Case Number: 6000679/2023

EMPLOYMENT TRIBUNALS

Claimant: **Mrs D Henry**

Respondent: **1. Apex Prime Care Ltd**
2. Carly Taylor
3. Daniel Lillywhite

Heard at: **Southampton**
On: **20,21,22 and 23 November 2023**

Before: **Employment Judge Rayner**
Ms A Sinclair
Ms KG Symonds

Representation
Claimant: **In Person**
Respondent: **Mr Michael White of Counsel**

JUDGMENT having been sent to the parties on 12 December 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Enthuse Care Partners Southampton limited, formerly the second respondent, are dismissed as a respondent by agreement with the parties. The remaining respondents are referred to as the first; second and third respondent respectively.

2. The Claimant's claims of

a. Direct race discrimination

b. Race related harassment and

c. Victimisation

are all dismissed against the first, the second and the third respondent as identified above.

3. The Claimant's claim that she was constructively and wrongfully dismissed, is dismissed.

REASONS

1. The respondent is a care provider. At the time the claimant applied for work the company was called Enfuse, although it became Apex Premier Care Limited by reason of a TUPE transfer during the course of the claimant's employment. The sale completed on 6 February 2023.

2. On application of the respondent at the start of this hearing, a claim against infuse was struck out, because the effect of the TUPE transfer is to transfer all liabilities of that company, including any liabilities that arise as a result of any finding of this court in this case, to Apex Premier Care Limited from the date of transfer.

3. An order was made under rule 50 of the Employment Tribunal rules in respect of any details that might be inadvertently included in any of the documentation about service users. The order made was for the anonymization of the names of any service user by use of initials and a prohibition on the disclosure of the names and addresses of any service user referred to. Reasons for that decision were given at the time and they are not repeated here.

4. In summary the claim brought by the claimant is one of direct race discrimination, harassment related to race, victimisation and wrongful constructive dismissal, contrary to sections 13, 26 and 27 of the Equality Act 2010 (the "EqA"), read with section 39.

The Issues

5. The issues, as set out I the case management order of EJ Gray are as follows:

Direct discrimination.

1. Did the First Respondent and Third Respondent discriminate against the Claimant contrary to section 39(1)(c) and 13 of the Equality Act 2010 ("EA 2010") by not offering the Claimant employment?

> *(a) On 18 May 2022 did the Third Respondent and Ms Davies decide not to offer the Claimant the position she had applied for because of her race?*

2. Did the First, Third and Fourth Respondent discriminate against the Claimant contrary to section 39(2)(d) and 13 by subjecting her to detriments?

> *(a) Did the First, Third and/or the Fourth Respondent subject the Claimant to the following treatment:*

(i) On 5 January 2023, was the Claimant excluded from two workgroup chats, namely the Enthuse are Domiciliary care chat and EastSide Enthuse care chat? The Claimant asserts the T hird Respondent did this.

(ii) Was the Claimant not given fair work opportunities, by giving her little opportunity to complete assessments? The Claimant asser ts this was from 17 June 2022 to 6 January 2023 and that the Third Respondent did this.

(iii) Did the Third Respondent fail to respond appropriately to the Claimant after she was bitten by a service user's dog on 3 December2022?(b) If so, did this amount to less favourable treatment? The Claimant relies upon a hypothetical comparator.

(c) If so, was the reason for the less favourable treatment the Claimant's race/colour.

Race related harassment

3. Did the First, Third and Fourth Respondent harass the Claimant contrary to section 40 and 26 EA 2010?

(a) Did the First, Third and/or the Fourth Respondent subject the Claimant to the following treatment:

(i) In July 2022, did the Third Respondent and Ms Davies offer the Claimant the position of domiciliary carer?

(ii) On 3 August 2022, did Ms Davies switch the Claimant's rota froma rota that had four calls to a rota that had eight calls without notification?

(iii) On 7 August 2022, did the Fourth Respondent scold the Claimant when she said that she had been schedule to work on a Monday?

(iv) In September 2022, did Ms Anderson send disrespectful messages to the Claimant in the WhatsApp retainer group?

(v) On 7/8 November 2022, did Ms Anderson opt to complete the Claimant's return to work form with her and say that "completing the form is the professional thing to do"?

(vi) In late November/early December 2022, did the Third Respondent pretend not to see the Claimant and leave her standing in the rain for three minutes?

(vii) In December 2022, did the Fourth Respondent say "you arewalking away from an apology? I wouldn't walk away!" whe n the Claimant attempted to apologise to a colleague, Mr Manley? During the same interaction, did the Third Respondent say "aww bless

viii) On 28 December 2022, did the Fourth Respondent deliberately not answer the Claimant's calls until 20:30 when she was dea ling with an incident involving a service user?

(ix) On 6 January 2023, did the Third Respondent respond to messages in the Retainer group chat stating "...dog was too unprofessional for the chat ... to get a life .... I'd like to put an incident form in for bullying in the workplace ... it's not bullying M its character-building" with laughing emojis.

(b) If so, was the above the conduct unwanted conduct related to t he Claimant's race/colour?

(c) If it was, did this conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Victimisation

4. Did the First, Third and Fourth Respondent victimise the Claimant contrary to section 39(4) and 27 EA 2010?

(a) Were the following protected acts?

(i) Reporting discriminatory chatter about a service use on 18 August 2022.

(b) Was the Claimant subject to the following detriments?

i. Between 5 January until 22 February 2023, was the Claimant excluded from two work group chats?
The Claimant asserts the Third Respondent did this.

ii. Between 17 and 22 February 2023, did the Third Respondent inform the Claimant that she had to give up one of her shifts on the retainer team so that some of her colleagues could make more money?

(c) If so, was the Claimant subjected to this treatment because she did the protected acts identified above?

Constructive wrongful dismissal

5. Did the First Respondent commit a repudiatory breach of the Claimant's contract of employment? The Claimant asserts that as a result of the con duct alleged above and it not being fair and transparent about adding a service user to her list on the 22 February 2023, she had no alternative but to resign.6. If so, did the Claimant resign in response to this breach? The Claimant would have been entitled to one months' notice pursuant to her employment contract.

Time Limits

7. For the alleged discriminatory acts set out at §§1, 2(a) and 3(a) above that are potentially outside the time limits in section 123(1)(a) EA 2010.

8. Does the Tribunal have jurisdiction to determine whether these act s contravened the EA 2010?

(a) Do these acts for part of conduct extending over a period of time?
(b) If so, does the end of this period fall within the time limit in section12 3(1)(a) EA 2010
(c) If not, is it just and equitable to extend time?

Remedy

9. If the Claimant succeeds on any part of her claim:(a) What is the loss caused to the Claimant by reason of the discriminatory act of which she complains?

(i)What financial losses has the discrimination caused the Claimant?

(ii) Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

iii.If not, for what period of loss should the Claimant be compensated for?

iv.(iv) What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

(v) Should interest be awarded? How much?(b) What recommendations, if any, should be made?
(c) If the Claimant succeeds in her constructive dismissal claim, what notice pay is she entitled to ?

The Respondents Response

6. The Respondent's deny the claims and, in broad terms, say that the Claimant was:
   6.1. treated exactly the same as her colleagues of other races – indeed, treated well, and with respect, as an employee – and has misconstrued various entirely innocent occurrences as slights against her.
   6.2. not excluded from the relevant WhatsApp groups at all, but – on the contrary – had herself left them. She was not added immediately back in because it had become clear that the chat groups were not an effective means of communicating with her.
   6.3. not constructively dismissed. The Respondent committed no repudiatory breach of contract; the Claimant resigned in an abusive phone call to Ms Taylor, left halfway through her shift, and thereafter refused efforts by the Respondents to follow up.

7. The tribunal heard evidence from the claimant on her own behalf, and from Miss Carly Taylor and Mr Daniel Lillywhite on behalf of the first Respondent, and on their own behalves.

