off but in fact she did an early shift at Elara House.

27. On 19 December 2020 (a Saturday), the Claimant was off work and had a telephone call with a locum GP. The Claimant explained to the Tribunal, and it accepts, that she rang in order to get her headache medication which had run out earlier in the week but this doctor who was not familiar with her history

advised her to take a Covid test "*just to be sure*". In effect, the Doctor was wanting a test to discount a diagnosis of Covid (at this stage of the pandemic there were no rapid antigen tests and samples had to be taken that were laboratory tested). The Claimant duly ordered a Covid test but also asked her sister, Miss Rziek, to bring some home from work which she did, and a test was taken that same day and posted. At this point the Tribunal notes that whilst this evidence came from the Claimant in terms of the content and reason for the doctor consultation by telephone the date was disputed, and she maintained this occurred on Sunday 20 December 2020. The reasons for rejecting this and concluding it was a Saturday 19 December 2020 are:

27.1. Ms Glasheen's email of 24 December records this as being the date of the "*home test*" in her recording of what occurred during a telephone conversation on "*22 December*" (p.106). So, there is a consistent and near contemporaneous document supporting it;

27.2. The record of a conversation with Ms Harvey's (which is headed 12 January 2021) mentions "*Samira then she'd sent away for a test yesterday (Saturday 19th December*). So, there is another consistent and near contemporaneous document supporting it as she could only send away for a test if she had spoken to the GP;

27.3. this was the date mentioned by the Claimant, the 19 December 2020, during the disciplinary hearing (p.259f): "*When I spoke to GP on 19.12.2020*…". So, the Claimant herself at one stage suggested the 19 December 2020;

27.4. the Claimant in the fact find of 8 January 2021 stated, "*I did the test on Sunday 20 December so I must have ordered it Saturday 20 December*", so it appears that the Claimant meant Saturday 19 December 2020 in this exchange and whilst other corrections were made by hand this was not corrected (p.130);

27.5. in addition to the majority of documents supporting the 19 December 2020 date, it also makes sense logically speaking. She was off that day, and it was a Saturday so it would seem logical to make contact with a GP rather than a Sunday following work, which would ordinarily be very difficult to successfully make any contact with a GP even by telephone. For much the same reason, Saturday post would more likely lead to a test result being produced the following day rather than something sent on a Sunday (as noted below the 'inconclusive' result was received the following day).

28. On 20 December 2020, the Claimant was not on the rota but in fact did work an early shift at Gadebury Heights. That same day she received what she described as an inconclusive result. She in effect did not get any proper result because the paperwork submitted with the test (that her sister had given her) was not as it should be.

29. From 22 December 2020, the Claimant was signed off sick as she was unwell. On 22 December 2020, Ms Glasheen had a telephone conversation with the Claimant. Some of content of the call was in dispute (namely whether there were admissions of having Covid symptoms since 17 December 2020) but the material parts for present purposes was agreed: Ms Bonsor had tested positive on 22 December 2020 and the Claimant was told to take another Covid test. The Claimant did so and on 24 December 2020 a positive Covid result was produced.

Investigatory steps

30. The Respondent was concerned by the potential attendance of the Claimant around vulnerable individuals so following her return to work an informal fact find meeting occurred on 8 January 2021 with the Claimant (p.130-131) and Ms Bonsor (p.98). On 12 January 2021, a statement was produced by Ms Bonsor and Ms Harvey had a conversation which was also noted (p.100-102 and p.104). On 14 January 2021, the Claimant was put on paid leave (pp.110-111) and she was suspended on 26 January 2021 (p.116-117). This letter of that date stated:

    ALLEGATIONS OF GROSS MISCONDUCT AND NOTICE OF SUSPENSION

    ….

    The allegation to be investigated is:

    - *You failed to comply with Health & Safety rules and regulations and/or displayed unreasonable behaviour towards the people you support and your colleagues by attending work when you had symptoms which you could reasonably have suspected to be due to Covid infection.*

31. Jo Stone (Peripatetic Manager) was appointed to investigate by Ms Taylor (Head of Supported Living and Residential Services) and Ms Stone held investigation meetings with: Ms Bonsor on 23 February 2021, Ms Harvey on 26 February 2021, Diana Combes on 1 March 2021, the Claimant on 1 March 2021, and Ms Glasheen (these were found at pp.134-138, pp.142-145, pp.148-152, 154-159, 160-164). Ms Stone produced a detailed investigation report on 13 April 2021 (pp.72-97).

Disciplinary hearing

32. On 14 April 2021, the Claimant was invited to a disciplinary meeting (pp.316-318). This set out the allegation in the same manner as the letter of suspension (see extract of this at paragraph 30 above). It warned that a potential outcome could be dismissal from employment, stated who the witnesses in attendance were to be, invited the Claimant to inform it if she wished to bring any witnesses, set out who would be present at the meeting and its timing (11 May 2021 by MS Teams at 1pm), attached relevant paperwork and informed the Claimant of her right to be accompanied.

