



EMPLOYMENT TRIBUNALS

Claimant: Miss T Banner
Respondent: HC One Limited
Heard at: East London Hearing Centre
On: 3, 4, 5 and 6 October 2023
Before: Employment Judge A Ross
Members: Mrs G Forrest
Dr J Ukemenam

Representation:

Claimant: In person (assisted by Louise Prince)
Respondent: Mr S Irving, Solicitor

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. The complaint of constructive unfair dismissal is dismissed.
2. The following complaints of discrimination are dismissed:
 - 2.1. The complaint of direct disability discrimination under section 13 Equality Act 2010 (issues 18-19 of the List of Issues);
 - 2.2. Each complaint of indirect discrimination under section 19 Equality Act 2010 (listed at issues 20 – 26 of the List of Issues);
 - 2.3. Each complaint of breach of the duty to make reasonable adjustments under sections 20-21 Equality Act 2010 (listed at issues 27-31 of the List of Issues);
 - 2.4. Each complaint harassment under to section 26(3) Equality Act 2010 (listed at issues 39-42 of the List of Issues);
 - 2.5. Each complaint of victimisation under section 27 Equality Act 2010 (listed at issues 43 - 46 of the List of Issues).
3. The Claim is dismissed.

REASONS

Complaints and Issues

1. The Claimant was continuously employed by the Respondent as the Home Manager at Hornchurch care home (“the Home”) from 11 June 2018 until her resignation with notice on 11 August 2021, which took effect on 11 November 2021. The Claim form was presented on 4 February 2022, after a period of Early Conciliation between 25 November 2021 and 5 January 2022.
2. The Claimant’s complaints were as follows:
 - 2.1. Harassment related to sex under section 26(1) Equality Act 2010 (“EQA”);
 - 2.2. Direct disability discrimination (section 13 EQA);
 - 2.3. Indirect disability discrimination (section 19 EQA);
 - 2.4. Breach of the duty to make reasonable adjustments (sections 20-21 EQA);
 - 2.5. Victimisation (section 27 EQA). The protected act was alleged to be a telephone call with Donna Daley and other management towards the end June or July 2021 disclosing medical evidence of Lupus and concern about her treatment.
 - 2.6. Unfair constructive dismissal.
3. At the outset, the Tribunal explained to the parties that the time estimate of this hearing had been reduced by one day due to lack of judicial resource; and that the hearing would consider liability only. The Tribunal explained that the aim was for evidence and submissions at least to be finished within 4 days.
4. Regional Employment Judge Burgher had drawn up a list of issues at the Preliminary Hearing in May 2023. We explained that these were the issues for the Tribunal to determine at this hearing.
5. In addition, REJ Burgher had ordered the Claimant to pay a deposit in respect of the complaints relying upon the disability of autism. The Respondent did not dispute the diagnosis of autism; but that it could not have known that the Claimant had autism, given the date of the diagnosis. The Claimant had failed to pay that deposit and those complaints had thus been dismissed on 29 September 2023. The Tribunal explained this to the Claimant before the commencement of the Final Hearing.

The hearing

6. At the outset of the hearing, The Tribunal dealt with a number of case management matters.

7. The Claimant was accompanied by Ms. Prince, who was permitted to assist and support the Claimant; and the Tribunal saw that she did provide useful assistance for the Claimant. In fact, the Claimant requested that Ms. Prince be permitted to ask questions in cross-examination. There was no objection and the Tribunal granted permission.
8. In terms of evidence, the two main witness statements were lengthy. The Tribunal adjourned until 2pm on the first day to allow the statements and documents referred to within them to be read.
9. Prior to the adjournment, the Claimant sought to adduce further evidence, and made an oral application.
10. The Claimant sought to adduce the evidence of Mr. Allen Alves, who attended with her. He provided a handwritten statement, albeit without a statement of truth. The Respondent did not object, contending his evidence was not relevant to the issues. The Tribunal permitted this evidence to be adduced.
11. In addition, the Claimant sought to introduce documentary evidence, consisting of a transcript of a meeting covertly recorded on 2 September 2021, a series of statements made by employees at the Home, and various other documents. This application was opposed.
12. The Tribunal considered the further documents over the adjournment. At first the Tribunal were minded to refuse the application for the admission of the transcript; but Mr. Irving helpfully pointed out, having read the transcript over the adjournment, that the meeting included Ms. Daley, his witness. He withdrew his objection to the admission of the transcript. The Tribunal admitted this transcript into evidence.
13. The Tribunal refused to admit the other documents for reasons given at the time, finding that to admit such evidence at such a late stage would obstruct and not further the overriding objective. The exception was an email exchange (dated 6 August 2021) relating to the admission to the Home of a relative of the Senior Home Manager, since this related to part of the complaints and was dealt with within the evidence of the parties.
14. The Respondent had not filed a list of essential reading, which, in view of a bundle of more than 1000 pages, was not helpful, although a short list was then provided by Mr. Irving. Given the length of the Claimant's statement, which did not signpost which documents were most relevant to her complaints, the Tribunal directed that she should provide an essential reading list. This was prepared over the adjournment and provided at 2pm.
15. It was common ground that the Claimant had, after termination of her employment, been diagnosed as having autistic spectrum disorder. The report dated 5 May 2023 explained the effect that this had on day to day activities. In addition, the Respondent admitted that the Claimant had the other disabilities alleged, Lupus and Ehlers-Danlos Syndrome (EDS).
16. Mindful of these disabilities, the Tribunal invited the Claimant to seek any reasonable adjustments required at the hearing. The Claimant explained that she

may be affected by brain fog from time to time, and that she may need more time when answering questions. The Tribunal explained that she need only ask for a break and the Tribunal could accommodate that; otherwise, there would be a break in the middle of each session.

17. In the course of cross-examination of Ms. Daley, the Tribunal was concerned that too much time was being spent by Ms. Prince trying to locate specific page references, or a sequence of pages. We have no doubt that the Claimant and Ms. Prince were doing their best, but the Tribunal decided that it would further the overriding objective for the Claimant to have time to formulate questions which included page references and related back to the List of Issues; and it was suggested that the questions were put into writing. The Claimant and Ms. Prince welcomed this opportunity. The Tribunal adjourned at 3.15pm until 10am the following day.
18. On 5 October 2023, the Tribunal adjourned the morning session twice at the request of the Claimant and Ms. Prince, for 10 minute breaks. After the second of these, the Claimant continued with the questioning, and then Ms. Prince took over after lunch.
19. The evidence of Ms Daley concluded at about 1440. The Tribunal then adjourned for 15 minutes, explaining that submissions would follow, with the Respondent going first so that the Claimant could hear the Respondent's submissions. The Tribunal indicated that each party had about 30 minutes for submissions
20. The Claimant indicated after about 30 minutes that she would need more time, because she was only about one third through the submissions. At first more time was agreed; but the Claimant was concerned that she could not read all her submissions within that time and asked to put her submissions into writing for the Tribunal. The Tribunal retired to consider its decision and decided that it would further the overriding objective to allow the Claimant until 9am on 6 October 2023 to send in her written submissions, copied to the Respondent. The Respondent was directed to file any submissions no later than 10am on 6 October and that, if these were necessary, these should be short.
21. The Tribunal explained to the parties that Judgment would be reserved and delivered in writing. It was pointed out that this would assist the parties in being able to read and understand the Reasons in their own time and it was a proportionate step, because the hearing had been reduced by 1 day, due to lack of judicial resources.

The Evidence

22. There was a bundle of documents prepared by the Respondent, which was agreed, save that the following were added at the direction of the Tribunal: a copy of the ET3 (p40A ff); the additional transcript (at p.1068-1097); and two emails (at p423A-B). The page references in this set of Reasons refer to pages in the bundle.
23. The Tribunal pre-read the witness statements and then heard oral evidence from the following witnesses:

For the Claimant:

- i. Allen Alves;
- ii. The Claimant;

For the Respondent, Donna Daley, Area Director.