8. We also had a statement from Mrs R Eden, in respect of transfer of Enthuse to Apex. We were also referred to an email containing a statement made by Janice Simmons which we refer to below.

9. We were provided with a bundle of documents of some 265 pages, a chronology of events and a helpful opening skeleton argument by the respondent.

10. That skeleton contained a broad overview of the legal framework relevant to race discrimination claims which we accept as a fair summary, which is reflected in our summary of the applicable legal principles set out below.

11. In addition we were referred to a number of cases in respect of both the TUPE issue, the Rule 50 application and the discrimination claims. We have referred to them in the legal principles we set out below ,where relevant.

Findings of FACT

12. The respondent had a contract with Southampton City Council to provide what is called bridging care and associated assessments. This is an assessment of care needs carried out when an individual either comes out of hospital and requires care in their own home in order to be able to leave hospital, or in other circumstances where care is urgently required. We understand that there is an initial six-week period, during which care is provided by the local authority and during which an individual's needs are assessed and alternative care packages are sought and put in place. The respondents contract then was to provide the bridging care or initial six weeks of care and to carry out the assessments.

13. The respondent provides what is known as domiciliary care, which includes the day-to-day work of assisting service users with washing; dressing; eating; mobility and other matters and care is provided to service users in their own homes.

14. The claimant had recently graduated in social work and wanted to work with older people. She told us and we accept that she was not interested in care

work itself, but was interested in the process of assessing people's care needs. When she saw the role advertised for bridging and retainer work, she applied for a job with the respondent. The claimant was expressly not interested in carrying out domiciliary care work both because of her own career aspirations but also because the retainer or bridging role was advertised at a higher rate of pay than the domiciliary role.

15. On 15 February the claimant was offered and accepted work at the rate of £15 per hour. This was the higher rate of pay and the claimant understood it to be an offer of work as an assessor doing the bridging or retainer work. The contract clearly states that it is a conditional offer, subject to passing of induction and completion of DBS checks and shadowing session before the job starts. The claimant understood that she would be required to carry out some shadowing of others and accepted and understood the reason for this.

16. The claimant signed contract on 22 February 2022. The job described in that contract is a *Care Partner*. We accept the evidence of the respondent that this was a generic term which covered all care work, both domiciliary and bridging or assessment work.

17. There is no dispute that the assessment/ bridging role was advertised at a rate of £15 per hours. In fact a rate of pay was only £15 an hour if the worker opted to include the 3% pension and rolled up holiday pay within the hourly rate.

18. The domiciliary care worker rate was lower and Ms Taylor who was unclear about the rate that was paid to workers, thought that it was above the minimum wage at about £11-12 per hour, also including pension and holiday.

19. We find that she is correct, and that the claimant signed a second contract on 22 February, which says that the pay rate for domiciliary worker is up to £11.54 an hour depending on whether holiday pay was included or not.

20. Following the offer of employment, and the claimant signing the documentation, she arranged three shadowing sessions at her convenience.

This involved her attending at the homes of service users with three existing care workers.

21. Nobody explained to the claimant what was expected of her in the shadowing, and the people she was shadowing were other care workers, some of whom also did bridging work. She was only able to attend at two of the shadowing sessions, as she was unwell and could not attend for the third. The claimant told us and we accept that she understood by shadowing that she was expected to follow and to see what was required. She said she was not told that she was expected to take part in delivering the care, but that she would have done so had any of the care workers she shadowed either suggested or requested that she do it.

22. She said on one occasion she was told to *get stuck in* but had no instructions or directions as to what was required. We all agree that the process of shadowing end of reporting back was one which was shambolic, unhelpful and not clearly explained to the claimant. We are not surprised that the claimant was bemused by the process, and are surprised that there appears to have been no formality to the process of reporting back.

23. Rather, there was an emphasis on other care workers considering whether the claimant was qualified or not. We note that one care worker reported back that she did not consider the claimant would be suitable for bridging work, but she gave no explanation and was not asked how this opinion was formed or the basis for it.

24. It is unsurprising that the claimant, when asked to carry out additional shadowing session, contacted the respondent's human resources department to ask what it was that she needed to do in order to demonstrate that she had experience.

25. The claimant explained again that she did have significant relevant experience. She received no response whatsoever to this request for help.

26. Nobody has explained to us why her request for some feedback was not responded to. The people responsible for receiving the claimant's

correspondence and replying to it, did not give evidence to the employment tribunal. We all consider that this was rude; unhelpful and quite possibly a breach of internal procedures, but we have no evidence before us that suggests that the claimant was treated differently to others in the assessment process.

27. We find that the way her requests and correspondence with human resources were dealt with both at the outset of her employment and following her shadowing was troubling. The claimant relies on this as background information, and we have considered carefully whether or not there is anything about this treatment and our findings about it which might lead to us draw inferences of race discrimination, either in isolation, or when looking at all our finings in the round.

28. We have reminded ourselves of the burden of proof in discrimination claims as set out in the legal tests below and have also carefully considered the evidence we have about why the claimant was asked to carry out additional shadowing and why she was offered a domiciliary role initially, prior to being allocated work on retainer or bridging shifts.

29. We find that the process in this organisation for confirming the recruitment of a new employee involved completion of the contractual paperwork with human resources, followed by a series of shadowing sessions. Following a shadowing session, the individuals with whom the person had carried out the session would be asked for their comments and views about the new recruit.

30. The notes that were completed for the claimant contain a table, which sets out all the types of work that a domiciliary worker would be expected to carry out on a day-to-day basis. This includes manual handling and administration of medication. We observe that all of the shadowing roles that the claimant carried out were of domiciliary care and none of them were anything to do with assessment of care needs.

31. Miss Taylor who was responsible for confirming the claimant in post, had very little understanding of what happened before the form arrived on her desk. She thought that it was filled in by somebody called Ms T Jones, who was

responsible for training, but told us that all she received was a form with the boxes ticked and comments recorded by the initial three individuals who carried out shadowing.

32. The form that was in the bundle which we have been referred to, had a number of additional comments made about the claimant and about the additional shadowing that she had been required to carry out.

33. Miss Taylor told us that she did not think the additional comments had been on the form when she saw it initially. She could not remember whether the box, which had a pass and fail tick box and in which the pass was circled, had been filled in or not. She said that it could not have been indicated that the claimant had passed, because otherwise she would not have insisted that the claimant carry out some extra shadowing as she would not have gone against the recommendation of the training officer. We find on balance of probabilities that this is right and that the form did not say that the claimant had passed her shadowing.

34. We also find that it is more likely than not that the form that she received had no information to show that the claimant had carried out any shadowing in respect of medication, but the manual handling part had all boxes were ticked.

35. Miss Taylor says she does not know when they were ticked and cannot recall if, when she saw the form, it included the ticked boxes or not.

36. What she does say is that when she received the form, she decided that the claimant needed to carry out more shadowing sessions, in order to satisfy the respondent that she had the necessary skills for dealing with medications and manual handling.

37. Unfortunately, she did not discuss this with the claimant but simply reported the matter back to the people in the organisation who dealt with training of staff.

38. We all agree that whilst the process appears to have been shambolic, it was very important for the respondent to be satisfied that a newly recruited worker

who was going to be dealing with vulnerable elderly people, was able to administer and deal with medication and to assist the service user in moving around physically.

39. The claimant had been communicating with somebody called Jessica Hardwick and Jessica had arranged for the claimant to come to the office to collect a uniform and PPE at the end of March/ beginning of April 2022.

