EMPLOYMENT TRIBUNALS

Claimant: **Miss S J Hickmore**

Respondent: **Golden Hands Home Care Limited**

Heard at: **East London Employment Tribunal**
(By Cloud Video Platform)

On: **29 June – 1 July and In Chambers on 6 July 2022**

Before: **Employment Judge C Lewis**
Members: **Ms G McLaughlin**
Mr L O'Callaghan

Representation:
For the Claimant: **In Person**
For the Respondent: **Ms Omotosho, Solicitor**

RESERVED JUDGMENT

1. The unanimous judgment of the Employment Tribunal is that:

1.1 the claim for constructive unfair dismissal succeeds;

1.2 the claim for racial harassment succeeds;

1.3 the claim for unlawful deduction from wages for the period 25 May 2020 to 21 August 2020 succeeds.

2. A Remedy Hearing has been listed for 14 November 2022. The hearing will take place in person.

REASONS

1. By a claim form received on 17 August 2020 following a period of Early Conciliation on 11 August 2020 the Claimant brought a claim of unfair constructive dismissal, race discrimination, notice pay, holiday and arrears of pay (claim 3202330/2020). The claim for

holiday pay and arrears of pay in respect of February 2020 (claim 3201221/2020) was dismissed upon withdrawal. The Respondent resisted all claims.

2. The Respondent is a Domiciliary and Supported Living Care Service based in Essex. The Claimant was employed by the Respondent as a Carer/Support Worker from 20 July 2018 until her resignation on 7 August 2020 giving two weeks' notice: her effective date of termination was 21 August 2020.

Procedural Matters

3. A Preliminary Hearing was held by Cloud Video Platform on 24 February 2021 before Employment Judge Moor at which the Claimant appeared in person and Ms B Omotosho (Solicitor) appeared for the Respondent, as she did before the Tribunal at the final hearing. At that hearing the Employment Judge was told that the Tribunal would hear from one or two witnesses for the Claimant and five witnesses for the Respondent. The hearing was listed to take place over three days in January 2022. Employment Judge Moor noted that this case was not suitable to be heard by CVP as a remote hearing. The Claimant had difficulties attending the Preliminary Hearing by video. In the Case Management Orders the usual directions were given for disclosure of documents and a preparation of a bundle and witness statements. The issues in the claim were clarified and agreed at the hearing and the Respondent was given leave to serve an amended response by 17 March 2021.

The issues to be decided

4. The issues in the case were summarised by Employment Judge Moor as follows:

    4.1 The claims are about the treatment of the Claimant, which she alleges entitled her to resign and claim unfair dismissal. She also brings claims of harassment relating to race and for unpaid wages. The Respondent resists all claims. The original claims for holiday pay and notice pay are dismissed upon withdrawal by the Claimant, the sums having been received.

5. The issues were identified in the following way:

    Unfair constructive dismissal

    5.1 Did the Respondent do the following things:

        (i) Provide the Claimant with a rota 7.75 hours per day over a five-day week, when the Claimant contends she should have been provided with a rota of 12.5 hours a day over a three-day week.

        (ii) Giving no contractual notice of these rota changes.

        (iii) After an investigation hearing after complaints about service users the Respondent did not inform the Claimant of the outcome promptly.

        (iv) The Respondent failed to communicate with the Claimant from 9 June until 7 July at which point the Claimant was required to attend a meeting the next day.

(v) Being accused of being dishonest and a liar by Maria Causapin in early July [that should read June] 2020] and of committing financial abuse of service users (in July 2020).

(vi) Being accused of being racist.

(vii) Attending the Claimant's home when she was off sick requiring her to sign the letters.

5.2 Did that breach the implied term of trust and confidence.

6. The Employment Judge set out the legal principles the Tribunal would have to consider in determining whether that was a constructive dismissal, and if so whether that was an unfair dismissal.

7. In relation to the harassment related to race claim, the issues were identified as follows.

7.1 Firstly, did the Respondent do the following things:

(i) Ms Causapin telling the Claimant on the telephone that she was only taking action against the Respondent because she (Ms Causapin) was Filipina. The Claimant alleges Ms Causapin screamed at her during this conversation.

(ii) Sending an email accidentally to the Claimant stating that Miss Causapin felt that the Claimant was discriminating against her because she was not British born. [Email at page 140 of the bundle].

(iii) If so, was there unwanted conduct?

(iv) Did it relate to race?

(v) Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? If it had that effect the Tribunal would 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 if that was not the purpose.

Unauthorised Deductions of Pay

7.2 The claim in respect of payments in February subject of case 3201221/2020 was withdrawn by the Claimant.

7.3 The remaining issue related to payments from 25 May 2020 to 21 August 2020. The Respondent did not pay the Claimant who said she was ready and willing to work. The Respondent says the Claimant refused to work except on one particular line.

8. A dismissal judgment was issued on 25 February 2021 in respect of Case number 3201221/2020, the February payments.

The Respondent's pleaded case

9. The Respondent pleaded case included the following:

9.1 The Claimant was originally employed on the basis of a five days per week contract of up to 37.5 hours per week which would fluctuate in terms of hours, both upwards and downwards, given the amount of the clients requiring care in any given day/week. At a Supervision meeting with the Claimant on 17 May 2019, following some serious issues around lateness and non-attendance it was agreed between the Claimant and the Respondent that the Claimant's working pattern would be altered to try and assist the Claimant in being able to attend for work and carry out her duties to the required standard. It was agreed that the Claimant would work over a core three-day period per week again with varying hours as per the needs of the business (paragraph 7 of the response to the claim). An action plan was agreed with the Claimant in order to avoid similar matters occurring and making clear that if there were similar occurrences then disciplinary action would follow, which may include dismissal.