24. In addition, the Tribunal read documents within the trial bundle as referred to by the parties. However, the Tribunal raised with the parties that the bundle contained a “without prejudice” letter before claim from the Claimant’s former solicitors (dated 29 September 2021), and a response to it from the Respondent. The Tribunal was informed that the Claimant had requested that this correspondence should be included in the bundle. The Tribunal noted the “without notice” nature of the correspondence and directed itself that these letters and the negotiating positions of the parties prior to issue could not be relevant in assessing the merits of the Claim.
25. The documentary evidence included a series of transcripts of meetings that were covertly recorded by the Claimant. The Respondent did not oppose the admission of these documents, because it sought to rely on parts of the transcripts. During her closing submissions, the Claimant invited the Tribunal to listen to certain recordings. The Tribunal refused that application because to listen to the recordings would not have furthered the overriding objective, for the following reasons:
 - 25.1. The late stage at which the application was made, after the close of the evidence, when further cross-examination of the Respondent’s witness (who was no longer present) was not possible.
 - 25.2. No audio files had been provided, nor a device to listen to the recordings on.
 - 25.3. The transcripts were agreed. Ms. Daley had not been cross examined about her conduct in the meetings, other than by reference to what was said as shown in the transcripts.
 - 25.4. No application had been made at an earlier stage, and no case management directions given in respect of the Tribunal listening to the recordings, such as an increased time estimate.
26. We have set out in our findings of fact our assessment of the key witnesses’ evidence on particular factual issues. Before reaching our findings of fact, we took into account all the evidence and submissions.
27. In reaching our findings of fact, the Tribunal directed itself that the demeanour of a witness – how they appeared to perform when giving evidence – was generally a poor guide to assessment of their reliability as a witness. We reminded ourselves that memory is fallible, and often reconstructs events. In addition, the events set out below began in 2021; and we took into account that memory was likely to fade over time.

28. We reminded ourselves that the witnesses in this case were not expert or professional witnesses. They were lay witnesses giving evidence about events which occurred over 2 years ago, after a number of months of the Covid pandemic which caused great difficulty for those working in the care home sector.
29. The Tribunal took into account that part of the disadvantage arising from the Claimant's ASD was difficulty in communication and management of emotions. As explained above, we took into account during the hearing that the Claimant might need assistance, such as if there was any doubt about questions asked in cross-examination. Questions were on occasion not permitted or reformulated for her. Ms. Prince was permitted to ask questions for the Claimant, and further time was allowed for the Claimant to complete her submissions by providing written submissions.
30. For clarification, the Respondent's witnesses referred to the Senior Home Manager as Pervine King. The Senior Home Manager called herself by that name. The Claimant referred to her as Pervine Emery. For ease of reference and consistency with the List of Issues, the Tribunal decided it would refer to the Senior Home Manager as Ms Emery-King.

Findings of Fact

23. The Respondent operates a residential care home business.
24. The Claimant was the manager of the Home in Hornchurch, which is within Area 4 of the Respondent's business.
25. The Claimant had resigned for the first time by letter dated 13 May 2019, at p110. The Claimant stated that this was for the same reasons as she resigned in 2021. The Tribunal did not accept this; we address the reasons for the resignation in 2021 later in this set of reasons. Moreover, the Claimant's witness statement alleged that she had resigned in May 2019 due to lack of support from management and HR. However, the Tribunal found that this was likely to be incorrect for the following reasons. The resignation letter made no complaint about management or HR, but expressed regret and thanked her Area Director for her continued hard work and the support given to the Claimant. In cross-examination, the Claimant said she could not recall if she had been provided with support, then said that Ms. Westwood had provided day to day support. The Claimant then responded to a question from the Employment Judge to say that it was the Senior Management Team and HR who had failed to provide support, because she was not listened to. The alleged lack of support related to the Deputy Home Manager, who caused the Claimant concerns.
26. The Claimant's oral and witness statement evidence tended to contradict the resignation letter at p.110. We found that the letter more accurately expressed the Claimant's position at the time and that the allegation that she was not listened to was unlikely to be correct; but that it was likely that she disagreed with the Respondent's approach to the Deputy Home Manager.
27. The Respondent permitted her to retract this first resignation, and the Claimant continued to work in the same role.

28. Donna Daley commenced employment with the Respondent in February 2019. At all material times, she was Area Director for Area 4, which consists of 9 care homes. Ms. Daley was the Claimant's line manager at all material times from March 2021 until her resignation. She did not know of the first resignation of the Claimant in 2019.

Respondent's knowledge of the Claimant's disabilities of Lupus and EDS

29. The Claimant's witness statement in several instances lacked particular details that the Tribunal expected to be present in a claimant's statement, given the nature of the case and the fact that the issues had been defined by REJ Burgher.
30. The Claimant's witness statement did not state when the Respondent was first informed about her diagnosis of Lupus, despite the Respondent denying knowledge in its Response to the Claim. In cross-examination, the Claimant stated that she had disclosed her diagnosis of Lupus to Ms. Daley on about 24 June 2021. The medical evidence was that the Claimant was informed of the diagnosis by letter dated 9 May 2021 (p1002).
31. Ms. Daley was first informed of the Claimant's diagnosis at a meeting with the Claimant and Julie-Ann from HR, on 2 September 2021 (shown in the transcript at p.1068ff).
32. On this issue of fact, the Tribunal preferred the evidence of Ms. Daley, for the following reasons:
 - 32.1 There was no evidence to corroborate that the Claimant had mentioned her Lupus diagnosis to Ms. Daley on or about 24 June 2021 as she alleged. In contrast, the Tribunal considered that the lack of any written communication to the Respondent or record by the Respondent about this impairment in June or early July 2021 weighed against such information being provided either on 24 June or at any time before 2 September 2021.
 - 32.2 At paragraph 84 of her witness statement, the Claimant stated that she showed Ms. Daley her letter with confirmation of her diagnosis of Lupus at the meeting on 27 July 2021. There is no mention of this in the transcript of that meeting, which weighs against the Claimant's evidence being correct. In cross-examination, the Claimant stated that this was because she made copies of the letters for Ms. Daley as she was leaving the Home. The Tribunal noted that there was no mention of this key piece of evidence in the Claimant's witness statement. The Tribunal inferred from these inconsistencies that the Claimant's evidence on this factual issue was unreliable.
 - 32.3 Ms. Daley gave clear and unwavering evidence on this issue. She was adamant in cross-examination that, had the Claimant told her that she had an auto-immune disease before the meeting on 2 September 2021, she would have remembered it, because she had had a family member who had Lupus and she herself had an auto-immune disease. Ms. Daley denied being told about Lupus whether in June or at the 27 July 2021 meeting. We preferred her evidence to that of the Claimant. We found that the first time

the diagnosis of Lupus was mentioned to the Claimant was in the meeting of 2 September 2021.

