



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss L Subramaniam

**Respondent:** Autism at Kingswood

**Heard at:** Bury St Edmunds (by CVP)

**On:** 20,21,22 September 2023 and 10 November 2023 in chambers

**Before:** Employment Judge Skehan, Ms Davies and Mr Vaghela

## Appearances

For the claimant: In person

For the respondents: Mr Pickett, counsel.

## RESERVED JUDGMENT

- 1) The claimant's claims of direct race discrimination and victimisation against the respondent are unsuccessful and dismissed.
- 2) The remedy hearing listed for 15 January 2024 is vacated.

## REASONS

- 1) The hearing was heard by video over 3 days. At the commencement of the hearing it was apparent that the parties had not prepared as the tribunal would have expected. We make no criticism of Mr Pickett, but there had been an obvious failure to prepare on the part of the claimant and the respondent's solicitors. In line with the overriding objective to deal with this matter fairly and justly, the tribunal took a practical approach to assist the parties to salvage their trial window. The first day was spent on case management issues.
- 2) The tribunal revisited the list of issues set out by EJ Gumbiti-Zimuto. The importance of the list of issues was explained to the parties. The claimant submitted that this was a list compiled in her absence and did not contain all elements of her claim. The tribunal took time to revisit the claim form, that was in narrative form, to check whether other issues

could be identified. The tribunal identified that the claimant had provided further information in respect of allegations, as requested by EJ Gumbiti-Zimuto. This document was not contained within the bundle. Mr Pickett confirmed that it had been received by but overlooked by the respondent in error. The respondent, once the paperwork was clear, took a pragmatic approach and agreed that the list should be amended as requested by the claimant and the matter could proceed within the trial window. The list of issues was agreed.

- 3) The claimant had not prepared a witness statement in accordance with the directions. The claimant's attachment to her ET1 was long and in narrative form with unnumbered paragraphs. The claimant's further document mentioned above was also long and in narrative form with unnumbered paragraphs. There was a third document, prepared by the claimant, contained within the bundle that was in long narrative form with unnumbered paragraphs. The tribunal was not minded to grant the respondent's request to strike out the claimant's claim for failure to comply with the directions, as we considered that a fair hearing could still be conducted within the trial window. Following discussion with the parties, it was agreed that the claimant would prepare one composite document, with page numbers and numbered paragraphs, that presented her complete evidence to the tribunal. The claimant was permitted to add further evidence relevant to the list of issues to this statement. The claimant forwarded this completed statement to Mr Pickett at the end of day 1, providing him with a reasonable opportunity to amend his cross examination as required. It was expected that we would start with the claimant's evidence at 10am on day 2 of this hearing.
- 4) On day 2 of the hearing, both parties provided substantial amounts of further disclosure said to be relevant to the matters to be decided. A further bundle of documentation was provided causing further delay to our timetable. We also encountered some technical difficulties, that were overcome with assistance from the participants concerned, but again caused delay to the tribunal timetable. The above matters necessitated our further deliberation day. The matter proceeded and the tribunal was satisfied that all parties could properly participate within the video hearing and the hearing was carried out in accordance with the overriding objective to deal with matters fairly and justly.

### **The Facts**

- 5) As is not unusual in these cases, the parties have referred in evidence to a wider range of issues than we deal with in our findings. Where we fail to deal with any issue raised by a party, or deal with it in the detail in which we heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance in determining the issues set out in the agreed list of issues. We only set out our principal findings of fact. We make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents. All witnesses gave evidence under oath or affirmation. Their witness statements were adopted and accepted as evidence-in-chief. All witnesses were cross-examined. We heard from the claimant on her own behalf. We also heard from Ms Saba and Mr Ncube on behalf of the claimant. We heard from Ms Asprey on behalf of the respondent.
- 6) The respondent is a charitable organisation that, by way of contract with the local authority, provides support for vulnerable service users who tend to have severe autism. The respondent provides multiple service users with an appropriate level of care to allow

them to have the best quality of life. Care is provided within supported living arrangements or within the user's own home. Uses are often provided with care on a 1:1 or 2:1 basis. The claimant was employed as a support worker on 17 February 2020. The claimant remained employed by the respondent at the date of the ET1.

- 7) The claimant's contract of employment includes the following relevant provisions:
  - a. Place of work: Aylesbury area. However, it is a requirement of the role to be prepared to work at other locations from time to time as deemed necessary by the respondent to meet the needs of the people supported and fulfil contracted hours.
  - b. Probationary period: There is a standard probationary period clause reflecting a probationary period of six months
  - c. working hours: 24 hours per week, to be worked in accordance with the rota, notified on a weekly basis, and will usually involve, night and weekend shifts..... Contracted working hours may be averaged over the monthly pay period.
- 8) The general managerial structure within the respondent was care assistant (the claimant's role), senior care assistant, line manager and area manager. Ms Michie was the claimant's area manager working on a peripatetic basis. The claimant initially reported to her line manager Miss Keira Wilson, whom the claimant held in high regard. The claimant complains that she had a fraught relationship with Ms Michie from the beginning of her employment. Her witness statement explains that she did not know Ms Michie but that Ms Michie's email correspondence tended to ignore her requests.
- 9) On 23 April 2020 the claimant sent a message to Ms Michie apologising for missing training on 22 April 2020. This email explains that the claimant had overslept and didn't wish to bring more attention to her situation, she didn't try to call or sort it out or even just let somebody know. She acknowledges that a lot of effort was put into fitting her in for training and not attending was careless. Ms Michie responds, 'Hi, thanks for email. It was just so disappointing to hear when Keira said that you were doing so well!! Let's make sure that we move forward and this doesn't happen again.'
- 10) During the claimant's probationary period, there were aspects of the claimant's role that she performed well from the outset, however there were aspects where the claimant was criticized by Ms Wilson. A probation review was carried out by Ms Wilson and the probationary review form dated 13 May 2020 is included within the bundle. The claimant conceded that her performance within her role at that time was not good and she needed to improve. The claimant's probation was extended by one month following the probationary review and the claimant subsequently passed her probation period. The probation review form reflects that the claimant has made a positive start and some areas and praises the claimant. It also notes areas of required improvement including frequent lateness and missed shifts.
- 11) The claimant expressly referred the tribunal to this probationary review written by Ms Wilson as an example of good management style on Ms Wilson's part. The claimant told

us that she accepted that her timekeeping had been poor and she had missed training due to oversleeping, and Ms Wilson had managed her well and helped her to improve.

- 12) On 27 May 2020, Ms Michie had a conversation with the claimant discussing matters that had been raised by other members of staff. This conversation was recorded in a short file note that said:

Discussed with [the claimant] issues raised from staff meeting – no bedsheet, incident Friday morning and no butter.

[The claimant] said that it was her fault about the butter and she had forgotten to ask someone coming on shift to bring it in, however it was nearly empty when she came on shift anyway

[the claimant] said that there was a bedsheet on the bed when [service user] went to bed on Monday so not sure what happened after this.

[The claimant] said that there was an incident on Friday but she did not complete the paperwork to report it as she was not hurt. Anna clarify that all incidents need to be documented and recorded.

- 13) The claimant accepts that she did not attend work for her shift in accordance with the rota on 10 June 2020 as she had misread the rota.

