



# EMPLOYMENT TRIBUNALS

Claimant

Respondent

**Miss L Ulliyott**

v

**Stronglife Care Ltd (1)**

**Ms Bamwait (2)**

**Ms Smith (3)**

**Heard: In Sheffield**

**On: 20-22 February 2023**

**Before:**

**Employment Judge JM Wade**

**Mrs J Lancaster**

**Mr M Taj**

**Representation:**

**Claimant: in person**

**Respondent: Ms K Hodson, employment advisor**

Note: A summary of these reasons was provided orally in an extempore Judgment delivered on 22 February 2022, which was sent to the parties on 27 February 2023. A request for the written reasons was received from the claimant on 5 March 2023. The reasons below, corrected for error and elegance of expression, are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the Judgment given on 22 February 2023 is also repeated below:

# JUDGMENT

1. The claimant's complaints against the second and third respondents are dismissed consequent on her withdrawal of the same on 17 August 2022.
2. The unanimous decision of the Employment Tribunal is that the claimant's Equality Act complaints against the first respondent are dismissed.

# REASONS

## Introduction, Issues and the law

1. This is a unanimous Judgment with reasons of the Tribunal in claims for disability discrimination and allegations of a failure to make reasonable adjustments, direct disability discrimination, or in the alternative harassment.
2. The claimant presented claims to the Tribunal on 31 March 2022 relating to her short spell as a senior carer with the respondent company from August to November 2021. The claimant was represented by Unison at a first case management hearing on 8 June 2022, but thereafter was a litigant in person. The Employment Judge directed a hearing on the time limit issues.
3. On 17 August the claimant emailed to withdraw her claims against the second and third respondents. At a preliminary hearing on 7 September 2022 an Employment Judge dismissed all other claims (unfair dismissal, wrongful dismissal, unauthorised deductions from wages, and unpaid holiday pay) for time limit reasons. He extended time on just and equitable grounds to permit the claimant's Equality Act allegations to be heard and determined at this hearing. Disabled person status remained in dispute, and the respondent also disputed that it had the requisite knowledge.
4. The claimant also asserted a failure to provide written particulars of employment, which if her other complaints succeeded, could have resulted in an uplift of compensation. For the claimant, however, the alleged failure has much greater significance. The provision, or not, to Miss Ulliyott of particulars of employment and when they were provided has shaped this claim: at the time of these events she was seeking to obtain a mortgage loan and establishing stable employment was very important in getting that mortgage. She considers that the respondent's alleged failures led to her losing that mortgage offer.
5. Returning to the pleaded claims before us, the disability discrimination allegations were identified in the Employment Judge's order which directed the parties to the relevant law. Firstly, a failure to make reasonable adjustments (Sections 20-22 with schedule 8 of the Equality Act 2010). The claimant said the respondent should have changed her working pattern/place of work and/or rostered additional staff. The PCP relied upon was staff frequently having to work full shifts on their own and unsupported. Further, the claimant alleged she was subject to harassment (Sections 26/40) or direct disability discrimination (Sections 13/39) as follows:

- a. through Rebecca Smith, in a confrontation on 24 November 2021, accusing the Claimant of being a “lousy carer if she was unable to cope with 17 residents on her own by reason of her physical and/or mental impairments”;
  - b. telling the Claimant not to play upon her mental health issues;
  - c. dismissing her.
6. The claimant’s case on her conditions affecting her at work developed during the hearing. In short she said that of the two units at the respondent’s care home (“EMI” and residential), a night shift on EMI was more physically straining because residents were frequently up in the night and their personal care needs were greater. That was the essence of her suggested adjustment to her place of work – to be allocated to the residential rather than EMI unit.