33. In respect of the disability of EDS, the medical evidence produced by the Claimant (post-dating her resignation) showed that she had this disability from before the commencement of her employment. However, the Claimant's Claim form does not refer to this disability at all (see p.29), and it is not referred to in any of the transcripts of meetings. The Tribunal found this lack of reference to EDS in these documents to be inconsistent with the Claimant's case and her oral evidence.
34. In addition, the witness statement did not indicate when the Respondent, and Ms. Daley in particular, were informed that she had this disability.
35. In cross-examination, the Claimant was referred to the Health Questionnaire. She said that it was completed for her and it is undated. This document makes no reference to her having EDS: see p.799-800.
36. The Claimant contended that this Questionnaire was a more recent version of one that had been completed when starting with the Respondent, because it referred to Covid on p.800.
37. The Tribunal concluded that the document at p.799 was likely to contain the Health information provided by the Claimant at the commencement of her employment. It was likely that the form had been amended or updated to include reference to Covid. For instance, the form recorded information about the Claimant's impairment of asthma; and the Tribunal found it was inconsistent that this form referred to asthma, but not EDS, if EDS had been mentioned by the Claimant at the time of her recruitment or at any later point.
38. In respect of knowledge held by Ms. Daley, the Claimant stated in oral evidence that Ms. Daley was informed of tests. She gave no evidence about what connection these tests had to her EDS, and her witness statement did not mention that Ms. Daley was told of any tests connected to EDS.
39. The Claimant's oral evidence was that her line manager prior to Ms. Daley, Girlee Abad, was aware of her EDS. She stated that this was evidenced by the emails at p.150-151. This Tribunal did not accept this evidence. In particular, the emails showed that, in October 2020, the Claimant complained that she had hurt her back moving boxes; in response, Girlee Abad said that she hoped that she was fine, and advised her to have a good rest. There was nothing in these emails to suggest that the Claimant had EDS nor that any symptoms resulted from that disability. The Tribunal found that the Claimant did not tell Ms. Girlee Abad of her EDS.
40. In addition, the Claimant stated that her line managers would be aware of her EDS, because that information was held on her personnel file, and that managers read personnel files. We saw no evidence that there was any reference to EDS on the Claimant's personnel file; there was no such document in the bundle.
41. We found that the lack of any documentary evidence at all which showed that the Respondent had been informed of the Claimant's EDS, or giving any grounds for

the Respondent to investigate any symptoms of EDS, meant that it was very likely that the Respondent had not been given this information.

42. The Claimant's personnel file was, in any event, held at Head Office. Ms. Daley could not and did not attend there routinely to read personnel files. In fact, she required permission before she could have access to personnel files. This is consistent with the experience of the Tribunal that a line manager would not routinely read or have access to information about health conditions of an employee.
43. Furthermore, the Tribunal accepted the evidence of Ms. Daley that she had no knowledge of the Claimant's EDS. Ms. Daley was unshaken on this point. In contrast, the Tribunal found the Claimant's evidence about Ms. Daley and Ms. Girlee Abad's knowledge to be unreliable, for the reasons explained above.
44. We should add that none of the Fit Notes in the bundle (from April 2020 to the end of 2021) referred to EDS (or Lupus).

Favouritism shown to Pervine Emery-King from senior management and Managing Director; and the appointment of Ms. Emery-King into the Area 4 SHM role

45. The Claimant's case on constructive dismissal lists one of the recent acts that triggered her resignation was that favouritism was shown to Pervine Emery-King, including by appointing her as Senior Home Manager ("SHM"). The Claimant stated in oral evidence that this was one of the main reasons she tendered her resignation. She relied on the transcript of a meeting, particularly p.606, in which she said Ms. Daley stated that Ms. Emery-King was her favourite manager and that she was bypassed in a home managers' meeting.
46. In answer to a question from the Employment Judge, the Claimant stated that there was a plan or conspiracy against her. The Claimant did not explain the parameters or identify all the conspirators, but her evidence was that there was a plan that she would be replaced as manager of the Home by Ms. Emery-King.
47. The Claimant relied in part on the fact that there was no adverse report from CQC about the Hornchurch Home, and no formal complaints about the Home.
48. The Tribunal found that the transcript at p.606 did not support the Claimant's case – and it did not refer to Ms. Emery-King being a favourite manager of Ms Daley.
49. Ms. Daley denied that any favouritism was shown to Ms. Emery-King, and she gave candid evidence. Ms. Daley admitted that Ms. Emery-King had been appointed SHM without any recruitment process. The Tribunal accepted Ms. Daley's evidence.
50. The Tribunal found that the SHM role was not a promotion in the sense that the SHM role was not a higher tier of management. We found that there was an increased responsibility; and although there was no increase in salary for the role, there was a pay increment for the additional responsibilities. The managing director wanted each Area within the business to have an SHM; the other Areas had an SHM, but Area 4 did not have one at the time that Ms. Emery-King was appointed.

51. The SHM role was that of Home Manager but with responsibility to support and induct new managers and to carry out the more complex investigations. Ms. Daley decided, having met and worked with Ms Emery-King after commencing employment with the Respondent, that Ms. Emery-King met the criteria for the role, because she had the skills and competencies required. Ms. Daley considered that Ms. Emery-King had, with a team effort, turned around the performance of a large Home (Morningson Hall). This is demonstrated by the CQC report which showed that three out of four areas inspected were classed as “good” and the fourth area was classed as “requires improvement”. Previously, they had all been “inadequate”. In addition, Ms. Daley knew that Ms. Emery-King had the ability to induct new managers.
52. Contrary to the Claimant’s allegation in cross examination, the CQC report did not indicate that Ms. Daley showed any favouritism to Ms. Emery-King.
53. The email dated 1 June 2021 (p258) from Ms. Daley about the SHM role shows that Ms. Emery-King had been carrying out the role of SHM prior to that date, but that the role had not been confirmed.
54. Although the Claimant believed the existence of a plan against her, the Tribunal found no evidence to support her belief. As a matter of fact, we found that there was no such plan or conspiracy. The Claimant’s allegation was that the Respondent had not agreed to the Claimant retracting her resignation because it wanted to put Ms. Emery-King in charge of the Home, because Ms. Emery-King’s home, Morningson Hall, was being sold. However, there was no objective evidence to support such an allegation. The more reliable and persuasive evidence came from Ms. Daley.
55. We found that the original plan had been that as home manager, Ms. Emery-King would transfer over to the buyer of Morningson Hall. A turnaround manager was managing Hornchurch Home in the absence of the Claimant on gardening leave. It transpired, after the decision was made not to accept the resignation of the Claimant, that the buyer of Morningson Hall already had a manager ready for that role so Ms. Emery-King returned to work for the Respondent. As a result, she was appointed to manage the Hornchurch Home from November 2021.
56. The Claimant’s evidence that one of the main reasons for her resignation was the favouritism shown to Ms. Emery-King was not credible evidence. There was no favouritism shown to Ms. Emery-King; and there was no evidence that the Claimant objected to her appointment as SHM in her resignation letter, and no complaint or grievance was raised about this during her employment.
57. In addition, the Tribunal preferred the evidence of Ms. Daley that the father-in-law of Pervine Emery-King, and his immediate family, did not receive special treatment when he was admitted to the Home, for reasons we explain below.
58. Furthermore, the Tribunal saw no evidence from which it could be inferred that the Claimant was not offered the SHM role because of her disability. The Tribunal found that at the time Ms. Emery-King was confirmed in the SHM position, on 1 June 2021, the Respondent did not know and could not reasonably be expected to know that the Claimant had the disabilities of Lupus and EDS, for the reasons set out at paragraphs 29-44 above.

Unannounced visit by Managing Director and meeting on 27 July 2021

59. The Respondent's managing director was James Ilesanmi. It was his practice, and the practice of the current managing director, to attend care homes without notice to the home's management. This was so that they could see a home on a normal day, without special preparations having been made, so that they could witness compliance with standards at the home.
60. Mr. Ilesanmi attended the Home on 27 July 2021, without notice of his visit. He had a meeting with the Claimant; during the meeting, Ms. Daley arrived at the Home and joined the meeting.
61. There was nothing for the Claimant to prepare for this meeting. The whole purpose of the meeting was that it should be unannounced. Moreover, it was reasonable Mr. Ilesanmi to visit the home at this time, because he had never visited the Home before, refurbishment work to part of the Home was just starting and because the Home was unprofitable. The main topics discussed at the meeting with the Claimant were the renovations and how the home was going to improve its financial performance. This is shown by the transcript at pp 307 – 425.
62. In terms of financial performance, at that time, the salaries of the employees at the Home amounted to about 118% of income of the Home, whereas the target figure was 65%. The Home had not been in profit since March 2021. The Claimant explained at the meeting and in evidence that this was because of the number of registered nurses employed at the Home.
63. As we have explained in these Reasons, at the date of this meeting, Mr. Ilesanmi could not have had actual or constructive notice of the Claimant's disabilities. In any event, the fact that this meeting took place had nothing to do with the Claimant's disabilities nor the alleged protected act.
64. The Claimant alleged in cross examination that at the end of this meeting, when the managing director had already left, she gave Ms. Daley a copy of her Lupus diagnosis. We found that this did not occur, and that during the meeting the Claimant had only informed Ms Daley that she was being tested for bowel cancer and that she had further tests and was awaiting results.
65. Ms. Daley did not know that the Claimant had had a number of tests, because the Claimant had not mentioned this to her. Ms. Daley asked to be kept updated with the tests and results. After the meeting, the Claimant provided no results nor any update. In those circumstances, the Tribunal found that it was quite reasonable for Ms. Daley not to carry out a risk assessment, until the results of the tests were known. The Claimant could have provided the test results and then asked for the risk assessment to be carried out, if warranted by the results.
66. From the oral evidence of Ms. Daley, the Tribunal found that she was sympathetic given the testing for bowel cancer, due to a similar stressful experience in her own family.