33. On 11 May 2021, the disciplinary hearing duly occurred. Handwritten notes were taken but a typed note, which is understood to be an amalgamation of the notes, was before the Tribunal at pp.259a-259i. The Claimant attended with a union representative, Kevin O'Daly. It appears that following an adjournment between 15:30-16:32, Ms Taylor who was the disciplinary hearing officer came to a decision that the Claimant had "*committed an act of gross misconduct*" and summarily dismissed the Claimant (p.259h).

34. By letter of 17 May 2021, the Claimant was provided with a letter confirming her dismissal and setting out what had occurred in the hearing (pp.272-286). The letter concluded with a 10-point list as to the reasons the Claimant was dismissed (pp.284-285).

Appeal process

35. On 23 May 2021 the Claimant appealed her dismissal (p.269). On 10 June 2021, the Claimant was invited by letter to an appeal hearing that was set for 7 July (this was one of the additional documents and so it not paginated). The letter informed the Claimant of her right to call witnesses and to be accompanied. It notified the Claimant who would be present at the hearing and that Mr Haigh (Director of Growth & Place) was the Hearing officer.

36. On 7 July 2021, the appeal hearing occurred, and the Claimant was once again accompanied by her trade union representative Mr O'Daly. Notes of the meeting were before the Tribunal at pp.324-328.

37. By letter of 12 July 2021, the Claimant was informed that her appeal had been dismissed (pp.329-334).

D) Relevant legal principles

Direct discrimination

38. With respect to claims of direct discrimination, s.13(1) EqA provides "*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*" In this case the protected characteristic is race (s.9 EqA). The comparison required by s.13(1), "*treats or would treat others*" is explained in s.23(1) as "*On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case*". The act of direct discrimination, s.13(1) EqA, is rendered unlawful in this case (one of detriment only and not dismissal) by s.39(2)(d) EqA, "*An employer (A) must not discriminate against an employee of A's (B)—(d) by subjecting B to any other detriment*". Finally, in relation to claims under the EqA, in this case the direct race discrimination and victimisation, s.136 EqA sets out burden of proof provisions.

39. Time limits are in issue in the present case and s.123 EqA sets these out.

40. In terms of relevant case law, the Tribunal had particular regard to the following:
    - 40.1. race can be defined in the negative, such as non-White and non-British (*Orphanos v Queen Mary College* [1985] IRLR 249 (HL) at [17]-[18] and *R v Rogers* [2007] UKHL 8; [2007] 2 AC 62 at [10] and [13]);
    - 40.2. it is usual to take a two stage approach, first deal with less favourable treatment and then whether reason why was protected characteristic, but not always necessary to do so and in some cases a composite question of what the reason for the treatment will be appropriate (*Shamoon v Chief Constable of Royal Ulster Constabulary* [2003] UKHL 11; [2003] IRLR 285 at [8] and [11]);
    - 40.3. the case of *Igen v Wong* [2005] EWCA Civ 142, [2005] IRLR 258 which has detailed consideration of the burden of proof provisions (see [76] and Annex of its judgment in particular), which has been approved by

the Supreme Court in *Hewage v Grampian Health Board* [2012] UKSC 37; [2012] IRLR 870 and expressly found to still apply to s.136 EqA in *Efobi v Royal Mail* [2021] UKSC 33, [2021] IRLR 811;

40.4. notwithstanding the burden of proof provisions and case law in relation to it, the emphasis in *Hewage* at [32] that their role is often for cases where there are doubts as to the facts necessary to establish discrimination and it has little to offer in cases where a tribunal can make positive findings one way or the other;

40.5. to be discriminatory race need only be a cause (that is not trivial) rather than the sole or predominant cause (ie 'a' cause rather than 'the' cause is the test) – see for example *O'Neill v Governors of St Thomas More Roman Catholic Upper School* [1996] IRLR 372 (EAT); *Nagarajan v London Regional Transport* [1999] IRLR 572 (HL); and *O'Donoghue v Redcar and Cleveland Borough Council* [2001] EWCA Civ 701; [2001] IRLR 615.

Victimisation

41. In terms of victimisation, s.27 EqA

> *s.27 Victimisation*
> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
> *(a) B does a protected act;*
> *(b) A believes that B has done, or may do, a protected act.*
> *(2) Each of the following is a protected act—*
> *(a) bringing proceedings under this Act;*
> *(b) giving evidence or information in connection with proceedings under this Act;*
> *(c) doing any other thing for the purposes of or in connection with this Act;*
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*
> *(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

42. As for the present case, victimisation would be unlawful by virtue of s.40(1)(a) EqA. As previously noted, the burden of proof provisions and time limit provisions of s.136 EqA and s.123 EqA apply to the victimisation claim also.