- 14) The claimant complains about a lack of work in July 2020. The claimant accepted that her allegation that she was left without work for a period of about four weeks is incorrect. The period when the claimant did not have work in July 2020 was approximately three weeks and those weeks were not consecutive. The claimant complained about her lack of work to Ms Michie orally. The claimant sent an email to Ms Michie's line manager, Ms Skogund, on 7 July 2020 raising the following issues:

- a. the claimant is often not provided with her contractual hours and required to take annual leave and states, '... I know that some situations are out of anyone's control. It is the company's responsibility to hold up their end of the contract....'
- b. The claimant raises issues as to the internal operations of the respondent and states, '... With [service user A] been taken to a mental health facility and [service user B] leaving other the end of the month am really struggling to see how all of the staff are going to meet their hours
- c. the claimant notes that there have been occasions where other staff have been largely over their hours while the claimant was not meeting her 24hr contract she says, '...I feel that there is an unfair distribution of hours...'
- d. The claimant says that she was led to believe when she started that she would work more in Aylesbury rather than high Wycombe, and stressed the personal cost to her of working in high Wycombe.
- e. The claimant ends her email by stating that, '... I understand that there's been lots of changes going on recently and the company has had to adapt which is probably putting a lot of pressure on management which we support workers may not see. This is why I am happy to help in anyway I can to resolve this issue...'

- 15) Ms Skoglund responded to the claimant copying in Ms Michie and Ms Wilson to address the claimant's email. Ms Michie responded on 8 July 2020:

- a. querying why the email had been sent to Ms Skoglund
  - b. noting she was looking at the rota, but the claimant should be meeting her contracted hours
  - c. noting the service user requirements that were outside her control and that the claimant had missed shifts due to not reading her emails or the rota correctly.
  - d. confirming to the claimant that her options were to take annual leave or let Ms Michie know which services the claimant is willing to travel to. The claimant was also reminded to complete all outstanding e-learning work as soon as possible.
- 16) There is text correspondence within the bundle between the claimant and Ms Michie that the claimant agrees can be described as rude on her part. In mitigation the claimant said that she was stressed when sending the messages. The messages include:
- a. From claimant : ‘...it is you who is doing the rota atm. I wouldn’t have to work back-to-back if I had my contracted hours last week and the week before that. I checked the shifts you offered and there was none I could pick up hence why I am saying that I am bending over backwards to meet my contracted hours. And I am the only one that is under hours because you gave my shifts to other staff. You need to stop shifting the blame every time I bring you an issue. If I’m saying something isn’t working do your job and fix it or at least investigated instead of dismissing it...’
  - b. From Ms Michie: wow! Just wow!! I’m not even going to respond to you with that attitude. Please let me know which of your shifts were given away I will get them back for you as I am not aware of any...’
  - c. From claimant: ‘I understand that you may be offended because you’re my manager and your older than me but this is the reality. You can’t keep excusing things that were not doing by using me as a scapegoat...’
  - d. From Ms Michie: ‘.....[Confirmation of shifts] .. I am not responding to you by text any more until you can address me respectfully as I do you...’
- 17) There is an email in the bundle from the claimant to Ms Michie dated 11 November 2020, in response to receiving the rota from Ms Michie on 10 November 2020. The claimant states that it is it is very important that her shifts are spread out. She notes that she is working four days in the first week and 1 day in the last week. The claimant explains that she had deadlines for University and University obligations. The claimant adds that she has observed other staff been given priority on more than one occasion with some staff working only in certain places and bank staff being assigned shifts before permanent staff. The claimant states that she is reliable and, ..’ I have worked on my punctuality and if anyone is still complaining about me, I have a long list of things other staff could be doing better. Which is why I would really appreciate it if my need to have regular hours and get first pick of OT be considered equally. My ideal solution would be set shifts on alternating weeks ...’
- 18) Ms Michie responded on 12 November 2020 confirming that if there are particular shifts that the claimant is unable to do she should let her know. No staff take priority and Ms Michie is trying to work out the rota fairly. Ms Michie states that the claimant cannot request set patterns and notes that the claimant has previously said she cannot work Thursdays and Fridays and Ms Michie has not put her on the rota for those days. Ms Michie states that she does appreciate that the claimant picks up work when she can

which is great, but Ms Michie can only do her best. The claimant is requested to look at the shifts and pick up from the needed what the claimant wants.

- 19) The claimant concedes that there were service users that she did not wish to work with and says, 'I didn't pursue shifts with CB as I was worried that after being inducted I would always have to work with CB or more than the average or occasional shift.'
- 20) On 23 January 2021, there was a case of Covid within one of the respondent's premises. The claimant's colleague Daryl, requested not to work on that site due to a vulnerable family member. The claimant was requested and agreed to undertake shifts at this site. The claimant was not permitted to work in other sites for a time after this shift and it was explained to her that Ms Michie did not wish to cross contaminate those sites. The claimant believes that she lost approximately 10 hours overtime due to this situation and complains that Ms Michie did not make sufficient efforts to provide her with this overtime. The claimant complains, 'AM went on to say that she could only give me what she had at the time (implying that she had no hours to give me), that she would keep me updated and that I wasn't under hours, which wasn't my concern and therefore made me feel like she was completely disregarding my wishes. I asked if I could swap shifts with the staff covering my shift, and AM replied that she couldn't. She then said that my shifts were being covered by staff that have not been at [contaminated site]..... She said that she was doing the best she could in this situation as if to guilt me for the situation being supposedly out of her control and once again reminded me that I wouldn't be under hours...'
- 21) The list of issues refers to an email sent by Ms Michie raising issues of cleanliness with members of staff (2 November 2020). There was no evidence at all before the tribunal in relation to this incident.
- 22) Mr Ncube told the tribunal that when he commenced work with the respondent as the claimant's line manager in December 2020, he was told by Ms Michie that the claimant was 'trouble' and 'one to watch'. Ms Michie elaborated that the claimant was often late, cancelled shifts at the last minute, didn't turn up for shifts, she wasn't a team player and did not listen to staff. Mr Ncube told us that Ms Michie made similar comments in respect of the claimant's colleagues including David and Daryl. Mr Ncube notes that he never met Ms Michie in person.
- 23) We note Mr Ncube's evidence that Laura expressed preferences in relation to service users she wished to work with, that caused her to be difficult to manage. Ms Michie told Mr Ncube that he was being too harsh on Laura and said that Laura had been with the company longer than anyone else and understood the needs of the service better than anyone else. Mr Ncube notes that Ms Michie undertook the rota herself because she knew which staff were strong and where they were strong. She suggested that that was not Mr Ncube's strength. He said that Ms Michie made changes to one rota template that he had completed on the basis that certain staff were better suited to work with certain users.
- 24) On 3 December 2020 the claimant had a 'supervision' meeting with Ms Michie. There is a record of this in the bundle. This records:

