Case Number: 3303718/2020-3303720/2020,
3303721/2020 – 3303723/2020,
3303749/2020 – 3303751/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
(1) Ms I Vaduva **(2) Mrs LR Sava** **(3) Mr NE Viorel**	**v**	**Aspen Village Ltd**

Heard at: Watford Employment Tribunal **On**: 3 to 6 October 2022, 1 November 2022 (discussion in chambers by C.V.P.)

Before: Employment Judge George
Members: Mr A Scott; Mr L Hoey

Appearances:

For the Claimant: Ms W Ansah-Twum, counsel
For the Respondent: Ms Y Montaz, consultant
Tribunal appointed interpreter: Ms C Berinde, Romanian language

RESERVED JUDGMENT

1. The first claimant's claim of unfair dismissal contrary to s.94 of the Employment Rights Act 1996 is dismissed on withdrawal.

2. The first claimant's claims of race -related harassment and direct discrimination on grounds of race are not well founded and are dismissed.

3. The second claimant's claims of race related harassment and direct race discrimination are not well founded and are dismissed.

4. The third claimant's claims of race related harassment and direct race discrimination are not well founded and are dismissed.

REASONS

1. At this hearing, which took place in person between 3 and 6 October 2022, we had the benefit of a joint file of documents which, in its final form, included pages numbered between 1 and 576. In the hardcopy format the parties had, by agreement, removed a number of pages which they agreed would not be referred to and were not necessary for a determination of the issues between

the parties. This was a pragmatic approach which avoided waste and cost. Page numbers in these reasons refer to that bundle. For the most part, the revisions to the bundle submitted electronically by the respondent on Day Two were to provide an electronic copy of those pages which had not been removed in the bundle but also to add pages 572 to 573 and that addition was consented to.

2. However, also on Day Two the respondent, by Ms Montaz, applied to introduce the document she had herself seen for the first time shortly before the start of the hearing at 2.00 pm and which had been disclosed to the claimants late. The respondent stated that the document was their gifts and legacies policy dated April 2019. The evidence of all three claimants' was that they had not been shown that policy at any time during their employment or in the litigation prior to the final hearing. This application was resisted by the claimants. After considering the parties' submissions, we granted permission to the respondent to rely on that policy which was inserted at pages 574 to 576.

3. We gave our reasons for that orally but, in the interests of avoiding further delay, set out the reasons for the decision here. In brief, a gifts and legacies policy appeared to be referred to in the disciplinary meeting with Mrs Sava where she appeared to agree that there was such a policy (see page 391). It was common ground that the claimants were not shown a physical copy of the policy in the disciplinary meetings but asserted that a copy had been handed to their union representative.

4. It had been agreed on Day One, before evidence started, that at the same time as considering issues of liability we would consider whether, if the claimants were successful on their discrimination claim, there should be a deduction from compensation to take account of the prospect that they would have be dealt with in the same way in any event, had there been no discrimination. It was on that issue that the respondent sought to be able to rely on the alleged gifts and legacies policy. We were of the view that it would be more prejudicial to the respondent not be able to rely on it than it would be for the claimants to have to respond to it, given the opportunity to give evidence about it, particularly when they denied ever having seen it and no positive evidence was advanced by the respondent to the contrary.

5. The point at which the respondent sought to introduce it was after Mr Viorel had concluded his evidence but before the other two claimants were cross-examined. Neither the respondent's nor the claimants' representatives applied for Mr Viorel to be recalled in order to face questions about the additional document. They could not therefore rely upon the document in respect of their defence of Mr Viorel's claim.

6. We were also mindful that it would be necessary for us the consider the document when evaluating the reasons for Ms Willis-Read's actions in dismissing Mrs Sava and disciplining Mr Viorel – both of which acts were said to be discrimination. If this specific policy was something that she was aware of then, whether or not the claimant's had ever come across it, the existence

of and Ms Willis-Read's knowledge of it that would be relevant to the issue we need to decide. One thing we need to consider is whether Ms Willis-Read was genuinely making the decision that she says she was making based on the facts as were known to her or whether she was influenced by improper racial motives.

7. All three claimants gave evidence with reference to written witness statements which they adopted in evidence (with corrections and amendments noted upon the Employment Judge's copy) and upon which they were cross-examined. The Tribunal flagged to Ms Ansah-Twum that the claimants' witness statements did not appear to cover all matters which it was necessary for them to cover to evidence all elements of their claims. In particular, Ms Vaduva's statement did not cover her resignation or the reasons for it and it was necessary for her to give supplementary evidence on that topic. To the extent that the claimants needed to explain any delay in presentation of their claims, that was not covered by the witness statements. Some page references were inaccurate. On Day Two, the Tribunal asked for a list of correct page references to be provided.

8. On the morning of Day Three, Ms Ansah-Twum forwarded a list of proposed amendments to the claimants' witness statements correcting page numbers but also addressing the time limit issues and providing Ms Vaduva's reasons for resignation. This was a somewhat unorthodox way of proceeding and was not what we had directed. However, it did give Ms Montaz advance notice of the supplementary evidence in chief which was likely to be given. The Tribunal directed that the revised page numbers could stand as corrections to the witness statements but that the supplemental evidence had to be given in orally so that it could be subject to cross-examination. The document entitled "Amendments to claimants' witness statements" was not adopted in evidence as such. Ms Ansah-Twum was advised that she could apply to recall Mr Viorel should she consider it necessary to do so – he had given his evidence before the so-called amendments to his statement were put forward. No such application was made. To be clear, the claimants' evidence consisted of their previously disclosed witness statements, subject to the corrected page numbers provided on Day Three, and oral testimony only. As can be seen, both sides' preparation for the hearing was less than perfect and the Tribunal was flexible in their approach to dealing with the consequences of that while seeking to ensure that the parties remained on an equal footing.

9. The claimants also relied on witness statements prepared by Marin Gheorghe Viorel (signed on 1 September 2022) and Lukas Maximilian Hentrich (signed on 9 May 2022). Both MV and LH worked as healthcare assistants (hereafter referred to as HCA) at the care home during the relevant period. Since they were not available to be cross-examined on their statements, we admitted them but give them such weight as we think appropriate in the context of all the other evidence in the case.

10. The respondent called three witnesses: Rosamunde Willis-Read - the chief operating officer, who had conducted the disciplinary hearings in respect of

the second claimant and third claimant; Amanda Scott - the chief executive officer, who had conducted the grievance hearings in respect of the second and third claimants and dismissed their appeals against their respective disciplinary sanction; and Wendy Lawther - the centre manager at the care home where the claimants were employed at the relevant time.

11. The claims arise out of the claimant's employment as nurses in a care home operated by the respondent. The first claimant was employed between 20 June 2015 and her resignation with effect on 17 February 2020. The second claimant was employed between 12 January 2015 until 13 July 2020 (after presentation of her claim). The third claimant's employment started on 5 January 2015, was continuing when he presented his claim and he subsequently resigned from his employment. There were no issues arising from his resignation within the scope of this hearing.

12. There are in fact six claims contained in the consolidated claim: Case Nos: 3303718 to 3303720/2020 a (premature) claim of unfair dismissal and race discrimination brought by Mrs Sava which included the details of Ms Vaduva and Mr Viorel and was therefore accepted as 3 claims by three claimants; Case Nos: 3303721-3303723/2020, a premature claim of unfair dismissal and a claim of race discrimination brought by Mr Viorel which included the details of Ms Vaduva and Mrs Sava; and Case Nos: 3303749-3303751/2020, a claim of constructive unfair dismissal and a claim of race discrimination brought by Ms Vaduva which included the details of Mrs Sava and Mr Viorel. The claims were consolidated in May 2020 (page 75).

13. Those nine claims were case managed by Employment Judge McNeill QC (as she then was) on 17 September 2021 when she extended time for presentation of the respondent's grounds of response to 10 May 2021. The various claims had been presented on either the 5 or 6 April 2020 following periods of conciliation that either took place on the 19 March 2020 or between 19 and 20 March 2020. It was also at that hearing that the claimants were given the titles first claimant (Ms Vaduva), second claimant (Ms Sava) and third claimant (Mr Viorel) and that Mr Vriorel withdrew his unfair dismissal claim as having been brought prematurely.

