EMPLOYMENT TRIBUNALS

Claimant: Ms S Pywell
v
Respondent: J.W. Nunn T/A Primrose Lodge

Heard at: Nottingham **On:** 11-14 & 17 April 2023

Before: Employment Judge Fredericks
Tribunal Member Hill
Tribunal Member Blomefield

Appearances
For the claimant: Mrs E Molloy (Lay Representative)
For the respondent: Mr H Wiltshire (Counsel)

RESERVED JUDGMENT

1. The claimant was constructively dismissed by the respondent.

2. The claimant's complaint that she suffered detriments after making protected disclosures is not well-founded and is dismissed.

3. The claimant's complaint of direct disability discrimination is not well-founded and is dismissed.

4. The claimant's claim that she has been harassed in a manner related to her disability is not well-founded and is dismissed.

5. The claimant is entitled to a basic and compensatory award arising from her constructive dismissal, to be determined at a remedy hearing which will be notified separately.

REASONS

Introduction

1. The claimant was employed by the respondent, an individual who owns the care home within which the claimant worked, from 1 July 2019 to 3 August 2021, when she left following her resignation. She worked as a senior care assistant.

2. These claims arise within the context of the national response to the Covid-19 pandemic, when we appreciate that work within a care home setting would have been incredibly difficult and emotionally charged. In short, the claimant says that she made protected disclosures about the work practices within the respondent and its related care home. She claims that she was subjected to detriment for doing so. Alongside this, she claims discrimination and harassment related to her disability. She says that these things together with the handling of her grievance combined to form circumstances within which she could consider herself to have been constructively dismissed. The respondent denies all of the claims.

3. The claimant was held to have been disabled at the relevant time under the purposes of *Section 6 Equality Act 2010* by Employment Judge Camp at a previous preliminary hearing. For the purposes of this hearing, then, we considered that the claimant had the disability at the time and it was no longer open to the respondent to argue that she was not disabled.

4. The claimant was represented by her other employer Mrs Molloy, a lay representative. The claimant gave evidence in support of her own claim and also called on evidence from: Corinne Davis (a former employee of the respondent); Mark Howkins (son of former resident at the respondent); Grant Howkins (other son of the same resident as Mark Howkins).

5. The respondent was represented by Mr Wiltshire of counsel. The respondent's sworn witnesses were: Samantha Bacon (Manager of Primrose Lodge); Noel Allcock (Area Manager for Mr Nunn's business group); and John Nunn (the individual respondent).

6. We made some adjustments to the hearing to allow evidence to be heard remotely. Mark Howkins and Grant Howkins attended the hearing remotely by CVP given their geography. Corinne Davis gave her evidence remotely by CVP, after the respondent's evidence, to allow her to still attend the hearing whilst also dealing with an urgent family matter. John Nunn gave evidence remotely by CVP from his work office, and we allowed his son to sit by him on camera in order to assist him navigate the pages of the bundle and to repeat questions he could not hear.

7. We sat as a panel of three in this hearing. The decision we reached on all of the claims was unanimous and so when this judgment refers to 'we', 'our', or 'the Tribunal', it refers to our collective view. We also had access to an agreed bundle of documents which ran to some 514 pages. Page references in this document refer to the pages of that bundle.

Issues to be decided

8. We were presented with an agreed list of issues prior to the start of the hearing, which were a combination of the issues set by Employment Judge Camp with minor additions made by Employment Judge Ahmed at a preliminary hearing on 22

February 2023 (where the claimant made a unsuccessful applications for additional specific disclosure). Those issues are complex and refer to significant swathes of the claimant's claim documentation. For reasons of proportionality, those parts of text are not typed out here. The parties can refer to those parts of the bundle for reference. Anyone else reading this judgment can see the matters addressed in the body of the judgment below.

9. We did not have time to deliberate or give judgment at the hearing. Issues relating to remedy were not addressed and so, although forming part of the agreed issues, they are not included here and the relevant parts will need to be considered fully at the remedy hearing.

10. The issues for us to determine at this final hearing were:-

10.1. ***Unfair dismissal –***

10.1.1. *Did the respondent do the following things:*

10.1.1.1. *The matters set out from paragraph 21 of the further particulars of claim – incidents to be looked at against the background set out in preceding paragraphs of those further particulars;*

10.1.1.2. *In particular, the claimant relies on: what happened during the meeting on 26 March 2021 (including that what happened was allegedly disability discrimination); the amount of time it took the respondent to hear and deal with her grievance; the grievance outcome; not considering her appeal against the grievance outcome; allegedly not taking her health and safety concerns seriously / not addressing them; see also the paragraphs in section 8.2 of the claim form beginning "At the end of June…" and "On the 30 June..."*

10.1.2. *Did that breach the implied term of trust and confidence? The Tribunal will need to decide:*

10.1.2.1. *Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and*

10.1.2.2. *Whether it had reasonable and proper cause for doing so.*

10.1.3. *Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.*

10.1.4. *Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.*

10.1.5. *If the claimant was dismissed, was the reason for dismissal that the claimant made a protected disclosure and/or the reason set out in ERA section 100(1)(c) [bringing health and safety concerns to the respondent's*

attention by reasonable means, in the absence of a health and safety representative or committee]?

If so, the claimant will be regarded as unfairly dismissed.

10.1.6. Alternatively, if the claimant was dismissed, what was the reason or principal reason for dismissal – ie. what was the reason for the breach of contract?

10.1.7. Was it a potentially fair reason?

10.1.8. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant, including following a fair procedure?

10.2. ***Protected disclosure/health & safety -***

10.2.1. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

10.2.1.1. What did the claimant say or write? When? To whom? The claimant says she made disclosures on these occasions:

10.2.1.1.1. See the following paragraphs of the further particulars of claim – 11, 12, 16, 22, 29;

10.2.1.1.2. At a meeting on 26 March 2021;

10.2.1.1.3. In her grievance of 29 March 2021 and at a grievance meeting – see paragraph 60 of her further particulars of claim.

10.2.1.2. Did she disclose information?

10.2.1.3. Did she believe the disclosure of information was made in the public interest?

10.2.1.3.1. Was that belief reasonable?

10.2.1.4. Did she believe it tended to show that the health and safety of any individual had been, was being or was likely to be endangered?

10.2.1.4.1. Was that belief reasonable?

10.2.2. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to her employer.

10.2.3. The Tribunal will also need to decide whether the alleged qualifying disclosures referred to above were instances of the claimant bringing to her employer's attention by reasonable means circumstances connected with

her work which she reasonably believed were harmful or potentially harmful to health and safety.

10.3. ***Detriment -***

10.3.1. To the extent this is in dispute, did the respondent do the following things:

10.3.1.1. At the meeting on 26 March 2021, swear at her, bully and threaten and harass and humiliate her, as detailed in paragraphs 41 to 51 of the further particulars of claim?

10.3.1.2. Delay dealing with the grievance;

10.3.1.3. Fail to uphold the grievance;

10.3.1.4. Refuse to consider her appeal against the grievance outcome;

10.3.1.5. Fail to take her health and safety concerns seriously and/or to address them; see the paragraph in section 8.2 of the claim form beginning "on the 30 June…".

10.3.2. By doing so, did it subject the claimant to detriment?

10.3.3. If so, was it done on the ground that she made a protected disclosure?

10.4. ***Knowledge of disability –***

10.4.1. Did the respondent have actual or constructive knowledge of disability at the time of the alleged events?

10.5. ***Direct disability discrimination –***

10.5.1. Did the respondent do the following things:

10.5.1.1. At the meeting on 26 March 2021, swear at her, bully and threaten and harass and humiliate her, as detailed in paragraphs 41 to 51 of the further particulars of claim;

10.5.1.2. Constructively dismiss the claimant?

10.5.2. Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else – a 'comparator' – was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who she says was treated better than she was.

10.5.3. If so, was it because of disability?

10.6. ***Harassment related to disability –***

10.6.1. Did the respondent do the following things:

10.6.1.1. At the meeting on 26 March 2021, swear at her, bully and threaten and harass and humiliate her, as detailed in paragraphs 41 to 51 of the further particulars of claim?

10.6.2. If so, was this unwanted conduct?

10.6.3. Did it relate to disability?

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

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

Findings of fact

11. The relevant facts are as follows, as we have found them on the balance of probabilities. To find facts on the balance of probabilities, we are making an assessment about whether something is more likely than not to have happened. In other words, if considering whether one of two things happened, we are looking for the one that appears to us to have a greater than 50% chance of being the truth of the matter.

12. Where we have had to resolve any conflict of evidence, we indicate how we have done so at the material point. When finding these facts, we have considered the documents we were referred to in the bundle, the written evidence in the witness statements, and the oral evidence heard in cross examination.