40. On the 4 April 2022 the claimant had asked whether she could come in the following Wednesday to pick up her uniform and select her shift pattern and this had been agreed. On the 5 April 2022 Jessica Hardwick emailed the claimant stating

> *I've spoken to the trainer regarding your shadowing shifts and the training team would like if you could attend another shadowing shift. when would be best for you?*

41. The claimant replied asking if she could possibly do a night shift. This was not possible and the claimant then asked to do a shadowing shift after 12:00 pm and stated an evening was more suitable. On the 27 April 2022 the claimant wrote again saying that she had completed her shadowing requirements, and stating that she wanted to work on the Monday, Wednesday and Saturday .

42. She asked when it was ok to come in and buy her uniform and asked for, and was given the prices again.

43. She received a further e-mail from training on the 29 April 2022 stating *the trainers have gained the feedback from the carers you have shadowed, but unfortunately they do require you to complete one more as not all requirements have been completed.*

44. In response to this, the claimant replied *I am available on Wednesday afternoon. Please let me know what is required to complete my shadowing thank you.*

45. The claimant received no response. She attended at a further shadowing session.

46. We observe that it was appropriate for the claimant to make inquiries, because she needed to know what it was that she was required to do.

47. We find that the real reason why the claimant was asked to carry out further shadowing was because the shadowing sessions she had been asked to cover had not involved her observing medication being administered. We understand that this was a central and key part of the observations and shadowing. This was a requirement for all staff and the respondent acted appropriately in requesting that the claimant do further shadowing to ensure that the requirement was met.

48. The claimant did attend at the shadowing session and during the course of that session she accepts that she commented to the person she was shadowing, that she may be a bit rusty.

49. It was now May 2023 and the claimant was keen to start work. At this point she understood that she had completed the various requirements and was looking forward to starting work doing retainer shifts and assessment work.

50. On 16 May 2022 the claimant wrote to Enfuse reminding them that she had completed all the shadowing requirements, had emailed and called regarding shift and yet had no concrete response. She wrote *please let me know if you do not require my service anymore so that I can move on and seek out other work opportunities if you do not need me anymore how do I get paid for my hours for shadowing and training.*

51. The claimant received a response from Sarah Anderson who apologised for the delay, said she had spoken to the team and that they would be contacting the claimant regarding getting her onto the rota. That was on Tuesday the 17 May 2022.

52. The claimant was then contacted by, and arranged to meet Carol Taylor on the 18 May 2022. This is the date she says the first act of race discrimination took place.

53. There is no dispute that the claimant went to the office on the 18 May 2022. The claimant says that she was met by somebody she now knows to be Miss Davis. She says that she explained she was there to meet Carol Taylor and that Miss Davis went to find her, but did not return.

54. The Claimant says that after waiting a while, she asked to use the bathroom and was shown through to the back of the office where she saw Miss Davis talking to someone she now knows to be Carol Taylor.

55. She says they stopped talking as she approached but did not speak to her.

56. She says that subsequently Miss Davis spoke to her and offered her domiciliary work, not bridging assessment or retainer work.

57. We have had evidence from Carol Taylor but not from Miss Davis. Miss Taylor told us that prior to the claimant attending at the office, she had seen the claimants training forms and had decided that the claimant was not yet ready to do bridging or retainer work and had asked Miss Davis to speak to the claimant for her, and to offer her domiciliary care work.

58. She says she had not met the claimant, and did not know what her race was, and that the only reason she wanted her to do some domiciliary care work was to ensure that the claimant was familiar with the work, before she moved into bridging or assessment work.

59. She told the tribunal that she had done the same thing previously with a white male worker and that, like the claimant, after a few weeks he had progressed from domiciliary work to retainer shifts. We accept her evidence and find that this is what she had done in the past. We find that she treated the claimant in the same way that she treated another, of a different race.

60. The claimant asserts that Miss Davis and Miss Taylor were talking about her. Miss Taylor denies this and says that she was talking to Miss Davis about a service user and that she stopped talking when she saw the claimant approaching because it was not appropriate to talk about a service user in front of somebody she did not know. She accepts that Miss Davis did not introduce the claimant to her and agreed that this was not helpful and was rude of Miss Davis. We accept her evidence and find that the conversation was not about the claimant.

61. We find that by the day the claimant went to the office, nobody had explained to her why she had been required to do additional shadowing shifts, she had not been introduced to the person she was supposed to be meeting and she had been kept waiting.

62. It is unsurprising that she did not consider her treatment by the organisation at that stage to have been particularly professional or appropriate.

63. The claimant accepts that Miss Davis spoke to her, but does not agree with the respondent that it was explained to her that the offer of domiciliary work was only temporary.

64. Miss Taylor says that when she spoke to Miss Davis she understood that there had been a discussion about the offer of domiciliary work and the reason for it, but she accepts that there were no notes of any meeting.

65. We find that Miss Taylor had not had to think about this matter until sometime later, when the claimant raised concerns in her tribunal claim. What Miss Taylor did recollect very clearly was that the claimant had immediately complained, raising the question about whether or not her race was a factor in the decision making.

66. Miss Taylor was adamant that her decisions were nothing to do with the claimant's race and that her decision that the claimant be offered domiciliary work was taken before she had met the claimant or before she knew that the claimant was black and west Indian. We accept her evidence that her

decision was made before that day, and before she knew what the claimants race was.

67. We asked the Respondent witnesses about the racial makeup of the company and we find, from the evidence of Mr. Lillywhite and Miss Taylor, and from the claimant 's own observations, that the people working in the office where Miss Taylor worked were all white British people. Mr. Lillywhite said that he had tried very hard to persuade one of the care workers who was, he thought west Indian, to join the office team but with no success.

68. We find that when the claimant attended at the office, there was nobody working there who looked like her or who sounded like her.

69. The claimant was not happy about the offer of domiciliary work because for the last month she had been expecting to be offered work both at a higher rate of pay and of a different type.

70. On the 18 May 2022 after her meeting, she wrote to Sarah Anderson at the Infuse HR team stating that she had been to the office, and was told she did not have enough experience for the role applied for.

71. She said she was under the impression when she applied that no experience was required. She said she was sure she would have been able to work competently in the role as she was literate; intelligent enough to read and understand questions on the forms.

72. She said she wanted to be paid for the shadowing shifts and also said she was very disappointed at how she was treated. She said

it made me question if I was a white person, would I be treated in this manner, from being given the run around with shadowing to my emails not being answered. I applied for the position in February and we are in May. I was called to the office to be told I was not experienced enough for a post that required no experience. I am really angry at the whole situation. Time is a precious commodity then when you lose it you cannot get it back and I felt as though Enthuse Care have wasted my time here

73. The claimant received a response on the 19 May 2022 from Sarah Anderson saying that she had tried to contact her and left a voicemail. The claimant replied on the same day saying *how are you? I tried returning your call but you were unavailable thank you* . The claimant heard no more and no further contact with her was made about this matter.

74. From the facts that we have found above it is unsurprising that the claimant wrote this letter raising a serious concern that her race may have been a factor in the way she had been treated. We are told this organisation has an equal opportunities policy, but we have not been referred to it and it is not suggested that the claimant was ever referred to it.

75. Miss Taylor accepted that she knew that the claimant had written the letter and thinks she knew because she was told about it. She did not recollect being asked any further questions about the process she had followed and nor did she think she had seen the letter at the time.

76. From this we infer that Enfuse took no action to deal with the claimant's concerns, but that those managing her did become aware that she had raised concerns.

77. We find that the fact of the claimant 's complaint was a matter that Miss Taylor had in mind, and we also infer from the way she answered questions that it was a matter of concern to her. This was however after she had decided that the claimant needed to work as a domiciliary worker on a temporary basis, and we find that the claimant was moved to bridging and assessment work shortly after.

78. She was adamant that race had played no part in the selection process. We accept her evidence that it was not something that influenced her decision. However, just as the claimant had no opportunity to have her concerns addressed, we observe that Miss Taylor had no opportunity through in any formal route, to reassure the claimant that her race played no part in the decision making or to explain to her fully and properly the process which had been followed.