9.2 The Claimant accepted this alteration to her working practices and continued to work with and for the Respondent without complaint. The Claimant would work on occasions less than 37.5 per week and other occasions more than 37.5 hours per week and on occasions would work additional days (Particulars of response paragraphs 8 and 9).

9.3 On 3 June 2019 the Claimant tendered her resignation to the Respondent which was due to expire on 30 June. However, she then asked to continue working with the Respondent until she had obtained new employment and her withdrawal of resignation was accepted. The Claimant continued in the employment of the Respondent since this time without any break in continuity of service. (Paragraph 10 of the Response).

10. The May 2019 agreement was contained in the bundle at page 62L. Under the heading "Agreement after meeting:

- This meeting will serve as a verbal warning and if occurs again, staff will be terminated right away.

Terms

- Agreed to do three long days only, no half days as difficult to cover"
  This agreement was signed by the Claimant, Madielyne Pamatmat (Care Manager), Maria Monnette Causapin (Registered Manager) and Bien Causapin (Managing Director) and dated 17 May 2019.

11. We have set out the pleaded case of the Respondent to put in context some of the matters set out below which took up a considerable amount of the Tribunal time allocated for the hearing.

CVP hearing

12. Despite what was noted by Employment Judge Moor at paragraph 2 of the Case Management Orders, shortly before the hearing was due to go ahead in January 2022 Ms Omotosho emailed the Tribunal to find out if the hearing remained listed in person or had been converted to a remote hearing. Unfortunately, the Tribunal had to adjourn the hearing dates due to lack of judicial resources and the hearing was re-listed for 29 June, 30 June and 1 July 2022, in person.

13. On 28 June 2022 at 9:19 in the morning Ms Omotosho emailed the East London Employment Tribunal with an urgent request for the conversion of the hearing listed for 29 June to 1 July 2022 to a CVP hearing, citing unfortunate personal circumstances. In her request Ms Omotosho stated that her clients did not consider this would prejudice either party and they were preparing to send the bundle and statements electronically to the Tribunal, in the alternative she requested a hybrid type hearing to allow the Respondents to attend remotely due to unforeseen difficulty faced by its Advocate. The Claimant was copied into that email, however no response from the Claimant was found on the file. The hearing was converted at the last minute to a CVP hearing.

14. The Claimant struggled to connect to the CVP hearing, she relied on the assistance of a neighbour to help her to log on each day. She was able to re-join after breaks if she left the browser open in between times. The Tribunal offered the Claimant the option of coming into the Tribunal on day two and three but she understood her neighbour was available The morning of the third day of the hearing was entirely lost due to the Claimant's neighbour not being available, the Claimant was unable to log on to the CVP without their assistance; her neighbour had returned by lunchtime and despite being told to attend the Tribunal the Claimant was waiting join the hearing by CVP at 14:00.

15. During the Claimant's evidence the Respondent sent an email to the Tribunal containing an excel spreadsheet of her hours and a rota form, the Claimant did not object to that document and accepted its accuracy as far as she could recall in respect of the hours she worked. On the morning of day 2 the Respondent sent a further document in respect of the Claimant's hours and rota allocation. This document contained clients' names, their full addresses, the times of the visits, the entry codes to their buildings and short details of their care requirements. It was not explained why this document had not been disclosed earlier, why it was necessary to introduce it in the middle of the Claimant's cross examination, nor how it added anything of relevance to the document provided on day 1. The Tribunal refused the Respondent's application to introduce this further document, the information it contained did not add anything to the schedule which was introduced in evidence the day before; the Claimant had already confirmed the accuracy of her payslips, and had accepted that she sometimes worked less than 37.5 hours in a week or less than 12.5 hours in a day. The introduction of a further document to illustrate this was not necessary and nor was it proportionate. The Respondent indicated it would also seek an order to a redact the sensitive personal information and an adjournment to undertake the redaction. The Respondent had indicated that it was ready for hearing in January and there was no explanation as to why this application was being made on day two of a three day hearing, part way through the Claimant's cross-examination.

16. Unfortunately, the remote hearing was made more difficult by the lamentable state of the bundle. The electronic bundle provided by the Respondent was not put together in numerical order, as well as there being numerous additional pages with alphabetical

additions to the page numbering, for instance at page 62 L- M. The payslips that were in the bundle were not in chronological order. The Claimant's copy of the bundle was incomplete. The Tribunal was able to mitigate the effects of the Claimant not having a complete copy of the bundle by sharing the Judge's screen to show the relevant pages; the Claimant was able to confirm she had seen the relevant documents (in disclosure), albeit they were not in her bundle, and she was able to answer questions about those pages.

17. The Claimant had some additional pages (263 – 268) which were not in the Tribunal's or Ms Omotosho's bundle,. The Claimant was able to hold these pages up to the camera: it was apparent that they were printouts of texts between herself and Mr Jimenez in the period June and July 2020 during which the Respondent disputed that she was available for work; the texts were consistent with the Claimant's evidence about contacting the Respondent with her availability and asking about her rota. No explanation was provided for why they were omitted from the Tribunal's bundle. If they were genuine texts they appeared to contradict the Respondent's assertion that the Claimant had not contacted them or made them aware of her availability in June and July (which was the basis on which the Claimant had been cross-examined on this issue). There is no explanation for why these had been omitted from the bundle. The numbering on the pages shown to us by the Claimant appeared to be in the same writing as the remainder of the bundle pagination, in the same thick felt pen. The Claimant had been cross examined on the basis that she had not made herself available for work during June and July. Mr Jimenez had his phone with him, he confirmed that he had the relevant texts on his phone, and that they were the same as the printouts held up by the Claimant. He agreed to send the relevant texts to Ms Omotosho so that she could print them off and make them available to the Tribunal.