43. In terms of relevant case law, the Tribunal had particular regard to the following:

43.1. The definition of detriment is widely construed and all that is necessary is whether a reasonable worker would or might take the view that the treatment was in all the circumstance to their disadvantage (*Shamoon* at [34]-[35]);

43.2. the test of causation for victimisation is in effect similar to discrimination in general in that it is a 'reason why' question, that is was the protected act in the mind of the person responsible for the alleged detriment (whether conscious or unconscious) and that it need only be a

reason for it (no requirement for it being the principal or main reason) – see *Khan v Chief Constable of West Yorkshire* [2001] UKHL 48; [2001] IRLR 830 at [29] and [77] for the former principle and *Villalba v Merrill Lynch* [2006] IRLR 437 (EAT) at [81]-[82] for the latter principle.

Unfair dismissal

44. The ERA at s.94(1) provides "*An employee has the right not to be unfairly dismissed by his employer*". As to the meaning of unfair dismissal this is set out in s.98 ERA:

> *s.98 General*
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
> *(2) A reason falls within this subsection if it—*
> *…*
> *(b) relates to the conduct of the employee,*
> *…*
> *(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

45. The relevant deductions that the Tribunal at this stage were considering, often referred to by the shorthand Polkey and contributory fault, are set out in s.122(2) ERA, s.123(1) ERA and s.123(6) ERA.

46. In terms of relevant case law, the Tribunal had particular regard to the following:
    46.1. *British Home Stores v Burchell* [1978] IRLR 379 (EAT) test at [2] which sets out a three-stage test: honest belief, reasonable grounds to sustain it, reasonable investigation in all the circumstances;
    46.2. that s.98(4) ERA amounts to a 'range of reasonable responses' test and it applies to all elements of this from investigation to sanction: *Sainsbury's Supermarkets Ltd v Hitt* [2002] EWCA Civ 1588, [2003] IRLR 23 at [29]-[30];
    46.3. that the Tribunal should not substitute its own view for that of the employer but apply the range of reasonable responses test: *British Leyland (UK) Ltd v Swift* [1981] IRLR 91at [11];

46.4. in considering the 'band of reasonable responses' in s.98(4) ERA in relation to the procedure applied, the Tribunal should not look at procedure in a vacuum but rather consider the employer's reason for the dismissal as the two (reason and procedure) impact upon each other; hence minor procedural issues will not necessarily render a dismissal for a serious act of misconduct unfair, and equally an appeal hearing can 'cure' any earlier deficiencies: *Taylor v OCS Group Ltd* [2006] EWCA Civ 702; [2006] IRLR 613 [47]-[48].

46.5. if the dismissal for misconduct (whether it be with or without notice) fell within the 'band of reasonable' responses the claim of unfair dismissal must fail - this applies even if the employee was summarily dismissed for gross misconduct in cases where an Employment Tribunal find his dismissal should have been with notice: *Weston Recovery Services v Fisher* UKEAT/0062/10/ZT at [11]-[16];

46.6. there is no legal principle that dismissal has to be a last resort before it can fall within the range of reasonable responses: *Quadrant Catering Ltd v Smith* UKEAT/0362/10 at [16].

E) Analysis and conclusions

47. The Tribunal sets out its analysis and conclusion on the claims, having regard to the agreed issues which are set out at in the sub-paragraphs to paragraph 8 above.

(1) Direct race discrimination

48. The Tribunal will first address the direct race discrimination claim.

Phone Incident

49. As set out above at paragraph 8.2.1, the first allegation of race discrimination was whether "*On a date near the commencement of employment, Fiona Saunders told the Claimant that she could not speak in Arabic on the phone and that the Respondent's language at the workplace is English*". The Tribunal did find that factual basis made out as set out at paragraph 14 above save that it occurred on 16 March 2019 rather than what ordinarily would be called near commencement of employment (eg near 5 December 2018). The facts and evidence were fully ventilated, and the Respondent knew the case it had to meet so the Tribunal does not view the discrepancy of date as material and proceeded on the basis that the factual basis had been made out. The Tribunal noted that the Respondent's written closing submissions did not suggest otherwise but defended the case on the basis that there was no less favourable treatment because of race and on time limits.

50. In terms of the Phone Incident allegation, there was no material before the Tribunal that assisted with a comparator. The Claimant did not suggest or put forward evidence that White or British people who were speaking on their phone in another language would have simply been left to converse with no intervention. On this basis it seemed difficult for there to be any basis for finding "*less favourable*" treatment. The Tribunal considered that Phone Incident may

be better approached by looking simply at the composite reason why question as *Shamoon* indicates may in some cases be appropriate (see paragraph 40.2 above). On this basis, the Tribunal concluded that the reason why Fiona Saunders intervened had nothing to do with the Claimant's race but was in fact because the policy of the Respondent was not to take personal calls in areas near service users and not to converse in a language that was different to service users, which the Tribunal has found was indeed part of the induction (see paragraph 13 above). Any individual, including those who were White or British, would have been treated the same in the circumstances. This conclusion flowed from the findings of fact, but the Tribunal acknowledges Miss Rziek's written closing submissions that pointed out that the Induction Checklist relied upon to support the policy deals with staff conversing with each other in languages other than English which was not what occurred as the Claimant was speaking on the phone to her mother. However, underlying the policy or rationale, as explained to the Tribunal and it accepts, is that the service users are vulnerable and are disturbed by hearing conversations which they are not part of and do not like in particular hearing a language they do not understand. This would apply just as much to a phone call as to speaking to a colleague, the service user would still be disturbed and would not know what was being discussed which *may* raise concern that it was something about them. Therefore, Ms Saunders would in the Tribunal's judgement intervene with anyone in this circumstance, irrespective of race, even if the matter was not within the strict narrow reading of the later documented policy.