79. We all agree that these events at the outset of the claimant's employment started the parties off on the wrong foot. The claimant, not unreasonably, questioned whether or not she was being treated less favorably than others because of her race and the respondent was aware that the claimant had raised a concern about the matter.

80. Nonetheless the claimant did start working shifts for the respondent and after a relatively short period of time she was offered work doing assessments and bridging work.

81. By June 2022 the claimant was working doing a mixture of assessment and retainer/ bridging work and domiciliary work.

82. When the claimant did a retainer shift, she was paid at the higher rate of pay, regardless of whether she did the majority of her work as a domiciliary care worker or otherwise.

83. We find that shift work for service users was unpredictable, and that the assessment work, in particular, was entirely dependent upon service users being discharged from hospital. This work was more often required earlier in the morning following a discharge, or in the earlier part of the day. The work required the care workers to be reactive and available often at short notice.

84. We find that shifts, and the work to be done within the shift, could be changed at short notice. The claimant's shifts were later in the day, by her choice, and therefore she was not as likely to be required for the assessment. Workers who were available earlier in the day would do them. We find that the main reason why the claimant did not receive as many shifts as she would have liked for retainer work, was because she was only available to do shifts later on in the day and that most of the assessment work was required earlier in the day

85. In June 2022 that there was a change in the contract that the respondent operated with Southampton city council. Whilst we have not been referred to any documentary evidence, we find that there was a reduction in the amount

of assessment work and bridging care that Enthuse would be allocated from then on.

86. As a result, there was less retainer work to be done by the all the care workers.

87. We accept the evidence of Miss Taylor that this posed an issue for all her existing workers who were also employed to do retainer shifts because there simply was not same amount of work to go around.

88. We accept that at this point she contacted about 20 of the care workers and asked all of them whether or not they would be prepared to do fewer retainer shifts. She offered them the opportunity of doing domiciliary care work on various shifts instead, in order to make up their work and their income.

89. We accept that claimant was spoken to as other employees were spoken to. We accept that there was a varied response, that some employees did not wish to do domiciliary work at all and that some employees were happy to do so.

90. It is not in dispute that the claimant was spoken to and that she was offered, as an alternative an opportunity of domiciliary work in Bournemouth, and it is also not disputed that the claimant was told that there was less retainer work to go around and that therefore there would be a reduction in it.

91. We find that it was not unreasonable for the claimant to understand from the conversations she had with the respondent, that she was being told that she needed to give up some of the work she was doing in order that others could also keep their earnings up. We find however that this is not in fact what was being said to the claimant.

92. We have not heard from any other care worker as to what was said to them, but we have no reason to doubt that the context and the thrust of the conversation with the claimant was broadly similar to the thrust and context of the conversations with all other workers, . Miss Taylor is adamant that the claimant's race was no part of the reason for this conversation and that the

only reason for the conversation with the claimant and the conversation with other workers, was that there had been a change in the contract, from which they derived the bridging and assessment work. We find as fact that the reason Miss Taylor spoke to the claimant and others was wholly the result of this change in the commercial realities and was an attempt to ensure that everybody was offered opportunities for alternative work, should they wish to take it up.

93. We find that the claimant was not treated differently to the way others were treated in this respect.

94. We find that the real reason for the offer of work in Bournemouth being made to the claimant, was that the respondent wanted to share out the remaining higher paid work between all those workers who had been doing it already, in order to ensure that they could retain their workforce.

95. The claimant tells us and we find as fact that from then on, there was a decrease in day shifts and night shifts ended altogether.

The WhatsApp Messages

96. In August 2022 the claimant was involved in an exchange with Dawn Davis and others on WhatsApp.

97. There is no dispute that Dawn Davis sent a message stating that the majority of the six individuals she wrote to, including the claimant, had barely 4 clients this evening. She said, *please come in at 2:00 pm and collect spot check review paperwork to do please*.

98. We find that this was an entirely reasonable request for Miss Davis to make. She was noting that all 5 workers were under occupied and was allocating them additional work to do. Spot checks required the retainer /bridging staff to go on an unannounced visit and check that work was being done correctly by other carers.

99. Later on at 14.40 that afternoon Miss Davis sent a further whatsapp message to the retainer group, again to the same 5 individuals stating *are you all having an extra long lunch break? If you don't wish to do sufficient amount of work, you will no longer be granted the opportunity on retainer.*

100. Whilst the tone of the e-mail is challenging, we observed that it was sent to five individuals and was not specific to the claimant. The claimant responded, with a comment *lunch break? when do I have a lunch break? I just work the times I am given*.

101. She states that following her exchange, she was then allocated four additional visits on her rota. She says the reason she was allocated these additional visits was that she had raised her message in the chat group. She also says it was part of an ongoing problem following on from her having raised her initial concern about her treatment being something to do with her race at the point she was initially put on to domiciliary work in May 2023.

102. In the list of issues this matter is put as an act of harassment.

103. The claimant subsequently successfully amended her claim with no objection from the respondent to include this as a victimisation claim.

104. We accept that from the claimant's point of view having additional visits added on to her rota may well have been unwanted treatment, but given the fact that we have found about the changing nature of the rota and given the email evidence that we have seen sent by Miss Davis about the relatively light workload of the individuals and since the claimant had not been into the office to collect additional spot checks at that point, we accept that it was entirely reasonable for her to allocate the claimant some further work. We have no evidence that this was singling the claimant out since Miss Davis had made her intentions clear that she expected each of the five named individuals to take on some additional work that day.

105. The claimant may have considered that this was hostile or unreasonable treatment of her an reasonable management request, to take up some additional work, to fill the time they were underoccupied for.

106. This may have been unwanted, but it is not capable we find of creating the adverse statutory environment for the purposes of a harassment claim.

107. Further even if we are wrong, we find that there is nothing to suggest that the incident was anything to do with the claimant's race, and we find that it was not related to race. For example, we find there was no evince that the claimant was treated any worse than any other worker.

108. The claimant did not complain about it at the time and we agree that in the context of the email exchange and what the claimant knew about the rotas and the fact that they could change at short notice, she ought to have realised that this was not about her race but was everything to do with needs of the business to cover work and ensure that people were doing the work that was required.

109. We also have no evidence before us that Miss Davis knew that the claimant had written her initial letter of complaint, although we do have evidence that Miss Taylor knew about it.

Issues with Mr Lillywhite

110. The claimant alleges that on 7 August 2022, Mr Lillywhite who is a named respondent, scolded her when she brought to his attention that she was not able to work on the following Monday. She had been scheduled to work on the Monday.

111. We accept that the claimant had received her rota in advance, and we accept that it included a change to her rota for the following Monday. She says and we accept that she was never able to work on a Monday. She accepts that she had not checked her rota when it was sent through and that it was relatively late on Sunday before the relevant Monday when she did check it. We also find that the company not unreasonably, expected

employees to check their rotas when they were sent through to ensure that they knew the work that they would be doing and so that any corrections could be made.

112. When the claimant realised that she had been rostered on the Monday, she contacted Mr Lillywhite accepting before us very fairly that it was late in the day. Mr Lillywhite gave evidence to the Employment Tribunal and candidly accepted that he had been frustrated with the claimant and that his frustration had probably come across during the course of the phone call. He denied that this was anything to do with the claimant's race but stated that it was simply that he had to reorganise the rota at short notice and ensure that he had cover for the service users the following day. He accepted that the initial error was his own, but he also pointed out that had the claimant checked her rota earlier and identified the problem to him earlier, he would have had more time to reorganise and would not have had to do a significant amount of work at short notice.

113. The claimant referred to various messages in WhatsApp groups in which she says individuals had raised potential errors or incorrect changes to the rota with Mr Lillywhite, in which Mr Lillywhite's response in the whatsapp group had been measured and apologetic. She said she was treated differently.