Evidence and submissions

7. The Tribunal had indicated that we would hear the claimant’s evidence first, and then give a preliminary judgment on whether she was a disabled person, before we heard the respondent’s evidence. We had a helpful file of papers prepared in accordance with directions. Having announced our decision that the claimant was a disabled person at the material time, we then heard from Ms Smith, the manager of the care home where the claimant was employed, and then from Ms Bamwait, an owner/director of the respondent which operates the home.
8. The greatest part of the Tribunal’s deliberations was spent making findings of fact which we consider to be safe. Two of the tools that are important to us in making findings of fact are to examine what the parties or witnesses said at the time, as recorded in material from that time. WhatsApp messages for example and in this case also notes in resident records, emails, and other communications that were recorded at the time.
9. As time passes, memories fade, and because memory is a reconstructive process, human beings frequently overlay their recollections with versions of events that they tell themselves again and again have happened in a particular way, such that they believe them to be true. This is well documented in research. Relying on memory alone, or rather asking witnesses what they remember about events, is not necessarily helpful. Where uncorroborated, memory is not necessarily a reliable or safe way of making findings of fact. In this case we have therefore gone to the contemporaneous material, and placed greatest weight on that.
10. At the end of the respondent’s evidence, Ms Hodson had provided careful submissions on the relevant law and how we ought to assess the evidence, including some of the aspects in which the claimant was not to be relied upon. The claimant thanked us for listening to her case, appearing to have understood that although some of the evidence (such as lone working on at least one occasion) was in her favour, much of it was not when examined carefully and correlated to the resident records and WhatsApp messages.

Was the claimant a disabled person at the material times (September to November 2021)?

11. We have found that Miss Ulliyott was a disabled person at the material times. We were helped by a very clear submission on the law that we have to apply

from Ms Hodson (Equality Act 2010, Sections 6 and Schedule 1 Part 1 of the Act).

12. It was accepted that the claimant at the material times suffered from three conditions: asthma, depression/anxiety and arthritis: these impairments were clear in the medical records.
13. The matter that was in issue was whether there was a substantial adverse effect on her ability to carry out day to day activities - an effect which was more than minor or trivial; and whether such an adverse effect had either lasted 12 months, that is by September to November 2021, was likely to so last, or if an impairment had ceased to have that effect, that it was likely to recur. Likely, in this context means, that it could well happen.
14. We have put out of our mind all of the medical evidence after 24 November 2021, when the claimant's employment ended, because we must not assess the disability question with the lens of hind sight.
15. The medical evidence in relation to anxiety and depression for periods earlier than that is very clear. In November 2017 the claimant was recorded as unable to leave the house at times. In November 2018 she was not sleeping and was not leaving the house. In January 2021 her sleep was recorded as terrible. Up to and including November 2021, at times she was unable to do anything by reason of depression and anxiety, including going out to do the shopping and attending to any of her household tasks.
16. Depression can by nature be an episodic and fluctuating condition. We do apply the recurrence provisions, and find that it may very well have happened in September to November 2021 that the substantial adverse effect that had been present, but intermittent and fluctuating over the last four years, might well recur, such that the effect is to be treated as continuing. The substantial adverse effects on the claimant's ability to undertake day to day activities was therefore long term at the material time.
17. As to asthma, there was insufficient evidence of substantial adverse effect (or deduced effect) on day to day activities to conclude disability from that physical impairment.
18. As to arthritis, the position is much clearer. The claimant had had a road traffic accident on 3 September 2019 or thereabouts. That led to diagnosis through MRI scan of a degenerative condition which explained the pain which she had been experiencing back to 2016. We accept that evidence. The claimant had a degeneration of the discs in her spine, C4 and C5. There is clear diagnosis of that.
19. The issue was, again, the asserted impact on day to day activities from that physical impairment. The claimant was subject to four medications/ treatments for her arthritis. We therefore take into account what the claimant's position would have been without that treatment. The substantial adverse effect on her at times included, with treatment, being unable to dress herself because of acute pain at times. We accept that evidence. Again the substantial adverse effect was not present at all times but was fluctuating. Again we find that the claimant's physical impairment was such that, even with the treatment involved, it may very well have happened that she would have a flare such that she would again be unable to get her arms through dresses, or do up zips and that was

the case from September to November 2021 and had been the case, getting progressively worse, since 2016. In such circumstances the substantial adverse effect on dressing is to be treated as continuing to have that effect and was long term in that it had lasted at least a year.

20. There we are. In conclusion we find the claimant was a disabled person by both physical and mental impairment at the material times.

