



# EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Number: 4103102/2023

Hearing held in Glasgow on 20 and 21 November 2023

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Employment Judge M Whitcombe  
Tribunal Member Mrs K Ramsay  
Tribunal Member Mr T Lithgow

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**Miss Alison Miller**

**Claimant**  
**In person**

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**Mochridhe Limited**

**Respondent**  
**Represented by:**  
**Miss T Ahari**  
**(Counsel)**

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## JUDGMENT

The unanimous judgment of the Tribunal is as follows.

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(1) The complaint of sexual harassment contrary to section 26 of the Equality Act 2010 succeeds.

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(2) The claimant is awarded compensation for injury to feelings of £3,118.36, including interest. The respondent is ordered to pay that sum to the claimant.

(3) Oral reasons were given in the presence of the parties.

## REASONS

### Introduction

- 5 1. These written reasons have been provided at the request of the claimant's  
new representative in accordance with rule 62(3) of the Employment  
Tribunals Rules of Procedure (2013). That request was made within the  
applicable time limit. Originally, oral reasons had been given in the presence  
of the parties. That took place in two stages. First, the Tribunal announced  
and gave reasons for its judgment on matters of liability. Then, after a  
10 separate portion of the hearing dedicated to remedy, the Tribunal gave its  
judgment and reasons on remedy. Our decisions and reasoning were  
unanimous in all respects.

### 15 Background

2. The claimant was formerly employed by the respondent as a support worker  
for just over two weeks from 11 May 2023 until 26 May 2023. The respondent  
is a company operating in the social care sector and is part of the City and  
20 County Healthcare Group Limited group of companies.

3. The claimant's role was to provide care to a vulnerable client in their own  
home, or on excursions outside that home. We will refer to that client as "X".  
The claimant had worked with X previously as an agency worker before the  
25 respondent assumed responsibility for his care. This claim arises from events  
on 25 May 2023 when X attempted to, and did, touch the claimant in an  
inappropriately sexual way. However, the allegation of sexual harassment  
concerns a remark allegedly made at around the same time by David  
McDonald, the claimant's supervisor.

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### Claim and issues

4. In a claim form (ET1) received by the Tribunal on 31 May 2023, the claimant brought a complaint of sexual harassment, contrary to section 26 of the Equality Act 2010. It appeared that the claimant had originally intended to bring a claim based partly on the actions of X and partly on the actions of her supervisor in relation to that incident. For further details of the evolution of the complaint, the case management order of Employment Judge Amanda Jones dated 1 August 2023 is a useful starting point.

5. By the time this hearing began, the case was focussed solely on alleged harassment by the claimant's supervisor, David McDonald, who was also employed by the respondent. It was alleged that he had said words to the effect that it was acceptable for clients to have sex with female staff as long as they consented.

6. There was a short and simple agreed list of issues, which did not include the statutory defence under section 109(4) of the Equality Act 2010. It had been relied on in the response (ET3), but the respondent's counsel confirmed at the outset that it would not be relied on at this hearing.

7. Importantly, it was conceded on behalf of the respondent that if David McDonald had used the words alleged by the claimant, or equivalent words, then the statutory definition of harassment in section 26 of the Equality Act 2010 would be satisfied. We are grateful to the respondent's counsel for focussing the hearing in that way before the evidence had begun. No doubt the claimant found it easier to present her case as a result.

**Evidence**

8. We were provided with a file of documentary evidence which ran to 322 pages. However, as is often the case, we were referred only to a small fraction of it (about 15 pages) and the intention appears to have been to include every single document generated by or associated with the claimant's very short

period of employment, or the care needs of X, whether or not those documents were relevant to the central factual issue of what, if anything, Mr McDonald might have said during the evening of 25 May 2023. The Tribunal intervened to avoid time being wasted on documents and lines of questioning that could not be justified by reference to the relevant facts alleged in the claim, the facts alleged in the response or the issues in the agreed list.

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9. On liability issues we heard oral evidence from:

a. Alison Miller, the claimant;

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b. David McDonald, the claimant's Team Leader and the alleged harasser;

c. Trea-Ann Lynn, another support worker who was working alongside the claimant on 25 May 2023.

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10. On remedy issues we heard oral evidence from:

a. Alison Miller, the claimant, once again;

b. Arlene Erskine (formerly McHugh), Registered Manager for the respondent's Glasgow and Edinburgh services.