14. Judge McNeill QC directed the first claimant and second claimant to write to the tribunal and the respondent to say whether (in the case of the first claimant) she intended to pursue her claim of constructive unfair dismissal and (in the case of the second claimant - whose dismissal postdated the claim form) she intended to apply to amend her claim to include a complaint of unfair dismissal.

15. The response to this direction was given by a letter 8 June 2022 in which the claimants' representative, Moorhouse solicitors, stated that the respondent had been notified that the first claimant did not intend to pursue a claim for unfair constructive dismissal and that the second claimant, Mrs Sava, had decided not to pursue her claim for unfair dismissal and was making no application to amend.

16. It appeared from Ms Ansah-Twum's skeleton argument on behalf of the claimants (the CSA), provided to the tribunal and the respondent on the first morning of the hearing, that the claimants argued that they had intended to communicate by that letter of 8 June 2022 a decision not to pursue claims of unfair dismissal under the Employment Rights Act 1996 (the ERA) and not that they abandoned dismissal related claims under the Equality Act 2010 (the EQA). In other words, in that skeleton argument it was argued that the acts of dismissal (in the case of Mrs Sava) and acts in response to which Ms Vaduva resigned were relied on as amounting to discriminatory dismissals contrary to s.39(2)(c) EQA. This is a possible interpretation of Moorhouse solicitors' letter of 8 June 2022 and one which the respondent accepted. The above rule 52 judgment issued on withdrawal is therefore limited to Ms Vaduva's claim of constructive unfair dismissal under the ERA and it was accepted that claims of discriminatory dismissal were part of Ms Vaduva's and Mrs Sava's claims. In fact, Mrs Sava (who was dismissed after the claim was presented) needed leave to amend her claim to pursue a claim of discriminatory dismissal.

17. It also appears from the CSA that the claimant "will also like to pursue a claim for harassment on the grounds of their race" (para.2 the CSA). It was accepted by Ms Ansah-Twum that an application to amend the claim needed to be made. One was formally made by email by the claimants' solicitors on Day Three of the hearing. Ms Ansah Twum also asserted that the claim included (to paraphrase the CSA) allegations of alleged detriments of failing to uphold the grievances brought by Mr Vriorel and Mrs Sava. These had not been identified as being issues at the case management hearing in September 2021, when the claimants had been represented by Ms Ansah-Twum. She candidly accepted that the need to make such an application had become apparent in preparation of the full bundle.

18. Ms Montaz, for the respondent, was taken by surprised by this since the CSA had been emailed to her shortly before the hearing and (understandably) she had not read it before coming into Tribunal. She was given time to take instructions. Although Ms Montaz ultimately did not object to the application to amend to add a race -related harassment claim and accepted that discriminatory dismissal claims were within scope of the complaint the respondent had expected to meet she objected to the application to amend to complain about the grievance. The Tribunal determined that application to amend on Day One of the hearing. The application was limited to the claims brought by Mrs Sava and Mr Viorel because Ms Vaduva had resigned prior to presenting her claim and did not bring a grievance during the course of her employment.

19. We granted leave to Mrs Sava to amend her claim to claim discriminatory dismissal, effectively by consent. At the time the second claimant presented her claim she was still in employment so a dismissal claim cannot have been part of the original claim. We were of the view that, given the way the litigation has continued – apparently on the presumption that such a claim

was among the issues - and the lack of prejudice to the respondent having to deal with that point, Mrs Sava should be given the necessary leave. In reality, the parties appeared to have prepared for the hearing on the basis that that was one of the issues that the Tribunal was going to have to consider.

20. We refused the applications by Mrs Sava and Mr Viorel to amend their claims to argue that there had been race discrimination in relation to the hearing of their grievances. We decided that the detriments should be limited to those which have been notified to the Tribunal during the housekeeping on day one of the hearing and set out in the issues below.

21. We provided oral decisions for our reasons and do not need to provide written reasons. However, in the light of the delay that there has been before promulgating the answer, we include written reasons for that case management order here to save time lest they be requested. We took into account the factors set out in Selkent Bus Company v Moore [1996] I.R.L.R. 661 EAT and in the more recent decision of Vaughan v Modality Partnership (UKEAT/0147/20).

22. The potential for an application to amend was first notified to the respondent in para.3 CSA where it was stated that the detriments relied on included a failure to uphold the grievance. When it was pointed out to Ms Ansah-Twum that the issues as defined by Judge McNeill QC had not included a failure to uphold the grievance as one of the alleged acts of detriment, the application to amend was made orally. It was resisted by Ms Mumtaz.

23. When the reasons for the application were probed, it appeared not to be fully thought through it in that it was initially argued to be in relation both to the first stage of the grievance and the second stage of the grievance. Then, when it was pointed out that the second stage grievance had been conducted by an individual who is not presently expected to give evidence on behalf of the respondent, that part of the application was withdrawn. This meant that it was a difficult application for the respondent to reply to. These would also be difficult issues for them to have to respond to within the litigation, were Mrs Sava and Mr Viorel it to be permitted to advance claims based on the grievances.

24. The relevant claimants had not included evidence regarding their grievances in their witness statements. So this was not simply an application to amend the claim but an application for leave to adduce supplementary evidence in chief at the start of their evidence. This risked further disrupting the timetable of the hearing because the respondent would not have any notice of such evidence.

25. The application was made very late in the day and there was no satisfactory explanation as to why the respondent had not been alerted to it prior to the morning of Day One of the hearing. The claims had been clarified at a preliminary hearing where the claimants were represented by Ms Ansah-Twum.

26. It is also fair to say that a complaint based on the grievance is a rather different issue to the others in that it does not rely upon an alleged actual comparator. The argument would be that Miss Scott had treated the relevant claimants less favourably on grounds of their race in failing to uphold the grievance (and, potentially, that the grievance appeal officer had done likewise). So far as we have been told there were no other comparable grievances at that option evidence.

27. By consent, we granted the necessary leave for the claimants to argue an alternative complaint of race related harassment, Ms Ansah Twum confirmed that the way in which the acts were related to race was argued to be that they had been motivated by race.

28. The tribunal was unable to sit on the morning of Day Two. That, the various applications referred to above (many of which were caused by late disclosure of documents and/or explanation of arguments) and the need for the three claimants to give evidence via a tribunal appointed interpreter meant that the original time estimate for evidence was exceeded and judgement had to be reserved. There has been an unfortunate and regrettable delay in writing this reserved judgment due to competing pressures of judicial business for which Judge George apologises.

29. It was agreed between the representatives that the question of whether, were the claimants to succeed, there should be any deduction from compensation to take account of the prospect that the respondent would still have taken the action that they did should be decided along with issues concerned with liability within the initial reserved judgement (issue (xiv) below). A provisional remedy hearing was listed when judgement was reserved. It was vacated when it became apparent that the reserved liability judgment would not be available in time for the parties to prepare for it and will not now be needed.

30. An amended list of issues which took into account the amendments to the issues necessitated by the above decisions was circulated to the representatives and agreed. It is replicated below

The Issues

31. The issues between the parties which fall to be determined by the Tribunal are as follows:

Time limits / limitation issues

(i) Were all of the claimants discrimination and harassment complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 (EqA)?

(ii) If not, should time be extended on a "*just and equitable*" basis?

EQA, section 26: Harassment related to race

(iii) It is not in dispute that the respondent subjected **the first claimant** (Ms Vaduva) to the following treatment:
   a. reporting her to the police; and
   b. suspending her;

(iv) Did the respondent behave in a way which entitled Ms Vaduva to consider herself forced to resign

(v) It is not in dispute that the respondent subjected **the second claimant** (Mrs Sava) to the following treatment:
   a. reporting her to the police;
   b. suspending her;
   c. subjecting her to disciplinary action; and
   d. dismissing her.