Further findings

21. Until her accident, the claimant had previously had a career driving buses. She had come to the care sector after that, initially working as a carer in domiciliary care, for which she had to drive and was not paid for her travel time to and from service users. She was also subject to a zero hours contract in the domiciliary care post.
22. In order to apply for a mortgage she needed to establish a permanent and regular income. She wanted therefore permanent, fixed hours employment, for that purpose. She was recommended to work for the respondent by a close family friend, on whom she could rely. That person told her that the respondent's care home nearby was a good place to work, and a nice place to work. On that basis she approached the respondent; she did not see the advertisement in which the respondent was seeking to appoint staff.
23. The claimant wanted to work as a "senior" carer as opposed to an entry level carer – the hourly rate was slightly higher and the post carried greater responsibility. The claimant completed application forms on 2 and 17 August and had to work her notice at her previous employer. She disclosed two health conditions in those forms, including musculoskeletal and mental health, but she said she did not require any adjustments nor in an interview, which the claimant does not remember shortly before she started. The claimant was appointed on the basis of her friend's recommendation and she started work on 8 September for training and induction, completing forms on 16 September, in which, again, she did not require any reasonable adjustments for her arthritis or mental health.
24. That is the background to the parties coming together. The claimant worked three shifts a week, typically 11 hour night shifts with an unpaid break. Rotas were published in advance and the staff communicated by WhatsApp groups. Significantly, on 27 October 2022 the rota for November was changed and Miss Smith, the manager, messaged the group to say that she was sorry about it.
25. It was typical that the rotas would come out towards the middle to the end of the month for the next month and there were many versions published because of staff being unable to work for various reasons. Part of the context at the time was significant Covid infection, both in the setting and amongst staff and also highly transmittable stomach related illnesses. Infection control and prevention was paramount and this meant that there were frequent, unpredictable staff shortages which were very difficult to be covered.
26. On or around 17 November Miss Smith asked staff in that group if they would like some wellness sessions once a month, because of her awareness of mental health being under strain because of the circumstances at the time, which were very wearing. That was responded to positively by a number of staff including the claimant. Up until the week commencing 19 November or

thereabouts the warmth in those exchanges is such that we do not find the claimant's working environment was causing her particular difficulties, notwithstanding she was tired by night shift working, having not done that in recent times, and lack of sleep exacerbated her conditions.

27. On or around 19 November the claimant received the rotas for December. She was rostered for 14 shifts, which was about right for her contracted three shifts per week. The claimant was due to be off on Christmas Day, but she was scheduled to work Boxing Day night and the night of the 27<sup>th</sup> of December. There was nothing in that rota to alert the claimant to the fact that she was considered to be a temporary member of staff. In fact, quite the opposite was the impression given by that rota – the impression was the appointment was ongoing.
28. On 20 November there was a message exchange with fellow carer, "G"; that asked the claimant to work on the Sunday night, which was the 21<sup>st</sup> November going in to the 22<sup>nd</sup>. The claimant asked whether that would be as a senior or as a carer. There was a difference in the rate of pay depending on the nature of the work done, and also responsibility: the seniors had to administer medication. The answer to that question told her that two other colleagues, mother and daughter were going to be working as seniors on the shift. The claimant's response to that was in fairly blunt terms: she considered those two colleagues to be unprofessional and she didn't want to work with them.
29. She also said she was prepared to help her fellow carer G, whom she liked, but did not understand how the shift was short from the rota if two others were due to work. G confirmed there were only three staff on, because one was only in to do medication. That was the position and ultimately the claimant agreed with G that she would do that nightshift and that they could work together **on whichever unit the mother/daughter were not working**. "As long as I'm not with them", was the gist of the claimant's consent to work.
30. The claimant's position does not support the claimant's case that EMI work was inherently disadvantageous to her in comparison with residential unit work - she was, in truth, prepared to work on either unit at that time. It was the colleague with whom she worked that mattered more to her and was really in her mind.
31. There was no reference in her messages in confidence to G about her arthritis or mental health – she did say: "with what they've done to me with the rota this month, as far I am concerned they can rot". This was in reference to the December rota, which had the claimant working intermittent shifts, rather than three night shifts in one block, which was her preference. Nevertheless this indicates a surprising degree of hostility to management, notwithstanding the otherwise cheerful and warm messages on the group chat.
32. On Sunday 21<sup>st</sup> the claimant arrived around 7pm to start that nightshift. A little earlier than that she was not feeling her best because she had a persistent cough and she thought she would struggle to complete the shift. She saw on the signing in sheet that the colleague due to cover medication had noted that she would be leaving at 1am. That meant for the claimant that she could not

leave shift early, because that colleague had already indicated that she would not be completing the shift.