The claimant's introduction to the respondent

13. The claimant and Ms Bacon knew each other prior to either working at the respondent. Ms Bacon describes how they were friends for years from being young as they grew up on the same estate. The claimant says that Ms Bacon was like a family member as a child. Ms Bacon's sister was married to and then divorced from the claimant's brother. The claimant's brother sadly passed away in 2019 following an accident. During his time in hospital, the claimant and Ms Bacon visited at the same time. They became close again, sharing car journeys and spending time in the family visiting room.

14. At this time, the claimant was working in a retail role which she did not feel was supporting her. She says, and we accept, that her mental health was hugely affected by what had happened to her brother. She says, and we accept, that she had suffered from depression in episodic fashion for some time prior to 2019. She says, and we accept, that Ms Bacon was aware of how difficult she was finding dealing with her brother's condition alongside working in an unsupportive role. We accept this because it sounds inherently likely, but also because Ms Bacon does not deny knowing that the claimant had a mental health condition at this, or any, time – only that she did not know it amounted to a disability. The claimant's brother sadly died in May 2019.

15. During conversations at or around the hospital visits in 2019, Ms Bacon told the claimant that there was a senior carer job at the respondent which she might wish to take. The claimant told Ms Bacon that she may be interested and, eventually, did start at the respondent on 17 July 2019. On 30 June 2019, the claimant completed an application form for the role that she would take. That application form was disclosed during the hearing and accepted into evidence. It shows that on the pre-employment questionnaire, the claimant ticked 'yes' to having "*back or neck pain"* and rheumatism/arthritis. She ticked 'no' to having *"depression, anxiety or nervous illness"*.

16. Consequently, we find that she hid her mental ailment from the respondent at the start of her employment. This is the only conclusion to draw when we have also accepted her evidence that she has had depression in episodes on and off over a number of years.

The respondent's knowledge about the claimant's illness

17. Ms Bacon acknowledges that the claimant was sad upon starting work at the respondent, and that they would talk about that, but she says that she did not perceive this to be abnormal in the circumstances and so she considered this to be a normal reaction to sibling grief. She says, and we accept, that the claimant performed well in her role. The pair continued to speak on supportive terms outside of work and each referenced the message exchange dated 1 November 2019 on page 218 in their evidence. Expressions of love are swapped between them and Ms Bacon reassures the claimant that she *"will always watch your back at work and always be your friend when ever u need me remember when we was at the hospital I told u if u ever need me day or night am here…"*

18. The claimant was aware that she could request to take time off work if she felt she needed it. On 3 August 2020, she asked if she could change a shift at work due to a back problem. The request was refused (page 221). During this period, the claimant was referred to see a psychiatrist on the NHS. Her first appointment was on 19 August 2020. Copies of appointment letters were shown at page 219 and 220, and 222 to 223. The claimant says that she gave these letters to her direct manager at the respondent to place on her file.

19. The claimant's HR file did not appear in disclosure, and we asked for it to be produced during the course of the hearing to see if there were any relevant documents within it. The only document of relevance was the application form referred to previously. There were no appointment letters stored on the file. The letter

of page 219 and 220 was not there. The letters advise only of an initial appointment; there is nothing in the letter about the nature of the illness.

20. The claimant attended her appointment at 9.15am on 19 August 2020. She did not feel well enough to work afterwards and messaged a colleague to say that she would not attend. That message (page 405) includes the words: "*I did mention to Sam that I may not be up to it after speaking to psychiatrist".* Ms Bacon said that she could not recall being told about the appointment. She confirmed that she did understand why the claimant might not be able to work after the appointment. We find on the balance of probabilities that Ms Bacon did know about this appointment and who it was to be with. We have no reason to doubt the contents of page 405, which is plainly a more reliable record of what was happening at the time than any memory almost 3 years later.

21. Corinne Davis also gave her views about how the claimant treated her illness at the time they worked together. She said she knew about the extent of the claimant's mental health difficulties because the claimant was quite open about them at work. She said that she knew that others knew about the claimant's mental health. In her view, Ms Bacon likely knew about them as well – although she conceded that they did not always work closely together. When Ms Davis gave her statement, she was still employed by the respondent on maternity leave. We do not consider that she had any particular motivation to be overly partisan to the claimant's cause in those circumstances, and so we are minded to accept her evidence on this point in support of the evidence outlined above.

22. Consequently, we find that Ms Bacon did know that the claimant was seeing a psychiatrist and that she knew that the claimant had significant mental health difficulties for a significant period of time during the claimant's employment.

23. The claimant's mental health *disability* was specifically raised by her in her grievance meeting with Mr Allcock on 10 May 2021, who knew that she had been signed off for a period of time prior to their meeting. His notes record that, when he asked the claimant to clarify exactly what her grievance is, he wrote the response (page 198):-

> *"SP: EMPLOYMENT RIGHTS*
>
> *WHISTLE BLOWING*
>
> *EQUALITY ACT 2010 – DISABILITY DISCRIMINATION.*
>
> *MENTAL HEALTH ISSUES HAVE BECOME WORSE WHILST AT PRIMROSE LODGE*
>
> *IT IS NOT WORK RELATED – SAM BACON IS AWARE".*

The alleged protected disclosures prior to 26 March 2021

24. The claimant also says that she was concerned about working practices at the respondent and made what she now relies upon as protected disclosures about those incidents. The first of those relates to the actions or omissions of a colleague.

She said that she raised concerns to her immediate manager Jo Stewart and to Ms Bacon on numerous occasions from July 2019. In summary, those concerns were about (pages 91 and 92):-

24.1. Missing medications, signing medications which were not given, signing Ms Bacon's name in the controlled drug book, signing another colleague's name without permission;

24.2. Not washing residents before bed time, showing lack of care, signing to state that personal care had been provided when it had not;

24.3. Lifting residents manually in his arms and not using hoists;

24.4. Taking away meals too quickly and before residents had finished eating;

24.5. Taking medication to the extent that he was unsafe to administer medicine to others;

24.6. Being rough with residents, one in particular who the claimant says was handled roughly and unkindly causing the resident to be injured and fearful, including specific allegations such as spraying body spray into her eyes;

24.7. Poking fingers into the eyes of residents; and

24.8. Not keeping proper daily logs.

25. In cross examination, Ms Bacon said that she could not recall any such disclosures about this colleague. She said that she never had any concerns about him and that if she had any inkling that he was behaving as alleged, she would have taken it very seriously and acted appropriately. When asked what specifically she would have done, she said that she would have asked the claimant to give more detail so that she could speak to the member of staff. She would have recorded that meeting in writing if anything arose of concern. We are mindful that not being able to recall something is not the same as saying it did not happen.

26. We must make a finding about whether or not the claimant made statements to the respondent about these issues at the time she alleges in July 2019. There is evidence in the bundle which indicates that the claimant is not shy about querying things she was unsure about, especially at the start of her employment. There is, for example, messages showing the claimant raising there being a builder on the roof without any protection (page 217). In our view, the claimant would have raised concerns about colleagues.

27. Two pieces of evidence from the respondent have confirmed our view of the conflict in the evidence. First, Mr Allcock recalls (and recorded) that the claimant was upset in her grievance process that the colleague had not been censured or disciplined for his acts and omissions. In our view, it is very likely that she raised them to somebody to have become apparently so fixated later on a lack of action against the colleague. Secondly, Ms Bacon made a comment during her evidence to the effect that the claimant said a lot of things when she first started which were at odds with her lack of contextual experience in a care setting. This comment does not make sense

unless Ms Bacon can recall at least some concerns from the claimant about working practices at the time.

28. Consequently, we find that the claimant did raise concerns after joining the respondent in July 2019 about the colleague in question. We cannot, though, find anything more specific than that because the claimant has never set out, then or now, any particular detail about what happened and on what dates, or when she disclosed any information and who to.

29. The claimant was concerned about staffing levels at the respondent. In her view, the respondent should not have less than three members of staff working within it to be able to provide a safe service to residents. She relies upon the text message to Ms Bacon at page 407 to show that she raised this issue. It says:

> *"Hi Sam. Sorry to message you. I have only me and Esther this afternoon. I have been over to ling dale* [the adjoining care home] *and they have no one for me. I don't have many members in contact book to contact staff. Xx don't be mad at me for messaging you".*

30. Ms Bacon responded: *"Hi just rang a few people and no one picking up so u have to manage for today x"*.

31. Factually, the message on page 407 does not raise a belief that the respondent should not have less than three people working within it. There is no reference to a minimum number of staffing at all. In her evidence, Ms Bacon submitted that the ratios are such that the legal minimum staffing is actually two members of staff. Although Ms Molloy and the claimant queried how that was safe in the particular conditions, neither of them could provide any evidence or information that Ms Bacon was mistaken about the regulations.