- a. The claimant had two probationary review meetings with Kiera Wilson and her probation had been extended until September 2020. The claimant was due a meeting in October, but Kiera was off sick.... The claimant has now passed her probation.
  - b. Punctuality is now better, can be early, in a better routine.
  - c. Texts can be rude and unprofessional- claimant explains that she has complained about the same issues and is faced with an argument as to why her concerns are not valid which the claimant believes is unprofessional and wishes they would be considered fairly rather than dismissed, this causes the claimant frustration. By asking Ms Michie to do her job the claimant asks her to stop making excuses as to why something can't be done and actually consider the claimant's suggestions. The claimant feels that her problems are deflected back to her.
  - d. The claimant understands this Michie has a lot on her plate specifically because she shared, after the claimant told her to do her job, that Ms Michie wishes all she had to do was her job but she is always faced with extra responsibilities. The claimant is receptive to this but doesn't want Ms Michie's workload to affect her ability to help the claimant with her concerns.
- 25) The claimant complains that, ' During the supervision, Anna interrupted me and didn't really allow me to openly discuss my concerns. She also didn't accurately depict what I was trying to convey, so I sent her some corrections to portray my side of the story more accurately (p73-75). I tried to be kind to Anna, and I was very receptive to the personal difficulties that she faced. Unfortunately, I was not able to resolve them. But this was not my responsibility, nor did it excuse Anna's behaviour towards me.
- 26) The claimant requested not to work with a specific service user, referred to as 'AV' within this judgment. No reason was given by the claimant initially for her reluctance. In December 2020 the claimant explained that this service user exhibited sexual behaviour that made her feel uncomfortable and she requested not to be placed on shift with them. There is email correspondence between the claimant and Ms Michie in the bundle reflecting the respondent's requirement to have adequate resources for this particular service user. This ends with an exchange on 22 December 2020 where Ms Michie explained that, 'I need to have as many staff inducted with [AV] as possible, even though you may not be working with him on a regular basis please otherwise it always falls to Sally as need reliable drivers to get there.... It won't be a regular thing but I would like you to go please'. The claimant responded, 'okay that's fine as long as I'm with a male.'
- 27) The claimant worked her shift on 8 February 2021 with AV and unfortunately she experienced problems. She sent an email to her then manager Mr Ncube stating that she was unwilling to work with AV again. The service user displayed inappropriate sexual conduct in a way that made the claimant feel vulnerable and unsafe. The claimant considered her male colleague to be incompetent in assisting her. The claimant's email records the incident and within her email she notes '... Sally didn't have a problem with it, which is great and I wish I felt the same so that I could do my fair share of his shifts but this is not the case. And quite frankly, the only people who support AV are Josh Nyasha and Sally so I don't understand why I'm being singled out...'

- 28) Following this email Ms Michie responded to the claimant noting that the incident with AV was at odds with the information the respondent had previously and stating, '*you are not being singled out at all – all staff need to be supporting [AV] - it will not just be male staff that go...*'. While the claimant was rotated to work with AV following this incident, she, following discussion with her manager Mr Ncube, did not undertake any further shift with AV. The claimant only worked on 8 February 2020 with AV.
- 29) The claimant says that Sally requested to be excused from working with a particular service user due to risk of physical aggression and this was accommodated by the respondent.
- 30) The claimant complains about Ms Michie's response to her idea relating dry wipes. This was an issue that was looked at in the claimant's appeal. The claimant says in her witness statement 'KA speaks about the email regarding RB's dry wipes and simply states that AM 'thanked me for my input', however, this does not reflect the situation at all. It's clear that AM was unhappy with my idea, she came up with reasons why it couldn't work and once she couldn't shut down my idea without seeming unreasonable, she replied 'ok' which is a very dry response not in line with her usual appreciation of staff's input.' The emails relating the dry wipe issues include the following text:
- a. Claimant to colleagues, copied to Ms Michie and Mr Ncube 21 February 2021 @ 15:40 relating to service user requirement: 'actually that reminds me, I was wondering if we could start getting some dry wipes for him...'
  - b. Ms Michie to claimant. 22 February 2021 @ 09.49 'that's a very good idea Lavanya, but we need to make sure that they are either flushable or the staff put into bin'.
  - c. Claimant to Ms Michie copied to all at 22 February 2021 @ 10.42 'they can go into the little bags.... That way we don't have to worry about blocking the toilet....'
  - d. Various comments from colleagues and the claimant with a 'ok' from Ms Michie on 22 February 2021 @ 12.11
  - e. Claimant to all 22 February 2021 @ 11.12 (time out of sync), 'Sounds good will follow all of that up
  - f. Ms Michie to claimant 22 February 2021 @ 11:12, 'Thanks Lavanya'
- 31) The bundle contains the record of a 'significant discussion' held between the claimant and Mr Ncube on 8 March 2021. This related to a complaint made by a user's mother two days previously, where a service user had chosen to stay in bed. The claimant was reminded to open curtains to facilitate a gentle awakening for the service user.
- 32) The claimant raised a formal grievance on 16 March 2021. The appeal was dealt with by Ms Estelle Christmas, the respondent's COO. The grievance relates to complains of being treated differently by Ms Michie by comparison to her colleagues in particular:
- a. a disparity in respect of hours with some team members working over 100 hours overtime whereas others did not meet their basic contracted hours,
  - b. the issue in respect of Covid 19, set out above,
  - c. Ms Michie's request that she work with AV,
  - d. That Ms Michie described her as 'bad staff' and was badmouthing her.



- e. The claimant accuses Miss Michie of bullying and believed this was due to racial discrimination. The claimant said that Ms Michie does not listen to her ideas
- 33) On 28 March 2021 the claimant had an incident with a colleague GG. The claimant washed her own service user's dishes but refused to wash the dishes she believed to be GG's responsibility. There was a disagreement between the colleagues in respect of the concept of teamwork with each considering that they have been intimidated by the other. The claimant later complained about GG's performance. Mr Ncube spoke to the claimant and told her that a service user complained because he didn't like the claimant because the claimant was rude to him. Further GG complained that she was anxious every time that she was on shift with the claimant and there were issues in respect of how the claimant gave medication. The claimant says that she was furious with these baseless complaints and felt her performance was being scrutinized.
- 34) On 29 March 2021 Ms Michie emailed the team asking whether the team had any ideas on how to improve. The claimant responded the same day suggesting a change in shift times. Ms Michie response, again on the same day to the claimant stating, 'I do see what you mean but that would mean applying for 1.5 extra on a Monday rather than just an additional hour for someone to pop in'. The claimant notes an email exchange you within the bundle relating to the provision of boardgames for service users that was enthusiastically adopted by Ms Michie.
- 35) The claimant's grievance was investigated. Ms Christmas met with the claimant and Ms Michie to discuss the allegations. By email dated 1 April 2021 the claimant was informed that, '...[Ms Michie] .acknowledged that she could have dealt with the issues you have in a more professional, supportive way which she had not realised the degree of your concerns and feels there may have been a total misunderstanding on her part. For reasons of confidentiality, it is not always possible to share all of the outcomes of an investigation would I would like to reassure you that the investigation found no evidence of racial discrimination which will hopefully alleviate your concerns....' The respondent suggested that a mediation program may be of assistance
- 36) The claimant notes that Shelley Benow commenced as a new Support Team Coordinator on 12 April 2021. She was described as 'tough but fair' by Ms Michie. The claimant believed that she had been hired to discipline her. On 15 April 2021 the claimant tried to introduce herself to Shelley but was stopped by another member of staff, Laura, as the claimant was late for her shift. The claimant complained to her manager Mr Ncube.
- 37) The claimant appealed the outcome of her grievance on 30 April 2021. The appeal was dealt with by the respondent's chief executive, Ms Kate Allen.
- 38) The claimant describes Mr Ncube as a manager who went above and beyond to treat her fairly. On 6 May 2021 Mr Ncube emailed the claimant attaching a PIP document. The covering email states, '... as discussed when we met last week please find attached and do not take this in any negative way as you are an important member of the team. This is just a helps the

we provide the best care for the PWS if there is anything you would like to discuss the above please do not hesitate to contact me, I will ask Oana to reset the medical training on e-learning'