Targets with insufficient time to complete

67. It was pointed out to the Claimant in cross-examination and by the Tribunal that she did not identify what targets she was referring to. The Employment Judge explained that he had read her witness statement and considered the documents referred to, but could not see any reference in the documents to a target that she had not met or which was time related. The Claimant was invited to consider this allegation overnight.
68. At the outset of day 2 of this hearing, the Claimant stated that the targets had been given orally.
69. The Tribunal found this evidence of the Claimant to be unreliable, even though she may have believed it to be correct. The Claimant had not previously mentioned targets being verbally provided; and the Claimant had still not identified what targets she was complaining about. There was no reliable evidence of any time-sensitive target; and the only targets referred to in the evidence had been met by the Claimant. Moreover, the Claimant did not raise any complaint with Ms. Daley or Mr. Ilesanmi about any target, evidenced by the transcripts of the meetings, nor did she raise a grievance.
70. We preferred the evidence of Ms. Daley, which was that the Claimant had not been given targets, but had been told that performance was being observed. There was a KPI for occupancy, a profitability measure, and compliance standards.

Inadequate support: redeployment of nurses

71. The Claimant believed that the reason the Home was unprofitable was because she had more registered nurses than the Home required. She explained in oral evidence that she wished to reduce the number of nurses to one, by moving to the Nursing Assistant model, in order to save £50,000 per annum. The Claimant complained that the support that she was provided with on this matter was inadequate.
72. However, the Tribunal preferred the evidence of Ms. Daley on the question of what support was provided on this matter for several reasons.
73. The Claimant did not identify what supportive work was not done by Ms. Daley or any other manager of the Respondent, save in a general way, by stating that she wanted the number of registered nurses reduced.
74. In contrast, Ms. Daley gave clear evidence of the steps taken to support the Claimant on this issue. This was not challenged in cross-examination.
75. The Claimant's request for nurses to be redeployed from the Home was made by email in April 2021.
76. The "Nursing Assistant" model, which we found meant a higher percentage of care hours being provided by nurse assistants rather than registered nurses, was taken to the managing director. In turn, Mr. Ilesanmi took the Claimant's request to Mr. Liddle, to analyse the staffing levels at the home, and the ratio of nursing assistants to nurses required. The Respondent could not rush the decision; it had to be sure

that there were enough nurses to meet the needs of new residents, not just existing residents.

77. Human Resources did carry out work in support of Claimant's objective. We accepted Ms. Daley's evidence on this issue. Mr. Fisher, HR business manager, was to lead the consultation with the nurses at the Home. He met with the nurses to discuss a proposed transfer to other homes. However, they declined to move to other homes voluntarily.
78. The end result was that the consultation process ended with no nurses being redeployed or dismissed. This was because, although the Claimant considered that she did not need so many nurses at the Home, she did not have enough nursing assistants for a reduction in nurses to be viable. The Home's occupancy had begun to increase.
79. The Tribunal inferred from the primary facts that the Respondent was probably reluctant to make nurses at the Home redundant, both because of the potential cost involved, but also because of their skills and the potential cost and difficulty in recruiting registered nurses again, when occupancy levels increased.
80. The Tribunal concluded that the Respondent provided the Claimant with all the support that she could reasonably expect on this issue. As Ms. Daley explained, the nurses could not simply be dismissed because they had employment rights.
81. Furthermore, there was no heavy workload imposed on the Claimant by her proposal for the nurses at the Home to be redeployed. As we have explained above, the work in this respect was wholly or mainly carried out by the Respondent's HR team. When the Claimant was questioned about what her workload was in respect of this issue, and it was put to her that it was not heavy, she answered that it weighed heavily on her mind. She provided no evidence to explain what work she did in respect of this issue. The Tribunal concluded that the allegation at issue 20 was not proved, and no such PCP existed.

Communication and contact with the Claimant to consider risk assessments and reasonable adjustments

82. The evidence of the Claimant did not explain what communication or contact the Respondent had failed to provide, save that she gave oral evidence that reasonable adjustments should have been discussed with her generally and that there should have been a risk assessment after her Lupus diagnosis. She gave no evidence that she had requested or proposed either a risk assessment or a reasonable adjustment to the Respondent whilst in employment.
83. The Tribunal accepted the evidence of Ms. Daley in respect of the issue of communication and consideration of risk assessments. She candidly accepted that she had not carried out a risk assessment, after the Claimant had referred to her Lupus diagnosis in the meeting of 2 September 2021.
84. Risk assessments by managers were generated as a result of the information provided by individual employees. The Claimant failed to complete the general document on the employee's portal, "MyView", which was in effect a pre-risk

assessment. This would have indicated any underlying conditions, such as Lupus, and this would have triggered an alert for her manager to complete a full risk assessment.

85. Moreover, the Claimant did not share information with Ms Daley about the number or nature of her medical appointments, nor did she keep her abreast of the outcome of tests, such as in respect of the investigation into bowel cancer.
86. As the Tribunal has explained above, the Respondent did not have actual or constructive knowledge of the Claimant's disabilities, until she made reference to one of them - her Lupus - after her resignation, at a time when the Respondent had already decided to refuse her request to retract her resignation.

Allegation of PCP that Ms Daley required the Claimant to communicate in an open way at unplanned ad hoc meetings

87. The Claimant gave no reliable explanation for this allegation. As indicated in these Reasons, the Tribunal preferred the evidence of Ms Daley on the issue of the nature and content of the communication between them, which we found to be corroborated by the documentary evidence.
88. The Tribunal found that there were no unplanned or ad hoc meetings between Ms. Daley and the Claimant, save for informal visits to the Home or catch-up meetings in the normal course of her role.
89. As explained below, there was no need for an agenda at the meetings on 9 September 2021 (when the Claimant was told that the Respondent had refused to permit her to retract the resignation) or 14 September 2021 because the parties knew the purpose of the meetings. The Claimant did not have a right to representation at the meetings. They were not formal meetings, and representation was not necessary, because she was not facing any disciplinary charges nor pursuing a grievance. It is clear that, in respect of the meeting on 14 September 2021, a Teams invitation had been sent (see p.690), which tends to suggest that it was not an ad hoc meeting.
90. In respect of why any such PCP of unplanned meetings placed the Claimant at any disadvantage, in cross-examination, the Claimant stated that she needed time to process things. When asked why advanced notice of meetings was relevant to Lupus or EDS, the Claimant failed to answer the question; she replied that in the conference calls, Ms. Daley would put an agenda in, so the Claimant would know the information required. The Claimant admitted that by the alleged reasonable adjustment of having advanced notice of meetings she meant that she should get an agenda in advance.
91. The Tribunal found that this PCP and the alleged substantial disadvantage arising from it were not relevant to either of the alleged disabilities before the Tribunal, but related to the autism of the Claimant.