(vi) It is not in dispute that the respondent subjected **the third claimant** (Mr Viorel) to the following treatment:
   a. reporting him to the police;
   b. suspending him;
   c. subjecting him to disciplinary action up to an including the imposition of a final written warning and the rejection of his appeal against that warning.

(vii) To the extent that the respondent behaved as alleged, was that unwanted conduct?

(viii) Did it relate to race? The claimants alleged that the conduct related to race because the relevant manager acted as they did because of race.

(ix) Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

(x) If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

EqA, section 13: direct discrimination because of race

(xi) To the extent that the above alleged actions occurred and are found not to be acts of unlawful harassment, was that treatment "*less favourable treatment*", that is, did the respondent treat the claimants as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimants rely on others who took items from the deceased resident's room as their comparators and/or hypothetical comparators.

(xii) If so, was this because of the claimants' race?

Remedy for discrimination

(xiii) If the claimants succeed, in whole or part, they claim compensation for injury to feelings and, in the case of Mrs Sava and Ms Vaduva, for financial losses. It is not contended that Mr Viorel has sustained any financial loss.

(xiv) If the claimants are successful, is there a chance that the respondent would have behaved as they did in any event? Should the claimants' compensation be reduced as a result to take account of that chance?

Findings of Fact

32. We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principle findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

33. The representatives had agreed a chronology on Day One of the hearing and we incorporate elements of that into our findings of fact.

34. In late 2019 one of the residents of the care home at which the claimants worked was admitted to hospital. He was discharged and returned to the care home on 1 November 2019. He was a long-term resident who had lived at the home for 12 years. Sadly, he died at about 11:20 pm on the night of 7 to 8 November 2019. He had a sister and family members had visited in the past, but not in recent times. He had a social worker from the local authority who was tasked with attempting to find his relatives. He was described as a "prolific shopper" and it seems that his room was full of belongings - as one might expect after such a long residence in one home. It so happened that the third claimant was on duty at the time the resident passed away and he recorded his death on the electronic system (page 543).

35. The unit manager came on duty on 9 November 2019. According to the claimants, that unit manager gave them oral permission to remove possessions from the resident's room during the handover meeting at 8.00 am that morning. Their evidence was that the explanation was given to them that there was no will or next of kin and that his wishes had been for his possessions to be distributed amongst staff and residents. The claimants claim that it was usual custom in the home for possessions to go to the staff

and other residents when a resident died without a will of next of kin: see paras.6 to 11 of the first claimant's witness statement; paras.21 to 24 of the third claimant's witness statement and paras.6 to 10 of the second claimant's witness statement. They allege that this instruction was given in the presence of the deputy home manager and that they relied upon this instruction and the tacit acquiescence in it by the deputy home manager as amounting to permission to remove the belongings.

36. All claimants stated that it was custom and practice that only oral permission was required to sanction the removal of possessions from a deceased resident's room. However Mr Viorel's detailed oral evidence about this did not quite go that far. He said that distribution of possessions had happened about four or five times during his employment, which amounted to about once a year. Although he said that it normally happened if the resident doesn't have any relatives or family, he also said, "it happens when the families they don't want to take anything and everything is managed through the management unit." He was adamant that they had had five managers in that period and they had all had the same practice. He had not therefore thought it necessary to approach the centre manager, Wendy Lawther, about it.

37. There was some hearsay evidence available to us from the unit manager, who was not called by either party. This was provided in writing after he had resigned (page 468 at 469) and was that he said, in conversation, that the resident would have liked for his belongings to be donated to staff and other residents but that he did not tell the staff that they could action that. It is fair to say that the unit manager does go into some little detail about conversations he reported having about donating particular belongings to particular individuals. WL threw doubt on that proposition and said the resident wasn't consistent in his expression of appreciation for the work of the staff. It seems to us that there was definitely scope for misunderstanding of what the unit manager said because English is not the claimants' first language. That appears to have been the unit manager's view.

38. During the afternoon and evening of Saturday 9 November 2019 a large quantity of the resident's possessions were removed from his room. The claimants state that a number of other members of staff were present at the handover meeting and also removed items (See C1 para.14 and C2 para.13). Mr Viorel was off duty on 9 November and drove to the care home to collect Ms Vaduva, his girlfriend, who put some items in his car.

39. CCTV footage of that day was subsequently viewed and collated. The Tribunal was not asked to view any footage. All that was available was a document at page 569 to 571 which was described in the index as "details of CCTV footage" but amounts to notes of what was seen in various pieces of footage. This is analysed further below but it appears that several members of directly employed and agency staff removed a large number of items from the premises on foot and by car including boxes, bags, suitcases and also larger items: a television and a fridge.

40. This all happened against the backdrop of various policies to which we have been taken. The undated Forest Healthcare Employee Handbook stages at page 138 and, at page 152 at paragraph 2.11 under the heading "Gifts and Gratuities" it is provided

> "No tips, gifts or favours should be solicited or accepted from any third party, e.g. service users, their families or contractors. Acceptance of money by any employee on his/her own behalf from a third party, and given in the context of a gratuity, is totally unacceptable and will result in disciplinary action being taken the penalty for which, if upheld, will be summary dismissal.
> If a service user or their family insist upon giving gratuities you must inform your Manager. Most care centres have separate amenities fund for the purpose of donations made to staff and/or the care centre."

41. We also note the provision for a policy on "gifts and hospitality" at page 300 within the Employee Handbook dated 7 August 2018 (at page 262 to 309). This is in similar terms. Also relevant is a paragraph in the contract of employment of the first claimant (page 321), which makes clear that, as a nurse, she had a contractual duty to comply with her code of professional conduct. The Employee Handbook is described as a contractual document (page 310 in C1's contract).

42. The document that was added to the bundle on Day Two at pages 574 to 576 appears to be a written gifts and legacy policy. All three claimants deny being aware of this document prior to the litigation. It sets out in some detail provisions for handling gifts and gratuities and makes clear that it is only sums of money or items the value of less than £10 which can be accepted as gifts. The respondent has not shown that the claimants were aware of the details of this written policy and we accept that they were not.

43. The claimants were also taken in cross-examination to the Nursing and Midwifery Council Code of Practice regarding gifts at page 492 para 21.1. It is said there that in order to uphold "your position as a registered nurse, midwife or nursing associate" you must:

> "refuse all but the most trivial gifts, favours or hospitality as accepting them could be interpreted as an attempt to gain preferential treatment."

44. There was some attempt on behalf of the claimants to argue that what transpired could not be regarded as an attempt to gain preferential treatment since the resident who was said to have given away his belongings was deceased as at the date in question and therefore incapable of influencing staff to give him preferential treatment.

45. We consider that Ms Willis-Read's evidence on this point was particularly persuasive. She said that, although the resident who had owned the possessions was deceased so there was no likelihood of it being an attempt to get preferential treatment for him, that

> "was not to say that other residents may become aware that you may be considered to be a valuable resident when your time comes, such that you may get extra special treatment."

46. In other words, she said that the rule did not just relate to the deceased resident in the present case, but to prohibiting behaviour which would or might influence any resident's thinking. We accept that reasoning and reject the argument that the fact of the resident's demise meant that accepting bequests could not be regarded as covered by that paragraph in the NMC Code of Practice.

47. Although the claimants all denied knowledge of the specific gifts and legacy policy relied on by the respondent there is evidence that they were aware that staff were not permitted to accept gifts at least without written approval. Mrs Sava, in interview with Ms Willis-Read (page 394) said that she presumed that the unit manager had written approval from Mrs Lawther and accepted that staff were not permitted to accept gifts. Mr Viorel accepted that in hindsight what was done was wrong and they should have had written permission from the centre manager, Mrs Lawther.

48. We accept that the document added at page 574 is the corporate policy that gifts should only be accepted below the value of £10 and should be declared. We also accept that the claimants were not aware of that specific policy. However the Employee Handbook made clear in more general terms that no tips, gifts or favours should be accepted from service users or their families. We also note Mrs Lawther's evidence (WL para.5) that there is no specific policy about the belongings of a deceased resident but that normally they are dealt with by relatives either directly or in liaison with the resident's social worker. Our comment is that it is entirely right and to be expected that a care home should have policies which are enforced about gifts and legacies to seek to ensure that residents are cared for according to their needs and not according to what they might give the caregiver whether in life or after their death.