- 39) Ms Asprey noted that the respondent did not have any record of the PIP. Her evidence was that the PIP was considered but not implemented as the claimant was on sick leave from 7 May 2021 to 3 June 2021, but Ms Asprey was not employed at the time. However, listening to Mr Ncube and viewing the document provided on day 2, Ms Asprey agreed that the PIP was implemented but it appeared that this was not followed up due to the claimant's sick leave. There is no other evidence provided relating to the PIP.
- 40) Mr Ncube says in his witness statement, '...I was not involved in the decision to place [the claimant] on a PIP, one day I received an email from [HR] asking me to sign a completed PIP which already included all of her performance goals...'. During his oral evidence he said that he recalled discussing the PIP with the claimant and he recalled sending it to the claimant. Mr Ncube told us that the PIP was required particularly because of the issue relating to medicine, and that there was a lack of performance on the claimant's part and the claimant needed to improve. Further the claimant was sometimes late and that was unprofessional and needed to improve. Mr Ncube said that he did not draft the document this came from head office. He did not speak to Miss Michie about it. Under re-examination from the claimant, Mr Ncube recalled that he considered the PIP justified by reference to the medication error made by the claimant. He said it was two years since the issue, and he could not remember what the error was. Mr Ncube noted that where there were issues or areas of concern he would write them down in the communication book. The claimant was informed that Mr Ncube left his position on 17 May 2021.
- 41) Ms Allen met with the claimant (on 20 May 2021) and met with Ms Michie (on 26 May 2021) and completed a report on the claimant's appeal against her grievance on 17 June 2021. Ms Allen dealt with this grievance appeal in a comprehensive manner. Ms Allen noted that:
- a. correspondence from Ms Michie was considerate and professional
  - b. the written evidence suggested that overtime shifts have been offered to all, with only one indication of overtime being allocated on rota. This was during the pandemic and included by Ms Michie as she believed she knew team preference.
  - c. The Covid issue was noted during a time where the respondent's priority was to ensure shifts were covered with people they support, transition risk was kept to a minimum and people were kept safe.
  - d. From an analysis of 21 staff (not including support managers) who have worked in Buckinghamshire in the last 12 months, she found that the highest overtime had gone to the claimant with 519 hours above contracted hours undertaken. The next highest overtime amount was 432 hours by a nonwhite colleague followed by 399 hours to a white colleague.
  - e. It was correct that the claimant had taken three weeks in July and August although not consecutive as annual leave. The claimant had failed to complete a short shadow induction shift which may have impacted on the hours available to her. That shift was with a new person to be supported in the July and August period

that may have enabled her to meet contracted hours and require less annual leave to be used.

- f. A random sample check found that other staff members have also been requested to take periods of annual leave in the same period. DP took 136 hours, TM 56 hours and ADB 48 hours.
- g. In relation to work with [AV], the investigation found that females can and do work with this service user. There were issues in accessing his support guidelines, kept outside the respondent premises, due to the pandemic. This limited the information available to all staff including the claimant.
- h. There is a reference within the investigation report, relating to bullying where the claimant suggests that Ms Michie is not acting intentionally but took a different approach with staff who are British descent and therefore the claimant believes that, 'it might be racial'.
- i. Ms Allen notes that on 22 February 2021, relating to the 'wipes matter', that Ms Michie expressly stated that it was a good idea and also thanks the claimant for her input.
- j. Miss Allen took a sample of 19 random examples to review and assess Mr Michie's approach and conduct. She found no written evidence of conduct of a bullying nature. To the contrary, the investigation found that Miss Ms Michie had included HR within some email responses where questions about working practices had been raised.
- k. The claimant queries why issues have not been raised with her colleague, GG. She stated that she had overheard a meeting/supervision with GG. Ms Allen notes that issues have been raised with GG and GG's probation had been extended.
- l. The claimant alleged that the recent departure of Mr Ncube made her believe that Ms Michie's less favourable treatment was racially motivated. Ms Allen was satisfied that the reasons for his departure were legitimate and not discriminatory.
- m. Ms Allen conducted an analysis of the diversity of the staff and the team in which the claimant worked alongside tracking disciplinary and/or performance cases. She concluded that 60% of the staff were nonwhite. The only disciplinary action raised in the last 12 months was within the 40% of the white British team members. She identified that two other support members had their probationary period extended in the past 12 months. 50% from ethnic minorities.
- n. Ms Allen noted that the claimant acknowledged that the probation had been justifiably extended and that the claimant had since changed her behaviour and approach. The claimant believes that others who acted in the same way did not have their probation extended but the claimant was unaware that probationary period had been extended for others.
- o. The claimant raised that the performance improvement plan was retaliation by Ms Michie. The investigation found that Mr MCube had prepared the PIP with support from HR. Ms Michie had expressly requested not to be involved in order to prevent any repeat allegations of unfairness or discrimination.
- p. Ms Allen found no evidence of less favourable treatment on the grounds of race and provided a comprehensive conclusion as set out within the bundle that included improved practices and improved support for managers in respect of allocation of work.

- 42) The claimant told the tribunal that the key issue in relation to allegation of 'hiding discrimination' related to Ms Michie's comment, reflected in Mr Allen's report that GG had had her probation extended. The claimant stated that GG's probation had not been extended as of that date as the claimant had overheard a supervision, and GG's probation was only extended at a later date to cover up racism on Ms Michie's part. There is a reference in the documents to, '... In the [GG]'s supervision which I overheard, there was no mention of probation extensions. This supervision evidently happened 02/05/2021 when I first raised the issue with KA. By this time, GC's probation had not been extended. I was told by one of GC's friends that her probation was extended and that was definitely after the meeting I had with KA.
- 43) Ms Asprey said that GG was employed on 25 November 2020. This would mean that her normal six-month probationary period would expire on 24 May 2021.
- 44) On 21 June 2021 the claimant along with her colleague was requested to join a zoom meeting. A shift was left uncovered by a mistake when the claimant and her colleague swapped their shifts. Ms Michie wished to find out why the shift was uncovered. The claimant conceded that it was not trivial for a shift to be missed from a service users perspective. There is an email from Laura of 22 June 2021 who had checked her records, and confirmed that the error had been on her part and apologised. The claimant complains that she felt marginalised because she was called to the zoom meeting for what she considered to be a trivial reason.
- 45) The claimant mentions an incident in her witness statement on 13 July 2021 with Ms Shelley Benbow. The claimant describes this incident commencing as, '...Shelley was demanding that I do various cleaning tasks around the house, but the tasks she was asking me to do were not my responsibility and we usually have more freedom in organising our shifts. As a result, I refused to do what Shelley was asking me to do, which led to her raising her voice ... saying that my problem was that I couldn't be managed.... She kept coming after me, demanding that I do different things though I have stated that I wouldn't do them...' The claimant notes that Shelley shared on that day that she was resigning. There is no evidence before the tribunal to support any allegation Shelly Benbow's recruitment was in anyway related to the claimant or that Ms Benbow instigated or sought to instigate any disciplinary action against the claimant at any time.
- 46) There was an email exchange between the claimant and Miss Michie on 14 June 2021. The claimant had been 15 minutes late for her shift. The claimant explained that she had assisted the respondent and covering a nightshift, went home for a shower and was delayed by traffic and stopping to get petrol. The claimant complains that when she arrived late for her shift, her manager Laura asked the claimant if she was late, 'without even saying hello'. The claimant did not respond. The claimant asked Laura several times to stop speaking to her as the claimant found Laura disrespectful. There were references in the bundle to the claimant refusing to comply with requests made by Laura. At some point during this incident Laura told the claimant that she should 'do her job'. Following this incident the claimant received an email from Ms Michie to discuss the claimant's lateness and her attitude towards Laura. Ms Michie thanked the claimant for

stepping in and covering the required shift but reminded her that she still needed to be on time for the shift in question. The claimant complains that Ms Michie disregarded the attitude that Laura had towards her.