Witnesses

18. The Claimant gave evidence and provided a signed letter from her neighbour. The Respondent called three witnesses, Mrs Maria Solas-Causapin, Bien Causapin and Eyvan Jimenez. Mr Jimenez's witness statement was very brief, consisting of four paragraphs. The second paragraph of which reads,

> "When Sam started working over three days a week after May 2019, she was not being given 37.5 hours. Sam knew this and so she would work less hours according to the business needs. She would provide us with her availabilities for the week and I would work the rota around the dates".

19. In response to the supplementary question asked by Ms Omotosho Mr Jimenez answered:

> "Yes, I had been told by management that the Claimant's contract had changed to 37.5 hours for three days".

He explained that he told the managers "it was impossible to do three days with the pandemic and everything and that it became harder to do that as the pandemic effects became worse".

20. At 15:20 on day 3 Ms Omotosho made an application to call two further witnesses to contradict Mr Jimenez's evidence that the contract had been changed. She did not seek to have Mr Jimenez declared a hostile witness however and was content to carry on asking him questions. The effect of her application would be to adjourn part heard in order for her

to call two further witnesses who had been available to her throughout but whom she had chosen not to call, to give evidence to contradict the Respondent's pleaded case and the evidence given by one of her witnesses whom she had chosen to call and was not seeking to declare hostile. The application was refused for the reasons given orally at the hearing. Ms Omotosho renewed her application to call two further witnesses at 17:05pm at the end of the hearing. This was refused, again for the reasons given orally. Ms Omotosho relied on parts of Mr Jimenez evidence in her closing submissions.

Other Procedural Matters

21. The Claimant hand delivered a memory stick to the Employment Tribunal on 6 July 2022 in advance of the In-chambers discussion. The Tribunal clerk was told the memory stick contained the recording of the meeting on 1 June 2020 with Ms Solas-Causapin and Ms Pamatmat. The Tribunal had not been asked to listen to that recording during the hearing. The clerk was asked to inform the Claimant that the Tribunal was not going to hear any new evidence during the course of our deliberations.

Findings of Fact

22. We make the following findings of facts so far as they are relevant to the issues that we have to decide.

23. The Respondent provides domiciliary and supported living care services based in Essex and provides care to clients of Essex County Council. It employs approximately 40 carers and allocates clients on what is known as "lines". A line is a series of visits allocated to a person on a rota. Those visits were to provide care for clients. Depending on the number of visits funded by Essex County Council clients received normally two but up to four visits a day. The Respondent tried to make sure those visits were in the same geographical area and the allocation of time was in approximately 15 – 45-minute slots with an arrival window of 30 minutes to allow for some time for travel between visits. The carers were not paid travel time but they were paid for petrol and on occasions provided with a car (i.e. a car left in a specific location for the carer to pick up and use)., which meant they still had to travel to the car's location. Travel between client visits could take between approximately 5 minutes to 15 minutes but was sometimes longer if an additional client had been added to the line for cover. The Respondent tried to keep the same client with the same carer i.e. the same line was allocated to a particular carer. During Covid this was particularly important as it allowed the Respondent to track who had been in contact with whom if anybody tested positive for Covid. On occasions another carer had to be switched to a client when their usual carer was away or off sick. On other occasions a client who was normally on the rota (or line) would not require a visit, for instance if that particular client was in hospital; some clients were in and out of hospital, particularly as the Covid pandemic wore on, and, unfortunately, some clients passed away.

24. The Claimant started work with the Respondent on 20 July 2018 as a Carer/Support Worker. In her contract (page 55 of the bundle) the standard rate of pay was £10 an hour, £11 an hour on Saturdays and £12 an hour on Sundays. Clause 8 sets out the normal hours of work in the following terms:

> "Your normal hours of work are 37.5 hours per week pro rata and will be organised per a rota which the Employer will notify to you in advance. The Employer does not guarantee to provide you with a specific shift pattern.
>
> You will be expected to keep your working hours **flexible** to meet the needs of the company. At times the needs of the Employer will require these hours to be modified and you will be expected to vary your hours of work accordingly.
>
> You will be supplied with a duty rota with details of your working shifts at least by the third week of the previous month. This rota is not subject to change without the consent of a senior manager.
>
> In addition to your normal hours of work, you are required to work any necessary additional hours for the proper performance of your duties including on call service."

The contract referred to a disciplinary and appeals procedure in the Employee Handbook, extracts from the handbook were also in the bundle, the disciplinary policy makes no reference to, or provision for, suspension without pay.

25. On 17 May 2019 the Claimant had a meeting with managers Madielyne Pamatmat, Maria Monnette Causapin and Bien Causapin. We do not need to address the issues which led up to that meeting in May, it was agreed that the Claimant was given a verbal warning and that was the end of the matter, everyone had drawn a line under it. At the end of that meeting it was agreed that the Claimant was to work her 37.5 hours over three long days only, with no half days. The Respondent found half days difficult to cover. The Claimant's evidence, which we accept, was that she had objected to being required to work half days and work her 37.5 hours over more than three days because this meant that she was working 15 hours a day but only being paid for 7.5, as she was only paid for the time allocated as being with each client; she was not paid for time in-between clients, travel time, or time between the scheduled visits for the same client. Clients were allocated up to four visits a day, for breakfast, lunch time, teatime and bedtime.

26. The contents of para 7, 8, 9 and 10 of the Response to the claim were not substantially in dispute. The Claimant accepted that it was sometimes not possible to allocate her full 37.5 hours in three days because, for instance a client in the line did not require a visit that day. The Respondent would try to find another visit to make up the hours if possible, for example she might be asked to cover another carer's client in their absence if that client was within a reasonable distance and fitted into the Claimant's line but not if it meant taking the visit away from another carer on their own line.