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11. Witness statements were not used and evidence in chief was given orally. All the witnesses listed above gave evidence on oath or affirmation and were cross-examined. Inappropriately, the respondent invited Arlene Erskine to watch part of the proceedings before she was called to give evidence, but given our other findings it was not necessary to consider whether that undermined any of her evidence.

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### **Approach to the evidence and credibility**

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12. When assessing the evidence we considered the inherent probabilities, recognising also that improbable things can and do happen. We scrutinised the evidence we heard for signs of inconsistency or contradiction. We gave due weight to corroboration, where it existed. We considered the consistency of the oral evidence that we heard with the documents generated at the time,

5 although there were relatively few of those. We bore in mind that human memory is not, as many people believe, like a photograph, which may range from the sharp and clear to the blurry and indistinct. Memory is essentially a reconstructive psychological process and numerous psychological studies have demonstrated just how easy it is for human beings to convince themselves that they saw or heard things that did not happen at all, or to forget striking things that definitely happened. The process of repeating, rehearsing and discussing allegations and evidence in preparation for a hearing can play a part in that. Honest witnesses can also very easily be  
10 mistaken.

13. Each side had valid points to make about credibility. It was a question of weighing and balancing those competing arguments.

15 14. With that general introduction, we thought that the following points were important, so far as the claimant's evidence was concerned.

a. The claimant was consistent about the remark allegedly made by David McDonald and the context in which it was made. We understood the respondent's counsel to accept that.

20 b. The claimant did not contradict herself in any relevant respect or make any relevant concessions, despite skilful cross-examination.

c. The claimant's account was vivid, detailed and, on the face of it, entirely plausible. While we are aware that vivid memories can also be wrong, and that the subjective strength of a recollection is an unreliable  
25 guide to its accuracy, this is nevertheless a factor which bolstered the claimant's credibility to some extent.

d. The claimant's account fits with some of the uncontroversial facts, for example, that X had a history of inappropriate sexualised behaviour on occasion. The respondent also accepts that there was a degree of  
30 inappropriate physical contact on the day in question, though there is a dispute about its precise extent and details.

e. It has not been suggested that the claimant has any motive or incentive to lie about the incident. Put another way, why would the claimant

make up the whole story or relevant details of it? No reason was suggested in submissions or cross-examination.

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- f. We were struck by the emotional impact on the claimant of describing her alleged harassment by David McDonald. She was visibly upset as she explained how it had come about and why she thought it was inappropriate. While we are aware of the difficulties and pitfalls of assessing the “demeanour” of a witness, we think that demeanour can have a valid part to play in the overall assessment. In this case it enhanced the claimant’s credibility.

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15. So far as the respondent’s witnesses were concerned, some important observations are as follows.

- a. Each of the witnesses was clear and did not contradict themselves.
- b. They did not depart from their original evidence or make any relevant concessions in cross-examination.
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- c. The respondent’s version of events is corroborated by two witnesses, whereas the claimant’s account relies on the evidence of a single witness. However, there are two qualifications to that.

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- i. The corroboration is not supplied by *independent* witnesses. Both continue in the respondent’s employment and have an understandable personal interest in demonstrating that they behaved appropriately in difficult circumstances.

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- ii. The accounts of those two witnesses are not, in fact, consistent on all the important details. For example, David McDonald said that he (alone) had inserted himself between X and the claimant, whereas Trea-Ann Lynn said that she had done so first and that Mr McDonald had later joined her in doing that.

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- d. In terms of the “inherent probabilities”, we think that it is inherently unlikely that an experienced team leader such as David McDonald would make a dangerously flippant and inappropriate remark of the sort alleged, given that the very reason for his attendance was to help to de-escalate X’s problematic behaviour. A remark of that sort would create a clear risk of an escalation of X’s sexually inappropriate

behaviour. Two female care workers were present and one of them was due to undertake a “sleep-in” shift.

5 e. That said, cases in the Employment Tribunal sometimes feature regrettable words said, actions done or mistakes made by people who are normally blameless, but who acted unacceptably on a particular occasion. As noted above, inherently improbable things can and do happen.

10 f. The Tribunal gained the impression that David McDonald’s evidence was somewhat rehearsed and, at times, slightly dramatic, including some performative displays of concern for the claimant’s welfare during the hearing itself. He appeared to go beyond giving us his unvarnished recollection of the facts, straining also to portray himself as a concerned onlooker, horrified by the claimant’s allegations, who could not possibly have done the things alleged. His evidence had a  
15 slightly artificial quality. That undermined his credibility a little.