32. On 10 April 2020, the claimant raised concern about a bruise on a resident's sternum. She describes this as 'very large'. She says that the bruise was noticed the day after it must have appeared, and that the colleagues from that evening had not reported the bruise or recorded any sort of accident or incident which could have led to the bruise. The claimant alerted Ms Bacon to the bruise. Ms Bacon agrees that she reviewed the bruise with the claimant. Ms Bacon says that she did not escalate the bruise because it did not meet the criteria for escalation, noting that bruises may appear on residents for any number of innocent reasons due to medication or the age of the residents. Ms Bacon says that the claimant agreed with the approach of monitoring the bruise and not escalating it.

33. The claimant disagrees that she consented to the decision not to escalate. In her witness statement, she sets out that the matter should have been reported and the resident's family should have been told. She did not have a compelling answer to the suggestion that she had the responsibility for doing so, if she thought it right, because she had discovered the bruise. Nevertheless, the claimant says she felt that matters were swept under the carpet at the respondent. For our purposes, we find that the claimant did raise the discovery of the bruise with Ms Bacon. Whatever either witness considers should have been done, the parties agree that the matter was not escalated and that the claimant did nothing else to escalate a complaint or concern after Ms Bacon had reviewed the bruise.

34. The 10 April 2020 event took place against the background of the immediate response to the Covid-19 pandemic. Ms Bacon manages Lingdale Lodge and is based there, as well as looking after Primrose Lodge. The claimant considers that the two homes are separate and relies on advice received to the effect that staff should not work across two different care homes. Actually, the buildings are on the very same plot of land across a courtyard and operate very much as one unit. We heard evidence, which we accept, that the staffing is shared between the sites as a matter of routine. Additionally, the food for both homes is prepared in the same kitchen in Lingdale Lodge before being moved across to Primrose Lodge.

35. In early 2021, a Covid-19 outbreak occurred in Lingdale Lodge. We accept that this was the first time that Covid-19 penetrated either Lingdale Lodge or Primrose Lodge, a remarkable achievement. At this time, Ms Bacon's daughter would cut the hair of residents at Primrose Lodge in exchange for cash. Ms Bacon's daughter also worked at Lingdale Lodge. The claimant says she spoke to Ms Bacon and said that her daughter should not cut hair in Primrose Lodge during the outbreak because of the risk of cross-contamination. Ms Bacon agrees that the claimant made such a call, and responded that the residents in Lingdale Lodge had not had their hair cut since the outbreak began. Ms Bacon denies that she was angry about the claimant raising concerns about her daughter, and said she thought the claimant was right in her point of view.

36. To resolve the conflict of evidence about Ms Bacon's reaction, we have considered the evidence available which shows the respondent's response generally to the outbreak. The claimant contends that staff were working across both buildings, including the member of staff who she had earlier raised complaints about. We have seen evidence from that staff member (page 185 to 186) which confirms that he worked in Lingdale Lodge before his wife contracted Covid-19 on 23 February 2021. When he returned to work on 11 March 2021, he began to work in Primrose Lodge. This is an example of staff working in two locations over this period, although we note that this was after the staff member had completed a period of isolation. We also heard evidence from all parties to the effect that staff wore PPE at all times when at work, and that there was a routine testing regime when somebody went from one building to another. We also note the finding made above to the effect that the efforts to keep Covid-19 out of the home were extremely successful.

37. In our judgment, the respondent and Ms Bacon would have recognised the danger posed by Ms Bacon's daughter cutting hair across both sites. It is clear to us that Ms Bacon did in fact take measures in response to Covid-19 very seriously. In those circumstances, we do not consider it likely that Ms Bacon would be surprised or aggrieved at the suggestion that her daughter should not be cutting hair across both sites. We find that Ms Bacon accepted what the claimant told her on this occasion and responded precisely as she says she did in the context of the overall response to the pandemic. We do not find that Ms Bacon was angry about this issue being raised.

38. The claimant was unwell on 26 February 2021 and attended hospital. She thought she may have had Covid-19, though in her evidence she suggested this was due to her mental health disability. It is apparent that the respondent was short of staff during this time, and the messages between the claimant and Ms Bacon on page

409 show that Ms Bacon asks the claimant if she is going to go to work, and then whether she has Covid-19. The claimant explains that she is in hospital because the doctor was concerned about her breathing. Ms Bacon then replies:

> *"So when will u no as I got no one to cover and am positive so let me no as I get a agency in"*.

26 March 2021

39. 26 March 2021 was the claimant's last working day at the respondent and it is when matters came to a head between the claimant and Ms Bacon. In the lead up to 26 March 2021, the claimant had experienced friction with a colleague who had been recruited to sit above the claimant in the hierarchy at Primrose Lodge. In our view, the claimant did not consider the assistant manager to be proficient in her job and this appears to be shared by Ms Davis in her evidence. Ms Bacon was aware of these issues and had encouraged both to get along with each other for the benefit of the home. On the morning of 26 March 2021, the claimant had attended a resident's funeral and she was not wearing her uniform when she met with Ms Bacon and the assistant manager. At the end of the meeting, the claimant and Ms Bacon spoke privately.

40. The claimant and Ms Bacon agree that there was a disagreement between them in that conversation. The accounts of the nature of that disagreement are completely opposed to each other and we are required to find facts about what happened in the conversation. We deliberated on the matter at length, drawing upon the accounts in live evidence and also the wider understanding about how the individuals operated with each other and others during the time period.

41. The way Ms Bacon presented the encounter in her written evidence was very simple. She said that the claimant wanted to understand who was 'in charge' between her and the assistant manager when they were working together. Ms Bacon said she replied that the assistant manager was. Ms Bacon says she then asked about the claimant's uniform and that the claimant said she had been at a funeral. Ms Bacon says that the claimant seemed irate during the exchanges and was raising her voice unnecessarily. Ms Bacon says that the claimant raised an issue about family members being concerned about something but that she did not clarify when asked. Ms Bacon says that the claimant had nothing else to say so she left. She said that the claimant spoke to her secretary on the phone straight after to say that she was going home, and that the claimant then left without speaking to her. This account accords with a written account given by Ms Bacon during the claimant's grievance process (page 446).

42. Other matters were put to Ms Bacon in cross examination. She denied that she had raised her voice or been aggressive or abusive to the claimant. She denied that her management style was abrasive or that she would shout or swear at staff members. She admitted that the claimant had also spoken about an issue involving members of ambulance staff who brought a resident back from hospital, but dismissed it as an informal and unwritten issue.

43. The claimant says that Ms Bacon and her spoke about the ambulance complaint and then that the claimant raised a concern about photos on social media indicating that

staff were moving across from one home to the other and that family members were concerned. She says that she thought that Ms Bacon was making up policy which would allow the respondent to accept residents back from hospital without testing for Covid-19. She also says that Ms Bacon's query about the family member's concern was sarcastic, implying that the claimant had instigated that concern. It is at this point of the conversation that the claimant says that Ms Bacon started to shout at her. She says that Ms Bacon made the following comments to her:-

43.1. *"who the fucking hell do you think you are talking to me in this way?";*

43.2. *"where is your fucking uniform?";*

43.3. *"No wonder you have no friends";*

43.4. *"You should be grateful";*

43.5. *"Fuck off";*

43.6. *"Go on, fuck off"*.

44. The claimant also says that Ms Bacon was hyper-critical of her work and made up accusations about her not providing proper care for the residents. She says that Ms Bacon referenced her daughter not working in both care homes. The claimant says that she thought she had been dismissed and asked Ms Bacon to put her comments into writing. Ms Bacon refused. The claimant said that she warned she would report the respondent to the relevant authorities and that Ms Bacon says that if she were to lose her license, it would 'be the last thing' the claimant did. She says that Ms Bacon then left for Lingdale Lodge, and that she was left completely devastated by the conversation. She says she rang Lingdale Lodge say that he was going home, and spoke to Ms Bacon's PA before leaving.

45. The claimant's account echoes a written account she says she provided on 29 March 2021 when she raised a grievance about the events of the previous few days. A handwritten copy of that letter is at 439 to 443 and Mr Allcock confirmed in his evidence that this is the letter he reviewed when investigating the claimant's later grievance. All of the key points of fact were first produced in writing three days after the events in question, although we do not necessarily accept some of the opinions in the letter about the reasons why Ms Bacon was acting in this way.

46. There is also material in the bundle relating to the events of this day. At 2.59pm, the claimant sent a message to Ms Bacon's sister which reads *"your Sam has just told me to fuck off because I put my concerns to her"* (page 433). At 4.14pm, Ms Bacon's PA messaged the claimant. The exchange was as follows (page 432):-

> *"Hi Sonia hope you're ok…"*
>
> *"I'm not… but thank you"*
>
> *"I don't know what happened and you don't have to tell me just knew you wasn't alright when you phoned…"*

> *"Sam told me to fuck off twice. She also threatened me that it will the last thing I would do if I report her…"*
>
> *"That's not good… I don't blame you for not staying I shall miss you… hope you get another job soon…"*

47. At 5.42pm on the same day, the claimant messaged another colleague to say: *"please could you get my lunch bag that's in the office fridge when you go in and my milk and t bags that are in the metal cabinet in office…"* (page 435). The reply is *"Awww… this makes me very sad…"*.