27. The Claimant tendered her resignation in June 2019 but was persuaded to stay on, her resignation was rescinded and there was no break in service. We find that she continued on the terms agreed on 17 May 2019. Mr Jimenez's evidence reflected the pattern of work that the Claimant was understood to be prepared to work and that the Respondent was to seek to provide the Claimant if possible, this continued up to May 2020. The Claimant understood that some weeks it was difficult to provide her with her hours over 3 days, particularly due to the effect of the pandemic, she accepted that in some weeks she did not work 37.5 hours in her three allocated days. She was prepared to be flexible and to work additional days but on the understanding that this was at her own choice and that she could not be required to work five days in order to accrue her 37.5 hours for that week; she

was sometimes prepared to work four or five days in a week but this was work additional hours, some weeks she worked over 40 and occasionally 50 hours.

28. We were referred to a spreadsheet of the Claimant's hours in 2020. In the week commencing 18 May 2020 the Claimant was allocated 12.75 hours, 10.75 hours, 10.75 hours and 10.75 hours over four days. The Claimant told us that she had accepted those hours that week, however, in the week commencing 25 May she was sent the rota on the Sunday which showed that she was working Tuesday to Saturday 10.25 hours each day. The Claimant was aware that one of the clients on her rota would not in fact require a visit as she was in hospital, this meant that the Claimant would only be paid for 8 hours. The Claimant refused those hours and told Mr Jimenez that she was entitled to do her hours over three days not five.

29. On 20 May, Pat Causapin (Mrs Solas- Causapin's husband and also a manager in the Respondent company) had arrived at a client's home expecting the Claimant to be there for a double (two person) carer visit. The Claimant was not there, his note of what took place is at page 112 of the bundle, he called the Claimant who explained she had overslept, she was three hours late. It was accepted that although the note was dated 21 May it was an account of events on 20 May (see also page 111A).

30. On 25 May 2020, JK, the next of kin of one of the clients in the Claimant's line, complained about the Claimant's care. In his written complaint he complained that the visits were fleeting and the standard of care was not what he expected for his mother, he asked that his mother be looked after by someone other than the Claimant in the future.

31. The Claimant accepted that the Respondent had to investigate this complaint and that it was not unreasonable for them to do so; she also accepted that they had to take the client off her rota/line at the client's relative's request. She told the Tribunal that this was one of the visits that was listed on her rota when it should not have been and that another client was in hospital.

32. On 27 May 2020 a complaint was received from CB, the son of PB, another client on the Claimant's line. A Complaint Tracker Form was filled out [page 109]. CB complained that the Claimant was two hours late on 23 May, and that this was not the first time that this had happened; in the "outcome sought "section of the form CB had written "change of carers or will change provider" [page 110].

33. The complaint tracker form [page 110] noted that the Claimant had put on the on-care documentation that she arrived at 7:45 and stayed until 9:13, 'which the son says is "a lie" it is noted that this is "another next of kin not happy with [the Claimant's] personal care". The complaints were investigated by Maria Causapin and Madielyne Pamatmat. Ms Causapin and Ms Pamatmat interviewed three other carers who visited the same client (one was a double up carer/replacement and two were off day replacements). The Claimant attended an interview about the complaint on 1 June 2020 at which she queried why it was only her who was being investigated when other carers were also visiting; the Respondent explained that the client had complained about the visits that the Claimant carried out on her own and not about the care from other carers [page 118 – 120]. The Claimant asked why the Respondent could not put her on another line while the complaints were investigated. The notes record that she was told that:

> "Now that the concerns are arising, we do not want this happening on different lines, and also we created [this] line for you as the key worker".

It was accepted that the Claimant's line was created to suit her geographical location when she moved to her current address.

34. Mrs Causapin told the Tribunal that the Respondent had offered the Claimant another line and she had refused it. The Claimant disputed this, she maintained that she was not offered any further rotas after the 1 June meeting. The Claimant accepted that she was offered a rota on 25 May, which she declined due to the reduced number of hours: she was not prepared to work 15 hours and be paid for 8. She maintained that the Respondent was not entitled to offer her 37.5 hours over five days. The Claimant also complained that the meeting was held to discuss the allegations against her and did not discuss the concerns that she had raised about the rota she had been offered. Mrs Solas-Causapin told the Tribunal that the Respondent remained prepared to offer the Claimant her line minus the two clients who had complained and the one who was in hospital.

35. Mr Jimenez's evidence in respect of the number of hours that the Claimant was offered was as follows: "As far as I remember I did not offer less than 10 hours, all the other lines were less than 10. She was adamant she would not do less than 10 hours."

36. The Claimant did not dispute that it was not always possible to provide her 12.5 hours over each of the three days and made plain that what she had refused to do and what she had disputed in May 2019 was being asked to cover and be paid for less than 10 hours on one day or have her 37.5 hours spread out over 5 days, the effect of which was that she had to be available for work from 6:30am until 9:30pm but only get paid for 7.5 hours or less, or 8 hours on occasions, depending on the actual visits to the client; she was not prepared to work 15 hours in order to be paid for 7.5 hours.

37. We are satisfied that the Claimant's position was well understood by Mr Jimenez, Mrs Causapin and Bien Causapin. This was at the root of the Claimant's objection to the rota she had been offered and there was no real basis for suggesting the Respondent did not understand that. The Respondent's evidence was that they were not always able to provide the Claimant with 37.5 hours work over 3 days.

38. During Mr Jimenez's evidence, he was asked if the Claimant was offered work in June or if he had been told not to offer her work. His initial response was that he was told that she was not to be put on the rota in June whilst the Respondent was seeking advice. He understood that they were seeking advice because the Claimant was saying that she could not be required to work for less hours pay. At this point in his evidence Mr Jimenez appeared to be looking at his phone. When asked about this he explained that he had been looking at a note pad where he had made some notes of dates. He was told by the Judge not to look at either a note pad or his phone. He was then asked again about whether he had been told not to offer the Claimant work and he changed his response.