Alleged working hours and arrangements

92. The required working hours of the Claimant were a PCP. However, there was no evidence that the Respondent knew or could have known that this PCP placed the Claimant at a substantial disadvantage. The Claimant did not mention her Lupus until 2 September 2021, nor any required adjustments.
93. in respect of the proposed reasonable adjustment of toilet breaks and rest breaks, the Claimant was the Home Manager; she could take toilet or rest breaks when she wanted to. There was no direction or rule to stop her doing so.
94. The Tribunal also found, as explained elsewhere in these Reasons, that the Claimant did not have any additional workload as a result of her proposal to move to a Nursing Assistant model and to re-deploy the registered nurses at the Home.

Allegation that Managing Director overturned Public Health England's directions, and put staff at risk

95. The Tribunal found that there was no basis in fact for the allegation that the guidance of Public Health England had, in essence, been overruled by senior management.
96. A relative of Ms. Emery-King was admitted to the Home on or about 29 July 2021. At the time, the hospital which had discharged him had failed to provide his PCR test result before discharging him. This was contrary to the correct procedure, but there was no evidence that Government Covid guidance had been broken, nor that, if there was a breach, it was made by any employee of the Respondent.
97. On 29 July 2021, Ms. Emery-King emailed the Claimant (p.429). This email referred to the fact that the resident was "now" allowed to have up to 5 essential visitors.
98. It was common ground between the parties that the resident was required to be isolating for 14 days after admission to the Home.
99. The Claimant's evidence was that a resident could only have essential visitors after the 14 day isolation period.
100. However, Ms. Daley and Ms Emery-King genuinely believed on reasonable grounds that he was still allowed essential visitors during this period. The guidance received from the Respondent's Covid lead was that essential care givers could visit the resident during the 14 day isolation period. In cross-examination, the Claimant admitted that the guidance email (at p.285) stated this.
101. Ms. Emery-King checked the position with Public Health Havering who said that it was for the guidance of the Home. She considered documents provided, and believed that these showed essential visits should be facilitated during the period of isolation.
102. On the balance of the evidence that the Tribunal heard and read, we preferred the evidence of Ms. Daley, which was corroborated by the documentation. It is likely that the Public Health England guidance at this time was that essential visitors could visit a resident in a home during the 14 day period of isolation after admission. We considered that the Claimant was likely to have been mistaken because the guidance changed over time.

103. The Tribunal found that Ms. Emery-King was not asking for special treatment by asking for essential visitors to be able to visit the new resident.

Events leading up to the Claimant's resignation

104. As part of the response to the Covid pandemic, and the number of deaths in care homes, the Government, by statutory intervention, made it a condition of employment for any person who worked in a care home to have the Covid vaccinations. The deadline for employees to have the vaccination was 16 September 2021.
105. The Respondent urged its staff to get vaccinated, in order to provide protection against contracting it and reducing the risk of hospitalisation or transmission if contracted. For example, the Claimant was sent a letter dated 23 March 2021 urging her to get the Covid vaccine: see p.213. The letter contained information about the vaccines.
106. The Claimant's Home had the slowest uptake of the vaccine. In her bi-monthly home visit report, Ms Daley reported that only 54.1% of employees working that the Home had received the vaccine. The target or standard was 90%. The report indicates that Human Resources support would be sought in respect of this matter.
107. The Claimant had not received the vaccine that the time of her resignation. In fact, the Claimant had not, up to the date of this hearing, received any Covid vaccination. The Claimant's evidence was that she had a medical exemption, but this evidence was not credible. At first, she stated that this exemption was from her GP; but there was no documentary evidence of this nor how the GP could have granted the exemption. Then she claimed a document gave her a medical exemption, relying on p.1012; but this document clearly did no such thing, because it merely records that she had applied for a medical exemption for the NHS Covid Pass (not that any exemption was granted).
108. The Claimant was absent from work on 5 August 2021.
109. There was a return to work telephone call from Ms. Daley to the Claimant on 6 August 2021. We accepted the evidence of Ms. Daley about the contents of this call; and she was not challenged in cross-examination on whether she used the word "replaceable". Ms. Daley did not state that the Claimant was "*replaceable*". Ms. Daley did ask the Claimant to be more open with her in communication, because, for example, she did not know that she had been absent sick on 5 August (evidence corroborated by the email at p.456). It is very likely, given the circumstances, that this return to work meeting included a discussion about whether the Claimant had received the Covid vaccine, and that the Claimant raised health concerns about receiving the vaccine. This was apparent from the oral evidence of the Claimant and the questions put in cross-examination, which described the Claimant as being petrified of the perceived risk of the vaccine.
110. The Claimant prepared her letter of resignation on about 9 August 2021. She sent it to Ms. Daley by email on 11 August 2021. The covering email states that she had been thinking about resigning for a few weeks.

111. The letter of resignation (p.466) did not complain about Ms. Daley nor about any of the matters set out in issues 1.1 – 1.4 nor 4.1 – 4.4 (save in one respect concerning alleged lack of support). The two matters highlighted by the Claimant as reasons for her resignation were:
- 111.1. “...the company’s decision on the uptake of the vaccination when I am uncertain regarding my own health currently”; and
- 111.2. “...the delayed help and support with the Registered Nurses here at The Hornchurch has reached a point of no return.”
112. In a telephone call on Friday 13 August 2021, Ms. Daley asked the Claimant to reconsider and think about her decision to resign over the weekend.
113. However, the Claimant had contracted Covid and was unable to attend work on Monday 16 August 2021. A temporary manager worked at the Home to cover her absence.
114. After 16 August 2021, the Respondent’s management discussed the resignation internally. The Respondent decided that it would not agree to the Claimant withdrawing her resignation. This was for the following reasons, referred to in the letter of 23 September 2021 (p738-739).
115. First, the Respondent’s HR and Ms. Daley’s manager pointed out to Ms. Daley that the Claimant had resigned before, which she had been unaware of. The Respondent’s directors considered that the business required stability and that allowing the Claimant to retract her resignation would produce uncertainty for the Home. In answer to a question from the Tribunal, Ms. Daley stated that this was the main reason for the decision not to allow the resignation to be retracted. We accepted that evidence. This was a reasonable, practical, decision in the circumstances.
116. A second reason, and part of the circumstances, was the Claimant’s Covid vaccination status. The Tribunal noted that the Claimant had not received the Covid vaccination at the time of her request, and had not produced any medical exemption evidence for the Respondent. The Claimant had had several months in which to arrange to receive the vaccine by August 2021. Given that the deadline for vaccination of care sector workers to enable them to continue to work in Care homes (16 September 2021) was only about 2-3 weeks away at the time this discussion was taking place, the Tribunal found that the employer acted with good cause in refusing to allow the Claimant to retract the resignation. The Tribunal considered that the employer had little alternative, given that there was no real evidence that the Claimant had changed her mind on vaccination. As Ms. Daley explained in cross-examination, all the Respondent’s managers were focussed on attempting to ensure that all staff were vaccinated, to keep people safe. This was what the Government, the Respondent and professionals were telling them to do.
117. The third reason was that the occupancy level at the Home was relatively low, at 47.3% at 9 September 2021 (see p742), with only 41 admissions over two years, leading to wage costs outstripping income. In short, the Home was unprofitable. The Tribunal took into account that the Covid pandemic no doubt had a negative

effect on occupancy levels for a period of time, but found that the Respondent was likely to have taken this into account in deciding that the occupancy level was relatively low in September 2021.