114. The claim made to the Tribunal in respect of this issue was a claim of harassment, that Mr Lillywhite scolded the claimant when she said she had been scheduled to work on the Monday. We accept that the response she received from Mr Lillywhite was unwanted and we accept that it may well have created, at that point, an adverse environment for the claimant. We have considered whether or not there was a difference in treatment (reminding ourselves that difference in treatment is not necessary for harassment claim but that evidence of different treatment might be evidence of it being related to race).

115. We all agree that there is a significant difference in the nature of the matters being raised in the WhatsApp group, which are small changes to the identity of the service users being visited for example, rather than a statement that

an individual will not be available to work an entire shift at short notice. We find that the situations are not sufficiently similar to be evidentially helpful in this situation.

116. We find that Mr Lillywhite gave his evidence candidly and openly. He accepted that he made errors on a number of occasions. He explained he was under great pressure at work and that he found some of the systems he was required to deal with complicated and difficult. He also said that there was a distinction between having to find alternative people to cover an entire shift and minor variations to existing shifts. We accept Mr Lillywhite's explanation in respect of his responses as being an indication of his frustration about the situation the claimant had put him in, rather than it being a response that was related to the claimant's race.

117. We are satisfied that whilst the exchange may have upset the claimant, Mr Lillywhite's response to the claimant was nothing to do with the claimant's race. It was wholly related to the fact that he was frustrated at having to deal with a change at short notice.

118. We have also taken into account another matter concerning the change to the claimant's rota. The claimant has told us in the course of her evidence, that she had a number of health issues whilst she worked for the respondent as a result of a health problem she had suffered with whilst a student.

119. She told us that she had suffered with a build-up of spinal fluid in her brain and receiving largely successful treatment for many years. When she had a hospital appointment, she told the respondent and told them that she could not work on that day and asked not to be allocated work. When she looked at her rota, she found that she had been allocated to work.

120. She raised a concern with the Tribunal that she felt this was an indication of the respondent's attitude towards her, although it is not one of the allegations that we have to determine.

121. We accept that claimant's evidence that this happened. We have not been referred to any particular policy or practice explaining how Human

Resources would ensure that information was fed back to those doing the rotas, but we find that on balance of probabilities, it was the result of a failing at the Human Resources end, rather than a failure by those who are responsible for putting the claimant on the rota. On that occasion, we find that a mistake had been made.

122. This was frustrating for the claimant, particularly as she had identified to the respondent that she had a medical appointment at the hospital and particularly because we accept that the nature of the claimant's health issue and the need to attend the hospital itself was a stressful and difficult thing for the claimant to do.

123. We also observe that the claimant, in the co-operative manner that we have observed in her throughout her employment, in fact agreed to then leave the hospital and go and carry out the shift that she had been allocated, despite the fact that she had specifically said she was not available.

124. We have asked whether or not the fact of a second error indicates a difference in treatment of the claimant, or an adverse attitude towards the claimant. We find that it does not.

125. The two situations were different and involved different people. Both involved mistakes made which impacted on the claimant, but we accept the evidence of the respondent that they were mistakes and nothing more. We accept that the day to day needs changed quickly, we accept that there was poor communication between the respondent departments and we accept that Mr Lillywhite found the software he used difficult and became frustrated at having to change a rota at short notice.

126. For those reasons we do not find that the claimant's race was anything to do with the actions of Mr Lillywhite.

Allegations involving WhatsApp

127. The claimant was included in a number of different chat groups, as well for employees.

128. The claimant alleges that on 18 August, she found some of the chat on one of the WhatsApp groups to be offensive.

129. We find that her concern was that she thought some of the chat was potentially unprofessional and discriminatory.

130. She raised her concern and attended a meeting with Lisa Chalk. We find that at that meeting she told Lisa chalk that she had concerns. The claimant says that she specifically said that some of the exchanges were potentially discriminatory.

131. She was told that Lisa Chalk would speak to Miss Taylor about it. There are no notes of the meeting. Subsequently and for the purposes of these proceedings, the claimant contacted Lisa Chalk and asked her whether she recollected that she, the claimant had raised an issue of discrimination during that meeting.

132. Lisa Chalk replied in a WhatsApp exchange, that she could not remember, she said that *a lot has happened. I do remember you complaining about x (a particular service user) and that is about all*. Miss Chalk has not given evidence to the Employment Tribunal. The respondent disputes that the claimant asserted that the chat was discriminatory and suggests that the claimant was raising a question or a concern about whether the chat on the WhatsApp group was professional or not. The claimant is adamant that she thought there was an issue of discrimination and she raised it, but there was no discussion at the meeting.

133. Miss Taylor remembers that there had been an issue raised with her about some unhappiness on the part of the claimant that there was unprofessional chat in some of the WhatsApp groups and that there was some discussion about what was professional and what the WhatsApp groups were for.

134. We find that that on a number of occasions messages were put in the chat groups and elsewhere by managers, reminding everybody what the

purpose of the WhatsApp chat groups were and reminding people to keep chat professional.

135. We find, we have taking into account our findings about the way that this organisation had dealt with the claimant's race related concerns previously, and on our own findings and observation that the claimant was not shy of raising issues where she considered that they existed, that it is more likely that the respondents failed to register what the claimant was actually raising with them than that the claimant did not raise her concerns. On balance of probabilities we find that the claimant did express concerns that the chat might be discriminatory and that she did a protected act in that meeting.

136. We have also taken into account the fact that there are exchanges within the group chat about a service user who did not speak English and queries about which carer spoke the same language. We all agree that this is a matter that is arguably related to race, but we find that none of the matters posted within the WhatsApp group are racist within the meaning of the Equality Act 2010. In particular we find that hey are not capable of creating an intimidating or hostile or otherwise offensive environment for the claimant.

137. In so far as the claimant says that her complaint was a protected act, we find that it did not raise a matter which was capable of being an act of discrimination within the equality act. Just because it made reference to race, did not make the claimants allegation about it a protected act.

138. Here, the care workers are asking a legitimate question related to the race of a service user. We find that the obvious reason why the matters are being raised in the group chat is because the carers wanted to ensure that somebody was able to talk to the service user about the care being provided and about the limits of the care that they were able to provide, and to do so in the service users own language.

139. We all agree that the posts that we have seen are appropriate and respectful and aimed at ensuring that the proper care is provided and understood by the service user.

140. The next allegation is that Ms Anderson sent the claimant disrespectful messages in the WhatsApp retainer group, in September 2022.

141. The context of this is the claimants concern about the quantity of WhatsApp messages she was receiving. She wanted to delete the messages from her phone, which was not unreasonable. She used the disappearing messages function, which caused annoyance to others, who did not want the messages deleted or removed.

142. A number of people raised this with her and in the chat people turned the instruction off. That meant the messages continued to appear in the claimant's chat. The claimant turned the disappearing messages back on and it was turned off again by others. This happened a number of times. A message was then posted by an individual care worker who suggested to the claimant that she should turn messages off only for her own phone as everybody else did. We accept reading that message that it was perhaps a rather curt message, but we take into account that the WhatsApp group was a work group and that other users of it were increasingly frustrated because the claimant had not understood how to deal with the problem she had.

143. We observe that it might have been helpful had somebody taken time to explain this to the claimant, but there is no evidence before us from which we could conclude that the message or the tone of it was anything at all to do with the claimant's race, and we find that it was not. given the circumstances we find the only reason the message was sent in the terms of the scent was because the claimant's constant use of the disappearing function was causing frustration which is evident from the message.

144. This allegation is put as harassment related to race. We have reminded ourselves of the guidance in the guidance from Dhaliwal v Richmond Pharmacology and other cases set out in our summary of law below, and we find that the comment was not capable of amounting to harassment within the meaning of the act.