48. In our view, these messages are indicative that the claimant considered that her employment was at an end following her altercation with Ms Bacon. It is apparent to us that Ms Bacon's PA thought the same, too. The claimant had not spoken to her about the issue until the messages on page 432. In our view, it is more likely than not that Ms Bacon's PA had heard an account of the conversation from Ms Bacon directly, which had led her to believe that the claimant had potentially been dismissed. Ms Davis also gave evidence about Ms Bacon and the dynamic between her and the claimant. In her view, Ms Bacon would speak to the claimant without respect on occasion. She said that the claimant and other staff members were afraid of Ms Bacon.

49. Drawing all of the evidence together, we consider it more likely than not that Ms Bacon did speak to the claimant in the manner that the claimant says she did, and find that Ms Bacon did make all of the comments outlined above, including telling the claimant to 'fuck off' directly twice, commenting about the claimant's lack of friends, and threatening her in the event the respondent's license is revoked. This is because the claimant's account is broadly supported by the contemporaneous messages she sent and by the comments of Ms Davis. Having seen Ms Bacon give evidence in cross examination, all three of us perceived that it is likely that she would have reacted as alleged when under pressure.

50. However, we also consider it unlikely that the claimant would have remained calm during the conversation. This was, in our view, more of an argument and the tone was heated in both directions. We do not consider that the claimant would have threatened to report the respondent unless she was angry or heated in response to what was being said to her.

The grievance process

51. On 29 March 2021, the claimant raised a grievance about the 26 March 2021 by the letter at pages 439 to 443. She was also signed off as not fit to work on the same date (page 235) and remained off work through a series of fit notes until at least 6 August 2021 (pages 236 to 242).

52. In our view, the claimant's grievance triggered some conversations at the respondent about how she should be dealt with. For reasons nobody could explain in the hearing, the assistant manager with whom the claimant did not get on made two e-mail complaints about the claimant. One was made on 31 March 2021 (page 444) and one was made on 26 April 2021 (page 445). The e-mails are identical apart from the second one has some additional paragraphs after the word 'outcome' which detail

how Ms Bacon spoke to the claimant about her 'unacceptable' behaviour. For reasons which, again, nobody could explain, these were passed to Mr Allcock. Mr Allcock thought Mr Nunn gave them to him, although it appears that only the assistant manager and Ms Bacon had access to the inbox where the e-mails were sent.

53. The e-mails allege that the claimant was bullying the writer, including the allegation that the claimant would *"shout and scream"* at her even after there had been management intervention. In our view, this allegation is not true. Ms Bacon was very clear that she did not consider that the claimant had bullied the person raising the complaint. The e-mails were both written after 26 March 2021, when the claimant left work and was off sick, and when at least two member of staff were under the impression that the claimant would not return. In our view, on the balance of probabilities, these e-mails are a fiction designed to muddy the claimant's reputation within the upcoming grievance process. It might be that this was the intention of the writer alone, but even if alone, that individual was senior to the claimant in the hierarchy and formed part of the claimant's management structure.

54. Mr Allcock was appointed to manage the claimant's grievance process. He was not directly involved in the claimant's or Ms Bacon's management structure. He operates as an area manager in a different part of Mr Nunn's business group. Mr Allcock knew that the claimant was off work with illness and so there was no immediate response to the claimant's grievance. On 7 May 2021, Mr Allcock wrote to the claimant to invite her to a grievance meeting. The letter (pages 447 to 448) explains that *"there has been a delay in arranging this meeting with you as you have been off work fur to mental health issues and I felt it inappropriate to contact you any sooner than I have"*. The claimant is told that she may have the company of a colleague or a union representative.

55. The 'company' grievance policy sent to the claimant at this time was for a care home called 'South Collingham Hall'. This is because the respondent had no grievance policy in place. Mr Allcock was told that the same policy would apply. A copy was shown to us from page 448 to 514. The claimant has complaints about the way the policy was followed, or not followed, in her view. In particular, the claimant is unhappy with the timings of the stages. We note that the policy is caveated that things will 'usually' occur within certain timings. We consider that the timeline followed by Mr Allcock was in line with the policy, as flexibility is allowed for issues such as the claimant being unwell.

56. However, in his evidence, Mr Allcock confirmed that he did not follow or complete any of the guidance or checklists which form part of the policy. He admits that he did not complete any of the forms or checklists. He did not complete any sort of investigation report. There were no notes of any conversations he had in the course of his investigation. We find that Mr Allcock was unprepared to conduct the hearing, and that the procedure he adopted suffered from an in-built risk that important matters would not be considered. At no point was there any prompt for Mr Allcock to interrogate the information he was receiving in his investigation. Frankly, having heard Mr Allcock's evidence about the process he conducted, we consider that he was not sufficiently trained or knowledgeable in conducting grievances to have competently taken control of this one from the claimant.

57. Mr Allcock met with the claimant on 10 May 2021. His notes were from page 197 to 200. The pages were printed out of order in the bundle. The correct order of pages is 197, 200, 199, 198. The claimant delivered her grievance about 26 March 2021 orally in much the same terms as she had written in her letter. She also added the historic concerns about the previous staff member, including false signatures in drug books and people working across both sites. At the end of the meeting, the claimant is told that an outcome would be written to her within seven working days.

58. In fact, it appears that Mr Allcock actually felt that he needed some more detail from the claimant. He wrote to her in an undated letter (page 449) to ask for her to reflect on what she had said and *"provide me with more information"*. The letter does not set out what more information is required. Mr Allcock told us that the letter was sent on around 12 May 2021. Mr Allcock also offered two possible outcome proposals to the claimant, notwithstanding that his investigation had barely begun. The claimant was asked to consider either (1) mediation between her and Ms Bacon, or (2) a transfer to a different care home entirely. The letter does not make it clear that these are interim proposals. We find that the wording used means that the options were open to being interpreted as the only two options open to the claimant at the end of the grievance process.

59. Mr Allcock said in cross examination that he was surprised that so much of the claimant's grievance centred around the 2019 and 2020 concerns about a colleague. Those concerns included safeguarding, violence against a resident, not reporting bruises, drug taking, working across two homes in the Covid-19 outbreak, and signing false names in a drug book. Mr Allcock appears not to have identified that he needed to investigate those concerns directly with that individual. He did, though, have a written account from that person (page 185 and 186) which dealt with the claimant's belief that staff were working across both homes during an outbreak. That statement's date was not clear from the bundle because the top was cut off. The partial date appears be some point between 20 April 2021 and 29 April 2021. It is clear that it was written in April, before the claimant's grievance meeting. This means that only the allegation about cross-contamination was addressed. The relevant part reads:-

> *"*[After a period of Covid-19 isolation] *I returned to work on Thursday 11/3/21. A new assistant manager had started work at Primrose Lodge so I went to work at Lingdale Lodge for 3 weeks until Sonia Pywell walked out at Primrose Lodge and I had to cover her afternoon shift on 26/3/21…*
>
> *Under no circumstance did I work a Primrose Lodge or Lingdale Lodge whilst being positive for Covid..."*

60. Mr Allcock now accepts that this account shows that the individual worked at Primrose Lodge until he contracted Covid-19. Upon his return, he worked at Lingdale Lodge for three weeks. He then moved again to Primrose Lodge. In other words, Mr Allcock accepts that the writer worked both sites during the Covid-19 outbreak at Lingdale Lodge, which is what the claimant had been concerned about in her grievance. He said in cross examination that he could not recall if he noticed this at the time, but he accepts that the grievance outcome confirmed that there had been no moving of staff between the sites – a conclusion which was plainly incorrect on the evidence he had available at the time.

61. Mr Allcock also considered Ms Bacon's account of the 26 March 2021 as outlined above. He was also aware of the complaints about the complaint which we have found to be false. He said he did not take those complaints into account because that assistant manager withdrew them. He also knew that the claimant was unhappy with Mr Nunn's handling of the safeguarding concerns and Covid-19 response, in that she was highly critical of the care home which he operates as a sole trader.

62. There is no other written evidence in the bundle of Mr Allcock's grievance investigation. Mr Allcock considers that this is because there is not any. He managed the disclosure process on behalf of the respondent. We find that this account is correct. Mr Allcock conducted his investigation through telephone calls with Ms Bacon and Mr Nunn and did not write anything down or, if he did, it was in privileged conversation with advisers and privilege has not been waived.