Prayer Incident

51. The second allegation of less favourable treatment, paragraph 8.2.2 above is, "*Circa 4 weeks after employment commenced, Fiona Saunders told the Claimant that she needed to leave the room where the Claimant was praying*". The factual basis for this, save that the date of it was circa May 2019 and not December 2018/January 2019 (which would be circa 4 weeks after commencing employment), has been found to be made out by the Tribunal as set out at paragraph 17 above. Once again, the discrepancy in date is not treated as determinative of this issue given the lack of prejudice to the Respondent and it is noted it did not even take this point.

52. The dispute before the Tribunal centred around whether Ms Saunders was correct to interrupt and want to use the room, whether she had other rooms available to her and whether she understood the Claimant to be in the middle of prayer. It is right to record that the Claimant did not appear to make any near contemporaneous complaint and the Tribunal accepts that it may well be she did not want to object to Ms Saunders taking the room because she was relatively new, and Ms Saunders was more senior. But the focus for the Tribunal must be on someone who is not in any material different circumstance (s.23 EqA). Therefore, if there had been a White or British person of Muslim faith who had been praying would Ms Saunders have acted more favourably? The answer to the Tribunal appears to be no and so there is no less favourable treatment made out. There was simply no evidence upon which to make a contrary finding, no evidence to draw a hypothetical comparator. Indeed, it appeared from the evidence before the Tribunal that Ms Saunders view was, she needed the office and there was nothing express or notable that meant the

Claimant had a greater claim to the office at that time. It may not have been a sensitive view to hold or perhaps another manager would have acted differently but this is what the Tribunal concludes. Therefore, the less favourable treatment issue and reason why issue led to this claim of direct discrimination failing.

PPE incident

53. The third allegation of less favourable treatment is, paragraph 8.2.3 above, "*In March 2020, Fiona Saunders told the Claimant to remove the PPE that she was wearing and told her just to use an apron, mask and gloves*". Once again, the date is incorrect but the factual basis is made out (see paragraph 20 above) and the Tribunal proceeds on the basis to consider the allegation given the lack of prejudice to the Respondent and it notably not taking the point that the date makes a material difference.

54. In this case the Tribunal accepts, as set out in its findings, that it was inappropriate to use such full body suits in the service user context that the Respondent faced. It follows that this was the reason why the Claimant was told to remove the Hazardous Material type suit. Whilst the Claimant's written closing submissions and live evidence made the point that she was not told of this, it being only the more senior employees who were made aware, and the suit remained on premises, this does not detract from it being in effect a policy. Moreover, there was no evidence before the Tribunal of others wearing this suit at the time and given that there were a few cases of Covid it would be surprising that there was no evidence of this if that really was the case. So whichever approach is taken, a less favourable treatment one or reason why, the answer is that the claim must fail.

Shouting incident

55. The fourth allegation, paragraph 8.2.4, "*In or around March 2020, Deborah Watt shouting at the Claimant*" fails on the basis the factual allegation has not been found by the Tribunal – see paragraph 18 above. In any event there was nothing to show less favourable treatment or it being because of her race. Indeed, the Claimant referenced in evidence to in effect Deborah Watt behaving in what she considered a rude manner to others, or rather that is what others say, which indicates that the treatment was not because of race but rather just how Deborah Watt behaved to all. So even on the Claimant's own evidence the claim had to fail.

Medication incident

56. The fifth and final allegation, paragraph 8.2.5, is "*On date unknown, Sadie shouted at the Claimant when she was delivering medication*". The claim fails on the basis that the material allegation was "*shouting*" and was not made out – see the factual findings at paragraph 15-16 above. However, in any event the Tribunal considered whether there was less favourable treatment because of race and concludes this was not the case. The reason for the intervention was there had been a medication error. It may have had serious consequences and one can understand why the intervention may have seemed strident to the

Claimant but equally why fast action needed to be taken. There is nothing to show that Sadie acted differently, more favourably, when spotting medication errors of White or British staff, and the Claimant accepted that there had been an error. Her complaint was that there was no proper communication with her or adequate explanation as to the timings and whilst one can have sympathy in this, that is there is a lack of clarity and it is not necessarily the Claimant's fault for what occurred, this does not detract from the reason for any intervention being nothing whatsoever to do with race.