33. The claimant was feeling unwell and she was unhappy about the allocation on the signing in sheets as to which staff were acting as seniors that night; she left within minutes of arriving. There was an unhappy atmosphere amongst those colleagues that evening, and the claimant accepts that she brushed shoulders with a colleague, as she was leaving site.
34. The remainder of that week the claimant was rostered to work nights on 22<sup>nd</sup>, 23<sup>rd</sup> and 24<sup>th</sup>. The 22<sup>nd</sup> was rostered on the residential unit. The 23<sup>rd</sup> and the 24<sup>th</sup> on the EMI unit. The claimant was at work for her shift on the 22<sup>nd</sup>. Shortly after she started she received a message from Miss Smith who wanted to meet her the next day, and the claimant said she could not meet during the day because she was on night shift and needed to sleep.
35. On these findings - agreeing to work the nightshift on 21 November, then coming in and then going home and there being a brush past with a colleague on the way out - it was entirely unsurprising that Miss Smith wanted to meet the claimant the next day to talk about matters, at the very least. Her invitation was very informal and there was no suggestion that the claimant need be worried about it or would face disciplinary procedures. Miss Smith was more concerned to know why the claimant had gone home. The respondent always sought to have four members of staff on a night shift (two on each unit). She therefore wanted to talk about the claimant going home that night.
36. The claimant did not know what the meeting was about, for sure, but her case was that she had, or was about to, put some letters under the manager's door in relation to these events, and considered the meeting was to discuss those matters.
37. We find, because it is clear from the timing on the contemporaneous evidence, that having received the message to meet Miss Smith, she set about collecting evidence about her colleagues, anticipating that there was going to be a row about something. She took a photo at 20:28 on 22 November of the EMI door being open (when it was supposed to be kept locked at all times). She also wrote out three letters in manuscript. The first was her account of her conduct in going home on the 21<sup>st</sup>. That set out why it was she came into work and went home, describing the atmosphere, the changing of the seniors and so on. She was effectively setting out, if she was going to be criticised, an explanation for her conduct her position.
38. The second letter was raising clinical practice issues about food hygiene and medication by colleagues, both at that time and also weeks and days earlier. Again she was seeking to get information and criticism about the colleagues she considered unprofessional (the mother and daughter team) in anticipation that they, and others, were going to say something about her going home.
39. Finally, the third letter she wrote sought a reasonable adjustment relying on her arthritis, and seeking to be allocated shifts together on the residential unit that very week. Essentially she was seeking a change from EMI to residential on the shifts of 23 and 24 November. Our findings are that the work on EMI was not more physically straining, in the round, than work on the residential unit. The notes or records include that at the material time, one EMI resident was

unsettled in the night; but they also include that the unit was not at capacity. The claimant's case was that one EMI resident was physically strong and assisting him at times caused her physical strain. While that was no doubt the case, we also accept Miss Smith's evidence that some residential unit residents also had physical needs in the night. On either unit, working alone at night was likely to put greater physical strain on any colleague. That was borne out by the claimant's experience on the night of the 23<sup>rd</sup>, working alone on residential.

40. It is convenient here to address the other aspects of the claimant's reasonable adjustments case. The claimant alleges, and we have to decide, did the respondent have a practice of staff frequently having to work full shifts on their own. Our finding is that on the night of the 23<sup>rd</sup> the claimant did work alone, and also on one or two other occasions. Colleagues described that as "working short" in contemporaneous messages, which meant three, rather than four, night staff across the two units.
41. As to the respondent's rotas, the respondent's copies in our file showed full staffing. The final rotas for any particular night did not help us very much to reach our finding because they do not record who, in fact, worked, but only who was rostered to work. The claimant made sure that the Tribunal had legible copies of those rotas that she had been able to retain at the time, because those supplied to the respondent and in our file were not very good copies. At least on one night shift in the claimant's legible copies only one colleague was rostered to be working, not two.
42. Pay records or signing in and out sheets would be one way to determine actual staffing, but we did not have those – rotas do not do so, and Ms Smith and Ms Bamwait accepted this. The contemporaneous messages indicate on at least two occasions during the material period, only three staff were working. They also confirm, however, that Ms Smith used all efforts to secure sufficient colleagues to work.
43. The claimant's case, in contrast was that at least 50% of her shifts were worked alone. We consider she is mistaken in that evidence. We can further explain that finding straightforwardly. There is plenty of content in the three letters written by her on the 22<sup>nd</sup> nightshift. At no point in three letters, one of which is to request a reasonable adjustment, does the claimant say: I work alone and unsupported during 50% of my shifts and this is not doable for me – or words to that effect.
44. For completeness, the claimant saw her GP on 7 December about her mental health and the GP recorded in the notes: "*worked as a care worker being left with 17 patients run on minimal staff.*" That is a description of the respondent's 17 residential unit residents. It describes the night of the 23<sup>rd</sup> of November. It does not describe, in our judgment, a regular and frequent occurrence across the three or four months of the claimant working for the respondent – it is a description of the claimant's last shift when that happened, before she walked out.
45. The respondent's evidence was that on no occasion were there only three colleagues working a nightshift. We consider Ms Bamwait is mistaken in that assertion also, for the reasons that we have explained.