39. We are satisfied that, contrary to the Respondent's assertion, the Claimant provided her availability for June, she texted the dates to Mr Jimenez, but was not allocated a rota. She contacted Mr Jimenez asking about the rota and was told that he was not able to offer her a rota whilst the office was seeking advice about the situation. We find this is consistent with the text exchange between them during 27 May to 14 July 2020 [additional pages T5

– T10]. The Respondent had sought advice in relation to the Claimant's refusal to work her hours over more than three days.

40. In advance of the rota being issued for the week commencing 25 May [T1], the Claimant offers to take a week holiday if there was not enough work for her. She was then asked whether she could be put on five days a week and if she wanted Saturday or Sunday. When told she would be put on Saturday she responded that that was fine. We do not find this to be inconsistent with the Claimant's evidence for previous practice of accepting additional days (taking her hours over her core 37.5 hours) when offered to her if they were convenient for her. However we are satisfied that under the terms of the May 2019 agreement the Claimant was not obliged to accept a rota which spread her core hours over 5 days as the proposed rota for 26- 30 May did. It was suggested that the rota was for 10.5 hours a day however we accept the Claimant's evidence that the hours offered did not in fact mean she would be paid for 10.5 hours, she was aware that one of the client's on the rota was in hospital so she would only be paid for 7 hours.

41. On 27 May 2020 the Claimant texted Mr Jimenez with her availability for June asking if she was still working with the Respondent and saying that she would stay with her three days a week contracted. On 5 June she texted him asking if she was on the rota that week and saying she was not sure what was happening with her employment status, his response was that he was not sure and he would ask the office. At T7 is a text from Mr Jimenez to the Claimant between 6 June and 13 June informing her that the office will let him know when he can put the Claimant back on the rota. On 13 June the Claimant asked if she had a rota for the following week, his response was that he had not been informed yet. The Claimant replies that she has no idea about what was happening, and she has complained that her hours should be over three days not over five over a 14.5-hour day. On 20 June 2020, the Claimant again asked if she was getting a rota for the next week stating that it was the fifth week that she had not been given any work or given a rota, that she is contracted to do 37.5 hours over a three-day week. She texted again on 21 June 2020 to ask if she was back on the rota. In the absence of a reply on 29 June the Claimant texted "I guess that is no again". Mr Jimenez's response is "sorry Sam, haven't heard back from the office, why don't you book a meeting to sort things out". The Claimant replies "… thank you, no point, Maria had said that she would be in touch around 4 – 5 June after the meeting but was not. She had asked via email since and said she was awaiting a decision and that they would be in touch with her, they (the office) should be in touch as they are the ones making the decision."

42. On 13 July 2010 the Claimant texted "I guess I am still not on the rota" and on 14 July Mr Jimenez's response "haven't got any news yet".

43. We are satisfied that the Respondent's assertion that the Claimant was not interested and not available to work for them during this period is incorrect. We find that she was available for work and was asking about work, including by texting Mr Jimenez. We are satisfied that the Claimant was told that she was not on the rota because the office had said that they were waiting for a decision about her refusing to work her hours over 5 days. Mrs Solas-Causapin confirmed in her evidence that she was seeking advice in the interim period from Citation in respect of the Claimant's refusal to work her hours over more than 3 days. The Claimant was not offered any hours from 1 June until 7 August 2020.

44. We find that the Respondent was not prepared to switch her to another line while she was being investigated. Mrs Solas-Causapin's evidence is not consistent with what was

recorded at the time by Bea Causapin in the note of the complaints interview [p120] nor is it consistent with Mr Jiminez's evidence that he was told by "the office" not to offer the Claimant another line until they "had taken advice". We are satisfied that the reason the Claimant was not offered a switch of line was because she was under investigation; the Respondent was not prepared to switch her to another line whilst the investigation was ongoing and risk problems arising on that line.

45. On 2 July 2020 the Respondent sent a letter to the Claimant inviting her to a disciplinary meeting on 6 July. It is accepted by the Respondent that the Claimant did not receive this letter, she had confirmation of that from Royal Mail. The Respondent called her on 7 July to ask her why she had not attended the meeting. On 5 August she was invited to attend a meeting on 7 August (page 150). On 17 July (page 154) the Respondent sent a letter to the Claimant referring to their letter of 2 July and informing her that she had failed to attend the meeting on 6 July and that the meeting had been rescheduled for 28 July. The Claimant phoned the Respondent to say that she had not received the letter of 2 July, she also said she was not able to attend the meeting at short notice and asked for the meeting to be rearranged. She also asked the Respondent to arrange for a date when her witness (who was also a carer working for the Respondent) was available.

46. In the interim the Claimant contacted ACAS to seek advice about her situation and the Claimant was contacted by Bien Causapin about the meeting the Respondent had scheduled for 8 July. She explained that she had not known about it and that she was unable to attend without any notice. She asked whether the meeting was formal or informal and was told that Bien was not able to tell her that because of data protection. The Claimant did not understand this as the meeting was about her. She had taken advice from ACAS and the issue was not clarified. She received another call about attending the office for a meeting, this time from Maria Causapin in which she queried what was happening about her contract, the results of the investigation and about the notification for the meetings. The Claimant describes Mrs Solas-Causapin as screaming and shouting at her over the phone, calling her a liar and saying that the Claimant was only doing this because she was Filipino. The Claimant said she tried to explain that she took advice from ACAS and that unless they could tell her or send her another meeting letter she would not attend as she did not know what it was about and if she needed a witness.