16. We are not concerned by the failure of one near contemporaneous note to record the events as now described by the claimant. The respondent draws attention to the entry made by Trea-Ann Lynn at page 301 of the joint file of  
20 documents. That note was not made by the claimant herself. It was made after a difficult shift packed with incident. It was also made in difficult circumstances, while X was shouting. It is true that it does not record the allegation now made by the claimant about David McDonald, but nor does it record some of the *agreed* facts, for example that X had held the claimant  
25 inappropriately and tried to touch her inappropriately. We do not feel able to treat the log as a complete and reliable record of the events which are central to this case, nor do we feel able to draw any adverse inferences from the omissions from the document. Its purpose was to record issues relevant to X’s care, not to record incidents of legitimate personal concern to carers. For  
30 all those reasons, we do not think that this document, or the omissions from it, undermine the credibility of the claimant’s account.

17. We do not think that the claimant’s credibility is harmed by the timing of her

5 first written complaint about the incident, an email of 28 May 2023. We do not think that the respondent's submission to that effect is sound. Copious research and the Tribunal's own experience both suggest that traumatised people often feel unable to complain about their experience for months or even years after the incident, let alone at the earliest opportunity. In this case, the interval between the incident and the complaint is only a matter of days.

10 18. The alleged incident occurred on 25 May 2023. The claimant resigned very promptly afterwards, by an email timed at 21:47 on 26 May 2023. It is true that the resignation communication is brief and does not refer to the central allegation in this case. However, the claimant *did* complain about that incident in an email sent to Diane Gibson on 28 May 2023. We regard that as prompt in all the circumstances. It is not important that the claimant erroneously sent that email to the HR Department of the parent company rather than to those with HR responsibility within the respondent. The issue, so far as credibility is  
15 concerned, is the date on which the claimant complained, not the date on which the respondent received it, or whether the respondent received it at all.

20 19. Overall, we regard the respondent's submission based on the alleged delay in complaining to be unsound in principle and unsupported by the facts. There was no significant delay in complaining.

25 20. We do not accept the respondent's criticism of the claimant's credibility based on a minor inconsistency between the case expressed in the claim form and her oral evidence at this hearing. In the claim form the claimant said that her email of complaint was sent the day after her resignation, which would make it 27 May 2023, whereas it was actually 28 May 2023. We think that this is a trivial discrepancy and that no adverse inference arises.

30 21. We do not think that the claimant's credibility is harmed by the fact that on 27 May 2023 she texted David McDonald, her immediate supervisor, to say that she would be resigning, without also mentioning the allegation of harassment against him. She was not obliged to do so, it would have been awkward to do



so, no useful purpose would have been served by doing so and in our judgment no adverse inference arises from a failure to do so. Importantly, the claimant made that allegation to a person who she thought worked in the respondent's HR department the very next day.

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22. We have reflected on all the points listed above. No one factor was conclusive. It is a matter of overall impression having weighed the many reasons why the evidence of one side might be preferred to that of the other. There is no certainty as to what happened, but we are not required to be certain. Overall, we felt able to give more weight to the claimant's evidence than to that of the respondent's witnesses. Overall, the claimant's evidence was a little more persuasive.

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23. Our conclusion was that where the claimant's evidence conflicted with that of the respondent on relevant matters, we should prefer the evidence given by the claimant. That is reflected in our factual findings below.

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### Legal principles

24. We will keep this section brief, given the concessions made at the start of the hearing. Our task, at least on liability, reduced to a single issue of fact. We were not referred to any authorities.

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25. Section 26 of the Equality Act 2010 provides as follows.

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#### **26 Harassment**

(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—*

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(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).*

5 (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*

10 (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—*

15 (a) *the perception of B;*

(b) *the other circumstances of the case;*

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

(5) *The relevant protected characteristics [include sex].*

20 26. While we considered the burden of proof provisions in section 136 of the Equality Act 2010, they had no real bearing on the outcome, and we see no value in setting them out. Having heard the evidence we decided that we were able to make positive findings as to what had happened and whether it fell within the definition of harassment set out above. The Supreme Court in  
25 ***Hewage v Grampian Health Board*** [2012] ICR 1054 observed that it was important not to make too much of the role of the burden of proof provisions. They required careful attention where there was room for doubt as to the facts necessary to establish discrimination, but they had nothing to offer where the tribunal was able to make positive findings on the evidence one way or the  
30 other. We think that this is just such a case.