145. The comment may have been unwanted, and the claimant may have considered that it was hostile, or humiliating, but we find that it did not create a hostile or otherwise adverse environment for her. This was a trivial matter and the claimant knew that she was causing the issue for others, and they were reacting to her.

146. Even if we are wrong, we find that there is no evidence on which we could conclude that the comments were in any way related to the claimant's race. The comments were made, we find because of the frustration at the claimant turning off messages.

147. We remind ourselves that this respondent used WhatsApp chat groups to communicate with its employees, and the employees used the chat groups to communicate with each other. This was important to them and there were many reasons why they might want to retain their messages.

148. The claimant says that as a result of her complaint about the comments made in the chat group, she was subject to unfavourable treatment in two ways.

149. Firstly, the claimant says that between January and February 2023 she was excluded from two group chats, by Miss Taylor.

150. Secondly, she says that in or around February 2023, the third respondent told her that she had to give up one of her shifts on the retainer, so that some of her colleagues could make more money.

151. Dealing with the first allegation of unfavourable treatment we find as follows.

152. We find that it was the claimant herself who had decided to remove herself from the group chats. The reason was that the claimant had become frustrated at the number of group chats and the amount of space they were taking up on her phone.

153. In order to manage this, the claimant started to use a disappearing function. When switched on in WhatsApp, it removed the messages from the chat.

We find that the claimant was using this as a way of freeing up space and used *disappearing messages* without initially realising that this would have an impact on everybody else.

154. However, using the disappearing messages function within the Whatsapp chat group meant that messages were deleted for everyone rather than being stored. There were a number of exchanges within the group, aimed at the claimant , asking her not to turn on the disappearing messages function , and other users then turned it off. The claimant turned it on, and there were then further messages.

155. The claimant was upset by the messages from other care workers.

156. In respect of the messages, we find that the key concern the claimant had was that people were putting things into the chat group that might be unprofessional, and that the groups used up too much of her phone space.

157. The claimant had a period off work and when she returned in January 2023, she had a meeting with Miss Taylor. Following that meeting Miss Taylor asserts that she had a discussion with others including one of the directors.

158. We find that the claimant needed to be in two of the WhatsApp groups for work, but that it was possible for her to be given the information shared in other groups, in a different way.

159. Miss Taylor was told by the director to add the claimant back into the two WhatsApp groups as they were of direct relevance to the work she was doing and therefore she could not continue to absent herself from them.

160. However, we find the second instruction given to Miss Taylor was *not to* add her back into the other groups. Miss Taylor was told that the company was prepared to facilitate her not being in those groups, as the claimant was clearly finding the amount of traffic and the quantity of messages in the WhatsApp group distressing and she could receive the information from other places.

161. The claimant had removed herself from the WhatsApp group, the respondent was instructing Ms Taylor allow this in respect of two groups.

162. We find that for purposes of victimisation the claimant was not subjected to a detriment by the decision not to re-join her to the chat groups.

163. For the purposes of direct discrimination we find that the claimant was subject to the treatment she alleges, but it was not less favourable treatment, although it was different treatment to her colleagues. She was treated differently to others who were in a different situation to her own. Other workers had not raised concerns about the quality of messages that they were receiving, they had not decided to remove themselves from the Whatsapp group and had not expressed concerns about the quantity of messages taking up space on their phones.

164. We have no evidence at all of how a hypothetical other person in the same situation but of a different race to the claimant would have been treated.

165. We find that this was a real reason for her not being added back into all the groups. She was not excluded but was allowed to remain absent from the groups. This was not less favourable treatment for the purposes of her direct discrimination claim, and it was nothing to do with her having made a complaint previously.

166. The Claimant has not suggested that she raised a concern about this at the time or asked to be re-joined to the two chat groups that she had left herself.

167. Since we accept the explanation we have received from the respondent that the reason why she was removed was in order to assist her and accommodate her concerns about the number of groups she was in, we conclude that even were the burden of proof were to shift on this occasion (and we find on the basis of the evidence we have that it does not) that the explanation from the respondent is nothing to do with the claimant's race and completely explains the decision. Further we find that it is nothing whatsoever to do with any complaints the claimant had made about comments made by others in the group. We therefore reject the claimant's

allegation of direct race discrimination and victimisation in respect of those matters.

168. It might have been possible to deal with this in a different way, by perhaps assisting the claimant to delete messages or perhaps by addressing concerns that she had about the chat, but the mechanism chosen by this respondent as explained by Ms Taylor is nothing to do with the claimant having raised a complaint about discrimination, or with her race and everything to do with attempting to assist the claimant to return to work and feel comfortable with use of the WhatsApp groups.

Claimant Left Standing in the Rain

169. The claimant alleges that on one occasion in November or early December 2022 when she went to the office, she was left standing outside the office when it was raining. The claimant alleges that Miss Taylor saw her and left her there deliberately, and that this was an act of harassment and, following amendment, an act of victimisation.

170. Miss Taylor is adamant that this is not what happened and that it was nothing to do with the claimant's race, or any complaints or issues she had raised in any event.

171. We find that the claimant attended the office and buzzed once to be let in. She was then outside for about three minutes. She says that she saw Miss Taylor in the office and believed that Miss Taylor saw her, but that Miss Taylor did not let her in and that she was left outside for a few minutes.

172. Miss Taylor said that she came out of the back office where she worked to get something from the front office and that she did see the claimant standing outside, that she then alerted the team to the fact that the claimant was there and told somebody to let her in. She understands that somebody subsequently did let her in. We find that this is what happened.

173. We do not understand why the clamant did not buzz a second time, and we find that it is likely that those inside simply did not hear the buzzer or see

her. The only photograph that we have seen of the office shows a front office with curtains or covering on the windows and we have no evidence about where people were sitting or what they were doing within the office. What we do know is that when Miss Taylor did see the claimant that the claimant was let in although the claimant complains that this took some . Miss Taylor is adamant that this was not the case.

174. We have considered whether the series of events we have found in this instance and in respect of other matters, might lead us to ask whether or not there was some deliberate action in not letting her in sooner. If so we would then need to ask if this was something to do with the claimant's race, so that the burden of proof shifts. We have also considered whether the circumstantial evidence might be sufficient for us to find that this was a deliberate act by Miss Taylor. Having looked at all matters both individually and cumulatively, we have no grounds on which to infer that Miss Taylor was acting deliberately or to ask whether her actions were anything to do with race or any complaints or protected act done by the claimant.

175. This is because on balance we prefer the evidence of Miss Taylor as inherently more plausible. We do not believe that Miss Taylor would have deliberately left the claimant standing outside in the rain and we do find that Miss Taylor came into the office, spotted the claimant was there and told somebody else to answer the door. We find that the claimant was not left outside deliberately and find that Miss Taylor acted as soon as she saw the claimant.

176. Was this unwanted treatment or a detriment? We accept that being left standing in the rain is unwanted and capable of being a detriment. However, we find that the claimant was not left standing in the rain, but that she was waiting to be let in and it was raining.

177. Was this something that could create a hostile or adverse or otherwise unfavourable environment for the claimant? We accept that if the claimant believed that she was being deliberately left outside, that that would have an impact upon her. We find that the claimant was not deliberately left outside and therefore the events were nothing to do with her race, or any

issue she may have raised or any thing she may have done which amounted to a protected act.

The Dog Bite

178. The next matter arose when the claimant was bitten by a client's dog. This is put as an act of direct race discrimination against Miss Taylor.

179. The claimant attended at a service user's property and whilst she was on the phone she was bitten by a service user's dog. She reported the matter immediately, was asked to provide some photographs of the bite and did so.

180. There was no note on the file to warn the claimant that this was a potential risk and it appeared from the evidence before us, although not in the witness statements provided to the Tribunal that Miss Taylor was aware that this particular service user had a granddaughter who had a dog and that the dog had previously bitten other care workers.