118. On or about 26 August 2021, the Home Manager role at Hornchurch Home began to be advertised. It was unfortunate that the Claimant learned of this by message from another employee at the Home before she returned to work after sickness absence. However, the Tribunal found that the Respondent needed to start the recruitment process shortly after the decision not to allow the Claimant to retract her resignation was taken. This was because the Respondent was concerned that the Claimant, for whom it had received a reference request from a prospective employer, might leave before the end of the notice period; and the recruitment of a new Home Manager was not a quick process. The Respondent needed both to allow time to advertise the role and further time to consider the credibility and suitability of candidates who applied, because they had to pass the CQC registration process as well as satisfy the Respondent's requirements for the role. Legal responsibility for the Home would ultimately rest with the Home Manager and the Director of Compliance
119. The Claimant returned to work on about 31 August 2021. She alleged in her Claim that Ms. Daley belittled her in front of colleagues during a conference call that day. We preferred the evidence of Ms. Daley on this issue, which was clear and explained events in detail, and she candidly accepted what was said at p.604. We found that an employee had joined Area 4 from another Area of the Respondent's business; he was introduced on the conference call, and managers in Area 4 were invited by Ms. Daley to introduce themselves. However, the employee had worked with the Claimant prior to the Home becoming part of Area 4. Ms. Daley did not dismiss the Claimant, but there was no need for the Claimant to introduce herself or the Home to this employee; therefore, Ms. Daley said that the employee knew about the Claimant, and passed on to the next manager. Ms Daley asked Ms. Emery-King to share relevant information about Mornington Hall, probably because that home was due to be sold. Furthermore, it is likely that the Claimant's evidence about this meeting is tainted by her memory reconstructing events, and that her perception now is not what happened at the time, evidenced by the fact that there is no mention of the alleged belittling call in the time line of her Claim at p.35.
120. On 2 September 2021, the Claimant had a meeting with Julie-Ann, from the HR department, and Ms. Daley. The transcript of this meeting is at p.1068ff. The meeting began with a discussion of the Claimant's recent absence with Covid. The main purpose of the meeting, however, was to examine the Claimant's Covid vaccination status, and what her plans were in respect of vaccination. The transcript showed that the Claimant informed the meeting that she had recently been told that she had Lupus, and was going through some more tests; Ms. Daley admitted in cross-examination that she was mistaken in her statement that she did not learn of the Lupus until the meeting on 9 September 2021.
121. The Claimant was asked how long it would take for the test results to be produced. It was explained to the Claimant that the Respondent needed something from her GP or hospital doctor to confirm if she was exempt for one of the three potential reasons explained to her. Those present in the meeting acknowledged that the Claimant was concerned about her health and scared about receiving the vaccine.

The transcript demonstrated that the Claimant was not prepared to receive the Covid vaccine at that time, albeit that the Claimant stated that she would like to have the vaccine, and that she was seeking medical clarification as to when she could have it. Julie-Ann referred her to government guidance about the vaccine.

122. The Tribunal found that there was nothing insensitive about this meeting. On the contrary, the transcript demonstrated that those present accepted that the Claimant was scared of receiving the vaccine and sought to re-assure her, including by reference to then current guidance.
123. In addition, this could not have been an unexpected meeting. The Claimant was a Home manager and she had not been vaccinated despite the proximity of the deadline of 16 September 2021. Moreover, she had just returned to work; so a return to work meeting to discuss her sickness absence and likely attendance was inevitable.
124. Ms. Daley did not raise the issue of a risk assessment with the Claimant at that meeting. Subsequently, Ms. Daley asked whether the Claimant had completed a vulnerable person risk assessment. The Claimant did not provide such a risk assessment. This risk assessment could have been generated by the Claimant logging onto the employees' portal, "My View", and completing the pre-risk assessment, which would have generated an alert for a full risk assessment.
125. The Claimant then took outstanding annual leave on 3rd September and returned to work on 8th September 2021.
126. The first opportunity that Ms. Daley had to discuss with the Claimant her resignation and request to retract was in a meeting arranged for this purpose on 9 September 2021. At that meeting, the Claimant stated that one reason for her resignation was the letter regarding vaccinations from Head Office (at p472); secondly that the nurses were difficult to manage and she needed fewer nurses; and also that she considered that Ms. Emery-King was being lined up as manager of the Home. The Claimant stated that she did not have further information from her GP but understood that she did not fall within the three categories of exemption. The Claimant did not suggest that the decision was linked to her alleged disabilities.
127. Ms. Daley and Mr. Fisher discussed the resignation and explained why the Respondent would not agree to it being retracted, giving the reasons explained at paragraphs 114-117 above. Also, by this stage, Ms. Daley had already completed a job reference for the Claimant in respect of a new job application.
128. The Claimant has complained that Ms. Daley discussed her resignation with senior management before this meeting. The Tribunal concluded that Ms. Daley had to do so, because it was not her decision whether the resignation could be retracted. By doing so, this had no effect on the relationship of trust and confidence between the employer and employee.
129. In addition, the Claimant complained that this meeting was insensitive. The Tribunal found that there was no reliable evidence to explain this allegation nor why the conduct at the meeting was insensitive. The Tribunal accepted the evidence of Ms. Daley in this respect. There was no need for an agenda, because the parties knew

the purpose of the meeting. The Claimant did not have a right to representation at the meeting, because it was not a formal meeting, and representation was not necessary, because she was not facing any disciplinary charges nor pursuing a grievance.

130. A further meeting took place on 14 September 2021 (not on 13 September 2021, as the Claimant alleged: see the Teams invitation at p690). The main reason for the meeting was to discuss the medical evidence required with the upcoming deadline for the first dose of the vaccination being 16 September 2021, evidenced by the transcript of covert recording of the meeting (p.699-711).
131. The Tribunal found that the Claimant had nothing to prepare for this meeting. There was no need, nor any point, in Ms. Daley sending an agenda. Ms. Daley was awaiting some medical evidence from the Claimant's GP, which was not provided.
132. At the meeting, the Claimant wished to discuss the decision not to agree to the resignation being retracted. It was explained that the reasons for this were being put into a letter for her. The transcript of the meeting (p.699-711) shows that the meeting also discussed that the Claimant may be placed on gardening leave.
133. After 14 September, the Claimant was absent sick. The Fit Note from the GP signed her off from 21 September to 5 October 2021, stating "stress at work".
134. The Claimant was placed on gardening leave from 23 September 2021 until the termination of her employment. There was no complaint about this from the Claimant; and the inference from the letter of 23 September 2021 is that the contract of employment permitted the Respondent to place an employee on garden leave.

Causation of the Claimant's resignation

135. The Tribunal found that the main reason for the Claimant's resignation was the mandatory requirement that she should receive the Covid vaccination in order to continue working in the Home. The resignation letter demonstrated that the Claimant's perception was that this was a requirement of the Respondent; but statute had made it a condition of the employment of care workers that they had to receive the Covid vaccine.
136. The Tribunal inferred from all the facts that the Claimant was not intending to receive the Covid vaccination at all at the time of her decision to resign. This can be inferred from the fact that she had had weeks of notice that this was necessary for staff at the Home; and, even by the date of the Tribunal hearing, she had not had the vaccination. Moreover, her oral evidence that she would have had the vaccination was unreliable and after the event rationalisation. This was demonstrated by part of her oral evidence, where she stated that the vaccination was against everything she stood for. Moreover, the Claimant's evidence in the meeting of 9 September 2021, that the Respondent's template letter at p.472 was one cause of the decision to resign, was unlikely to be correct, because it is dated 12 August 2021, one day after the Claimant's resignation.
137. The Claimant's approach, by inference from the resignation letter and the transcripts, was that the statutory requirement of vaccination was a matter of

negotiation, and that her recently diagnosed Lupus and bowel cancer investigations were sufficient to mitigate the legal requirement. This perception was mistaken. For the Respondent, there was no alternative; all staff had to have the vaccine save in certain narrow circumstances where the law provided for exemptions (such as where there was a medical exemption).