- 47) Ms Saba worked with the respondent since 2019 through an agency and then on a bank contract, her evidence makes no reference to the claimant. She is currently in dispute with the respondent in respect of a separate matter. She states that she heard management talking highly of new staff even though she considered their performance was nothing extraordinary, they would get extra shifts or hours but ethnic minorities were struggling to be heard. She refers to Darryl being quickly promoted where ethnic minorities within the team were not given any promotion. She makes reference to a new ethnic minority manager being dismissed within a month stating, 'it seemed to be whoever tried to whistle blow or tried reporting any concerns got targeted for doing so'. Ms Saba notes that some doctors were, 'liked highly by the management and they were referred to as white British doctors...'.

### **The law**

#### Race Discrimination

- 48) Direct discrimination is defined within section 13 Equality Act 2010. The question for direct discrimination is whether, because of the protected characteristic the respondent has treated the claimant less favourably than it has treated or would treat others. For the purposes of direct discrimination, the employment tribunal needs, under S23 Equality Act 2010, to consider a comparator where there is a no material differences in the circumstances relating to each case. At the conclusion of her evidence the claimant referred to actual comparators in respect of some allegations and the hypothetical comparator in relation to others. This is addressed in respect of each allegation below.
- 49) The burden of proof provisions in the Equality Act 2010 are set out in section 136(2) and (3) and provides effectively a 2 stage approach: Stage 1: can the claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the respondent. Stage 2: is the respondent's explanation sufficient to show that it did not discriminate?

#### Victimisation

- 50) Victimisation is defined within section 27 of the Equality Act 2010. The 'protected act' in this case is the claimant's grievance within which she has raised a complaint of race discrimination. S27 defines victimisation as being subject to a detriment because of doing a protected act.

### **Deliberation**

- 33 The claimant commenced work in February 2020. The UK experienced the consequences of the Covid 19 pandemic in respect of lockdowns and restrictions on mixing from March 2020. When reviewing the facts we are mindful that both parties were dealing with these unprecedented conditions within an environment supporting vulnerable people.
- 34 We acknowledge that situations of race discrimination may be subtle or may materialise without active intention on a perpetrator's part. We have carefully examined the entirety of the evidence placed before us with both conscious and unconscious bias in mind.

- 35 Ms Asprey was not employed by the respondent during the time in question and could not give direct evidence in respect of the claimant's allegations. Her evidence was based upon her knowledge gleaned from the documentation and background knowledge of the respondent's operations. She was a straightforward, credible and helpful witness.
- 36 We acknowledge that the claimant was acting in person. We do not consider the claimant's evidence to be untruthful or designed to mislead the tribunal, however we do question the credibility of the claimant's evidence. For example, we highlight the claimant's complaint of direct race discrimination relating to her 'dry wipes' idea being ignored by Ms Michie. The emails within the bundle including the words '...that's a very good idea Lavanya...' addressing and praising her 'dry wipes' suggestion. It is simply not the case that Miss Michie did not consider, ignored or dismissed the claimant's idea. Ms Michie acknowledged the claimant's idea, praised the claimant and reacted positively to her idea. We can find no reasonable criticism of Ms Michie's response to this matter. This matter has also been dealt with previously and in detail internally by the respondent's CEO Ms Allen within the grievance appeal process. The claimant spent time on day 1 of this hearing including this allegation within the list of issues. During the course of the hearing, the claimant was referred to the email referenced above yet continued to consider this an example of direct race discrimination. This allegation was given further time within the claimant's submissions. The claimant has damaged her own credibility in pursuing this type of allegation as a serious allegation of race discrimination, when the documentation shows the allegation to be groundless. The claimant demonstrated an inability to view the circumstances giving rise to this litigation with objectivity.
- 37 We also note on a general level, the unfortunate negative attitude displayed by the claimant when encountering managerial instruction during her employment with the respondent. An example is the claimant's words in her email of 11 November 2020 when asking for additional hours, '...if anyone is still complaining about me, I have a long list of things other staff could be doing better...'. The claimant had a tendency, when faced with reasonable criticism, to respond with criticism of others. The claimant appears unwilling to be accountable for her own actions. The claimant then tends to complain when her complaints have not been treated with the same gravity as the respondent's original concerns. The claimant appears overly sensitive in respect of a perceived lack of praise, even in the face of written praise. The claimant appears to expect the respondent's workplace to revolve around her and the disparity between this expectation and the reality of a busy workplace seeking to meet the needs of vulnerable service users, causes friction.
- 51) We note Ms Saba's evidence that at its highest, amounts to unparticularised allegations of discriminatory conduct. It provides us with insufficient details of these allegations to consider them further or draw any negative inference against the respondent. Further, Ms Saba's unparticularised allegations conflict with the comprehensive grievance appeal report from the respondent's chief executive. For example, Ms Saba's comment in respect of those of ethnic minority getting less work than white colleagues was not the claimant's experience by reference to Ms Allen's report showing that the claimant had carried out the most overtime over a 12 month period. Mr Ncube's evidence shows that Ms Michie criticised both the claimant and her white colleagues equally where she felt performance was lacking. Ms Saba does not provide any evidence that directly relates to the claimant

and Ms Saba is a currently in a dispute with the respondent. Taking the entirety of the circumstances, we place little weight upon the evidence provided by Ms Saba.

- 52) While there is a conflict between Mr Ncube's written evidence and his oral evidence, we found him to be a straightforward and helpful witness who through his oral evidence assisted the tribunal in understanding the circumstances as they were at the time.

*AM Raised concerns about the claimant's lateness.*

- 53) The claimant confirmed during submissions that this allegation related only to instances giving rise to the extension of her probationary period. It is common ground that the claimant was late on occasions. We conclude that, where the claimant was late and Ms Michie was aware of her lateness, she did raise concerns about the claimant's lateness with her. The claimant accepts that her timekeeping was not to an acceptable standard and this was something that the claimant later addressed. Lateness on the part of a support worker causes difficulties for the respondent in that it has an obvious knock-on effect for other staff finishing shifts, and providing the required level of care to vulnerable service users.

The claimant told us that the comparator in this matter was Mr David Miller. However there was no evidence before the tribunal in relation to Mr Miller. Mr Miller is not an appropriate comparator as we cannot conclude that he was in materially the same circumstances as the claimant. In the circumstances we have considered a hypothetical comparator. We conclude that any concerns raised by Ms Michie with the claimant in relation to her lateness were raised because the claimant was late for work. We conclude that it is more likely than not that Ms Michie, acting within her managerial role, would act in a similar way when dealing with a hypothetical comparator who was also late for their shift. There is nothing within the evidence that suggests that the claimant's treatment was in any way connected with her race. The claimant has failed to make out any prima facie case in respect of this allegation.