46. The claimant's case is that "working short" put her under greater strain and exacerbated her conditions, than someone without her conditions. It is all the more surprising then that the claimant's letter does not say that at all, and nor do her contemporaneous messages. She identifies the difference in the units as being the matter that she wants to raise – her feeling of greater strain from the EMI unit, and that it would be better for her to work on residential.
47. The claimant's case was also that there were multiple telephone calls to Miss Smith across the three months of employment discussing disability and the difficulties for the claimant in working on a shift alone. Miss Smith's evidence was that there had been no such conversations. The tone of the WhatsApp messages does not reveal any difficulty in the communications between the claimant and Miss Smith up until the week of the 21<sup>st</sup> November. The claimant had not raised the working short issue with her GP during her employment, nor with colleagues with whom she was prepared to be very frank in WhatsApp messages. We have not been provided with the call data other than on 24 November (which we come to shortly); even if we had been provided with that data that would not have told us what the calls were about.
48. We also know that the claimant, at the end of October, had emailed her mortgage company to say, in effect, "I have not been provided with my contract of employment yet, and it will not be provided until I pass my three month probation period, but the manager will confirm to you that I am employed for the hours I have indicated if you write to her and here is her email address". There was no evidence that the mortgage company followed up on that.
49. We draw two conclusions from this. Firstly, it is quite likely that if there had been communication between the claimant and Miss Smith by telephone it might well have been about that mortgage application. There is no corroboration, no contemporaneous evidence at all that the claimant was discussing her disabilities with Miss Smith before her letter. Secondly, it appears that she was confident and at ease and on good terms with Miss Smith at the end of October such that she had agreed to write to the mortgage company – this again is consistent with the tone of the messaging at the time. We therefore, again, consider the claimant is mistaken in her case that she repeatedly complained to Miss Smith by telephone about lone working.
50. We then come and decide the allegations about the events on 24 November. They concern the claimant's interactions with Miss Smith and then Miss Bamwait and the reason for dismissal. The claimant gives, and has given at various times, a lengthy account of her meeting with Miss Smith, which took place as the claimant was finishing her night shift on the morning of 24 November shortly after 7 am. Their conversation took place both in reception and in the office.
51. The Tribunal does not have an audio recording of that interaction as we sometimes do, and we cannot be certain, about precisely what was said, but we have to make findings about it using the material available to us.
52. The two accounts (Miss Smith's account and the claimant's account) are completely at odds, much like their accounts about "working short" – both giving evidence of extremes, whereas we have found the real position was much less

exaggerated. We look to a whole range of context both before and after the alleged incidents to help us assess what is likely.