49. The claimants also relied upon belongings having been distributed in the past as reassurance. However, on this instance they were part of a group of people moving a large quantity of belongings from the resident's room within 48 hours of his death. Nothing of this scale is described as having happened before and Mr Viorel's evidence suggested previous distribution had happened with the family's consent.

50. All three claimants were registered general nurses. We've come to the conclusion that the claimants knew or ought to have known that this was wrong and contrary to their Code of Conduct as nurses and to the Employee Handbook prohibition on receiving gifts. The fact that they were unaware of the specific policy at page 574 does not affect that conclusion given the terms of the NMC Code and the Employee Handbook. Even if the first and second claimants, who were those on duty on 9 November 2023, believed that what the unit manager had said was that the residents' belongings could be given to the staff and other residents, they should have realized that removing the

items in the way they were removed was wrong and should not have been authorized by him.

51. The quantity of what was removed was so great and it happened so quickly after the resident's death that it comes across as having been a scramble to take the best belongings. It was unedifying. We can understand why the police might have concluded that there was no reasonable prospect of proving criminal dishonesty but it was unedifying and disrespectful.

52. There is an unresolved factual dispute about whether the deputy centre manager was present at the handover session when the first and second claimants were apparently told they had permission to remove items. We do not need to resolve that. The only oral evidence is that of the claimants who were insistent that the unit manager gave permission in the presence of the deputy centre manager. Mr Viorel's evidence about previous examples, when analysed, were cases where actual permission had been given by relatives. It is true that this resident had not had visits from relatives in the recent past but he was known to have a social worker. Given that the items were removed the very next day after his death and on a Saturday those involved could not reasonably have thought that the family of social worker had consented. We do accept that Mr Viorel's evidence suggested that the absolute ban on gifts over the value of £10 had not been enforced without exception. However, against background of the principles in the Employee Handbook the quantity and speed of removal was clearly wrong. This should have been realized by the claimants at the time regardless of what they thought the unit manager had said and whether the deputy centre manager was present. We do not think they can rely upon the much more limited previous incidents as comparable. Mr Viorel, to do him justice, realized this after the event. There was no evidence that the care home was under pressure to clear room for another resident. Mrs Lawther stated there were other vacant rooms.

53. She also stated that the care home had received confirmation from the resident's social worker on 19 November 2019 that contact had been made with a relative who had agreed to make arrangements for his funeral and would contact the care home about his belongings. Subsequently the responsibility reverted to the local authority. She continued (para:12 of her statement) that, over the weekend of the 23 to 24 November, someone notified her that a nurse was in possession of an item which he recognised as having belonged to the resident.

54. We accept that, on 26 November, Ms Lawther checked the resident's room which she described as having been stripped of all items that could be packed and removed. This is when she discovered what had happened. She did this in company with the unit manager who apparently told her that the resident had told one of the nurses that she could have his suitcases. Her evidence was that she reviewed the CCTV footage from 9 November 2019. According to Mrs Lawther, page 569 to 571 was drawn up to identify the

individuals shown in CCTV footage which she personally had reviewed and she provided a copy of it to the police.

55. After taking advice, on 28 November 2019 Ms Lawther informed the police who attended the care home,

> "and viewed the CCTV themselves. I went through all the names of the staff members who could be identified. Upon their request, I gave them a list of five names– the three Claimants (who were the only Nurses shown) and two Agency staff who were seen taking a TV and fridge. The healthcare support workers should not have taken items from the room. They are however not bound by the same rigour of leadership and Code of professional conduct, and they had observed this being condoned by the nurses on duty. The police made the decision of who would be arrested based on their judgement." (para.21 in the original version)

56. In oral evidence Ms Lawther corrected the second sentence of that extract so that it read,

> "Upon their request, I gave them a list of five names of homestaff – the three Claimants (who were the only Nurses shown) two care staff and two Agency staff who were seen taking a TV and fridge."

57. The three claimants were arrested on 28 November 2019 (see C1 para 26, C2 para 27, and C3 para six). The claimants were particularly upset the manner of the arrest because they were handcuffed and detained in front of family and colleagues. It must have been a shocking and humiliating experience. They were then informed by the respondent that they were suspended. This was confirmed in writing on 2 December 2019 (pages 330 to 336). The unit manager was also suspended.

58. At the heart of the claimants' claim of race discrimination is that they were the individuals who were arrested when many others were involved who were not arrested. 13 names are included in the claimants' statements and Ms Lawther produced an appendix which is a breakdown of the staff by ethnicity and by role. The respondent's defence is first, that the police decided whom to arrest and secondly, that the distinguishing feature about the claimants was not their race but that they were all registered nurses whereas the other staff identified on the CCTV footage were HCA's.

59. We need to consider:

    a. Who decided whom to report to the police?
    b. Which individuals were reported?
    c. Who decided whom to arrest?
    d. Who decided whom to suspend and why?
    e. Whether the claimant's status as RGN was a material factor amounting to a difference the claimants' circumstances on one hand and there HCA comparators' circumstances on the other?
    f. Were there any RGNs in a comparable position who were not reported to the police or not suspended and, if so, why?

60. The only registered general nurse on the claimants' list in their witness statement is that of an RGN of Indian origin. However, contrary to Ms Vaduva's and Mrs Sava's statement, Mr Viorel gave evidence that that RGN was not at the handover meeting and had found out about the alleged permission to remove items later (NEV para.27 to 29).

> "I normally take used to take or give a lift to [the Indian RGN] at home in the morning with my car. In that particular morning she asked me to give her a lift and said that she took box of books and CDs . I saw that."

61. This evidence was the basis of the claimants' allegation that the CCTV footage was incomplete. Mr Viorel asserted that people had continued to take items from the room after 9 November. In fact the complaint was that the footage of later dates had not been viewed. He accepted that he had not told Ms Lawther that the RGN of Indian origin had taken items when she had later been on shift, so there was no reason for Mrs Lawther to investigate that RGN. There is no evidence that Mrs Lawther should have known to look at the CCTV footage for other dates. Her failure to do so does not therefore support the claimants' allegation that she deliberately overlooked the potential culpability of other people.

62. Mr Viorel accepted that he was not sure whether there were any respondent managers who would have known that the RGN of Indian origin had taken items. He did not mention that RGN's involvement at the time, indeed not until the litigation.

63. Mrs Lawther's own account was that that RGN had volunteered that she had removed items and had returned them, presumably when the claimants' arrest became general knowledge. We accept that Ms Lawther was shown a quantity of items and was told they have been returned. This would, as it did in the case of some HCAs, reasonably affect the view taken of that RGN's culpability.

64. All of that leads us to conclude that Mrs Lawther did not have reason to report the non-Romanian RGN by name to the police on 28 November 2019. Mr Vriorel confirmed that RGN did not appear on the disclosed CCTV footage and she did not remove items on the 9 November itself. She wasn't on the CCTV footage that was shown to the police and could not have been identified from it. Mrs Lawther didn't have reason to cause the RGN of Indian origin to be investigated internally, at least at the outset. Once Mrs Lawther became aware that that RGN had subsequently removed items, there was not the same reason to suspect that she had breach NMC Code as applied in the case of the claimants; she had volunteered this information and returned the items. We are persuaded that those are genuine and non-discriminatory grounds for treating her differently to the claimants. The RGN of Indian origin was not materially the same circumstances as the claimants.

65. The other alleged comparators are HCAs. The claimants first saw the actual CCTV footage about 4 to 6 weeks before the final hearing. As we have

already said, it is the absence of the aforementioned RGN that causes them to call it incomplete. The allegation is not that the CCTV footage shows only part of the relevant time period on 9 November 2019 or that it fails to show all of the people who were involved on 9 November 2019. The claimants do not allege that pages 569 – 571 are an inaccurate description of who can be seen and identified on the CCTV footage.