Stepping back and looking at overall picture

57. As will be apparent from the above, all the claims of direct race discrimination failed. The Tribunal in its analysis approached each issue individually. However, sometimes there is a danger in overly strict compartmentalisation in discrimination claims. Factual evidence in one allegation, which may lead to inferences, can be ignored for example. For this reason, the Tribunal also stepped back and looked at the overall picture to see whether a different conclusion should be reached. It had regard to the fact that the Claimant was speaking Arabic, that she was praying and the racial make up of the workforce, that the individual alleged discriminators were not giving live evidence before the Tribunal; but even looking at these factors it concluded it was insufficient to lead to any inferences being drawn that would lead to a burden of proof transferring or questioning the conclusions it reached on the reason why which all pointed to matters being nothing to do with race.

Time limits

58. The claims failed but the matter of time limits, which is jurisdictional, was also part of argument and evidence. The Tribunal briefly sets out its conclusions on this aspect which is that all the claims are well out of time, and it is not "*just and equitable*" to extend time.

59. Firstly, the matters were all well out of time:
    - 59.1. Phone incident was 16 March 2019, and so time ran out on 15 June 2019 which makes the ET1 of 6 September 2021, over 2 years and 2 months late (814 days late to be precise);
    - 59.2. Prayer incident was May 2019, and so time ran out in August 2019 which makes the ET1 of 6 September 2021, over 2 years late;
    - 59.3. PPE incident was November 2020, and so time ran out on in February 2021 which makes the ET1 of 6 September 2021 about 7 months late;
    - 59.4. Shouting incident was March 2020, and so time ran out in June 2020 which makes the ET1 of 6 September 2021 about 15 months out of time;
    - 59.5. Medication incident was 19 April 2019, and so time ran out on 18 July 2019 which makes the ET1 of 6 September 2021, over 2 years and 1 month late).

60. Secondly, there was no real explanation for why the matters were brought so late. It is notable that the Claimant was a member of a union, seemed to

understand about the Employment Tribunal and at some stage had engaged a solicitor.

61. Thirdly, even taking the most charitable view and dealing with the least out of time incident there appears to still greater comparative prejudice in extending the time than in refusing it. Whilst the Respondent did still employ the relevant individuals it was difficult to address the claims evidentially other than in generalities because of the time which had passed. One may point out that the Respondent successfully defended the claims but that does not mean that it would not have had even better evidence to put forward and an easier time as it were if the allegations were raised nearer the time. Indeed, the present case is not one where it was all subject of internal grievances and so evidence amassed or documented.

(2) Victimisation

62. The Tribunal now turns to consider the victimisation claim.

Protected Act issue

63. The first of the two protected acts relied upon is, as set out at paragraph 8.4.1 above, "*written email complaining of bullying to Ms Glasheen of 19 April 2019 at pp.65-66*". The email itself is short and complains in large part about the Medication incident. It includes "*she was speaking to me in harshly way in front of other service users and she was complaining about the time…she said you need to have training properly. I said ok and I feel I been bullied from her….I feel hilarious I wasn't imagining it will humiliate me….I will appreciate if the staff working with me is respecting me as I offer respect from my side as well*" (p.66). In response Ms Glasheen stated on 22 April 2019 "*I am sorry to hear that you feel "bullied" and you feel your colleagues have shown a lack of respect towards you….*" and the Claimant was directed to the bullying and harassment policy in Ms Glasheen's email of 22 April 2019 (p.65).

64. This email of 19 April 2019 does not make any mention of discrimination or analogous words. It does not mention race of either the Claimant or Ms Novak. It does not set out that the lack of respect is in anyway associated with race. Looking at it in the round the Tribunal concludes that it does not amount to "*B does a protected act*" (s.27(1)(a)). The Claimant in the email was not bringing proceedings under the EqA, not giving evidence or information in connection with proceedings under the EqA, not doing any other thing for the purposes of or in connection with the EqA and was not making an allegation of contravention of the EqA. It was this last category (s.27(2)(d) EqA) that it was understood the Claimant was relying upon, but it cannot be implied that an allegation of discrimination was being made (it is evidently not one that is expressly made). In reaching this conclusion, the Tribunal had regard to the response by Ms Glasheen which did not advance things to more than a generic bullying allegation and directed the Claimant to the policy.

65. The Tribunal also considered whether Ms Glasheen (the recipient of the communication), or the Respondent in general, believed that the email

amounted to the Claimant doing a protected act or that she may do one in the future. It concluded that she did not. Firstly, as before, the complaint email does not even mention race in the broadest sense. Secondly, her email in response does not indicate any belief in this, a signposting to the bullying and harassment policy in and of itself is not sufficient. There was nothing afterwards in terms of follow up that would alter this view or make Ms Glasheen think that such an allegation of discrimination *may* be made in the future (see paragraph 67-68 below).