**Standard of proof**

27. Where facts were disputed, we made our findings on “the balance of probabilities”, in other words, a “more likely than not” basis. If we decided that a fact was more likely to be true than untrue, then for the purposes of our decision it is deemed to be true. Conversely, if we decided that a fact was more likely to be untrue than true, then for the purposes of our decision it was not proved. It is therefore a rather binary process, in which a 51% probability is equivalent to certainty. That is the standard of proof used in civil courts and tribunals. Nothing must be proved “beyond reasonable doubt” and we do not have to be “sure” of anything in order to proceed on the basis that it is true, as would be the case in a criminal court.

28. We emphasise all of that because we would not want any witness whose evidence we have not accepted to think that we were, by implication, calling them a liar. That does not follow. It just means that we decided that their evidence was, on balance, unlikely to be correct.

**Relevant facts**

29. X lives with a serious traumatic brain injury following a road accident, and because of that injury he has complex needs. Sometimes, he can become disinhibited and finds it difficult to control his impulses. He can say and do inappropriate things. Sometimes, he can be overly familiar, inappropriate, and can say and do things of an inappropriately sexualised nature.

30. The claimant first worked with X in January 2023, as an agency worker. Prior to the incident described below, the claimant had only known X’s sexualised remarks to relate to his former partners. He had never made comments of a sexual nature to or about the claimant, as far as she knew.

31. 25 May 2023 was a very difficult day for all of those who provided care to X. He had been exhibiting increasingly challenging behaviour since the previous

day. X had been verbally abusive towards the claimant and Trea-Ann Lynn and had sworn at them. At around 1745 David McDonald had to attend to support and assist them.

5 32. There came a point when David McDonald was occupied making a phone  
call about X's care from another room. X had been given medication and had  
eaten dinner. X shouted to the claimant, who had been in the staff room. The  
claimant moved to stand at the door between the hall and the kitchen/lounge  
area. X apologised repeatedly for "being verbal" to the claimant earlier that  
10 day, then walked closer to the claimant. By this time David McDonald was  
standing in the open plan kitchen/lounge area, which was behind the position  
where X was standing. X then grabbed the claimant, started cuddling her very  
tightly, tried to touch her breasts and tried to kiss her. He would have kissed  
the claimant on the lips had she not been able to evade him. X then said that  
15 he wanted to have sex with the claimant. The claimant shouted to David  
McDonald, asking him to "*have a word*" with X. The claimant explained what  
X had just said. David McDonald looked at X and at the claimant with a smile  
on his face and said to X, "*yes, you can have sex as long as the female staff  
consent*", or similar words to the same effect. Eventually, the claimant  
20 managed to squeeze away from X, who made another remark about having  
sex with her. The claimant ignored that remark.

33. In the claimant's view, this behaviour was out of character for X, with whom  
she had previously had a good working relationship since January 2023. The  
25 claimant was upset and spent the rest of the night in the staff room. She  
explained to Trea-Ann Lynn that she was not comfortable with what had  
happened. Trea-Ann Lynn did not really respond but made a cup of tea and  
chatted.

30 34. When the claimant left the premises at the end of her shift she did not feel  
herself. Her next shift would have been Sunday 28 May 2023, but she did not  
feel able to undertake it given that she would be working with X and with  
David McDonald. Therefore, she gave notice of her resignation with

immediate effect by means of an email to Arlene McHugh (as she was then called) at 21:47 on 26 May 2023. The next morning, the claimant sent a text to David McDonald to tell him that her resignation had been submitted the previous night.

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35. David McDonald's remark made the claimant feel sick when she thought about it. She felt shocked for several days. She still thinks about the incident now. The fact that David McDonald was a team leader made her feel worse than she would otherwise have done, because instead of solving the problems arising from X's behaviour, he made the situation worse. For several months the claimant's sleep was disturbed, and she would wake up, trying to figure out why the incident had happened. The claimant has not worked with adult clients since the incident on 25 May 2023. She currently works with children, in a female only house.

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36. The claimant believes that a judgment in her favour and an award of compensation would probably help her to move on. She might approach her GP about counselling but has not done so yet.