63. Unusually, Mr Allcock did not conduct any investigation into the allegations raised in the grievance itself. Instead, he delegated the investigation to Ms Bacon and Mr Nunn – two individuals who had personal interests in the grievances being found to be unfounded. We were so surprised by this evidence that one of the Panel asked Mr Allcock if he understood that he was authorised to investigate the grievance himself. He said he was.

64. Mr Allcock said he spoke to Ms Bacon about 26 March 2021. He said she denied that she had swore at the claimant or that she had been angry. Instead, Ms Bacon said that the conversation was short and it was only about working with the assistant manager and Ms Bacon's daughter. Mr Allcock asked Ms Bacon about the resident's bruise and Ms Bacon said that there were no concerns about it. Mr Allcock asked Ms Bacon about whether or not a resident had been missing money as the claimant had mentioned. Ms Bacon said she was not aware of this and nothing had been raised with her. Similarly, Ms Bacon denied there were any issues with care of residents or with her daughter being stopped cutting hair across both sites.

65. The respondent was most concerned about the allegation that signatures in the drug book were being done in Ms Bacon's name. Mr Allcock asked Ms Bacon about this and she denied anyone was authorised to do so. He says that Ms Bacon checked the drug book and then confirmed verbally that all of the signatures were hers. Mr Allcock also asked Mr Nunn to check the drug book for signatures, also. Mr Nunn did so, although in his own evidence he admitted that he did not know what he was looking for. In live evidence, he said that he and Ms Bacon looked at the books together. Ms Bacon had said she was alone. We do not consider this to be a material point, but it does highlight that memories of the process have faded and that if records had been kept properly, the respondent would be on more sure footing about what happened and when.

66. The claimant did not provide any more detail to her concerns following the initial grievance meeting. She said that she was not aware she needed to, but that in any case she considered the grievance outcome had been given in the 12 May 2021 letter which presented two outcomes to her. We accept this evidence. The letter does not outline what information is needed. The grievance note do not indicate that more information was requested at the end of the meeting.

67. On 17 May 2021, Mr Allcock sent an outcome letter dismissing the grievance (page 450 and 451). The letter was written by a third party. It states, erroneously, that *"present at the hearing were myself, Noel Allcock, and yourself"*. In fact, only the claimant and Mr Allcock were at the hearing. The letter states that there were three reasons for the hearing:-

    67.1. The disagreement with Ms Bacon;

    67.2. Breach of health and safety regulations in regards to Covid-19; and

    67.3. Discrimination due to a disability.

68. There is then a double line gap where, ordinarily, a grievance outcome letter would explain what investigation has been carried out into the grievance and what material was considered. Mr Allcock accepted this might be the case, and said simply that the letter had been prepared by an external adviser for him to send on. This meant that the claimant had no idea what investigations had been done into her complaint and what evidence had been considered in dismissing her grievance.

69. The letter then says: *"having concluded the investigation into your concerns, I gave my decision as follows…"*. In fact, no decision had yet been given in respect of the grievance, unless this is a reference to the letter offering mediation or a transfer, which Mr Allcock said in his evidence was not intended to be an outcome letter at all but a request for [unspecified] further information. We find the respondent's process and correspondence here to be confused and confusing.

70. The letter tells the claimant that the grievance was not upheld for three reasons. These are listed below, with consequential findings of fact made in respect of each:-

    70.1. *Your disagreement with S.Bacon was not witnessed by other individuals*

    It is not clear why this is relevant to Mr Allcock deciding to dismiss the grievance. He does not say which account of the altercation he prefers, or why. He fails entirely to engage with the substance of the grievance and abdicates from making a determination about what actually happened on 26 March 2021 and why. He was able to make a decision in an un-witnessed conversation, just as we have done, by speaking to each of the individuals and drawing on any background evidence – if he had investigated to find any such evidence.

    70.2. *Statement from your colleagues state that staff did not transfer from Lingdale Lodge to Primrose Lodge during the Covid-19 pandemic at Lingdale Lodge*

    We are not clear which statement(s) are being referred to in addition to the one from the colleague who had, as Mr Allcock now accepts, indeed transferred from Lingdale Lodge to Primrose Lodge during the period. That evidence was plainly written on the very statement referred to but the respondent has inexplicably drawn the opposite conclusion from it.

The only other explanation is that the respondent knew full well that the grievance letter was a lie but also knew that the claimant would not be given the opportunity to see the statement containing the opposite information.

In either case, we find that the claimant was misled about the evidence gathered in the grievance investigation.

70.3. *There has been no discrimination against you due to your protected characteristic*

No reasoning is given for this in the letter, and nowhere in his evidence does Mr Allcock indicate he conducted any investigations into this aspect of the grievance at all.

71. The letter also confirmed that the two possible proposed outcomes to the grievance had been put to the claimant through the ACAS process, which reinforces why the claimant might have believed before 17 May 2021 that her grievance process was only going to result in two outcomes she considered would be unsatisfactory. The end of the letter is also confusing and the penultimate paragraph appears to trail off mid-sentence. The claimant is given seven days to mount an appeal.

72. Given all of the above, we find as a fact that the respondent's grievance process in dealing with the claimant's complaint was extremely poor for the following reasons:-

72.1. The investigator carried out no direct investigation;

72.2. The investigator did not follow the process, completed not paperwork, and kept no notes;

72.3. The investigator delegated the investigation directly to those who had the biggest interest in the grievance being dismissed and appears not to have realised that at the time;

72.4. The reports from those who had an interest in the outcome were accepted in their entirety without question, whereas the claimant was not believed at any point;

72.5. The claimant was presented with outcomes to the process before the investigation was complete;

72.6. The claimant was asked to provide more information but was not told what information was required;

72.7. The claimant was misled about a key piece of her grievance in that there was a statement directly supporting her concern but she was told that that concern was confirmed as unfounded;

72.8. No investigation was carried out into the disability discrimination aspect of the grievance at all;

72.9. No information was given to the claimant about the investigation or the evidence considered;

72.10. The claimant was told an outcome was already given, when it had not been;

72.11. The investigator failed to conclude the key part of the grievance about 26 March 2021 simply because there was no direct third party account; and

72.12. The letter itself with the outcome is obviously incomplete.

73. On 20 May 2021, the claimant asked for a seven day extension to the appeal because she intended to take legal advice (page 452). This was granted (page 453). The day after that extension expired, the claimant's solicitors made contact to ask for a further extension (page 455) and again when that was unanswered (page 456). This was refused three days later (page 457).

The claimant's resignation

74. On 14 June 2021, the claimant's solicitor made an appeal anyway (page 460 to page 465). That appeal concerned many of the matters now found to be at fault with the process, so far as they could have been appreciated in the absence of any justification for the outcome of the grievance. Despite saying the appeal would not be considered as it was out of time, part of the matters raised were considered anyway. That part of the appeal was rejected by letter dated 16 June 2021 (pages 467 and 468). This letter said that the grievance and appeal could not be substantiated.

75. Despite this, the letter then goes on to admit that some staff did transfer from one home to the other. This appears to confirm that the claimant was correct with the concerns raised in her grievance and yet the respondent is still confirming that no part of her grievance is being upheld in any form. Consequently, despite doing nothing to reverse the part of the grievance outcome, the respondent admitted, by implication, that it was wrong to uphold the claimant's grievance. It continued to uphold the grievance outcome despite that admission.

76. On Friday 25 June 2021, the claimant received a pay slip from the respondent which showed that she was paid three weeks' statutory sick pay in June. She understood that she should have been paid for the full month. On 29 June 2021, she e-mailed the respondent (pages 472 to 473) to raise that she considered she had not been paid for the full month. She said she had queried the payment with the wages clerk but had had no reply. She said that she assumed that she had been dismissed and this is why she had not received a full month's pay. In her evidence, the claimant also said that she thought this was a tactic to force her to resign.

77. Mr Nunn replied to the claimant's e-mail on the same day (page 471). He reassured the claimant that she had not been dismissed, but that she had been paid up to date according to her fit notes. She had received five weeks' pay in May and three weeks' pay in June. The claimant now accepts that she was never underpaid.

78. On 3 July 2021, the claimant wrote to Mr Nunn to give her resignation (page 474). The relevant parts of that resignation are:-

> *"However, even though you say that I have not been dismissed I have decided that I have to leave.*
>
> *You have ignored my complaints and concerns, and no one seems to have any concern about the effect of all of this is having on my health. You keep saying that I can return to work, but I don't see how I can when nothing is being done about whistleblowing, and I now feel I can't trust that I will be safe or treated fairly if I come back.*
>
> *I would like to be paid for my outstanding holiday and my notice."*

79. We consider that there were three broad reasons for the claimant's resignation as a matter of fact. The first is that the grievance process did not provide any sort of resolution to the core part of her grievance. It was dismissed and remained dismissed even after the respondent admitted she was correct on a key factual point. The second is that she did not feel safe to continue working at the respondent given her overall experiences to date. The third is that she believes that nothing is done when people raise whistleblowing issues.