*AM Advised the claimant's line manager to extend the claimant's probation period.*

- 54) The claimant's evidence is that the extension of her probationary period was dealt with by her manager, Ms Wilson and she pointed to the extension of her own probationary period as an example of good management style on Ms Wilson's part. There is nothing within the evidence to suggest that Ms Michie had any direct part or 'advised' Ms Wilson to extend the claimant's probationary period. We conclude that the decision to extend the claimant's probationary period was made by Ms Wilson and Ms Michie did not, 'advise' her to do so. We note, in any event that in light of the claimant's performance during her probationary period, there can be no reasonable criticism of the respondent's decision to extend her probationary period.
- 55) The claimant relies upon her colleague GG as an actual comparator. While we do not have details of any performance concerns raised by the respondent with GG, we conclude from the documentation that GG's probationary period was extended in any event. She was treated in a similar manner to the claimant. We have also considered the hypothetical comparator. We conclude, on the balance of probability that any hypothetical comparator with similar performance during their probationary period to the claimant would have had their probationary period extended. We conclude that the extension of the claimant's probationary period was on the basis of the claimant's performance. There is nothing

within the evidence to suggest that this extension is in any way connected to the claimant's race.

On 28 May 2020 AM spoke to the claimant about "bedsheets" and an "empty tub of butter".

56) it is the case that on 28 May 2020, Ms Michie spoke to the claimant in relation to issues that had been raised by the claimant's colleagues. This included issues relating to bedsheets and an empty tub of butter. Ms Michie made a file note of her discussion. We note that this discussion happened shortly after the claimant's probationary period was extended, at a time when the claimant's performance was under review by the respondent. We conclude that the file note is a fair note of the discussion held with the claimant. For example, it records the claimant's explanation in relation to tub of butter. The claimant refers to various colleagues as actual comparators but there is no evidence to suggest that any of the claimant's colleagues were in similar circumstances, therefore we consider the hypothetical comparator. We can identify no reasonable criticism of Ms Michie for the content of this note or her decision to record this discussion. We conclude on the balance of probability that Ms Michie would make a similar note if dealing with a hypothetical comparator in similar circumstances to the claimant. There is nothing within the evidence to suggest that this is in any way connected to the claimant's race.

In about July 2020 AM left the claimant without any shifts for a period of about 4 weeks

57) The claimant's complaint in respect of an absence of shifts during July 2020 relates to 3 nonconsecutive weeks. The claimant acknowledged that changes within the service users' requirements were having a knock-on effect on the respondent's requirements for support workers. The claimant was aware that the absence of available work across the respondent's service during this period had been caused by circumstances outside of the respondent's control. The analysis carried out by Ms Allen indicates that while the claimant was required to take annual leave during this time, so too were her colleagues and in particular we note the substantial amount of holiday taken by DM. The claimant concedes that she had not undertaken a shadowing opportunity with a particular service user as she did not wish to work with that service user. This reduced the potential work available to her. The claimant referred to actual comparators for this allegation as AV or DM. We conclude that DM was treated in a similar manner to the claimant in that his work was reduced and he was required to take annual leave at that time. We have no evidence in relation to AV therefore we are unable to consider whether she was a potential comparator. We have considered the hypothetical comparator and taking the entirety of the evidence into account we conclude that a hypothetical comparator in circumstances that are not materially different from the claimant's would have been treated in the same manner, and provided with similar work opportunities due to the external events that had affected the respondent's workload. We conclude that the reason for the reduction in work available to the claimant was due to changes within the respondent of which the claimant was fully aware. There is nothing within the evidence to suggest that this is in any way connected to the claimant's race.

AM required the claimant for a period of time to work with a service user (AV) who exhibited sexual behaviour notwithstanding the claimant's request not to work with them.

58) The claimant undertook a single shift supporting AV. The claimant agreed to undertake this shift to assist the respondent. This tribunal acknowledges the difficulties that the claimant experienced during the shift. It is the case that the respondent requested the



claimant to undertake further shifts, however the claimant following discussion with the line manager was relieved of this duty. The claimant told us that Sally, along with Laura or DM were all comparators in respect of this allegation. It can be seen from the correspondence that Sally was requested to work with AV on a regular basis. We have no information in relation to the circumstances of Laura or DM. The reason for the respondent's request for the claimant to work with AV is clearly explained to the claimant within the emails exchanged. The respondent wished to have sufficient cover to accommodate AV's needs. We conclude that the claimant was not treated less favourably any actual or hypothetical comparator. This request was not in any way because of, connected to or tainted by the claimant's race. This request was made entirely due to the respondent's requirements for cover this particular service users.

- 59) Although unclear, we have also considered identifying this complaint as a failure to take the claimant's wishes into account and providing her with less flexibility than her colleagues. The claimant expressly refers to Sally being permitted to decline work with an aggressive service user. As we do not know the circumstances of that scenario, we do not consider Sally to be an appropriate comparator. However we note that the claimant's experience with AV was not consistent with the information available to the respondent within the documented likely behaviour of AV. The claimant also undertook only one shift with AV and thereafter explained her position. The claimant's preference was taken into account and the respondent provided her with the flexibility not to work with this particular service user again. The email correspondence shows Ms Michie's focus was to ensure that the service user had sufficient cover. Further, the claimant has avoided shifts with a further service user by failing to undertake the required shadowing experience. There is no suggestion that the respondent sought to follow this up as a disciplinary issue. This appears to suggest that the claimant's preference was taken into account and she was provided some flexibility in respect of her shifts. Taking the entirety of the evidence into account we conclude that the claimant was not treated less favourably reference to a failure to take her wishes into account or a failure to provide flexibility. In any event we are unable to identify any connection between the respondent's actions that we conclude were driven by reference to service user requirements and the claimant's race.

AM sent an email in which she addressed issues of cleanliness regarding members of staff (of colour) but failed to do the same in respect of British members of staff (02/11/2020).

- 60) The claimant confirmed that there was no mention of or relating to this allegation within the evidence before the employment tribunal. We do not consider it further.

Due to a case of covid (23/01/2021) AM asked the claimant to cover at the respondent's "main supported living service" resulting in the claimant having "lost overtime", and refusing to allow the claimant to "pick up shifts of people" who were not going to work in the main service until the end of a resident's period of self-isolation.

- 61) This allegation relates to a time during the second national lockdown due to Covid 19. The claimant refers to the actual comparator Darryl, however our understanding is that Darryl was the colleague who had a vulnerable relative and requested not to work within the contaminated site. He is therefore in materially different circumstances to the claimant and not an appropriate comparator. In the alternative the claimant refers to the hypothetical comparator. The claimant's complaint here appears to be that she was ultimately disadvantaged for agreeing to assist the respondent. Although unclear, the

claimant appears to claim that Ms Michie should have removed shifts from her colleagues and passed them to the claimant. We appreciate that a scenario where the claimant volunteers to help and is ultimately worse off can be frustrating. However, it is clear from the documentation that the reason that the claimant had 'lost overtime' or was not able to pick up as much overtime as she would have liked was because of the Covid related restrictions in relation to cross contamination of sites. All of the information available to the tribunal would lead us to conclude that the hypothetical comparator in similar circumstances would have similarly lost out. There is nothing within this allegation that we can identify that would indicate a prima facie case for race discrimination. We have also considered the suggestion, as we understand it, that the respondent should have effectively 'bumped' others from their allocated shifts to provide overtime to the claimant. There is no suggestion within the evidence that this was something that the respondent did. All of the evidence suggests that the completion of the work rota was a complex task and this would be made more so by Covid restrictions. We conclude that the claimant is unable to show any prima facie case of less favourable treatment on the grounds of race in respect of this allegation.