138. The Tribunal also found that the next most significant reason that the Claimant resigned was because she had obtained another job. The Claimant had applied for another job in July 2021. She was interviewed between 13-17 July 2021. The new employer sought a reference for her from the Respondent. The inference from her oral evidence was that she received a job offer prior to her resignation; she stated that it was only when the Respondent refused to allow her to withdraw her resignation that she accepted the job offer. The Claimant began the new job in November 2021, after her gardening leave ended.
139. The third and least significant of the reasons for her resignation was that the Claimant perceived that she had received insufficient support to assist her to move to the "Nursing Assistant" model, which would reduce the number of registered nurses working at the Home, and which would reduce the wage bill at the Home. This would result in increased profitability for the Home. As we have explained, the Claimant's perception of inadequate support on this issue was mistaken.
140. The Tribunal found that, save as set out above, as a matter of fact, the allegations listed at issues 1.1 to 1.4 and 4.1 to 4.9 had nothing to do with the decision to resign. In particular, it was not possible for the allegations at 1.3, 1.4, 4.6, 4.7, 4.8 and 4.9 to have caused the decision to resign, because they post-dated the date on which the resignation letter was sent.
141. Furthermore, the fact that the Claimant wished to retract her resignation a few days after she sent the resignation letter is contrary to her evidence that the allegations listed at issues 1 and 4 amounted to a course of conduct which amounted to a repudiatory breach of the implied term of mutual trust and confidence. This inconsistency leads to the inference that the Respondent did not breach the implied term of mutual trust and confidence and tends to corroborate the findings of the Tribunal in respect of causation of the resignation.

The Law

142. The relevant law is set out in Appendix 1 to this set of Reasons, to which the Tribunal directed itself.

Submissions

143. The Tribunal heard oral submissions from the Respondent. The Tribunal heard oral submissions by the Claimant. The case was adjourned to 0930 on 6 October 2021, by which time the Claimant had helpfully filed the remainder of her submissions in writing. The Respondent made very little response to those submissions, adding some tracked changes, some of which were for clarification of what the Claimant had meant.

144. The Tribunal took into account each and every submission of the parties. It is not necessary for the Tribunal to address all of them in this set of Reasons. In particular, the Tribunal noted that the Claimant's submissions did not address directly the list of issues in a sequential or ordered way. We do not blame her for this because she is a litigant in person, but it tended to lead to submissions being of limited or no relevance to the issues between the parties. We accept that the Claimant felt so strongly about her case that she found it difficult to focus on the relevant issues.

Conclusions

145. Applying the law to the facts set out above, the Tribunal reached the following conclusions on the issues for determination.

Issues 1-10: Constructive unfair dismissal

146. The Tribunal concluded that the Claimant did not resign for any of the matters alleged in issues 1.1 – 1.4 and 4.1 to 4.9, save that a minor cause of the resignation was the Claimant's perception of lack of support in respect of the Claimant's plan to reduce the number of registered nurses at the Home. However, the Claimant's perception on this matter was mistaken as a matter of fact.
147. The Tribunal concluded that the main causes of the resignation were the looming deadline by which the Claimant and other care workers had to receive the first Covid vaccination and her new job offer.
148. In any event, the Tribunal concluded that the Claimant did not prove the allegations at issues 1.1 and 1.2 nor at issues 4.1 to 4.9 for the reasons set out in our findings of fact.
149. The complaint of unfair dismissal fails and is dismissed.
150. For the avoidance of doubt, having seen and heard the Claimant give evidence and considered all the material on the causation of her decision to resign, the Tribunal concluded that the Claimant would not have received the Covid vaccination by 16 September 2021, or any later date. This is evidenced by her oral evidence and the fact that she has not been vaccinated to date. This would inevitably have led to her dismissal at or before the date that her gardening leave ended.
151. Had it been necessary to do so, the Tribunal would have assessed that there should be a *Polkey* deduction of 100% of the compensatory award.

Issues 18-19 Direct Discrimination

152. The Claimant's case alleged that she was not appointed to the SHM role in July 2021 because of her disability (Lupus or EDS). The findings of fact show that Ms. Daley and Mr. Ilesanmi could not have known of her disabilities at the time that Ms. Emery-King was appointed as SHM. In particular, on the Claimant's own evidence, she did not tell Ms. Daley of the Lupus diagnosis until 21-28 June 2021; and the email at p.258 shows that the appointment as SHM of Ms. Emery-King was confirmed on 1 June 2021.

153. The complaint of disability discrimination is dismissed.

Issues 15-17: Knowledge of the disabilities of Lupus and EDS

154. The Tribunal concluded that the employer did not know and could not reasonably have been expected to know that the Claimant had EDS during her employment.

155. The Tribunal concluded that the Respondent did not know and could not reasonably have been expected to know that the Claimant had Lupus until this was disclosed in the meeting on 2 September 2021 with Ms Daley and the HR consultant. By this date, the Claimant had already resigned and the decision had been made not to retract the resignation.

156. Moreover, if the Tribunal are mistaken about the findings in respect of knowledge of the disability, we concluded that the Respondent could not have known and could not reasonably be expected to know that the Claimant was, or was likely to be, placed at a substantial disadvantage by the PCPs alleged.

Issues 20-26: Indirect discrimination

157. The Claimant did not address the Tribunal on how the indirect discrimination complaint could succeed.

158. In any event, the Tribunal has found as a fact that the alleged PCP – heavy workload requirement to redeploy nurses in July 2021 – did not exist.

159. If the Tribunal is wrong about this, there was no evidence that such a PCP would place the Claimant at particular disadvantage when compared with non-disabled persons, so this complaint must fail.

Issues 27-31: Duty to make reasonable adjustments

160. The Tribunal concluded that the duty to make reasonable adjustments was not engaged.

161. The Claimant did not prove the alleged PCP of lack of notice of meetings, or lack of an agenda. Moreover, she failed to prove that the alleged PCP put the Claimant at any disadvantage. Adjustments at 30.1 and 30.2 related to the alleged autism. Therefore, advance notice of meetings and the alleged requirement for written communication were not reasonable adjustments in the circumstances of this case.

162. The allegation that the PCP of the working hours and arrangements required by the Respondent put the Claimant at a substantial disadvantage is not proved. The evidence showed that the Claimant did take time off for medical appointment; Ms. Daley had not been made aware of these, and did not prevent any taking place.

163. In any event, in respect of this second PCP, the Tribunal must consider what adjustment(s) was reasonable in the circumstances. At the time that the Respondent learned that the Claimant had Lupus, she had already resigned; and the Claimant sought no adjustments nor gave information which indicated that she

was likely to be placed at a substantial disadvantage by any PCP, whether by prompting a risk assessment or otherwise.

164. In any event, after disclosing that she had Lupus (but without providing any information about symptoms or effect), the Claimant was then absent from work on leave and, at the next meeting on 9 September 2021, the Claimant did not provide any medical evidence. After the meeting on 14 September 2021, the Claimant was absent sick, until placed on gardening leave on 23 September 2021. In those circumstances, it was reasonable for the Respondent to make no inquiries about her Lupus diagnosis or her symptoms after 2 September 2021.
165. Moreover, the argument that a reasonable adjustment in respect of this PCP was further toilet and rest breaks is inconsistent with the evidence that the Claimant was a Home Manager. The adjustment was not required to remove the alleged disadvantage - and so was not reasonable - because she could take breaks at her discretion.
166. The complaints under sections 20-21 EQA fail and are dismissed.

Issues 39-42: Harassment

167. Each complaint of unwanted conduct set out at 39.1 – 39.2 to 39.4 - 39.8 has not been proved to have happened as a matter of fact, as shown in our findings of fact. In particular, the Tribunal concluded that there was no favouritism shown to Ms. Emery-King.
168. Although it was not raised as a complaint in the list of issues, the Claimant raised during the hearing that there was a conflict of interest with Ms. Emery-King. The Tribunal concluded that there was no conflict of interest involving Ms. Emery-King; family members of staff members were allowed to be admitted to the Respondent's care homes, and there was an incentive scheme for staff to introduce family and friends as residents.
169. In respect of issue 39.3, the meeting with the Managing Director on 27 July 2021 was unplanned. However, there was nothing for the Claimant to prepare for; and unplanned visits by the MD were features of the Respondent's business. The Tribunal concluded that the visit was not related the Claimant's disabilities. Moreover, the visit was not unwanted; but even if it was unwanted, it did not have the proscribed effect.
170. The harassment complaints fail and are dismissed.

Issues 43 – 46: Victimisation

171. In respect of the alleged protected act at issue 43, the Tribunal concluded that there was no such protected act. The Tribunal found no evidence of any protected act.
172. Furthermore, the Tribunal repeats paragraphs 167 to 169 above in respect the matters alleged at issues 44.1 to 44.8.
173. The victimisation complaints must fail and are dismissed.