80. Mr Nunn replied on 5 July 2021 (page 475) to accept the resignation. It confirmed that the claimant would be paid any outstanding pay and holiday up until 3 July 2021. We find that the respondent interpreted the claimant's resignation as being a termination without notice and was prepared to accept that. On 9 July 2021 (page 477), the claimant e-mailed to ask whether or not she was going to be paid for her notice period. That e-mail does not demand that notice is paid or ask for it to be paid. It merely asks if the respondent could *"let [her] know"* whether it was intending to pay her for her notice pay, and said that she would send a further fit note if so. Mr Allcock replied on 13 July 2021 (page 478) to advise that the respondent would pay the claimant sick pay up until 3 August 2021. This was done on the understanding that the claimant would fulfil her notice whilst off work due to ill health.

81. The claimant's employment ended on 3 August 2021.

Relevant law

Constructive dismissal

82. An employee is entitled to treat themselves as constructively dismissed where they terminate their employment contract following the employer seriously breaching that contract in a way which goes to the root of the employment contract (*Western Excavating (ECC) Ltd v Sharp [1978] QB 761*).

83. The serious, or repudiatory, breach of contract may be to express provisions of the employment contract or to provisions which are implied into the contract by case law. All employment contracts contain a term that *"the 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 SA (in Liquidation) [1998] AC 20*, as amended by *Varma v North Cheshire Hospitals NHS Trust [2007] 7 WLUK 116*).

84. Whether or not there has been a breach to the implied term of trust and confidence is an objective question and the employer's intentions are irrelevant. If the employer commits conduct which is likely to destroy or seriously damage mutual trust or confidence, then it will be deemed to possess the subjective intention (*Leeds Dental Team Ltd v Rose [2014] ICR 94*) and the employee is likely to be able to accept that repudiatory breach and terminate the employment contract (*Morrow v Safeway Stores Plc [2002] IRLR 9*).

85. The determination as to whether a breach is sufficiently serious as to constitute a repudiatory breach is an objective test, and it does not matter that the employer might genuinely believe a breach to not be repudiatory (*Tullett Prebon Plc v BCG Brokers LP [2011] EWCA Civ 131*). The overall repudiatory breach may be a single act or a collection of smaller breaches or a series of events which are not individually breaches but which amount to a breach when put together (*Garner v Grange Furnishing [1977] IRLR 206*.

86. To accept a repudiatory breach of contract and claim constructive dismissal, an employee must resign or treat the employment contract as having ended in response to the breach. It is sufficient for these purposes for the breach to have played a part in the decision to resign (*Wright v North Ayrshire Council [2014] ICR 77*). The tribunal is able to ascertain the true reason for the employee's resignation (*Weathersfield Ltd v Sargent [1999] ICR 425*).

87. When faced with a repudiatory breach of contract, an employee can choose to either accept the breach, which ends the contract, or affirm the contract and insist upon its further performance. Failure to resign or act in a way which treats the employment contract as ending risks the employee either affirming the contract or waiving a breach of the contract of employment. When considering whether a contract has been affirmed, the tribunal will look at all of the circumstances of the case (*WE Cox Turner (International) Ltd v Crook [1981] ICR 823*).

88. Employees should be careful when choosing to continue to work for a period if they intend to rely upon a repudiatory breach of contract in a constructive dismissal claim. In *Quilter Private Client Advisers Ltd v Falconer [2020] EWHC 3294 (QB)*, Calver J said, at para 121:

"It is undoubtedly the case that if the employee decides to accept the repudiatory breach, he must do so unambiguously and with sufficient dispatch. If his purported acceptance is delayed, he runs the risk of a court finding that his action has not been sufficient to discharge the contract. However, in my judgment it is what happens during the delay which is the critical feature: provided the employee makes unambiguously clear his objection to what has been done by the employer, he is not necessarily to be taken to have affirmed the contract by giving a short period of notice, and continuing to work and draw pay for a limited period of time ... It all depends upon the facts of the particular case whether the employee has nonetheless unambiguously accepted the repudiation of the employer and with sufficient dispatch. The length and circumstances of the delay require to be examined in each case."

Direct disability discrimination

89. *Section 13(1) Equality Act 2010* provides:-

> *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others"*.

90. The claimant must establish that she was objectively treated in a 'less favourable' way. It is not sufficient for the treatment to simply be 'different' *(Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 HL*). The person(s) with whom the comparison is made must have *"no material difference in circumstances relating to each case"* to the person bringing the claim (*section 23(1) Equality Act 2010*). The comparator should, other than in respect of the protected characteristic, *"be a comparator in the same position in all material respects as the victim" (Shannon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL)*. If there is no such comparator in reality, then the Tribunal should define and consider how a hypothetical comparator would have been treated if in the same position as the claimant save for the fact that they would not have the protected characteristic relied upon *(Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2002] ICR 646, CA)*.

91. The phrase 'because of' is a key element of a direct discrimination claim. In *Gould v St John's Downshire Hill [2021] ICR 1 EAT*, Mr Justice Linden said, in respect of determining 'because of':-

> *"It has therefore been coined the 'reason why' question and the test is subjective… For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of. In need not be the sole ground for the decision… the influence of the protected characteristic may be conscious or subconscious."*

92. It is a defence for a respondent to show that it had no knowledge of the protected characteristic relied upon, on the basis that the protected characteristic it did not know about could not have caused the treatment complained of (*McClintock v Department for Constitutional Affairs [2008] IRLR 29 EAT*. However, this defence does not apply where the act itself is inherently discriminatory (such as differentiation on the grounds of a protected characteristic), and in such cases whatever is in the mind of the alleged perpetrator of the discrimination will be irrelevant (*Amnesty International v Ahmed [209] ICR 1450 EAT*).

93. Under *section 136(2) Equality Act 2010*, the claimant needs to show facts, found on the balance of probabilities, which could lead the Tribunal to properly conclude that the discrimination has occurred before any other explanation is taken into account. If the claimant succeeds with this, then it is for the respondent to show that the contravention has not occurred (*section 136(3) Equality Act 2010*). The Tribunal must first consider whether the burden does shift to the respondent. The claimant must show more than simply there is a protected characteristic and a difference in treatment (*Madarassy v Nomura International Plc [2007] IRLR 246*).

94. Once the burden has shifted, if it does, the respondent must to show that the treatment was 'in no sense whatsoever' due to the protected characteristic *(Igen Ltd v Wong [2005] IRLR 258)*. In weighing up whether or not there has been discrimination, the Tribunal should consider all of the evidence from all sides to form an overall picture. Causation, or the 'why' the conduct was committed, is a subjective conclusion of law rather than objective conclusion of fact: what is the reason for the conduct and is that reason discriminatory (*Chief Constable of West Yorkshire Police v Kahn [2001] UKHL 48*. It is almost always the case that the Tribunal needs to discover what was in the mind of the alleged discriminator (*The Law Society v Bahl [2003] IRLR 640*).

Harassment related to disability

95. *Section 26 Equality Act 2010* provides:-

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

96. 'Disability' is a protected characteristic because it appears in the list of protected characteristics at *section 4 Equality Act 2010*.

97. Under *section 136(2) Equality Act 2010*, the claimant needs to show on the balance of probabilities that there are facts from which the Tribunal can decide that harassment related to disability has occurred. If the claimant succeeds with this, then it is for the respondent to show that the contravention has not occurred (*section 136(3) Equality Act 2010*). This means that the claimant will need to show more than simply she was disabled at the time any unwanted conduct occurs (*Private Medicine Intermediaries Ltd v Hodkinson EAT 134/15*.

98. Harassment claims must be determined by considering evidence in the round, looking at the overall picture. Although the knowledge and perception of the characteristic on the part of the alleged perpetrator is relevant, it is not necessarily

determinative *(Hartley v Foreign and Commonwealth Office Services [2016] ICR D17)*. This means that the determination of the words 'related to' is a finding the Tribunal should make drawing on all of the evidence before it to account of the possibility, for example, that the alleged perpetrator may be displaying a sub-conscious bias which affects the recipient even if they do not know of the protected characteristic (*Tees Esk and Wear Valleys NHS Foundation Trust v Aslan and another [2020] IRLR 495 EAT*).

99. The same provisions and principles as to the burden of proof and its shifting apply as is set out in respect of discrimination above.