66. The Tribunal now turns to consider the second of the two protected acts relied upon is, as set out at paragraph 8.4.2 above, "*A complaint to Ms Glasheen during a meeting of 23 April 2019, which is recorded in writing at pp.67-69.*" In doing so it has regard to the earlier email of 19 April 2019 and assumes that this is part of what Ms Glasheen knew.

67. At p.67 it records the following material parts of the conversation:

> *I asked what you meant by "bullied", you said staff should respect each other In a team, and help each other and not talk about confidential things in front of service users. You said Sadie should have spoken to you alone, not In front of other staff and service users. I asked if Sadie was shouting and you said Sadie's voice was "high". You said you felt scared and that your "head was going". You said you felt stressed In your head and shoulders.*

68. The Claimant was being specifically asked about what she meant by bullying, which is probably the closest phrase to something that could in certain circumstances amount to an allegation of breach of the EqA (although as set out above not in this case in isolation). She did not bring race into her response or give anything that would indicate the matter was one that may be covered by EqA even by implication.

69. The situation is not advanced when there is return to the concept of what was done that allegedly amounted to bullying at p.68

> *I asked you If there was anything specific that Sadie had done that had made you feel "bullied". You said her voice was "high". You went on to say that Sadie did not talk to you on shifts and that Debra Watt, support worker never answered you when you spoke to her and did not say hello to you.*

70. The closest the conversation appears to get to the issue of race discrimination is in the exchange at p.69

> *I asked you if you thought there was a cultural element to the issues you had raised, you said "maybe*".

71. Taking the full record into account and the background circumstances the Tribunal concludes that this is not a protected act. The Claimant was offered the opportunity even in a broad sense to state there was a "*cultural element*" which *may* lead to an argument that race is involved (assuming that culture was used as a euphemism for race, or something so intertwined with race in any event). She did not state that it was and so there is nothing to amounts to an

implied allegation of a contravention of the EqA and furthermore no reason for Ms Glasheen, or the Respondent to believe she had or may do.

Causation issue

72. Although not strictly necessary, the Tribunal considered whether any of the alleged detriments had been caused by the two alleged protected acts (which the Tribunal found above did not in fact amount to a protected act).

73. The first of these relates to the Prayer Incident, see paragraph 8.5.1 for this issue. The factual conclusion on this is set out at paragraph 17 above and the Tribunal did find the material facts occurred. The issue is whether Ms Saunders was influenced by the earlier actions in April 2019 (that is the two alleged protected acts).

74. The Tribunal notes that she was not the recipient of the complaint and nor was she present at the meeting. There was nothing that was before the Tribunal that established any knowledge of either of the two protected acts by Ms Saunders. Without knowledge of it she could not be influenced by it. In these circumstances therefore the causation case could not be made out, the mere fact that the incident occurred shortly after the alleged two protected acts is not sufficient in this case to lead to an inference that it was caused by it given this important piece of information was missing.

75. In relation to the second the Inappropriate comments incident, see paragraph 8.5.2, this was found not to be made out on the facts so fails. In any event, there was once again nothing to establish these two individuals knew of the alleged two protected acts nor explain why a year later, they were being influenced by it. Of course, time alone is not a decider, but it would be surprising for two individuals that do not feature prominently in the initial complaint or meeting, and for which no action was required after these, to be influenced by it a year later. Therefore, the Tribunal concludes that on causation grounds too the claim must fail.

Time limits

76. In terms of time limits whilst all victimisation claims were found to be unsuccessful, the Tribunal also concluded that they were well out of time, and it was not just and equitable for time to be extended. In terms of time limits, the Prayer Incident time limit occurred in May 2019 and so time ran out in August 2019 which makes the ET1 of 6 September 2021, over 2 years late. The Inappropriate comments incident assuming it occurred in November 2020, ran out on in February 2021 which makes the ET1 of 6 September 2021 about 7 months late. The reason for it not being just and equitable to extend is for the same reasons set out in relation to the direct discrimination claims at paragraph 59-61.

(3) Unfair Dismissal

77. The Tribunal finally turn to address the claim of unfair dismissal.

Reason for dismissal issue

78. The Tribunal heard from the decision maker for the dismissal, Ms Taylor, and considered the documentation in the bundle. Its conclusion is that Ms Taylor had an honest belief that the Claimant had committed misconduct and accordingly the reason for dismissal was "conduct". In this case the reason is as set out in p.285 [7]

> *you failed to comply with Health & Safety rules and regulations and/or displayed unreasonable behaviour towards the people you support and your colleagues by attending work when you had symptoms which you could reasonably have suspected to be due to Covid infection is substantiated.*

79. The reason for reaching this conclusion is not only was this Ms Taylor's evidence, both live and in her witness statement, but the bundle indicated that:
    79.1. The suspension letter of 25 June 2021 was titled "*ALLEGATION OF GROSS MISCONDUCT*" and set out the charge being investigated which was the same one that resulted in the Claimant's dismissal (p.116);
    79.2. The above is also contained in the introduction section to the investigation report (p.74) which at p.97 concluded there was a case to answer in relation to this disciplinary allegation;
    79.3. The above charge was also part of the investigation meetings the Claimant had with Ms Stone (p.134);
    79.4. The disciplinary hearing concludes with Ms Taylor stating "*Decision to dismiss you. You have committed an act of gross misconduct*".