66. They argue that the footage was selective in that it doesn't cover enough days and that more could have been done to identify those individuals who were not obviously identifiable on the CCTV footage but could be seen removing the resident's belongings. RWR's evidence was that each time she viewed the CCTV footage (and she said she had done so on different occasions) it had always been the same footage.

67. So although, for example, Ms Vaduva was insistent that the footage had been cut even she did not say that there were other RGN's involved on 9 November who should have been identifiable from CCTV footage. As we have already explained, there is no evidence that the RGN of Indian origin ought reasonably to have been known to be involved by Mrs Lawther before she spoke to the police.

68. We have concluded that the evidence before us does not support an inference that the CCTV footage provided to the police and analysed in the notes at page 569 was an incomplete record of the CCTV footage from 9 November. It may be the case that CCTV footage from other dates might have captured staff removing items on subsequent occasions. The evidence before us does not support an inference that Ms Lawther focused on 9 November to the exclusion of any other date for any reason save that her reasonable belief was that that was the occasion on which items have been removed.

69. Her witness statement account of the information she provided to the police was amended (see paras.55 and 56 above). Whereas the approved statement disclosed in advance stated that she had provided five names to the police her oral evidence was that she provided five names of employees. She did not cross refer to page 569 in her statement. Her oral evidence was that this document had been provided to the police. The way this evidence emerged was that she said they have provided a paper list that included the names of HCAs as well as those of the claimants "they were the home team [provided] to the officer who viewed the CCTV as well". When asked where was a copy of the paper list, WL identified page 569.

70. The document at page 569 identifies the three claimants by name and states that they were RGN's. Three other named individuals are identified as HCAs: two are described as seen taking items and one as getting into the car of one of those two. Mr Hentrich is identified by name and described as going into the corridor of the resident's room but is stated not to have taken items. Two male agency staff are referred to in frame 11 to 17 and described as removing a fridge and television but they are not named.

71. As corrected, WL Para.21 does match the information apparent on the face of the notes at page 569 in that of the seven directly employed individuals mentioned by name, the description of the actions of five amount either to taking items or of positively acting in a way which provided assistance (Mr Viorel driving the car). Two other are mentioned by name (Mr Hentrich and the HCA who got into a car) but their actions as seen on the description of the CCTV do not of themselves point to them being involved in removing items or in assisting in their removal. The claimant's do not state that the CCTV footage that they have now seen is of a quality that means other people are identifiable from that footage alone. They argue that other angles or other enquiries should have been done to result in the identification, for example, of the other four persons referred to in frame 7.

72. The claimants' allegation is that Ms Lawther directed the police towards them. If we were to accept that page 569 was given to the police that suggests that WL identified at least two other individuals by name as having been seen removing items and the third who left in the same car.

73. Mr Viorel raised a grievance against Ms Lawther (page 510) and also made a complaint against the police. Mrs Sava also raised a grievance.

74. The best evidence available to us about the police account of their involvement is found in two documents. First there is the investigation report into Mr Vriorel's complaint (page 347-see in particular pages 354 and 358). This confirms that five individuals were identified. The second document is page 572. Amanda Scott told us and we accept that this is a note she made of a phone conversation with a detective when investigating the grievances. The grievance hearings took place on 11 December 2019 so this conversation must have been shortly before that. This conversation with the DC was the basis of Ms Scott's conclusion that WL had not targeted the Romanians.

75. She confirmed in oral evidence that it was her handwriting. She said that she had contacted the police before the grievance hearings because it was an unusual set of circumstances and she had wanted clarification from the police themselves about how they had made their decisions relating to these events. She had taken the notes in her notebook of what the DC said to her over the telephone to aid her memory. Based on those notes and her recollection she said that the DC did not refer to a list verbatim but said in no way had it been victimisation because five people had been identified and he listed the nationalities which included two non-Romanians. She rejected the suggestion that the two named individuals must have been the agency workers saying that there wasn't any question in her mind but that the DC was describing other people involved who were not employees.

76. We think that this conversation, reported and noted by Ms Scott, supports Mrs Lawther's evidence that she identified five employees to the police who could be seen removing or assisting in the removal of items, gave the police their

job roles and the police made a decision as to whom to arrest. This was not something that the respondents were responsible for. We reject the interpretation argued for on behalf of the claimants that the five referred to in the manuscript notes must be the three claimants and two agency staff who were not directly employed. We do remind ourselves that Ms Lawther amended her statement but consider the amended version to be more plausible based upon the other documentary evidence.

77. We also note the difference between the list of people in Ms Vaduva's written statement para.14 and the list that she originally provided in her ET1. In the list at page 15 she did not include the RGN of Indian origin but did include two Romanian HCA's as being among those who were present when the unit manager allegedly told the staff to empty the resident's room. The inference from page 15 that all those listed participated. In that original list there are two Romanian present and no RGN. In the amended list in paragraph 14 of her witness statement the two Romanians do not appear but the non-Romanian RGN is included despite that being contrary to Mr Viorel's evidence. Her explanation for the difference was that she got confused and it wasn't intentional but we accept the respondent's accusation that this was done deliberately to try to present the list that best fitted the claimants' case (i.e. that the only Romanian's present were targeted) rather than the most accurate list. While this may not affect our finding on what information Ms Lawther provided to the police, it does mean that the claimants' argument that all the Romanians involved were targeted is not borne out by the facts.

78. The evidence before us was that the agency HCAs seen taking the television and fridge freezer were not booked again by the respondent.

79. The respondent agreed that the same disciplinary procedure, and the same gifts and legacy policy applied to HCAs so we considered that the decision not to suspend them required explanation. Ms Willis-Read joined the organisation after the event. She explained her understanding (which of necessity would be based on hearsay) of why the two directly employed HCAs who were identifiable from the CCTV and could be seen removing belongings were not disciplined – given that the same disciplinary procedure applied. First, she stated that nurses had a level of additional responsibility, a leadership role in all homes and it was also of paramount importance that they upheld the NMC Code of Practice. Secondly, her understanding was that quite a number of HCAs had returned belongings when they realised what had happened to the claimants and that was why the respondent had not taken it further.

80. It appeared from WL's oral evidence that it was she who decided to suspend the claimants and she was asked why the directly employed HCAs had not been suspended, given that, on the face of it, there were grounds to think that at least two of them had removed items. She emphasised the point in time they were at in the police investigation:

a. "We were still in safeguarding at that point. At that point we were not aware of the complete decision by the police. And any disciplinary process where safeguarding involved and police involved would be neutral act for full investigation to be carried out."

b. "In terms of the HCAs - the items had started to reappear in the home. I was not able to suspend a specific person based on them being in possession of items because I did not know who had items or not. At that point not received anything back form the claimants and I had been told by the police that they had said needed to return and at that point that had not happened." (In fact the claimants had been told not to contact the home and were told to and did return items to the police station.)

c. "Also I took the view, with guidance with HR, that nurses are senior and role models. And they felt that the HCA should have been dealt with on the basis that they had been following instructions from seniors who were leading them."

d. "CQC also advised we suspend as they were nurses leading the team".

81. WL's involvement in decision making ceased once the decisions to suspend had been made because, as she put it, she would be a witness.

82. The first reason put forward by WL appeared to be that, by 2 December 2019, although the claimants were no longer under arrest the criminal investigations were ongoing so it was necessary to prevent a return to work for safeguarding reasons while the police were still investigating them. On the other hand, it appears from DC Waldock's account in the report of the investigation into Mr Viorel's complaint that he identified during the period covered by their arrest that the unit manager supported the claimants' assertion that they had received permission to remove the items to an extent that was sufficient to negate dishonesty, a necessary component of the crime of burglary. Nevertheless, it is quite possible that that information or a communication of the decision not to prosecute had not been provided by the police to the respondent by 2 December 2019. Mrs Lawther's first reason is apparently sound.