Detriment following protected disclosure

100. *Section 47B(1) Employment Rights Act 1996* states:

> *"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by [their] employer done on the ground that the worker has made a protected disclosure."*

101. A 'protected disclosure' is defined by *sections 43A to 43H Employment Rights Act 1996*. The relevant parts for this dispute are:-

> *"43A – Meaning of 'protected disclosure'*
>
> *In this Act, protected disclosure means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."*
>
> *"43B – Disclosure qualifying for protection*
>
> *(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…*
>
> *(c) …*
>
> *(d) That the health or safety of any individual has been, is being or is likely to be endangered…"*
>
> *"43C – Disclosure to employer or other responsible person*
>
> *(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –*

(a) to [their] employer…"

102. The claimant says she made disclosures to her employer, which mean that any public interest disclosures she made which fall within *section 43B(1)(a), (b) or (d) Employment Rights Act 1996* will be protected disclosures following which she has a right not to be treated detrimentally because she made them.

103. *Section 48(2) Employment Rights Act 1996* states that *"it is for the employer to show the ground on which any act, or deliberate failure to act, was done"*. It might be that the Tribunal can draw an adverse inference from a failure to show any such ground, but the Tribunal is not bound to do so. The Tribunal can find any ground or reason for the act, or failure to act, which it considers appropriate from the evidence. In the words of Mrs Justice Simler (as was) in *Kuzel v Roche Products Ltd [2008] IRLR 530*:-

> *"The identification of the reason will depend on the findings of fact and inferences drawn from those facts. Depending on the findings, it remains open to [the Tribunal] to conclude the real reason was not one advanced by either side".*

104. To determine whether or not a thing is done or not done 'on the ground that' the claimant made a protected disclosure, the Tribunal is required to analyse the mental processes (conscious or unconscious) which caused the act to be done or not done. It is, therefore, a subjective test and not a factual 'but for' analysis (*Harrow London Borough v Knight [2003] IRLR 140, EAT*). The employer must show that the protected disclosure did not materially influence (in the sense of more than trivially influencing) the decision to act or not act (*Fecitt v NHS Manchester [2012] IRLR 64*).

105. The mental process of the person acting, or not acting, and the extent to which that can be said to be the employer's mental process, was considered by the Supreme Court in *Royal Mail Group v Jhuti [2020] IRLR 129*. In that judgment, talking about dismissal but in terms applicable to any detriment, Lord Wilson said:-

> "*The need to discern a state of mind, such as here the reason for taking action, on the part of an inanimate person, namely a company, presents difficulties in many areas of law. They are difficulties of attribution: which human being is to be taken to have the state of mind which falls to be attributed to the company?*
>
> *…*
>
> *if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason".*

Discussion and conclusions

Constructive dismissal

106. In our judgment, the respondent has acted in a way which is calculated or likely to destroy or seriously damage the implied term of mutual trust and confidence, without proper cause, in two very material aspects:

106.1. The treatment the claimant was subjected to by Ms Bacon in the facts found and summarised at paragraphs 43 and 44 above; and

106.2. The poor grievance process conducted by the respondent in respect of the claimant's grievance (with the flaws summarised at paragraph 72 above), which was then perpetuated by the admission of an error and a refusal to uphold that relevant part of the appeal.

107. There can be no 'proper cause', in our view, for either repudiatory breach of contract. No employee should be expected to be told to 'fuck off' directly by a manager speaking in anger. No employee should be expected to stand being the victim of a personal attack about their life or their character. No employee should be expected to stand being the victim of a direct threat from their manager, whatever the circumstances. Ms Bacon's actions, on behalf of the respondent, constitute a serious breach of the claimant's employment contract which she was entitled to accept, resign and claim constructive dismissal.

108. The claimant did not immediately resign in response to the 26 March 2021, although it was her last day of working on site at the respondent. Instead, she was signed off sick and chose to attempt redress through the grievance process. That grievance process was poorly conducted for the reasons already outlined. It is plainly unfair and unreasonable for the independent investigating manager to delegate all of the investigation to those who have a direct interest in the outcome of the grievance. The respondent argues that there was no other way of conducting the investigation. We do not agree. Mr Allcock is not part of the business group as the care home. The respondent has access to managers across a variety of settings. Most obviously, Mr Allcock himself should have taken hold of the grievance investigation and satisfied himself with his own eyes about the aspects he delegated.

109. There is no reasonable excuse for telling the claimant that there had been no staff moving from one care home to another, on the basis of statements from colleagues, when the only written statement we have seen says the *direct opposite*. We have found that this misled the claimant about the evidence gathered in the investigation, and agree with the claimant's submissions that her trust in the process and the respondent was obviously destroyed because she *knew from her own knowledge* that staff had transferred. The respondent only perpetuated that lack of trust by admitting that staff had transferred as she had alleged, but then confirmed that is was still not going to uphold any part of the claimant's grievance. We are not surprised that the claimant lost all remaining trust and confidence in the respondent in those circumstances. The entire grievance process followed, from submission to appeal outcome, was supposed to provide the claimant with a route to air her concerns and find redress where those concerns were well founded. It did not do that, and in failing to provide that the respondent has acted so unreasonably that it has, in our judgment, further breached the claimant's employment contract to the extent that she was entitled to resign and claim constructive dismissal.

110. The claimant did not immediately resign. There was nine days until she thought she was being underpaid and assumed she had been dismissed. There was then a further three days between clarification and her submitting her resignation. The respondent submits that the claimant affirmed her contract by the delay, acting as though she intended for the employment contract to continue. However, we are mindful, following *Crook* and *Turner*, that it is not the case that there needs to be an immediate resignation without notice. We must look at all of the circumstances and the actions of the claimant in order to decide whether or not she resigned in response to the breach or affirmed the contract.

111. In our view, it is relevant that the claimant was signed off work during this period with mental health illness. This, in itself, is likely to slow down any response and lead to a delay to reaction to allow time to process the situation. Further, the claimant was not working on site at the respondent. She did nothing to fulfil her job role, and there was no impetus provided by an immediate requirement to fulfil that job role either. The claimant had submitted her grievance on 29 March 2021 in response to events on 26 March 2021. Due to her illness, the outcome to the appeal stage (to the extent accepted as an appeal) did not arrive until 16 June 2021. We do not consider that the claimant taking two weeks to process whether or not she felt she had sufficient trust and confidence to return to work, where she was not presently able to work anyway, meant that she had affirmed the contract following the breach we have found.

112. The respondent contends that the claimant did not resign in response to the breach(es), but in response to the pay misunderstanding. It says, correctly, that the respondent had made no error over pay and so this could not give rise to a cause for constructive dismissal. We are mindful that the breach of contract need only be one of the reasons for the decision to resign and claim constructive dismissal. As found above, the resignation e-mail itself indicates that the resignation comes as a result of the experiences felt by the claimant over a period of time, and that a key feature of the resignation was the respondent's failure to deal with her grievance properly and the reasons for it (which include the treatment received from Ms Bacon). We are satisfied that the claimant resigned in response to the respondent's repudiatory breach of contract.

113. The claimant was constructively dismissed. She is entitled to remedy for that at a separate stage, where we consider that it will be relevant to consider the extent to which the claimant has mitigated her losses and the extend to which the respondent's grievance failures might lead to an uplift of up to 25% of the award for unreasonable failure to follow the ACAS guideline.

Protected disclosures and detriments

114. The claimant says she suffered the detriments outlined in the list of issues above as a result of the protected disclosures she made. Of those, we found all apart from the one relating to a failure to take health and safety seriously to have occurred as a matter of fact. The respondent does not dispute that those detriments, if occurred because of the protected disclosures, would indeed be matters of detrimental treatment. The respondent's first position is that none of those things occurred. We have found that to be an incorrect position in respect of all but one case. The respondent's second position is that none of those things relate to the protected

disclosures and that the disclosures did not materially influence them occurring. We are required to examine the reasons why Ms Bacon, Mr Allcock and Mr Nunn acted as they did in order to make conclusions about this head of claim. We deal with each detriment in turn.

115. We found that the claimant raised concerns about a colleague in 2019, and then also reported concerns about a resident's bruise in 2020. These issues happened one and two years prior to the first issue which is claimed as a detriment. In our view, this elapsing of time is sufficient in this instance for us to conclude that the detriments we have found did not happen because of those disclosures. There is no evidence at all that those issues raised by the claimant could have been in the minds of any of the respondent witnesses during their dealings of the claimant. There is no causation between those events and root of the claimant's claim.

116. We found that the claimant did raise concerns with Ms Bacon about her daughter cutting hair in both settings at the time of the Covid-19 outbreak. However, we have found that Ms Bacon agreed with that course of action and that the claimant's suggestion was taken on board. We have found no failure on the part of the respondent to take health and safety matters seriously at the time, commending it for its efforts during the pandemic. We do not consider that Ms Bacon held raising that specific issue against the claimant during the events of 26 March 2021. The respondent has not advanced a reason for the treatment which we have found as a detriment because it denied that the thing happened at all. However, we do not consider this the sort of case where we would draw an adverse inference for a lack of reasoning. In our view, Ms Bacon's outburst was from a sense of frustration triggered in that moment. It was not linked to her daughter in any way.