47. The Claimant provided a signed letter from her neighbour Mrs Vanessa Sallitoe [pages 138 – 139] in which she stated that on the morning of 13 July 2020 she was in her garden when the Claimant came out into her garden on her mobile phone; it was clear she was having a heated conversation, the woman on the other end was speaking in a very raised voice. She heard the lady say to the Claimant,

> "You are only doing this as I am Filipina. Why are you doing this"

Mrs Sallitoe states that she heard the Claimant asking the lady not to call her racist or insinuate that she was racist, and that the Claimant seemed to be very upset about the accusation made against her. The Claimant then asked her neighbour if she had heard it all, which she had said "yes, she had heard the comment" . Mrs Sallitoe did not give evidence to the Tribunal,

48. On 13 July 2020 the Claimant received an email from Mrs Solas-Causapin which Mrs Solas-Causapin had sent to her by mistake (page 140). In that email Mrs Solas-Causapin described the phone conversation as follows:

> "Samantha called us today stating that she does not have the letter and she did not receive it and I asked her to come today because she is aware that today is the fifth day and the last grace period but she stated it is not. I just feel that she is discriminating me because I am not British by birth, she has refused to come since Tuesday she is aware. She stated she will contact ACAS and will take this to Tribunal. I even told her that why she keeps refusing to do the duty and to meet me. I informed her that she gave me problem and that she is in safeguarding for three service users who complained about her. Please, I need help to resolve this matter."

49. Mrs Solas-Causapin denies screaming and shouting during the call but accepted that she raised her voice. She denied saying the words "You are doing this because I am a Filipina", her account is that she said to the Claimant "it is because I am not British by birth". She relies on the description contained in the email sent the same day.

50. We find that Mrs Solas-Causapin raised her voice during that telephone call and are satisfied on the balance of probabilities that the words used on the phone were said loud enough for the Claimant's neighbour to hear. We find that that Mrs Solas-Causapin said to the Claimant that she was "only doing this because I am Filipina". We are also satisfied that the Claimant understood this to be an allegation that she was racist and that she was upset by this allegation and found it to be offensive.

51. On 17 July 2020 one of the Respondent's managers, Mr Hernandez, was asked to hand deliver an envelope containing a letter re-scheduling the disciplinary meeting, a letter about the Claimant's failure to attend the earlier meeting, together with a number of other documents. The Respondent decided this letter should be hand delivered due to the Claimant not receiving the original letter sent in June. The Claimant refused to sign for the document as she had not had time to read them and she found it intimidating for the manager to be on her doorstep. Mr Hernandez went away and telephoned the office to find out what to do, he spoke to Bien Causapin who told him to hand over the documents in any event and to note that the Claimant had refused to sign for them. Mr Hernandez returned to the Claimant's door and asked her to take the documents and then sign the document (which we see at page 129) noting that the Claimant refused to sign but that he handed over the documents that had been delivered to her home. On the same day, the Claimant obtained a sick note from her GP in relation to work-related stress and anxiety (page 146 of the bundle).

52. On 22 July 2020 a further allegation had been received in respect of the handling of a client's money. On 5 August the Claimant was emailed an invitation to a meeting to discuss the both the existing allegations and new allegations. The letter of 5 August is at page 150, it informs the Claimant that in addition to the disciplinary allegations outlined in the previous letter further allegations have come to light and that a further investigation meeting had been arranged for 7 August at 3pm. The letter sets out the nature of the allegations in respect of potential financial abuse and breach of company's policies and handling service users finances, it stated that the meeting was an investigation meeting. The Claimant indicated she would attend but asked that the Respondent made sure that her colleague Geoff was available (page 147). On 6 August the Claimant emailed the Respondent to find out if it was an investigation or a disciplinary as the letter was not clear and was informed that it was an investigation meeting. The Claimant was informed that the witness she had requested was on shift on the day in question but should be able to come in his break.

The Claimant's resignation

53. On 7 August the Claimant attended the meeting in respect of the allegations against her (as set out in the 5 August letter) the allegation in respect of handling a client's finances and accessing their bank account was raised with the Claimant. The Claimant told us, and we accept that her complaint about her hours was not discussed. We find that was not the purpose for which the meeting had been arranged. At the end of that meeting the Claimant handed in her pre-written resignation letter [page 138]. In her resignation letter she states that she is resigning as she feels it has become intolerable to continue working with Golden Hands due to the false misconduct and race allegations made against her.

54. The Claimant told us that the reason she resigned was a combination of the fact that there were further allegations raised during the course of the investigation; that she had a dispute about her hours that was unresolved, that she had not been put on a rota for five weeks; in the meantime she had been shouted at and called a liar and a racist and that the whole situation was intolerable. She told the Tribunal that she could not continue not knowing whether she was going to be able to return to work or what was going to happen next. She had decided to go to the meeting to see if matters could be resolved and to give the Respondent an opportunity to sort things out but the meeting was inconclusive, nothing was discussed about her hours or her rota and she did not see any end to the situation within sight so she decided to hand in her letter of resignation and to leave the Respondent's employment. She gave notice of two weeks which expired on 21 August 2020. We accept that those were her reasons for resigning.

55. We were told by Mrs Causapin that she had no intention of dismissing the Claimant in response to the complaints or subsequent allegations of financial impropriety and that she had never dismissed any of her carers and could not imagine circumstances in which she would do so.

Reason for the Respondent's Conduct

56. We have found that from May 2019 there was an agreement with the Claimant that she would be offered her core hours over three days rather than five days. We find that the Respondent's reasons for not offering this rota from 25 May 2020 to be as follows: in the week of 25 May 2020 one client was in hospital; there were then complaints in respect of two clients which meant that the Claimant could not be rostered to visit them; the Respondent did not consider it to be appropriate to move her to another line in the interim whilst the investigation was carried out. We are satisfied that the Respondent had reasonable and proper cause for removing those clients from her rota and for not transferring her to another line.