83. The second reason put forward is that the CQC had advised that the claimants be suspended as they were the nurses leading the team. Mrs Lawther reported to the CQC by the Reg.18 form on 10 December 2019 (page 555) but by the time of this form she was informing the CQC of suspension so it does not provide independent support of her evidence that they advised her to suspend.

84. The next reason relied on is the alleged difference in the position between HCAs and RGNs who are described as leading the team. We were persuaded that the RGNs are rightly regarded as being in a leadership role and in a position where what they do has the prospect of influencing the actions of more junior members of the team. We are certainly persuaded that

the respondent genuinely believed that to be a valid distinction to draw and accept the evidence of RWR and WL to that effect.

85. We accept that, up to a point, the level of culpability of those other than the claimants was unclear because the HCAs began to return items. In the case of the claimants there was the quantity of belongings seen to have been removed or (in the case of Mr Viorel) they had apparently assisted to remove. In the case of the HCAs, even those directly employed who were identifiable, it was harder to see what had been removed and a quantity had been brought back surreptitiously. It is not that the respondent took no action in relation to those HCAs. They decided to deal with the matter through learning points in supervision. There is confirmation of that in the Reg.18 report at page 561. Perhaps other employers would have made a different decision but we accept that this decision was genuinely made for the reasons given.

86. We are satisfied that these were the genuine and entire reasons for suspending the claimants but not suspending the HCAs who could be identified from the CCTV footage.

87. We are mindful that the claimants argue that there are particular matters which give rise to an inference of a cultural attitude towards Romanians that they are of less value which is said to have influenced WL's report to the police and decision to suspend.

88. The first is an allegation that the deputy centre manager relayed to Mrs Sava a comment said to have been made by WL that she was "as not good as a cleaner" (See LS para.36 & 37 and pages 500 – 502). Those pages are screenshots apparently of WhatsApp or text messages between Mrs Sava and the deputy centre manager. In fact the alleged comment is that Mrs Sava is "about as good as a cleaner".

89. We do not regard this hearsay evidence as reliable. This is in part because from the little we have heard about the deputy centre manager she may have had reason to be untruthful or provocative about WL if she herself felt vulnerable to criticism in relation to the removal of the resident's possessions. She appears to have given different reasons at different times for her resignation with effect on 6 December 2019. She returned for a short period between 14 and 25 February 2020 before resigning for a second time.

90. Furthermore for Mrs Lawther to make the alleged comment would suggest an attitude inconsistent with the way that she had behaved toward Ms Vaduva. The latter had started as a housekeeper with the respondent. Mrs Lawther explains that, although qualified nurses in Romania, the claimants' English language skills initially made them ineligible to be employed as nurses in the UK by the respondent. Ms Vaduva progressed under the management of WL not only to have her nursing qualification recognised when her English language skills had improved sufficiently but also to be appointed team leader. Ms Vaduva's resignation letter (page 344) pays tribute to that.

91. We also give weight to Mrs Lawther's evidence that

> "I do not, in the home - generally I do not refer to the domestic team as cleaners they are the housekeeping team and site assistants. I will also add Ms Vaduva started her career in the housekeeping team. I do not discriminate between my teams they are all valuable and treated equally."

92. We find that she was not merely paying lip-service to the concept of valuing all of the team equally. She gave very short shrift to the suggestion that she would use the alleged comparison as disparaging. We accept that she does, in fact, hold the housekeeping team in high regard and it is that sense of a single team which is reinforced by the support she appears to have given to Ms Vaduva in achieving promotion. So we do not consider the hearsay evidence of the deputy centre manager to be reliable and we give weight to Mrs Lawther's egalitarian attitude in finding that she did not make that statement about Mrs Sava.

93. There was another allegation against Mrs Lawther based upon the WhatsApp at page 501. This concerned Marin Viorel who is the third claimant's brother and worked as a "senior carer" for the respondent. He states in his paras.9 and 10 that Mrs Lawther had reversed a decision by the deputy centre manager to approve his proposal to reduce his shifts and referred to the WhatsApp message. Page 501 is an undated screenshot which includes an email from Mrs Lawther to the deputy centre manager which has apparently been forwarded to Marin Viorel. All that is visible on page 501 of the email is the following:

> "Will check diary for this and next week.
> Need to move fast now.
> Had an email from Marin which frankly, well, I will forward you what I sent with it to Miriam.
> Can't decide whether it's a cultural attitude problem or just a Marin issues, either way, we are not"

94. The full email is at page 503 and concludes:

> "we are not responsible for his poor decisions; but apparently he can just pick and choose what he wants and we comply … don't think so."

95. The email dates from 18 June 2019 and the context is explained by the exchange of emails at pages 504 to 508. Marin Viorel had resigned from a permanent contract to go to another post in another carehome and had asked for a bank contract. The respondent explained that this did not guarantee him particular hours. He had then asked to move back onto a 36 hour per week contract but was advised that he was now on a contract which did not guarantee hours – which was why particular shifts had been cancelled. He emailed to complain about that. The context is therefore inconsistent with Maring Viorel's description in his paras.9 & 10.

96. This exchange supports Mrs Lawther's oral evidence that she was referring to an ongoing work cultural attitude of entitlement. In this specific instance she explained that she meant a sense of entitlement to return to the permanent contract but gave other examples of what she regarded as this culture of entitlement. She had explained to Marin Viorel that the permanent role had already been filled (WL para.31). This explanation is entirely consistent with the chain of emails and we accept it. We reject the argument that we should infer an anti-Romanian attitude on the part of Mrs Lawther from her email at page 503 because that would be to take a single phrase out of context and give it an inference that is contrary to the contemporaneous documentation.

97. To recapitulate, we are persuaded that Mrs Lawther did not only report the claimants to the police; she also reported two directly employed individuals who were not Romanian. In the second place, we are satisfied that the respondent has shown genuine and non-discriminatory reasons which explain the decisions to suspend and has done so by means of cogent evidence. The decision by WL to suspend the unit manager (who is not Romanian) on 23 December 2019 when he was due to return to work from sick leave is consistent with the reasons she gave for suspending the claimants. So long as he was not in the workplace there was no safeguarding issue for the respondent but, given the allegation against him that he had authorised staff to take the residents' belongings, there were potentially disciplinary charges for him to face as well (see the first paragraph on page 561 in the Reg.18 report).

98. Mrs Lawther was also criticised by the claimants for not approaching the claimants to ask for an explanation before taking action. She stated that she had been advised she could not speak to them while there was a police investigation ongoing for fear of prejudicing that investigation. At the point when she first discovered the loss of possessions, she was in a position where she had a duty of care towards residents and obligations towards the business with regards to their registration and took advice about reporting the matter to the police. Once she did so, it was the police who decided to arrest the claimants. The police investigation was then a complete and genuine explanation for not seeking an explanation from the claimants before suspending them: see also page 393 where the HR representative explained the same in Mrs Sava's disciplinary hearing. As Mrs Lawther explained, once she had taken that decision, as a potential witness she played no further role in the disciplinary process concerning the claimants or the unit manager. He resigned on 10 February 2020, approximately 6 weeks after his suspension.

99. It was suggested that Mrs Lawther should have inferred that consent had been given from the large number of staff removing items, but she had a duty to protect the residents and that had to be taken into account rather than make assumptions that there had been no abuse of the caregiver relationship.

100. Ms Scott gave her grievance outcome on 20 December 2019 by letters at page 339 (Mr Viorel's grievance outcome) and page 523 (Mrs Sava's

outcome) Mr Viorel and Mrs Sava appealed and their grievance appeal hearing was on 21 January 2020 (page 341). It is clear, reading the notes of their meetings with Ms Scott (for example, Mr Viorel's at page 513) that the claimants did not accept the explanation that they had not been targeted for arrest by WL because of their nationality and that Mr Viorel, in particular, was very aggrieved that he had been arrested when the level of his participation had been that he stayed in the car having come to pick up his girlfriend.

101. In her letter of resignation on page 344, Ms Vaduva referred to her recent experiences and stated that she considered "this to be a fundamental breach of the contract on your part". Mrs Lawther wrote to ask Ms Vaduva to reconsider but she did not do so. It was put to her in cross examination that she had started a new job 4 or 5 days after her resignation, which she agreed to. She denied that she had resigned because she had found another job but stated that she felt humiliated and discriminated against so felt forced to resign.