53. When the claimant finished her shift there were other people in the building. Miss Bamwait had come to the site very early. She heard shouting, she could not say who it was, or what it was, but she heard raised voices - it could have been residents or staff, she did not know, but we accept her evidence that Miss Smith was very upset after the altercation and she made file notes about what had happened.
54. Later in the afternoon, perhaps having calmed, we know from telephone records that the claimant tried to call Miss Bamwait, having been provided with Miss Bamwait's telephone number by the administrator at the setting. She also emailed the setting administrator at 4.30pm that afternoon to say that there was a copy of her contract on the file, Miss Bamwait had told her - and could that please be provided to her and then she indicated that she was going to attend site to collect it. That prompted Miss Bamwait's call to her, in which she dismissed the claimant (that is not disputed), confirming that in a letter sent shortly afterwards to the effect that her contract was due to end on 30 November in any event, and she was required to work until that date, but as a fixed term it was not to be renewed.
55. The claimant's conduct in contacting her employer for a copy of her contract is absolutely indicative of her priority at this time, which was solely focused on having a contract in order to satisfy the conditions of a mortgage offer which had been made, and which was due to expire. She knew that that was essential for that purpose. The only contract which Miss Bamwait had approved, was a fixed term contract expiring on 30 November (which had been made clear in the advertisement in the Summer, but of course the claimant had not seen this). Miss Bamwait had directed in July that permanent contracts were no longer to be issued because the respondent had experienced falling resident numbers and she did not want to be in a position to have to redundancies or give notice. She was only prepared to authorise temporary contracts at that time. Miss Smith had not issued the contract to the claimant, and before the events on 24 November, had no intention to end her employment. There was no signed copy of the claimant's contract on the respondent's files, but Miss Bamwait did not know that.
56. The claimant also contacted her GP on 24 November that afternoon by telephone. A note was made at 18:29 that the claimant had a persistent cough. She did not report upset or anxiety or any other matter, nor that her manager has called her a lousy carer if she was unable to cope with 17 residents on her own by reason of her physical and/or mental impairments"; and telling the Claimant not to play upon her mental health issues. The claimant did not then attend work for her night shift of the 24<sup>th</sup>.
57. This first account from the claimant of the alleged altercation with Miss Smith is in the claimant's claim form on 31 March 2022. Surprisingly there is no communication about it at the time to her union representative, when she is in contact with him to chase her contract of employment. In contrast, the letter of dismissal to the claimant sent to her shortly after 24 November confirms the reasons for the claimant being dismissed and that includes her shouting and swearing at Miss Smith on that morning and similarly in a conversation by

telephone with Miss Bamwait in the afternoon, those being the reasons not to renew her contract.

58. Rather than complain about Miss Smith's treatment of her on 24 November, the claimant emailed the respondent's accountant on 25 November asking about wages for her training and SSP payments. She was then in contact again on 1 December 2021 saying that she would be providing a fit note. We find, then, that the claimant was in denial about events on the 24<sup>th</sup>.
59. The papers are clear that on occasions the claimant loses her temper. There is also evidence in her WhatsApp communications that she can be very frank about colleagues. It is also clear on the WhatsApp messages that at this time she was angry with her employer about the rota and held some of her colleagues in very low esteem.
60. We cannot be certain about the conversation/altercation that took place on the morning of 24 November but we find, applying all the tools available to us that the interaction started with, from Miss Smith, "how are you?", or "how was your shift?" or words to that effect, intending to catch the claimant for an informal meeting to discuss events on the Sunday. That resulted in a very negative response from the claimant, because she was tired, unhappy, upset, and angry with the employer at having to work alone: at around 6.30 that morning she had had to deal with very difficult personal care circumstances affecting a resident; upsetting for both the resident and the claimant, and she was without support from colleagues and was due to go off shift. Those matters are addressed in the resident's care notes.
61. Unsurprisingly the claimant vented about working alone, shouting at Miss Smith and there was a longer discussion covering the fire procedures while lone working, the lack of the claimant's contract, and the claimant may well have said that she would, "go to the CQC", knowing that she had taken photographs and gathered evidence on the 22<sup>nd</sup>. The claimant's anger was intimidating but Miss Smith persisted seeking to talk things through in the office. The claimant was adamant she would not come to a further meeting to discuss matters from the 21<sup>st</sup>.
62. We find that the claimant had written, but not provided her letters to Miss Smith – if she had done so, she would have been expecting a meeting to discuss them. Miss Smith, we find, accepting her evidence, had not been provided with those letters.
63. We further find, on the balance of probabilities, that Miss Smith did not tell the claimant "not to play on her mental health" - the claimant did not include this in her witness statement, nor did she challenge Miss Smith about it when she had the opportunity to ask her questions. As to calling her a lousy carer we take into account that there is no corroboration for this –not to the GP, nor the union representative, nor the employer, nor anyone else. In her consultation with the GP on 7 December, the notes record at 10.44 the claimant told the GP, "has tried to talk to manager but told to leave if she's not happy" - there is no mention of the manager shouting at her, or otherwise acting in the way alleged on the 24<sup>th</sup>.
64. In the round we accept Miss Smith's evidence and consider that the claimant is mistaken and Miss Smith did not make these comments at all. Rather, Miss

Smith sought to deal with the claimant but was met with swearing and anger, made worse by the strain of the night shift. During their meeting Miss Smith noticed the claimant's nails, which were contrary to policy, and the claimant reacted saying, "I'm not fucking removing them". When Miss Smith asked the claimant to talk about the events of Sunday, the claimant said again, "I'm not coming to a fucking meeting" and stormed off saying, "you're a fucking cunt and I'm not coming back".