*The manner in which AM conducted a supervision session with the claimant (3/12/2021).*

62) The supervision session referred to within this allegation includes discussion in respect of the claimant's text correspondence with Ms Michie. The claimant accepts these texts to be rude. The tribunal considers that the tone of the text and the language used from the claimant to her supervisor in respect of organising the Rota to be unreasonable and not conducive to a productive working relationship. We do not criticise the respondent for raising this with the claimant. We have considered the contemporaneous documents and the claimant's comments in respect of how this supervision session was conducted and we conclude that it was done so in a reasonable manner. There is nothing within the evidence to indicate that there is any connection between the manner in which this supervision was conducted and the claimant's race. We conclude that the hypothetical comparator in similar circumstances to the claimant would be subject to a similar supervision session.

63) *The unfair distribution of shifts between July 2020 and 16th March 2021 (complained about on 12/11/2020 and again in Grievance raised on 16th March 2021).*

64) A significant proportion of the claimant's allegations related to the allocation of basic contractual hours and overtime. Under the claimant's contract her weekly hours of 24 hours could be averaged over a month. There was nothing within allegations that appear to be a breach of the claimant's contract of employment. The claimant undertook significant overtime. The claimant was undertaking University study alongside her employment during this time. The claimant's university obligations resulted in her having limited availability for work with the respondent. The claimant chose not to work with a particular service user by not undertaking the shadowing session. These restrictions in turn caused practical problems for the respondent when putting its rota together. We do criticise the claimant but acknowledge that there was a lack of flexibility on the claimant's part in respect of potential working hours for the respondent.

65) Ms Allen's investigation noted that the claimant had been awarded the highest amount of overtime hours. The claimant sought to explain her overtime by reference to Ms Wilson's input, with the inference being that when Ms Michie was in charge it was different. However the claimant alleges that Ms Michie discriminated against her from the start of

her employment. Mr Ncube's evidence indicated that Ms Michie interfered with the rota on the basis of staff strengths being utilised, yet this did not disadvantage the claimant, she had substantial overtime allocation. We conclude that, other than the period of time during July 2020 as noted elsewhere, the claimant was provided with her contractual hours and significant amounts of overtime. There is no evidence whatsoever before this tribunal to indicate that the claimant was in any way subject to an unfair distribution of shifts. We also repeat our comments in respect of the specific issues facing the respondent that reduced the availability of work in July 2020

*AM labelling claimant as "bad staff". (Additional).*

- 66) We note Mr Ncube's evidence in relation to this allegation. We conclude that while the expression 'bad staff' was unlikely to have been used, Ms Michie did inform Mr Ncube when he commenced work as the claimant's line manager that the claimant was 'trouble'. Ms Michie said that the claimant didn't turn up for shifts, she wasn't a team player and didn't listen to Laura, came to work late and cancelled shifts last minute. The claimant named white comparators of Laura, David (said by Mr Ncube to be similarly criticised by Ms Michie) and Gemma in relation to this allegation. We do not consider any of those named to be appropriate comparators as we are unable to identify their particular circumstances. However, the extension of this criticism by Ms Michie to others including white staff leads us to conclude that the hypothetical comparator in similar circumstances to the claimant would be similarly criticized. There is no prima facie connection to race in relation to this treatment. In any event, we conclude that the reason for the negative comments was Ms Michie's reasonable perception of the claimant's performance.

*AM providing greater levels of praise for "White-British" members of staff than those "of colour". (Additional)*

- 67) We note that in general terms the claimant's allegations of less favourable treatment have no overt connection to race. The claimant within her submissions stressed that while she had performance issues and timekeeping issues, this did not explain Ms Michie, 'never said something good'. The claimant's dry wipes example shows this not to be the case. We consider the claimant's evidence unreliable in this area. We have considered this element of the claimant's complaints in more general terms. We note considerable evidence within the bundle of staff changes/shortages at a managerial level within the respondent during this time. This is reflected within comments from Ms Michie along the lines of, 'if I only had my own job to do'. We note that Ms Michie worked on a peripatetic basis and did not meet Mr Ncube in person. We conclude that Ms Michie had a very high workload during this period and we consider it likely that her time was thinly spread across her responsibilities. We have carefully examined all the available evidence and make no criticism of Ms Michie within this judgment.
- 68) We conclude that Ms Michie has praised the claimant and this is recorded within the documents. There is no evidence before the tribunal that she provided greater level of praise for 'White British' members of staff and those 'of colour'. The claimant told us that the actual comparator in relation to this allegation was 'Tabitha', however we have no information whatsoever in relation to her circumstances.
- 69) In the claimant's case, there were performance issues as accepted by the claimant resulting in a justified extension of her probationary period. The claimant's manner in corresponding with Ms Michie is acknowledged by the claimant to be on occasion, overtly

rude. The claimant's attitude to dealing with her colleagues, with documented examples such as leaving part of the washing up for a colleague, failing to acknowledge lateness on her part because of perceived rudeness on the part of her supervisor appear to demonstrate that she is difficult to manage and not 'a team player'. We conclude that the claimant's conduct at work and attitude towards her colleagues have resulted in situations where she has been the recipient of negative feedback. There is no evidence before the tribunal to suggest that praise or criticism was expressed for any reason related to race. There is no evidence that Ms Michie praised "White-British" members of staff more than those "of colour". We conclude on the basis of all the available evidence that the hypothetical comparator who behaved in a similar way to the claimant would receive a similar level of positive feedback.

AM not considering the claimants ideas (Additional): Toilet wipes usage/process

70) We refer to our comments above in respect of this matter.

AM not considering the claimants ideas (Additional). Procedure for delivering medication to service users

71) The claimant refers to the email exchange noted above. The claimant put forward an idea that would require additional staff coverage to Ms Michie. Ms Michie sent a polite response acknowledging the claimant's idea but noted the requirement for additional staff coverage. The claimant compares this response with an enthusiastic response from Ms Michie to a suggestion that boardgames are brought in for service users. The tribunal notes that there is a difference within the nature of the suggestions. One involves cost and administrative resources, the other involves no cost or administrative change on the respondent's part. We consider both responses to be perfectly reasonable and do not criticise them. There is an obvious reason for the disparity of response within the suggestions made. We note to Ms Michie's positive response to the claimant's wipes idea. We consider that the hypothetical comparator is the appropriate comparator in the circumstances. We would consider that any colleagues who made a similar suggestion that involved increased cost and administration for Ms Michie is likely to have received a similar polite response indicating a potential issue.