57. We accept the Claimant's evidence that she had offered to take holiday for that week if there were not enough clients. This is consistent with the text message she sent to Mr Jimenez. We also accept the Claimant's evidence that having spoken to ACAS she considered herself to be suspended and she contacted the Respondent to tell them that she should be paid for those hours. We are satisfied that the Claimant was available for work and had informed the Respondent that she was available to work her hours in accordance with their May 2019 agreement

58. We are satisfied that the Claimant was suspended from the visits to the clients whose relatives had complained and also suspended from work on any other line. We are also satisfied that there was no contractual right to suspend the Claimant without pay. We find that the effect of the Respondent's decision not to place her on another line and not to send her to see client's whose relatives had made complaints about her was that there was insufficient work available to provide the claimant with her core hours over 3 days.

The relevant law

59. Ms Omotosho provide helpful written submissions the law. In addition we have set out the relevant legal principles below.

60. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

61. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:

(i) that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach); (the final act must add something to the breach even if relatively insignificant: Omilaju v Waltham Forest LBC [2005] IRLR 35 CA). Whether there is breach of contract, having regard to the impact of the employer's behaviour on the employee (rather than what the employer intended) must be viewed objectively: Nottinghamshire CC v Meikle [2005] ICR 1.

(ii) that the breach caused the employee to resign – or the last in a series of events which was the last straw; (an employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to plead constructive unfair dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract; see Logan v Celyyn House UKEAT/2012/0069. Indeed, once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon; see: Wright v North Ayrshire Council EATS/0017/13/BI); .and

(iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

62. All contracts of employment contain an implied term that an employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores plc [2002] IRLR 9.

63. In Croft v Consignia plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.

64. In Cantor Fitzgerald International v Callaghan [1999] IRLR 234, the Court of Appeal held that whether or not non-payment of agreed wages, or interference by an employer with a salary package, is or is not fundamental to the continued existence of the contract of employment depends upon the critical distinction to be drawn between an employer's failure to pay, or delay in paying, agreed remuneration, and his deliberate refusal to do so. An emphatic denial by the employer of his obligation to pay the agreed salary or wage, or a determined resolution not to comply with his contractual obligations in relation to pay and remuneration, will normally be regarded as repudiatory. On the other hand, where the failure to pay or delay in paying represents no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness or accident or unexpected events, it is open to the court to conclude that the breach did not go to the root of the contract. However, if the failure or delay were repeated or persistent, perhaps also unexplained, the court might be driven to conclude that the breach or breaches were repudiatory

65. It is open for an employer to argue that, despite a constructive dismissal being established by the employee, that the dismissal was nevertheless fair. The employer will have to show a potentially fair reason for the dismissal and that will be the reason why the employer breached the employee's contract of employment; see Berriman v Delabole Slate Ltd 1985 ICR 546 CA. The employer will also have to show that it acted reasonably. If an employer does not attempt to show a potentially fair reason in a constructive dismissal case, a Tribunal is under no obligation to investigate the reason for the dismissal or its reasonableness; see Derby City Council v Marshall 1979 ICR 731 EAT.

Conclusions

Unfair constructive dismissal

66. Whether the Respondent, without reasonable and proper cause, behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent, by doing the following:

(1) Providing the Claimant with a rota of 7.75 hours per day over a 5-day week when she should have been given 12.5 hours a day over a 3 day week

67. We are satisfied that on 27 May 2020 the Claimant was provided with a rota which meant that she would be paid for only 7.75 hours each day over 5 days when she should have been provided with her hours over the course of three days.

(2) Giving no contractual notice of these rota changes

68. We found that the Claimant was not formally notified that this was a change to her rota with an explanation or request that she agree to it in the interim although the Claimant had worked to a not entirely dissimilar rota the previous week. We do not find that she

waived her entitlement to stick to her agreement with the Respondent that her core hours should be three days and she would be able to work additional days if she chose to do so.

(3) Not informing the Claimant promptly of the outcome of the investigation into complaints by service users

69. We have found that the Respondent did not keep the Claimant informed as to the outcome of the investigation between 9 June and 2 July 2020. She had been told that she would hear back within 4 – 5 days. A letter was sent to her on 2 July but the Claimant did not receive it. The reason given by the Respondent for not being in touch with her is that they were seeking advice. The advice being sought was in relation to the Claimant's hours and pay. The Claimant's complaint about her hours and pay was inextricably linked with the outcome of the investigation into the complaints, as the complaints were the reason for the Claimant not being offered her core hours. We have found that the Respondent did not offer her alternative work or make up her hours and pay in the interim and that as a result the Claimant was left both not knowing what was happening and without work, in the interim leaving her with no money, which we find was what underpinned the Claimant's complaint in this regard.

70. We do not find that the Respondent had reasonable and proper cause for suspending the Claimant without pay. We find that in order to comply with the contractual agreement the Claimant ought to have been offered her normal hours for the clients that she could visit (because no complaint had been raised in respect of their care) and the difference in her hours made up by paying her for the periods covered by suspension, i.e the hours she would have been with clients, whether on her own or on another line, but for her suspension.

(4) The Respondent failing to communicate with the Claimant from 9 June until 7 July at which point the Claimant was required to attend a meeting the next day.

71. We found that the Respondent wrote to the Claimant on 2 July, this letter was not received by her through no fault of the Respondent. The lapse in time was therefore 9 June to 2 July. Having heard from the Claimant we are satisfied that the thrust of the Claimant's complaint was the contrast between the delay in hearing about any outcome and the short notice of the meeting that was arranged for 8 July. The meeting on 8 July was rearranged once the Claimant informed the Respondent she was not able to attend.

72. The Respondent was conducting its investigation and speaking to witnesses. They accepted that the Claimant had not received the letter on 2 July and rearranged the meeting. We do not find that this in itself was conduct that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent.