117. The claimant relies on her raising the concerns of family members during the meeting of 26 March 2021 as being a protected disclosure. In our view, this is the comment which did trigger Ms Bacon's outburst due to the pressure she was under at the time with managing the home in such difficult circumstances. However, the claimant's actions with this issue do not go to any of the matters outlined in *section 43B Employment Rights Act 1996*. Reporting the concerns of others is unlikely to be a protected disclosure because the belief that the disclosure tends to show one of those matters in *43B(1)* needs to be held on the part of the claimant herself. Whilst she had those concerns, the claimant's case is very clearly that she raised the family's concerns with Ms Bacon, not her own. In those circumstances, we can only conclude that this concern is not a protected disclosure and so the claimant cannot bring a claim for any detriment arising from raising it.

118. The only claimed detriment arising from any disclosures made during the grievance process are the issues outlined above with the handling of the claimant's grievance itself. Those failings were systemic in nature and would, in our view, have occurred whatever the instance of the grievance. Those systemic failings were so poor that the claimant was constructively dismissed when she became aware they would not be rectified. In our view, Mr Allcock did not have those protected disclosures in mind when conducting the grievance. There is no evidence before us that he acted as he did because of any of the disclosures which may have been made to him. We accepted his evidence that he did the best he could in the circumstances where he was working remotely, during Covid-19, and he thought it was appropriate to trust those he delegated the investigation of the grievance to.

That mid-handling led to an unreasonable outcome for the claimant's grievance, but it was not in our judgment informed by the nature of the grievance itself.

119. None of the claimant's claimed detriments have been found to flow from her claimed protected disclosures. Whilst she did make some protected disclosures, we consider these were either taken on board and investigated by the respondent, or did not inform processes which were in their own right so poorly managed that the reasons why those processes were in chain were irrelevant to what happened. Consequently, this claim fails and is dismissed.

Direct disability discrimination

120. The claimant relies on two instances of what she says is less favourable treatment, as outlined in the list of issues above. We have found that Ms Bacon was abusive to the claimant on 26 March 2021. We have found that the claimant was constructively dismissed. The respondent, through the individuals involved, did subject the claimant to the treatment complained of. However, to succeed in this claim, the claimant must show that the treatment is less favourable treatment than that which would have been given to those without the claimant's disability. In other words, if the respondent would have treated those who did not have the disability in the same way, then the direct disability claim cannot succeed. The claimant did not advance a direct comparator in respect of the analysis, and so we have adopted a hypothetical comparator who would have been in the same position of the claimant (having done the same things) but without the disability.

121. The difficulty that the claimant has is that, on her own evidence, Ms Bacon was a volatile manager who is not infrequently hostile to those who work beneath her. We heard evidence from the claimant, which we have accepted, that Ms Bacon would shout at other colleagues and that there would be an atmosphere following a disagreement. We heard evidence from Ms Davis, which we have accepted, that Ms Bacon was a source of fear for other members of staff and that something about her manner in the workplace was frightening. We have also seen evidence from the bundle that Ms Bacon can be short and sharp in text messages. Finally, we formed our own view over the course of the hearing that Ms Bacon does seem to experience emotion when under pressure which could result in anger if pressed. This means that, at first viewing, we consider it most likely that Ms Bacon would have reacted on 26 March 2021 in the same manner no matter who she was speaking to – and no matter what their disability status.

122. We have found that Ms Bacon knew of the claimant's health impairments and knew that they were severe enough to have been referred to a psychiatrist for a period of treatment. However, we have found no facts and heard no particular argument which seeks to link the treatment on 26 March 2021 to that knowledge. We have considered whether the nature of the words used by Ms Bacon might indicate in some way that disability was an influence upon the outburst. We could not detect any. In our view, the claimant has not shown the 'something' beyond the treatment happening and the fact she has a protected characteristic which would shift the burden of proof on to the respondent following the principles in *Madarassy*. Instead, we consider that Ms Bacon was reactive, entirely inappropriately, to her sense of frustration with the claimant in that particular circumstance. She reinforced this conclusion for us whilst giving evidence when she commented on the claimant's

black and white and forceful point of view which is expressed despite an overall lack of experience in the sector. Consequently, we do not consider that the claimant was treated less favourably because of her disability and this part of the claim must fail.

123. Our deliberations and analysis in relation to the constructive dismissal detriment follows a similar path. The respondent was, as outlined above, woefully deficient in terms of running a fair and reasonable grievance process. We do not repeat those failings here. However, aside from establishing that she mentioned her disability and the *Equality Act 2010* in her grievance hearing, the claimant has not established anything else which indicates that the treatment was less favourable than someone would have received who was not disabled. The failures we have identified are systemic in nature and we consider that they would have occurred no matter who had raised a grievance of this type. We do not consider that any delays to the process were less favourable treatment due to disability. Much of the delay was in response to the claimant's illness, true, but it could equally be that the respondent is criticised for pressing on with the process despite the claimant's illness. The claimant has not established facts from which we could properly conclude that she has been treated less favourably because of her disability. This part of the claim must also fail.

124. It follows that, overall, the claimant has not established any facts from which an inference may be drawn that there was any disability discrimination. Consequently, there is no need for the respondent to justify the treatment on the grounds of something other than discrimination. In any event, we consider that the claimant was treated the same as anyone without her disability would have been treated.

125. This aspect of the claimant's overall claim fails and is dismissed.

Harassment related to disability

126. We have agreed with the claimant's characterisation of the events of 26 March 2021 and found for her in terms of the actions that Ms Bacon did towards her in that meeting. We have no doubt that Ms Bacon's abusive outburst was unwanted conduct which led to the claimant feeling degraded and intimidated, and that it created a hostile atmosphere which the claimant felt she could not return to until the situation was remedied. Given the nature of the facts found, that feeling on the part of the claimant has to be reasonable.

127. However, to succeed in her claim for harassment *related to disability*, the unwanted conduct has to relate to the claimant's disability. This means that the conduct should be about the disability, or if not then the reason behind the conduct should be of sufficient relation to the disability. In our judgment, the claimant runs into the same difficulty as with the direct discrimination claim above. Ms Bacon is simply, in our view, prone to behave in this way regardless of whether the person has a disability or not. We have carefully considered the words which we have found used, and do not consider that they relate to or are motivated by the claimant's disability. Yes, those comments are personal in nature and severe and inappropriate enough to have constituted a repudiatory breach of the employment contract. But they are not, in our view, related to disability. We can detect no other reasoning on the part of Ms Bacon for her actions which are anything beyond her frustration with the claimant in the moment due to work reasons.

128. The question then is whether there is any other evidence that will allow us to conclude that the harassment related to disability on a prima facie basis (ie. that there are the facts from which we could draw the inference that the harassment occurred). In her evidence, the claimant said it was her perception that the treatment from the respondent here was related to her disability. We do not accept that. We accept that the claimant was sensitive at the time, perhaps because of her disability. We accept that the incident would have had a severe detrimental impact upon her disability. But we do not consider, and do not conclude, that the claimant immediately perceived the attack upon her to be related to her disability. The claimant says that Ms Bacon can behave in this way with any member of staff at almost any time.

129. In our view, this would be the real impression of the reason in the claimant's perception at the moment of the incident. In our judgment, the issue has become framed around harassment at a later period, after some reflection, and so the claim fails. In our judgment, this is a situation analogous to ***Hodkinson***. The claimant had the disability and unwanted conduct occurred.

130. In those circumstances, we do not consider that the claimant has established facts that would shift the burden on to the respondent to show that the conduct complained of was not harassment related to disability. Consequently, this aspect of the claimant's overall claim fails and is dismissed.

Disposal

131. The claimant succeeds on her claim of constructive dismissal following the treatment of her on 26 March 2021 and the significant failings to properly deal with that or her ensuing grievance process. She is entitled to a basic and compensatory award as a result of the dismissal and the parties will be informed of a remedy hearing listing separately to this judgment. Given the length of time since the dismissal occurred, this is a case where the statutory cap to the compensatory award may apply. The claimant will need to show that she has not unreasonably failed to mitigate her losses at the remedy hearing. We may need to consider whether an award should be uplifted to reflect the extent to which the respondent unreasonably failed to follow the ACAS code of practice relating to grievance.

132. We do not consider that any of the claimant's treatment was caused by or related to her disability, or done as a result of a protected disclosure she made. These claims are consequently dismissed. We consider that the respondent's management and processes would have resulted in any person being treated equally poorly in these circumstances, and there was no influence on those failings from the disclosures or any protected characteristic.

133. Finally, I apologise for the length of time it has taken to produce this judgment. This was a broad and wide ranging claim, covering a very sensitive time period, and involving complicated and sensitive relationships. It properly needed a great deal of thought and care when reaching this decision.

Employment Judge Fredericks-Bowyer

13 July 2023