80. Miss Rziek submitted that in fact the real reason for the Claimant's dismissal was that she was a scapegoat. That is that the Covid infection had led to a safeguard report and there was a need for someone to take the blame. The Tribunal rejects this as being the real reason for the dismissal. There was nothing to suggest that Ms Taylor had in her mind the need for a 'scapegoat' and the weight of the evidence is that she honestly believed the Claimant's conduct had in effect unnecessarily exposed her colleagues and service users to Covid infection.

s.98(4) issue

Reasonableness of grounds/investigation

81. As at the stage of making the decision to dismiss, the Respondent had carried out an investigation that was documented in an Investigation Report by Ms Stone. The people who were part of the investigation are set out at paragraph 31 above. Moreover, the Claimant attended a disciplinary hearing, accompanied by her trade union representative, and answered questions and was able to put questions and points as appropriate. There was no investigatory step that the Claimant sought to explain then that was missing. Miss Rziek did not in fact make any suggestion that there was something that was missing in the investigation or something that reasonably needed to be done. The Claimant's case rather was that the Respondent should have accepted her account which was that she did *not* have any symptoms of Covid.

But the Tribunal concludes that in fact its grounds for belief in misconduct fell within the range or reasonable responses, having conducted a reasonable investigation, as:

81.1. the relevant witnesses accounts were taken;

81.2. in respect of it favouring the accounts of colleagues that the Claimant said she might have had Covid, it was reasonable where there was a conflict to accept this view as there was supporting evidence and as the Respondent pointed out no reason on the face of it to lie (p.284 [3]);

81.3. the Respondent actually accepted that the Claimant thought all she had was a headache and did not consider that a Covid symptom but found in effect the tipping point was when a GP told her to take a Covid test (p.285 [4]). Before the Tribunal the Claimant accepted that upon being told to take a Covid test she should not have returned to work and that doing that would have been an act of misconduct. However, she maintained that this event happened *after* the last time she worked at the Respondent before being signed off sick. The Respondent however was entitled to conclude that it occurred on 19 December 2020 and <u>not</u> after her last shift on the 20 December 2020. Whilst the Tribunal had to make its own assessment in order to deal with the issue of contributory fault and set out its factual findings on this at paragraph 27, the Respondent's route was simpler and reasonable: she gave that date at the disciplinary hearing.

<u>Reasonableness of procedure</u>

82. Turning to the reasonableness of the procedure, the Tribunal note that:

82.1. the Claimant was informed of the allegations and the need to attend a disciplinary meeting at which the problem was discussed, with the Claimant having opportunity to respond to the case against her (ACAS Code paras 9-12).

82.2. the Claimant was offered the opportunity to be accompanied at the disciplinary hearing, which she exercised (ACAS Code para 13);

82.3. the Claimant was informed of the decision to dismiss and her right to appeal (ACAS Code para 21).

83. Procedurally therefore it appeared that the main tenets of the ACAS Code were complied with. Equally there was nothing in the internal procedure that seems to have been materially breached.

84. Miss Rziek made the following points in relation to the procedure:

84.1. Ms Taylor selected Ms Stone as the investigating officer and reviewed the report that suggested proceeding to the disciplinary hearing and then chaired that hearing itself. This, it was suggested rendered a decision to dismiss bias or premeditated. The Tribunal considered that Ms Taylor's role did not in fact amount to any bias (apparent or otherwise) it was an administrative role and the investigation report only suggested in effect there was a case that needed to be answered, when Ms Taylor had the hearing, she may of course have changed her mind. In the circumstances, this approach did not take the procedure outside the reasonable band even if it may have been better for the chair to have had nothing whatsoever to do with the process before chairing the meeting;

84.2. The suspension was not handled in line with the policy allegedly because the Claimant was not adequately informed of reviews and so on. However, this does not deal with the fairness or otherwise of the dismissal itself and so it does not appear relevant to s.98(4) ERA. In any event, the Claimant was aware that the investigation was occurring and knew of the charge. Nothing materially changed so there was no reason for the suspension to be removed. Once again nothing in this therefore renders the procedure outside of the reasonable band;

84.3. The Respondent relied or at least mentioned a safeguarding outcome which the Claimant never had an opportunity to comment on. This did cause the Tribunal some pause for concern initially as fundamentally if an employer is relying upon something the employee should have an opportunity to comment and address it. On balance however this did not render any dismissal outside the band procedurally as it was made clear that in fact that was *not* something that was relied upon or even viewed by the disciplinary panel. The reference or 'reliance' upon it at p.285 [6] of the dismissal letter was not in fact as fact showing the Claimant individually had done something wrong but that the safeguarding report showed it was a serious situation. The Tribunal accepted this having heard live evidence on the issue and given this, although potentially not the best drafting at p.285 [6], reliance upon it in that vein did not procedurally render the matter outside the reasonable band;

84.4. Failure to have Diana Combes as a witness at the disciplinary hearing. However, the Claimant was informed and had a right to call witnesses and was accompanied by her union. She never exercised this right and so not having a witness whom the disciplinary panel were never told she was allegedly a 'key' witness is not outside the reasonable band.