(5) Accusing the Claimant of being dishonest and a liar in early July 2020 and of committing financial abuse of service users

73. We have found that at 1 June meeting Mrs Causapin did not accuse the Claimant herself of being a liar but informed her of the next of kin's allegation which was that the Claimant had lied on the documentation. We do not find that the Claimant was called a liar on any other occasion by Mrs Causapin. There is no evidence before us to that effect.

74. The Claimant was also faced with an allegation of committing financial abuse at service users made in July.

75. We find that the Respondent had reasonable and proper cause for making the Claimant aware of those allegations based on complaints and allegations made by firstly service users and secondly by other employees who were employed as carers. We do not find that bringing those allegations to the Claimant's attention and investigating them amounts to conduct that was such that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent.

(6) A**ccusing the Claimant of being racist**

76. We have found that Mrs Causapin accused the Claimant of only acting as she was doing because Mrs Causapin was Filipina. We find that the effect on the Claimant reasonably perceived that to be an allegation of racism.

77. No evidence of any reasonable or proper basis for making that allegation has been put forward by the Respondent. We are satisfied that accusing the Claimant of being racist towards her employer was conduct that was likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent.

(7) Attending the Claimant's home when she was off sick requiring her to sign for letters.

78. We find that in the circumstances the Respondent had reasonable and proper cause for attending the Claimant's home and requiring her to sign for letters. The envelope contained important information about the disciplinary investigation and meeting. A previous letter in respect of the disciplinary meeting had not been received despite being sent through Royal Mail signed for delivery. The Claimant's fit note stating that she was suffering from work related stress and anxiety was obtained on the same day as the visit, 17 July 2020. We are satisfied that the Respondent did not have reason to know that the Claimant would find the visit particularly stressful. We do not find that this was conduct which was likely to destroy or seriously damage trust and confidence between the Claimant and the Respondent.

Reason for resignation

79. We are satisfied that the Claimant found the position in respect of not being given any work and therefore not being paid for five weeks, facing what she believed to be false allegations of misconduct and race discrimination to be intolerable. We do not find that the allegations of misconduct were made without reasonable and proper cause or could contribute to a breach of trust in confidence being seriously damaged.

80. However we do not find that the Respondent had reasonable and proper cause for suspending the Claimant without pay. We find that in order to comply with the contractual agreement the Claimant ought to have been offered her normal hours for the clients that she could visit (because no complaint had been raised in respect of their care) and the difference in her hours made up by paying her for the periods covered by suspension, i.e the hours she would have been with clients, whether on her own or on another line, but for her suspension.

81. We have found that the failure to provide the Claimant with work or pay and the failure to communicate with her to inform her what was happening in that period in respect of the hours and pay was the principal reason for her decision to resign and the allegation that she had acted in a racially discriminatory way towards Mrs Solas-Causapin contributed to that decision. We find that those were matters which were likely to and did seriously damage the trust and confidence between the Claimant and the Respondent. We are also satisfied that the Respondent did not have reasonable and proper cause for those actions as set out above.

Did the Claimant resign in response to the breaches – or did she affirm the contract?

82. We find the Claimant resigned in response to those breaches, those were in her mind and those were active on her thought processes in her decision to resign. We do not find that the Claimant affirmed the contract before resigning, she attended the meeting to find out if matters could be resolved and if she could return to work and having no resolution and seeing no end in sight, she decided that she had to act on her decision to resign. We are satisfied that those matters set out above that we found to be a breach were an effective cause of that resignation.

Was the dismissal nevertheless fair?

83. The Respondent relies on the Claimant's alleged misconduct.

84. The Tribunal has not found that the allegations of misconduct and the investigation of those were matters that are capable of contributing to the breach of the implied term of trust and confidence. We are satisfied that the Respondent had reasonable and proper cause for investigating the Claimant's conduct and that if those allegations were proven there would have been a potentially fair reason for disciplining the Claimant. However we were told in any event by Mrs Causapin that she had no intention of dismissing the Claimant in response to those allegations and that she had never dismissed any of her carers and could not imagine circumstances which she would do so.

85. We have not found the Respondent had a potentially fair reason for the actions which we have found to have been the breach is of contract. nor that they could rely on any potentially fair reason in the circumstances for dismissing the Claimant the Respondent having stated that they would not have dismissed her in the circumstances for the misconduct.

Harassment related to race

86. We found that Mrs Causapin did tell the Claimant on the telephone that she was only taking action against the Respondent because Mrs Causapin was Filipina. We find that was unwanted conduct and that it related to race. The comment was only made because the Claimant and Mrs Causapin were of different races or ethnic backgrounds.

87. We find that although the purpose of that comment was not to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant or to violate her dignity, it did have that effect. We are satisfied that it was reasonable for the conduct to have had that effect on the Claimant. We find that it was reasonable for the Claimant to perceive

that she was being accused of being racist and that this was offensive to her and created a hostile environment for her with her employer.

88. We are satisfied that the email, the Claimant received on the same day alleging that the Claimant was discriminating against Mrs Causapin because she was not British born. was also related to the race and compounded the Claimant's perception that she was being accused of being racist. We also find that it was reasonable for her to perceive it in that way and that this was offensive to her and created a hostile environment between her and her employer.

Unlawful deductions from pay

89. The Claimant was not paid from 25 May 2020 to 21 August 2020. We find that she was ready and willing to work during that period. She did not refuse to work on another line, she had indicated that she was prepared to work on another line or to take paid holiday to which she was entitled. We are satisfied that there is no provision in the contract permitting the Respondent to suspend the Claimant without pay during the course of any disciplinary investigation. We therefore find that there was an unlawful deduction from her wages in respect of those weeks' pay.

Remedy Hearing

90. A Remedy Hearing has been listed to take place in person on **14 November 2022**.

Employment Judge C Lewis

12 October 2022