AM calling the claimant into a zoom meeting to investigate a shift cover arrangement which failed – a trivial reason to be called into a meeting. (Additional)

72) The claimant acknowledged that it was important for the respondent to provide appropriate level of care for service users and that it was important that shifts were not left uncovered. It is common ground that there was an uncovered shift. The claimant was asked to attend a meeting to allow Ms Michie to find out why the shift was uncovered. It is reasonable that Ms Michie sought to find out why the shift was uncovered. We note that this was through no fault on the claimant's part. The later email correspondence shows it was caused by an administration error on Laura's part. We are unable to find any reasonable criticism of Ms Michie. The claimant refers to Laura as a comparator, however, she was responsible for the admin error rather than potentially due to complete the shift. The appropriate comparator is a hypothetical comparator who was potentially to complete the shift. We conclude that the hypothetical comparator would be treated in the same way. There is nothing within this allegation to lead the tribunal to suspect that Ms Michie's actions are in any way related to race.

AM hiring Shelley Benbow to discipline the claimant on 12/4/2021 with malicious intentions, knowing she would be harsh on the claimant. (Additional)

- 73) At no time did anyone within the respondent seek to discipline the claimant for any reason. There is nothing within the evidence to suggest that Ms Benbow's recruitment was in any way connected to the claimant. The claimant provides one example of a negative interaction with Shelley by the claimant refused to do cleaning tasks as she was asked because she felt it was not within her responsibility. The claimant was described as 'unmanageable'. This incident happened on the day that Shelley announced her resignation from the respondent. We conclude that Shelley was not hired by Ms Michie for any reason connected to the claimant.

AM caused Estelle to carry out an investigation onto the claimant's grievance and concluding that there was no racism.

- 74) The claimant raised a grievance and Ms Estelle Christmas carried out the investigation into the claimant's grievance in accordance with the respondent's normal policies. There is nothing before the tribunal to indicate that Ms Michie played any inappropriate part within the grievance process. The subject matter of the grievance overlaps considerably with the subject matter of this litigation. There was no evidence before the tribunal that the grievance was tainted in any way by race discrimination. We refer to our findings in relation to the various allegations considered within the grievance under the various headings within this judgment. We conclude that the hypothetical comparator who raised the issues raised by the claimant would be dealt with in a similar fashion by the respondent.

The claimant's appeal against the grievance not being conducted by Kate and its conclusion that there was no racism.

- 75) The appeal was dealt with by Ms Kate Allen. We consider that Ms Allen undertook a comprehensive review into the claimant's appeal and we do not criticise her within this Judgment. There is considerable overlap between the subject matter considered within the appeal and within this litigation. There is no evidence before the tribunal that the appeal process was tainted in any way by race discrimination. We conclude that the hypothetical comparator who raised the issues raised by the claimant would be dealt with in a similar fashion by the respondent.

Covering up racism. (54.4)

- 76) The claimant placed considerable emphasis on this point during the hearing. The claimant's argument was difficult to follow but the gist of the argument appeared to be that Ms Michie had sought to extend her colleague's Gemma's probation following the claimant's appeal to falsely show equality of treatment and cover up racism. There is no evidence whatsoever to support this allegation. It is common ground that Gemma's probation was extended. The timing of that extension is unknown. The claimant does not know when Gemma's probation was extended. GG commenced her employment with the respondent on 25 November 2020. The normal probationary period is six months that would expire on 24 May 2021.
- 77) Ms Allen's grievance appeal outcome report records that she met with the claimant on 20 May 2021 and Ms Michie on 26 May 2021. We conclude that it is likely that GG's

probationary period was extended prior to Ms Allen meeting with either the claimant or Ms Michie. Further, as set out below, we note that the claimant probationary period was properly extended without taint of race discrimination. There is no evidence of any attempt by Ms Michie or anyone else to 'cover up racism.' We conclude on the balance of probability that this did not happen.

Extending the claimant's probation period.

- 78) It is common ground that the claimant's probationary period was extended. This was dealt with by the claimant's then line manager Ms Wilson. As referenced above, the claimant agreed that this was a reasonable step and describes this as an example of good management on Ms Wilson's part. The claimant refers to a comparator of Gemma in relation to this allegation. However while we do not know the circumstances, it is common ground that Gemma's probationary period was also extended. We consider that in the alternative the hypothetical comparator in circumstances similar to the claimant is likely to have their probationary period extended in a similar way to the claimant. We conclude that the claimant's probationary period was extended for reasons relating to the claimant's performance during that time. There is no evidence to suggest that it was any way connected to or tainted by race discrimination.
- 79) On a general note, we conclude in respect of each of the above allegations that the claimant has not made out a prima facie case to meet the first step required when considering the burden of proof. It is also the case that even if we are wrong, the respondent has in each scenario provided a credible explanation for its actions that are entirely unrelated to and untainted by any reference to race.

Victimisation

- 80) The claimant's grievance included an allegation of race discrimination. This constitutes a protected act under the Equality Act 2010.

Claimant was put on to a Performance Improvement Plan

- 81) it is the case that the claimant was put on a PIP. Ms Michie expressly requested not to be involved following the claimant's grievance and Mr Ncube told us that he did not discuss it with her. We conclude that Ms Michie had no part in this process. Mr Ncube told us that the PIP was put in place because he believed that the claimant's performance needed to improve. Taking the entirety of the evidence into account we conclude that the reason for the PIP was entirely related to the claimant's performance and unrelated in any way to the claimant's protected act.
- 82) Laura W, on 14/6/2021, said "you should do your job" and was rude. AM dealt with complaint badly and did not seriously consider it.
- 83) This incident relates to a scenario whereby the claimant was late to work on 14 June 2021. We refer to the facts of this incident set out above. It is the case that the claimant had assisted the respondent in covering a shift. However, it is also the case that the claimant was expected to be on time for the shift in question. This is a scenario where it would be reasonable for the claimant to explain the background to her lateness. The absence of a 'hello' or 'good morning', while lamentable, does not make it reasonable for the claimant to refuse to answer her manager. We consider that the circumstances of this incident are such that the claimant could be reasonably and appropriately be requested to 'do their job'. The claimant's complaint seems to be that she was criticised for using

such an expression to Ms Michie. The circumstances within which the claimant used that expression to Ms Michie was in the context of a rude text message where it was unreasonable and inappropriate for the claimant to address Ms Michie in such terms.

- 84) It was unreasonable behaviour for the claimant to be late (without explanation) and fail to respond to her managers question. Ms Michie reasonably brought this to the claimant's attention. The claimant's complaints in respect of her manager's approach do not answer the respondent's reasonable concerns. In the circumstances, we consider that the respondent acted reasonably in treating the claimant's allegations of rudeness within management style on the Laura's part as a secondary matter. We consider the claimant's chosen way dealing with this matter to be unreasonable. We conclude from the circumstances surrounding this complaint that the reasons for the respondent's actions are rooted within the incident itself. There is nothing within the evidence to suggest that the claimant has been treated to her detriment in any way for reasons related to her previous grievance.
- 85) For the sake of completeness we note that there are potential limitation issues in respect of the allegations in that anything that occurred for 15 February 2021, is potentially out of time. However in light of our findings above we do not consider the limitation period further.
- 86) For the reasons set out above we conclude that the claimant's claims of direct discrimination on the grounds of race and victimisation are unsuccessful and dismissed.
- 87) Finally, we note the delay in finalising this Judgment. We apologise to the parties and note that the hearing was held 20 to 22 September 2023. As explained to the parties when reserving our decision, the first available deliberation day was 10 November 2023 and we have sought to provide this Judgment to the parties as soon as possible following this deliberation day.

Employment Judge Skehan

Date:20 November 2023

JUDGMENT SENT TO THE PARTIES ON

5 December 2023

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL OFFICE