181. Miss Taylor told us and we accept that the respondent had previously contacted the granddaughter and told her that she could not have the dog at the premises. However, there was no note on the file and Miss Taylor accepted that there should have been a note on the file.

182. We find that following this event there was a discussion or a phone call in which Miss Taylor did make a comment that the photographs the claimant had sent in were not very clear and the claimant raises a question as to whether or not Miss Taylor thought they were not clear because the claimant's skin is black.

183. Miss Taylor said her comment was nothing to do with the colour of the claimant's skin, and was said simply because she thought the photographs were not clear . One of the photographs we have seen in the bundle is clearer than the other, neither show bite marks clearly, but it is obvious from the photographs that the claimant has a small bruise. We find that the real reason Miss Taylor made her comment is because the photos were not very

clear to her. This was nothing to do with the colour of the claimant's skin. Miss Taylor believed the claimant, but thought the photos unclear.

184. No report was made in any accident book and it does not appear that there was any particular policy referred to. When asked Miss Taylor said that she knew that there was a health and safety policy that applied to the care workers themselves, but that she had not referred to it. It was suggested to the claimant that she send in some photographs; that she see her GP and that she check that her tetanus jab was up-to-date.

185. We find that Miss Taylor did take action about the service user immediately. Miss Taylor gave notice to Southampton City Council that they would not be prepared to provide care to the service user any longer and the reasons were given, and the care package was cancelled.

186. Miss Taylor pointed out that this action had not been taken previously but was taken on this occasion and we find that this was appropriate.

187. However, we find that there was a failure to communicate this information to the claimant. Since the claimant having been bitten by a dog, she may well have suffered more than a bruise. Individuals have different responses to dogs and being bitten by a dog and it would have been appropriate for some enquiry or investigation or reporting of this matter to have taken place.

188. The nature of care work, which involves going into the homes of others where there may be pets which are uncontrolled, carries an obvious risk. We would have expected there to have been a proper risk assessment in this case.

189. We find that there was a shambolic approach to many aspects of process and procedure within the organisation. Miss Taylor has given honest and clear evidence to us about the lack of clarity and lack of policy which she was required to deal with. We also recognise from the evidence of Mr Lillywhite and Miss Taylor that this was an extremely busy organisation and that there was a large amount of work to be done. We find that when the

claimant rang Miss Taylor to find out what had happened, and Miss Taylor said that she had been busy, that this was in fact true.

190. The claimant was unfortunate in being the victim of the dog bite, but it could have been any care worker. The response of the organisation was to ensure that action was taken to remove the service user, and we have no evidence that they would have acted any differently towards any other care worker.

191. Therefore, we cannot find that the claimant was treated any differently to anybody else was or would have been treated. In fact, in this case the only difference in treatment was that action was taken to terminate the care provision when the claimant complained which had clearly not been taken previously.

192. On that basis we do not consider that the burden of proof passes to the respondent but if it did, we accept that the explanation for the response by Miss Taylor to the claimant , was that the claimant had reported and Miss Taylor had done what she considered to be necessary and that there are no findings that we have made from which we could conclude that anything Ms Taylor did or did not do, was anything to do with the claimant's race.

193. In considering the motivations of Miss Taylor, and in asking whether or not any of her actions might have been on grounds of race, we have considered an email, referred to us by the respondent, written by another member of staff whose name is Janice and who is described to us as being a Black West Indian woman. We have not had any evidence from her and the email that is attached to Miss Taylor's witness statement is not itself a witness statement. it is unclear what the purpose of it is for, but it does not appear to have been written for the purposes of proceedings.

194. It appears to be a reference from another woman who worked at the same time as the claimant, who was either the same race or of a similar racial background to the claimant and who has written a testament as to how supportive she found Miss Taylor to be. We observe that such evidence does not carry a great deal of weight and it is certainly not probative of how Miss Taylor dealt with the claimant, or whether her race was a factor in any

of her treatment by Miss Taylor. It is a matter which we have taken into account only as supporting the conclusion that we have already drawn, that Miss Taylors treatment and interactions with the claimant are not on grounds of race, and it is inherently unlikely that Miss Taylor would have deliberately left the claimant or anyone else standing in the rain, for example.

195. The claimant raises a matter of harassment that on 7 – 8 November 2022, she was asked by Ms Anderson to complete a return-to-work form and that when she attended the office, Ms Anderson said to her, when taking her away to find the form, that completing the form was *the professional thing to do*. The claimant raises a concern that this was said to her because the claimant had previously raised concerns about professionalism within the WhatsApp group.

196. We have not heard any evidence from Ms Anderson and we accept the claimant's evidence that a comment of this type was made to her. We accept that the claimant found this to be an odd comment to be made.

197. However, we also observe that filling in the back to work form *was* the professional thing to do, indeed it was a required thing to do, and it may well just have been an unfortunate turn of phrase.

198. We are troubled by the number of occasions on which there appear to have been mishaps, errors and potentially adverse comments made to the claimant and we have considered in this instance as with all instances, whether there is any evidence or any facts that we have found, which point to the matters being linked, or indicative of some adverse motive when looked at cumulatively.

199. Having considered this carefully, we find, even considering the circumstantial evidence, there is nothing to suggest that this comment was anything to do with race.

200. The most we can say about this incident, is that it is possible that there was a link between this comment and something the claimant had said previously, about professionalism and it may have been a sarcastic remark.

201. We find that this is not particularly probable, and we find therefore that it was not linked to anything the claimant said before.

202. We conclude that this is not capable of amounting to a matter of race related harassment. Even if it was an unwanted comment, it was not capable of creating the adverse environment anticipated by the statutory provisions and in any event, we cannot find that it is related to the claimant's race. We remind ourselves that this is put as a complaint of harassment.

Mr Lillywhite's comment about the apology

203. The next issue is that in December 2022 the fourth respondent, Mr Lillywhite made a comment in the claimant's hearing, that another work colleague was walking away from an apology.

204. The claimant accepts that she had been contacted by her work colleague Mr M. He has not given evidence before us. She accepts that he had contacted her to ask her whether or not she had had the inoculation and follow up inoculation. We understand this to have been a question about covid jabs.

205. She answered simply with a yes and yes and thought that she had been curt. She explained to us that it was a difficult day for her because she was dealing with a number of family emergencies and that she was not really in the mood for talking to the office. We understand that that was the reason why perhaps she was curt.

206. She went into the office and when she saw Mr M again, she attempted to offer him an apology. We find that this was typical of the claimant's cooperative approach to her colleagues.

207. She says that he simply walked away from her and at that point Mr Lillywhite said *you are walking away from an apology, I would not walk away*. Mr Lillywhite has no recollection of making this comment and is adamant that he did not say it. However, during the course of his evidence he did say that he did wonder why somebody would walk away from an apology, he thought it was an odd thing to do and he did remember the incident.

208. We prefer the claimant's recollection and find that the comment was made.

209. The claimant says the comment made by Mr Lillywhite was an act of race related harassment. We have looked at this in the round. We understand that for the claimant, to have her genuine apology refused would be upsetting. We find that it was unreasonable of Mr M, and that he should have accepted the apology. We also think that Mr Lillywhite and perhaps Miss Taylor who came to know about this incident afterwards, should have told him that he should have had the good grace to accept an apology genuinely offered.

210. The claimant also says that Miss Taylor commented during the same interaction, something to effect *Aw bless*… and the claimant felt this was unwanted. Miss Taylor says that she did not make the comment, she has no recollection of it. Again, we have found the claimant to be an honest witness before us and we prefer her recollection of that incident, because she had sought to apologise and her recollection of being rebuffed is likely to have been clearer than that of either Mr Lillywhite or Ms Taylor.