65. The claimant then withdrew from the group WhatsApp chat almost immediately having left the building that morning – before 8am. We conclude she was in a high state of emotion and had made a very clear decision, on impulse, about her future with this employer – not dissimilar to the, "they can rot" message she had sent some time earlier.
66. Miss Smith made file notes about this conversation and provided them to Miss Bamwait.
67. As far as the third allegation, being dismissed as an act of harassment or less favourable treatment because of disability, we accept Miss Bamwait's evidence that she called the claimant that afternoon, because of the altercation with Miss Smith and because the claimant had indicated in an email that she was coming to the site to collect her contract and she did not want any further upset in the setting that day.
68. She called the claimant and said, in simple terms, that her conduct to Miss Smith had not been acceptable and that she was not going to renew her contract because of that conduct. The claimant also swore on that call. Miss Bamwait asked a colleague to be with her when she rang the claimant, and he took notes.
69. In all our findings in this case we also bear in mind that the claimant has not been a good historian. We complete the chain of events by recording that on 6 December the claimant's mortgage offer lapsed, although she was told she could appeal. In her subsequent communications with the mortgage company, after she had certainly received a copy of the dismissal letter from her union representative, she told the mortgage company that she had been dismissed for reporting the respondent to the CQC. The claimant had made no such report at the time of her dismissal and was still in denial that her own conduct had been the reason for her dismissal.

### Conclusions

70. In the light of these findings it will be clear that these are not facts from which we can conclude the respondent engaged in harassment or direct disability discrimination. We are against the claimant concerning the alleged remarks of Miss Smith.
71. As to the reasonable adjustments complaint, we ask whether the respondent had a practice of "staff frequently having to work full shifts on their own and unsupported". We have concluded that two or three occasions in three months, at a time of great illness amongst staff, was not a practice. It occurred on those occasions despite the best efforts of Miss Smith to cover those shifts.
72. On that finding alone, the reasonable adjustment complaint fails. Even if we are wrong, and two or three occasions is a practice, in order for the respondent to

be under a duty to make reasonable adjustments at a particular point in time, it has to have to have knowledge of the disabilities - arthritis and depression/anxiety, **and it** has to have knowledge of the relative disadvantage arising from that disability interacting with the practice.

73. Drawing these findings together, the respondent could not reasonably have known that “working short” put the claimant at particular disadvantage. At the outset of her employment she had indicated no adjustments were needed, and subsequently she did not raise it by telephone or email or WhatsApp, when it is clear from her communications with her union and her mortgage company that she was fully able to communicate sensibly in that way. Miss Smith did not have the requisite knowledge until the claimant “let rip” on the 24<sup>th</sup> about having to work alone on the 23<sup>rd</sup>.
74. Given the circumstances as we have found them, even if knowledge arose on the 24<sup>th</sup> and we are wrong about a practice of requiring staff to “work short”, it was not reasonable for the respondent to have to make an adjustment because in truth it always set out to have full staffing and the situation would only arise if cover was not available when the claimant was due to work. As she had indicated she would not be returning and did not then return to work, the respondent cannot be found to have failed to make an adjustment at any point in the material times. The reasonable adjustments complaint is also dismissed.
75. Finally, Miss Bamwait’s decision was in no way related to, nor was it less favourable treatment because of, disability.
76. The claimant was a disabled person at the material times; she was dismissed. The presence of those two matters does not mean the respondent has contravened the Act. The reason for the claimant’s dismissal was her own conduct. There was an outstanding matter of walking off shift on the 21st which needed to be talked about. There was, far more significantly the altercation with Miss Smith, in which the claimant had sworn at her manager and she had sworn at Miss Bamwait during their call. We are very clear that these were the only reasons for her dismissal. Both harassment/direct discrimination complaints are therefore also dismissed.
77. It will also be apparent that we find Miss Bamwait believed the claimant had been provided with particulars of a temporary fixed term contract when she dismissed her and that a copy was on file. The claimant had not, in fact, signed and returned a contract, and had an Equality Act complaint succeeded, we might have found that particulars had not been provided to her by the setting

administrator, which is contrary to section 1: Miss Smith was not treating her as a temporary member of staff and we did not hear from the setting administrator directly. The balance of evidence would have been with the claimant on that matter.

JM Wade

Employment Judge Wade

Date 3 April 2023

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