> "After all the humiliation and everything that happened to me I had to find another job because I wanted to prove myself that I'm a right person and would have help me to move on and leave behind this bad experience."

102. We recall that it was Ms Vaduva who was arrested at work in front of colleagues and accept that she felt humiliated as a result "my image as a professional worker was affected by this" she stated. We accept that that was part of her reasons for resignation. She also felt strongly that the 3 Romanians had been targeted from among those whom she regarded as equally responsible and that was part of her reason for finding alternative employment.

103. As already explained, the police investigation into Mr Viorel's complaint was carried out and that report is dated 7 April 2020. Invitations to a disciplinary investigation hearing were sent to Mrs Sava and Mr Viorel on 27 April 2020 but they did not attend the scheduled date of 4 May 2020. They did attend the rearranged dates of 13 May 2020 – as did Ms Vaduva, who, in error had also been invited to a hearing despite no longer being an employee. The minutes for those are found, respectively at page 368 (C1), page 375 (C2) and page 371 (C3). Investigation reports were completed for all three claimants (including Ms Vaduva) and all three were invited to disciplinary hearings which were conducted by Ms Willis-Read on 8 July 2020. She also invited the unit manager to a disciplinary hearing but he wrote a statement (page 468) rather than attend an investigation hearing. He also had already resigned and made that statement in the May 2020 statement.

104. It seemed surprising to us that the investigation and disciplinary hearing was conducted in respect of Ms Vaduva who was no longer employed by the the respondent (see page 381 for the notes of the hearing) without anyone mentioning that she was no longer employed. The participants appear to have proceeded on the presumption that, having been given the opportunity to reconsider her resignation, Ms Vaduva had done so but that was an error. Her explanation for attending was that she wanted to clear her name and

prove that she hadn't done anything wrong intentionally but had followed what had been common practice for everybody.

105. Outcome letters were issued to Mrs Sava and Mr Viorel. Mrs Sava was dismissed for reasons set out in the letter, which is at page 406 - 407. Ms Willis-Read explained that she found it unsatisfactory that Mrs Sava, while admitting removing the resident's belongings from his room took no responsibility for this evening though she knew that her actions contravened company policy and the NMC Code of Conduct. At pages 391 and 395 of her disciplinary hearing she accepts that she breached the gifts and gratuities policy but argues that doing so had been common practice. Ms Willis-Read was influenced by there being a breach of the NMC Code – including with regard to providing leadership in protecting people's wellbeing - and by what she regarded as a lack of insight on Mrs Sava's part into the importance of personal responsibility in following the company's gifts and legacy policy. She decided that the actions amounted to gross misconduct for which the outcome should be summary dismissal. We find that these were genuinely Ms Willis-Read's reasons and that they were conclusions open to her on the evidence she had.

106. Mr Viorel received a final written warning for reasons set out in the letter at page 408. There were two matters which distinguished his situation in the judgment of Ms Willis-Read: he had not personally removed the resident's belongings from his room and his reflection on what had happened and the seriousness of what others had done seemed to her to show a genuine appreciation of error. His actions were found to be serious misconduct.

107. Both he and Mrs Sava appealed their sanctions and the appeals were heard by Ms Scott on 26 August 2020 (page 410 (C2) and page 437 (C3)) Mrs Sava's outcome dismissing her appeal is at page 426 and Mr Viorel's is at page 457. Much of what Mrs Sava raised was criticism of the arrest and an explanation of how distressing and shocking the circumstances of the arrest were to her. As such her arguments repeated those which had already been covered in the grievance and were rejected by Ms Scott. She considered that the personal responsibility of someone covered by the NMC Code of Conduct meant that she was responsible regardless of the instructions of the unit manager and previous occasions when belongings had been donated to staff had not been comparable circumstances which excused what had happened on this occasion. These were conclusions for which Ms Scott had ample evidence.

108. As in previous meetings, Mr Viorel accepted that what had happened had been wrong (see page 443 top paragraph). Among the points he made were, in essence, that the sanction was severe in his case given his limited involvement and also that it was unfair that they were not treated the same as all the other employees who had been involved in removing items. Ms Scott concluded that he had assisted in the removal of the items and that was contrary to his duty as a nurse. She did not consider him to have provided

evidence to give her comfort that he had learned from the event. She rejected his appeal.

Law applicable to the issues in dispute

109. The claimants complain of a number of breaches of the Equality Act 2010 (hereafter the EQA).

110. By s.39(2) EQA an employer must not discriminate against an employee by dismissing them or subjecting them to any other detriment. Section 40 prohibits harassment in employment. In the present case, the claimants complain of race discrimination, namely discrimination within section 13 EQA because of race, and race related harassment.

111. Section 13 (1) of the EqA reads:

> "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."

112. On a comparison between the case of the claimant (A) and that of another person (B) for the purposes of s.13 there must be no material difference between the circumstances: s.23 EQA. The circumstances in question are those relevant to the decision taken by the alleged discriminator.

113. The definition of harassment is contained in section 26 of the Act and, so far as relevant, provides as follows:

> "(1) A person (A) harasses another (B) if—
>
> (a)A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b)the conduct has the purpose or effect of—
>
> (i)violating B's dignity, or
>
> (ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a)the perception of B;
>
> (b)the other circumstances of the case;
>
> (c)whether it is reasonable for the conduct to have that effect."

114. Section 136 of the 2010 Act applies to all claims brought before the Employment Tribunal under the EQA and reads (so far as material):

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

115. The so-called shifting burden of proof, now encapsulated in s.136 EQA, has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of the Sex Discrimination Act 1975 and Race Relations Act 1976 but the guidance is still applicable to the equivalent provision of the EQA.

116. When deciding whether or not a claimant has been the victim of direct discrimination, the employment tribunal must consider whether they have satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was race. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves that the reason for their action was not that of race.

117. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination can be unconscious but that for us to be able to infer that the alleged discriminator's actions were subconsciously motivated by race we must have a sound evidential basis for that inference.

118. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the employment tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. That is not to say that it is appropriate simply to add evidence which could realistically suggest that there was discrimination into the balance and then conduct an overall assessment on the balance of probabilities. That risks not giving the claimant the benefit of s.136. At the first stage, the Tribunal is considering whether there is evidence from which it could *in the absence of any other explanation* decide that the contravention of s.13 EQA occurred. If there is, then the burden transfers to the respondents who must discharge it by cogent evidence.

119. Although the law anticipates a two stage test, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

120. It is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminated but still may have been materially influenced by considerations of disability. The burden of proof provisions may be of assistance if there are considerations of subconscious discrimination.

121. The structure of the Equality Act 2010 invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, but those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of race, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

122. What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT at paragraph 22, Underhill P said:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

123. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him was reinforced in Grant v HM Land Registry & EHRC [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

124. In Pemberton v Inwood [2018] EWCA Civ 564; [2018] ICR 1291, Underhill LJ set out guidance on the relevant approach to a claim under section 26 of the EQA as follows [at para 88 which is at the top of page 1324 in the ICR version of the case report]:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative

> victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

125. Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. Bakkali v Greater Manchester Buses (South) Ltd [2018] ICR 1481 EAT.

Conclusions on the Issues

126. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

127. We start by considering the substantive issues and will return to questions of whether the claims were presented in time if any are successful.

128. It is not in dispute that the respondent reported Ms Vaduva to the police and suspended her. She did not specifically mention the suspension when describing the reasons for her resignation but those did include her arrest (which was a consequence of the report to the police) and being, as she regarded it, singled out with her Romanian colleagues from others who she regarded as equally responsible for wrongdoing. List of Issues (hereafter LOI) para(iii) is made out as having occurred as a matter of fact. Ms Vaduva resigned in response to acts of the respondent.

129. It is not in dispute that the respondent reported Mrs Sava to the police, suspended her, subjected her to disciplinary action and dismissed her.