Summary

23. The Tribunal has concluded that all the complaints fail and the Claim must be dismissed.
24. We would like to express our thanks to the Claimant, Ms. Prince and Mr. Irving for the courteous and helpful way in which the cases were presented. We are acutely aware of the emotions that a final hearing create in the parties and witnesses. We are grateful to the parties for the moderation of their approach at this hearing and in their submissions. Ms. Prince, as she acknowledged, had no advocacy training, but she ably managed to put the Claimant's case in cross-examination. The Claimant herself provided concise submissions in writing, and in time, when directed to do so. Mr. Irving co-operated with the Claimant and the Tribunal; and in doing so, the Respondent did further the overriding objective, which the Tribunal recognised.

APPENDIX 1 **LEGAL FRAMEWORK**

Save where stated, all section references below refer to the Equality Act 2010.

Constructive Dismissal

1. Section 95(1)(c) Employment Rights Act 1996 provides that there is a dismissal when the employee terminates the contract with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.
2. In constructive dismissal cases, the burden was on the employee to prove the following:
 - i. That there was a fundamental breach of contract on the part of the employer;
 - ii. That the employer's breach caused the employee to resign;
 - iii. The employee did not affirm the contract and lose the right to resign and claim constructive dismissal.
3. The propositions of law which can be derived from the authorities concerning constructive unfair dismissal are as follows:
 - 3.1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: see *Western Excavation Limited v Sharp*.
 - 3.2. It is an implied term of any contract of employment 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 trust and confidence between employer and employee: see *Malik v Bank of Credit and Commerce International* [1998] AC20 34h-35d and 45c-46e.

- 3.3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, Browne-Wilkinson J in *Woods v Wm Car services (Peterborough) Limited* [1981] ICR 666 at 672a; *Morrow v Safeway Stores* [2002] IRLR 9. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.
 - 3.4. The test of whether there has been a breach of the implied term of trust and confidence is objective as Lord Nicholls said in *Malik* at page 35c. The conduct relied as constituting the breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.
 - 3.5. A breach occurs when the proscribed conduct takes place: see *Malik*.
 - 3.6. Reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach; but it is not a legal requirement: see *Bournemouth University v Buckland* [2010] ICR 908 at para 28.
 - 3.7. In terms of causation, the Claimant must show that she resigned in response to this breach, not for some other reason. But the breach need only be an effective cause, not the sole or primary cause, of the resignation.
4. We note that a breach of trust and confidence has two limbs:
 - 4.1. the employer must have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee; and
 - 4.2. that there be no reasonable or proper cause for the conduct.

Reasonableness: s.98(4) Employment Rights Act 1996

5. In determining whether a constructive dismissal was unfair, it is for the employer to show that the reason for the dismissal is a potentially fair reason within s.98 Employment Rights Act 1996. (In this case, the Respondents accepted that if a constructive dismissal was proved, it would be an unfair dismissal.)

Direct Discrimination

6. The Tribunal directed itself to Section 13, which contains the definition of direct discrimination. When considering the question of the appropriate comparator, we also considered section 23(1):
“*On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.*”

“*Because of*”
7. The Tribunal must look to determine the causation of the treatment – by asking the “reason why” question. But the Tribunal does not need to go further and decide

whether the reason for the treatment was a deliberate intention to discriminate. Discrimination may be unconsciously carried out: see R(E) v Governing Body of JFS and the Admissions Panel of JFS [2010] IRLR 136 at paragraph 62 - 65 per Lady Hale. The motive or intention of the putative discriminator is irrelevant.

8. In the JFS case, at paragraph 63, Lady Hale applied the following passage in the judgment of Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572:

“in every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator.”

Indirect discrimination

9. Section 19 EQA defines indirect discrimination. The Tribunal directed itself to the statutory test.

Breach of the duty to make reasonable adjustments

The Knowledge requirements

10. Paragraph 20 of Schedule 8 EA 2010 provides a limitation on the duty where the Respondent lacks the requisite knowledge:

“20. Lack of knowledge of disability, etc.

- (1) *A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –*
- (a) *in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;*
- (b) *[in any case referred to in [Part 2](#) of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.”*

11. At Paragraph 5.13ff, the EHRC Code of Practice provides as follows:

It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a ‘disabled person’.

The nature of the duty

12. The duty to make reasonable adjustments is set out in sections 20-21 EQA.
13. Paragraphs 6.23 to 6.29 of the Code give guidance as to what is meant by “reasonable steps”. 6.23 provides:
- “The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.”*
14. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. These include:
- *“whether taking any particular steps would be effective in preventing the substantial disadvantage;*
 - *... “*
15. Ultimately, the test of the ‘reasonableness’ of any step an employer may have to take is an objective one and will depend on the circumstances of the case: see paragraph 6.29.
16. Substantial disadvantage is such disadvantage as is more than minor or trivial.

Section 26 EQA: Harassment

17. Section 26 provides, where relevant:
- “(1) A person (A) harasses another (B) if—*
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and*
- (b) the conduct has the purpose or effect of—*
- (i) violating B’s dignity, or*
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
- (2) A also harasses B if—*
- (a) A engages in unwanted conduct of a sexual nature, and*
- (b) the conduct has the purpose or effect referred to in subsection (1)(b).*
- (3) A also harasses B if—*
- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,*
- (b) the conduct has the purpose or effect referred to in subsection (1)(b), and*
- (c) because of B’s rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.*

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.”

“Related to”

18. The question of whether unwanted treatment ‘relates to’ a protected characteristic is to be tested applying the statutory language without any gloss Timothy James Consulting Ltd v Wilton UKEAT/0082/14/DXA. In Bakkali v Greater Manchester Buses (South) Ltd [2018] IRLR 906, EAT Slade J held that the revised definition of harassment in the Equality Act 2010 enlarged the definition:

‘In my judgment the change in the wording of the statutory prohibition of harassment from ‘unwanted conduct on grounds of race ...’ in the Race Relations Act 1976 s 3A to ‘unwanted conduct related to a relevant protected characteristic’ affects the test to be applied. Paragraph 7.9 of the Code of Practice on the Equality Act 2010 encapsulates the change. Conduct can be ‘related to’ a relevant characteristic even if it is not ‘because of’ that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, ‘related to’ such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. As Mr Ciumei QC submitted ‘the mental processes’ of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the Claimant.’

19. The need for a tribunal to take a rigorous approach to the question of whether conduct related to a protected characteristic was recently emphasised in Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, EAT:

‘The broad nature of the ‘related to’ concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual’s conduct was related to the characteristic in question. Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the tribunal which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the tribunal may consider it to be.’

Victimisation

20. Section 27 provides, where relevant:

“A person (A) victimises another person (B) if A subjects B to a detriment because –

- (a) B does a protected act, or*
- (b) A believes that B has done, or may do, a protected act.*
- (2) Each of the following is a protected act –*
 - (a) bringing proceedings under this Act;*
 - (b) giving evidence or information in connection with proceedings under this Act;*
 - (c) doing any other thing for the purposes of or in connection with this Act;*
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.”*

21. The detriment must be “because of” the protected act, but this is not a “but for” test: see *Bailey v Chief Constable of Greater Manchester* [2017] EWCA Civ 425. Although motivation is not required, the necessary link in the mind of the discriminator between the doing of the acts and the less favourable treatment must be shown to exist: see *R (E) v Governing Body of MR. FRIENDS* [2009] 1 AER 319, approving *Nagarajan v London Regional Transport* [1999] IRLR 572 on this point.

The Burden of Proof Provisions

22. In the event, although the Tribunal considered section 136 EQA, it did not find it necessary to apply it in this case, where positive findings of fact have been made which did not depend on whether the burden of proof had shifted or whether the Respondent had then managed to discharge it.

Employment Judge A Ross
Dated: 31 October 2023