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37. During the remedy phase of the hearing, the claimant began to give inconsistent answers about the causative impact of David McDonald's comment on the one hand, and X's actions on the other. She deflected several proper questions on that subject and often gave no real answer. The suggestion in cross-examination was essentially that the claimant would have resigned because of X's behaviour, even if David McDonald had not made the remark set out above. Ultimately, after an extremely long pause, the claimant said, "*I honestly can't answer that*". There was then another unusually long pause, and the claimant said, "*I don't know*". We note that in a text message on 27 May 2023 the claimant said, "*I emailed my resignation to Arlene last night. I would be back working with [X].*"

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38. Our finding on the balance of probabilities is that the claimant would have resigned in response to X's behaviour alone. David McDonald's remark was

an aggravating factor which caused injury to feelings, but the resignation would have occurred anyway at the same time. Quite simply, the claimant did not wish to work with X again and that drove her resignation and its timing. To the extent that it is relevant, we find that the reason why the claimant now works with children in a female only house is also because of X's behaviour, rather than because of anything done by Mr McDonald.

### Reasoning and conclusions

#### *Sexual harassment*

39. The respondent conceded that if we found that David McDonald had used the alleged words, or similar words, then they would satisfy the definition of harassment in section 26 of the Equality Act 2010 and that the respondent would be liable for them. The concession was made on the basis that a single remark in those terms would be enough for a finding of sexual harassment.

40. For the reasons set out above we have found that David McDonald did say, ““yes, you can have sex as long as the female staff consent”, or similar words to the same effect. Given the respondent's concession we also therefore find that the respondent was in breach of section 26 of the Equality Act 2010 and make a declaration accordingly. That concession was rightly made because, at the very least, the remark was “unwanted conduct of a sexual nature” which had the effect of violating the claimant's dignity (section 26(3)(a) and (b)).

#### *Compensation for injury to feelings*

41. We are satisfied that the claimant suffered injury to her feelings because of David McDonald's remark. It was made in the context of a stressful and distressing incident in which X touched the claimant in an inappropriately sexual way. X also stated a desire to have sex with the claimant. In that context David McDonald's remark made an upsetting situation worse. A male supervisor failed to deal appropriately with a situation in which a male service

5 user was mistreating the claimant in an incident with obvious sexual overtones. The sexual harassment by David McDonald minimised or even enabled X's inappropriate behaviour, whereas he should have been de-escalating the situation. The fact that David McDonald was in a position of authority was a feature which aggravated the injury to the claimant's feelings.

10 42. The effect on the claimant's feelings has been reflected in the distress, shock and disturbed sleep referred to above. However, the Tribunal's judgment is also likely to bring some closure and to help the claimant to move on. We do not think that the current injury to feelings is likely to continue at the same level for very much longer. It will most likely resolve altogether eventually.

15 43. We also bear in mind that it would be difficult to disentangle the upset caused by X's actions on the one hand, and David McDonald's comment on the other. We can only compensate the claimant for the latter effect.

20 44. We are satisfied that the injury caused to the claimant's feelings by the harassment by David McDonald fell within the lower band set out in the Presidential Guidance, which in this case suggests a range of awards from £1,100 to £11,200. In our assessment, the appropriate and just award, which (as far as possible) puts into money's worth the injury caused to the claimant's feelings is £3,000. To that we add interest calculated based on 180 days at an annual rate of 8%, making £118.36. The total award of compensation for injury to feelings will therefore be £3,118.36, including interest.

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*Compensation for financial losses*

30 45. We do not make any award for the financial losses caused by the end of the claimant's employment with the respondent. That is because we must award compensation on the same basis as applies in delict or tort. The claimant is entitled to be compensated for the difference between the financial position she is in now, and the financial position she *would have been in* if the unlawful harassment had not occurred. The unlawful harassment is that of David

McDonald, not the behaviour of X, so we must imagine a situation in which X had acted in the same way, but in which Mr McDonald had not made the unlawful remark.

5 46. We are satisfied that the claimant would have resigned on 28 May 2023 because of X's conduct alone, and that while David McDonald's remark increased the injury to feelings, the claimant would have resigned anyway. Therefore, we cannot make any award of compensation for financial losses flowing from the end of the claimant's employment with the respondent.

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47. It was unnecessary in those circumstances for us to make any findings on the respondent's additional argument that the claimant's employment would have come to an end anyway on or about 19 July 2023 when the respondent ceased to care for X. Given the conclusions we have already reached, that possibility is irrelevant and need not be considered further.

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**Employment Judge M Whitcombe**

**Date of reasons 21 December 2023**

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**Entered in register  
and copied to parties**

**22 December 2023**