130. It is not in dispute that the respondent reported Mr Viorel to the police, suspended him and subjected him to disciplinary action including the imposition of a final written warning and the rejection of his appeal.

131. We accept that all of those actions were unwanted (LOI para.(vii)). We then need to consider whether the respondent's actions were related to race; the allegation is that they are related to race because the manager responsible

acted as they did because of race. We are satisfied that none of the above actions were related to race and that none of Mrs Lawther, Ms Willis-read or Ms Scott were motivated in any way by race.

132. There is inevitably overlap between our reasoning on this point and in relation to whether there was less favourable treatment on grounds of race – as is to be expected given the way the case is put. All of the matters put forward by the claimants as requiring explanation by the respondent have been explained and we are satisfied that the respondent's managers decisions were motivated entirely by the serious view they took of breaches of the NMC Code of Conduct and the Employee Handbook provisions about accepting gifts. None of the acts alleged to be harassment were related to race in any way.

133. In relation to the inference of anti-Romanian bias alleged against Mrs Lawther:

    a. Mrs Lawther has satisfied us that there are non-discriminatory explanations for the comment about there being a "cultural attitude problem" in her email at page 503 (see para.96 above).

    b. She was alleged of having disparagingly referred to Mrs Sava as only "as good as a cleaner" but we have found that that comment was not made.

    c. These two matters do not, therefore, give rise to an inference that Mrs Lawther thought poorly of Romanians in general.

    d. We have found that the information provided by her to the police did not specifically target the claimants only or only Romanians. The police were provided with the names and job roles of 5 individuals who could be identified as being actively involved in moving items or in removing them from site. The claimants' were the three RGNs in that group. The police made their own decision about whom to arrest. There is insufficient evidence to support a conclusion that the CCTV footage from the 9 November 2019 (which was that shown to the police) would have led to the identification of others and Mrs Lawther did not know at the time she found out about the incident that a search of other dates might lead to evidence against other individuals.

    e. The RGN of Indian origin who removed personal possessions from the resident's room was not known to Mrs Lawther until the former volunteered that she had removed items and had returned them. She was not in a comparable position to the claimants.

134. In effect, the allegation against Ms Willis-Read and Ms Scott relies on them being presented with 3 individuals who it was alleged had been suspended on grounds that included racial bias. The disciplinary proceedings that were commenced against the unit manager shows that it was not only Romanians

who were subject to disciplinary action. The distinction between those in positions of leadership (the unit manager and the RCNs) and those not (the HCAs) was valid and unrelated to race.

135. As to LOI (ix) we reject the argument that the conduct had the purpose of violating the claimants' dignity or of creating an intimidating hostile, degrading, humiliating or offensive environment for them. In each case, the purpose was to take appropriate steps with regard to safeguarding and discipline.

136. As to LOI (x), in all the circumstances we do not think it was reasonable for the acts complained of to be regarded as having the harassing effect. This is because there were good grounds for reporting staff to the police on suspicion of theft who were believed potentially to have removed a deceased residents' belongings without permission. There were good safeguarding grounds, following advice by HR and the CQC, for suspending staff who would otherwise be returning to the workplace. There was evidence that supported taking disciplinary action against them including dismissal.

137. In those circumstances the acts complained of do not meet the test for harassment and were not related to race. The race related harassment claim fails. Neither of the relevant acts which were part of the reasons for Ms Vaduva's resignation were race related harassment and so her claim that constructive dismissal is an act of race related harassment fails.

138. We move on to LOI (xi) and the claim under s.13 EQA. We need to consider whether the above actions were less favourable treatment and whether there is evidence from which, in the absence of any other explanation, the Tribunal might conclude that discrimination should be inferred.

139. The first act (which can be considered in relation to all three claimants) is that of reporting them to the police. The claimants compare themselves with non-Romanians who were not arrested. However the respondent has satisfied us that Mrs Lawther gave information to the police about all the individuals who could be named and were directly employed. The CCTV footage showed two individuals who were apparently not named and removed large items – but they were HCAs engaged through an agency. The CCTV footage also showed individuals whose job roles appear not to have been provided – but the CCTV footage appears not to show that those individuals could be seen actually removing or assisting to remove any items. We have found that Mrs Lawther provided the names of 5 individuals directly employed by the respondent (two of whom were not Romanian) and that it was the police who decided which individuals should be arrested.

140. Overall, the claimants were treated the same as 2 directly employed HCAs who were not Romanian and have not shown facts from which it might be inferred that, in reporting them to the police, they were treated less favourably on grounds of race. The police made their own decisions on whom to arrest and the respondent cannot be responsible for that.

141. On the other hand, the claimants were treated differently to those two HCAS whom the respondent knew had removed items on 9 November and who were visible on the CCTV because they were not suspended and were not put through disciplinary action. The claimant argued that they were actual comparators. The respondent argues that the fact that they were HCAs was a material difference meaning that they were not in a comparable.

142. It follows from our finding that there was a genuine and relevant reason why the claimants were suspended and the other HCAs weren't that they were not in materially the same circumstances for the purpose of s.23 EQA (see paras.80 to 86 above). The material difference was that the HCAs were not bound by the NMC Code of Conduct as well as the Employee Handbook and were not in leadership positions. One witness said that it was felt that, had the RGNs not behaved as they did, then potentially the HCAs would not have behaved as they did. We consider the difference in professional obligations, in expectations of the role and in seniority were material differences relevant to the reason the alleged discriminators treated the claimants as they did which mean that the HCAs were not suitable actual comparators.

143. As we have explained in our analysis of the harassment claim, there were a number of allegations against Mrs Lawther which formed the basis of the allegation that an inference of subconscious bias should be made against her. Either those matters have not been established as a matter of fact or Mrs Lawther had a complete explanation and we do not consider that they amount to a safe basis for an inference of race discrimination.

144. We've made findings about the four reasons why the claimants were suspended. The reasons why the HCAs were dealt with by supervision are unrelated to race (see para.85 above). The unit manager (who was implicated because he was said to have given permission for the items to be removed but had not removed items himself) was suspended when he was fit to return to work. This suggests that, had the respondent known about the RGN of Indian ethnic origin earlier enough, had there been evidence that she was regarded as similarly culpable, the respondent would have also suspended her. The reason that that RGN was not suspended when she did come forward was that the only knowledge the respondent had about her wrongdoing was the information she had volunteered which included that she had returned the items she had removed. We accept that these were genuine non-discriminatory reasons to treat her differently to the claimants.

145. On the basis of our findings, the claimants were not treated less favourably in relation to the police report than other in a comparable position. We work on the presumption that the burden of disproving discrimination passes to the respondent in respect of the suspension because it is necessary to consider the explanation for the failure to suspend the two HCAs shown on the CCTV footage. We have concluded that the respondent has shown on the basis of cogent evidence that there were materially differences in the situation of the HCAs and that the reasons for suspending the claimants (but not the HCAs) and then for subjecting Mrs Sava and Mr Viorele to disciplinary action and

dismissing Mrs Sava were genuine non-discriminatory reasons. The direct race discrimination fails.

146. If we had found that the allegations relied on as a cause of Ms Vaduva's resignation were race related harassment or discrimination then we would have found the claim based upon them to be a course of conduct leading up to that resignation. Her claim was presented within time based on that 17 February 2020 resignation.

147. Had we found in the claimants' favour, there would have been no deduction from compensation for discrimination or harassment to take account of the prospect that the respondent would have acted in exactly the same way absent any discrimination. The reason for that is the evidence that what the claimants were most upset by was the humiliation and perceived unfairness of being targeted out of up to 16 others who they allege were also at the handover and believed had acted on the alleged instruction to remove items. Although it is highly likely that the claimants would have been reported to the police and then put through suspension and disciplinary action in exactly the same way, they would not have suffered the specific injury for which compensation is sought, namely injury to feelings due to the feelings of being singled out. They would not have suffered that injury had all staff been treated the same way.

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Employment Judge George

Date: 31 March 2023……..

Sent to the parties on: 6 April 2023

For the Tribunal Office