84.5. The Claimant's limited English had a material effect on the proceedings and the decisions. For examples admissions made, which were apparently mistaken, notes were signed but not read and also, she was confused or stressed by questions being asked of her from lots of people during the disciplinary hearing. However, on these particular facts there was no translator requested, the Claimant was represented by her trade union and had never indicated an issue with her English and so it was reasonable (within the reasonable band) for the Respondent not seeking to get translation or have concern with any apparent admissions made.

84.6. The appeal was superficial as the appeal officer had not taken the time and did not review all the investigation pack. The Tribunal concluded that Mr Haigh did read the key aspects and whilst he took a strict 'review' only approach, he addressed the main points of appeal. His approach was not one that took the appeal outside the band of reasonable responses.

85. Finally, the Tribunal had regard to the process end to end, having regard to the reason for dismissal. It concluded that the procedure fell overall within the reasonable band.

Reasonableness of sanction

86. In terms of the sanction, Miss Rziek made the following points:

86.1. There was discrepancy of treatment as others, such as Ms Bonsor, had breached procedure and not been dismissed. However, before the Tribunal there was no evidence that anyone had symptoms of Covid or was told to take a test by a medical professional and did not do so. Ms Taylor stated, and the Tribunal accepted, that others were dealt with in relation to Covid breaches, but no one was in a comparable situation to the Claimant of having ignored symptoms or testing but turning up to work. Accordingly, the Tribunal concluded there was no discrepancy of treatment in this case.

86.2. The Claimant was not patient zero. The Tribunal accepts that this may well be the case but that was not the reason she was dismissed and even if not the patient zero causing spreading of the disease in this setting could merit dismissal (see below for more).

86.3. The police and DBS had not taken the issue further. The Tribunal concluded the tests were different to that in the employer-employee dismissal context and mere fact there was no criminal offence found, or DBS did not view the matter as meaning the Claimant could no longer work with such a vulnerable group, did not detract or rather deprive an employer concluding that an employee could not remain employed by them by virtue of the same breach.

86.4. The Claimant was not told to isolate. That may be true, but the Claimant accepted that once she was told to take a test she should not be attending the work premises so there was nothing material in a GP not specifically advising isolation in this context given the Claimant's evidence before the Tribunal.

87. Whilst none of the points made above indicated a sanction that was outside the reasonable band, the Tribunal did reflect on whether the decision was simply too 'harsh' (which was one of the Claimant's points of appeal). She had a clean disciplinary record and had made an error of judgment when she plainly clearly believed she had no covid symptoms and perhaps really the case was one of a final warning, or dismissal with notice at most. However, the Tribunal reminded itself that its role was not to substitute but to apply the reasonable band as relevant to this employer in this industry. In relation to the mitigation, including clean disciplinary record and honest belief in not having Covid symptoms, the Respondent did take this into account. It however concluded in essence that the service users were vulnerable and such errors could have serious consequences, as well as the Claimant not apparently appreciating or showing adequate insight into her mistake. The Tribunal concluded that in fact dismissal did fall within the reasonable band of responses on balance for the very points that the Respondent made. It reminded itself that whilst the situation with Covid may have changed and developed at the *time* of the decision this was a disease with no vaccine and very stringent public health requirements at the time. Ultimately, the Respondent needed to have trust and confidence in the Claimant that a similar mistake would not happen, and it was within the reasonable band for it to conclude that this was no longer present given the Claimant's behaviour. Even before the Tribunal the Claimant maintained she did nothing wrong.

88. Therefore, the claim of unfair dismissal fails.

Polkey/Contributory fault

89. Although not strictly necessary given the claim fails, one of the issues the Tribunal was due to consider, and which was addressed was Polkey/Contributory fault. The factual findings and conclusions of the Tribunal do not give rise to any alternative Polkey findings or reductions. However, the conclusions in relation to the Claimant seeing the GP, who advised her to test, *before* the date of the next shift she undertook for the Respondent, was blameworthy conduct that caused the dismissal. Had she taken the test and awaited a negative result before working for the Respondent the situation would never have arisen. In these circumstances the Claimant was largely to blame for the dismissal and had it been necessary a 75% reduction for contributory fault would have been made.

Employment Judge Caiden

Dated: 19 December 2022

RESERVED JUDGMENT AND REASONS
SENT TO PARTIES ON 4 January 2023

FOR EMPLOYMENT TRIBUNALS

Notes

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