211. The comment made by Mr Lillywhite could be unwanted conduct by the claimant, although we are unclear why, and and might make the working environment difficult or hostile for her, if she thought the comments implied some criticism of her. We find that they did not. We find that , in context, the difficulty was not the comments made but the actions of the person refusing her apology.

212. However, even if there was a hostile or humiliating or other adverse environment, none of the facts that we have found support a conclusion that this was anything to do with the claimant's race. If anything, the

behaviour of Mr M, who Mr Lillywhite told us had been upset by a phone call, was rude, but the response of Mr Lillywhite appears to be admonishing him and the response from Miss Taylor is simply odd. We cannot conclude on the basis of the information that we have before us and the facts we have found that this is related to the claimant's race, and we find that it was not.

Mr Lillywhite failing to answer the claimants calls

213. On 28 December 2022 the fourth respondent is alleged to have deliberately failed to have answer the claimant's calls.

214. We find that this was an instance where Mr Lillywhite had been on call for two weeks. He said and we accept his evidence that he had agreed to be on call during that period, so that others could have some Christmas time with their families, as over the past few years this had not been possible.

215. We also accept his evidence that the evening of 28 December 2022 was the one evening when he wanted to have some time with his family, to have a meal. We accept that he had contacted all the carers, not just the claimant and indicated that he would not be available for a period of time that evening.

216. We accept the claimant's observation that if somebody is on call, then the purpose is that they would be available to assist. However, Mr Lillywhite told us, and we accept, that it was the practice within this organisation that there would often be occasions when somebody on call would not available for a certain period of time and that there were alternative mechanisms by which an individual could be contacted.

217. We find that on this evening, the claimant was concerned with good reason about one of the service users, and that she attempted to contact Mr Lillywhite and that she was unable to get through to him initially.

218. We also find however, that the claimant was able to obtain assistance from others and that Mr Lillywhite did in fact attempt to call her back subsequently and that she did ignore three calls that he had made.

219. We understand that this was a difficult issue for the claimant. We understand that she was doing her job and wanted to talk to somebody and was concerned, but on the facts that we find, Mr Lillywhite was not responding to calls because he had previously indicated that he would be unavailable rather than because it was the claimant calling him. This was not something which was related to the claimant's race but was a failure to respond related to his previous indication that he would be unavailable because he was attending at a family meal. We therefore dismiss that claim.

220. There is a further allegation that the claimant found exchanges within the chat group on 6 January 2023, that the third respondent responded to messages in the group chats which had stated the dog was too unprofessional for the chat, to *get a life* , *I would like to put an incident form in for bullying in the workplace.* In respect of this, we find that there had been some exchanges about somebody's dog and that Miss Taylor was simply reminding people that this was not a professional matter to be included in the chat. This was a reasonably good natured exchange which we find was not directed at the claimant . We find that this exchange does not amount to unwanted conduct but if we are wrong, we find that it was not conduct which had the effect of creating a hostile or otherwise unlawful environment for her. We find that comments were an exchange between work mates who are perhaps having a joke with each other, and we find that this is not capable of amounting to harassment within the statutory sense.

221. The claimant alleges that between 17 – 22 February 2023 the respondent informed her that she had to give up one of her shifts on the retainer team so that some of her colleagues could make more money.

222. This brings us to the issue of the TUPE transfer. We accept that the company was taken over by Apex in February 2023 by way of TUPE transfer and that all employees transferred. We accept the claimant's evidence that

she had understood that as a result of that transfer, the current patterns of work would be retained and that nobody would lose work.

223. Miss Taylor told us and we accept her evidence, that whilst this had been the intention at the outset, unfortunately Apex had not fully understood the complexity involved in providing the bridging work and had not understood what was required or the costs associated with it.

224. Apex decided to make some changes, which involved them dropping some of the less lucrative retaining and bridging work. This meant that there was a reduction in the amount of work available for all the carers to do at the higher rate of pay.

225. We accept the evidence from Miss Taylor that she was then required to contact all the carers to talk to them about the reduction in the better paid retainer work and that one of the people she spoke to was the claimant. Miss Taylor accepts that she was talking to her employers because this was an issue for all of them.

226. We find that she contacted about twenty individuals, and we find that she asked all of them whether or not they would be prepared to do fewer retainer shifts and perhaps take up some additional domiciliary shifts, so that there could be a sharing out of the better paid work.

227. We find the additional domiciliary work was offered to everyone as a way of making up both their work and their income. We accept Miss Taylors evidence that not everybody wanted to accept domiciliary work, and that some people did leave as a result. We find that others were prepared to accept the changes.

228. The claimant puts this as a claim of victimisation and we have therefore considered whether the reason why Miss Taylor spoke to the claimant about this and asked her if she was prepared to give up any of her shifts was anything to do with the claimant having raised the protected acts upon which she relies. In this case the claimant relied upon the reporting of discriminatory chatter about a service user on 18 August 2022.

229. We find no evidence that the fact the claimant had raised concerns about the chatter in August 2022 had any influence on the decision to speak to the claimant , or what was said to the claimant at all.

230. We find that this was a commercial situation in which Miss Taylor was required to redistribute a diminishing quantity of work in order to try to retain as many carers as she could. We accept Miss Taylor's explanation for this.

231. We find that the claimant was spoken to as other employees were spoken to. We find that the claimants understanding that she was being asked to give up some of her work to be shared out amongst others, was what she was being asked. We accept that the reason why the request was being made and why there was a discussion was that everybody was facing a reduction in work. The claimant was not being treated differently to anybody else and the explanation for it is nothing to do with the fact that the claimant had previously raised concerns or done protected acts.

232. Following this discussion, we find the claimant was unhappy with the work that was allocated to her and we understand why. Essentially, she was facing a reduction in income.

233. Following that discussion, there was a further incident which the claimant says led to her resigning. The claimant was on rota to visit a particular service user, but during the course of the claimant's visit to the service user and following her enquiries from other care workers, it became clear that she was not the first person to have visited this service user. She had been sent in error to see her and there was therefore a risk, that , if the claimant had not realised this, she could have double prescribed or double allocated medication.

234. Fortunately, the claimant realised that there was an issue and made every attempt to contact both the office and fellow care workers to find out what had been happening. She was able to confirm an earlier visit from another person who had ensured the medication had been taken, and therefore the claimant did not help the service user to take second lot of medication.

235. The claimant contacted the Miss Taylor and was able to speak to her. The claimant accepts that she was extremely upset and very angry. The reason she was so upset was twofold. Firstly, she was really concerned that she had been sent to a service user's house to do a job with no indication that the medication had already been taken, and was extremely concerned that she may have been responsible for over administrating medication and therefore not only perhaps caused injury to the service user but also been held responsible herself for a failure which was clearly not her fault. She was concerned that she may have been set up to fail.

236. The second thing that concerned her was that the error had been made at all and that it had been made with an impact upon her. She accepts that she was very angry when she spoke to Miss Taylor and that she made the decision there and then that she was resigning. The response from Miss Taylor was one of surprise and she asked why she was resigning at that point. There is no dispute however that the reason why the claimant resigned was in response to this particular incident.

237. We find that in fact this was an error made by Mr Lillywhite. He has given evidence about this, and we accept his evidence that he simply made a mistake. We are unclear about how the mistake arose, but there appears to have been some confusion over the rota which led to the claimant being allocated to double up on this particular visit. We found Mr Lillywhite to be an honest witness. We can see no reason why he would deliberately send the claimant on a second visit or why he would risk the health and wellbeing of a service user and we find that he did not. We find that this was an unfortunate sequence of events which the claimant observed, notified and dealt with.

238. It is unfortunate that it was the claimant who was at the rough end of this particular error and it is also unfortunate that the other care workers who had dealt with it were not alerted earlier, in order to have saved the claimant the stress and trouble. However, we have found no facts that suggest other than that this was a genuine mistake, and find that this was nothing to do

with the claimant's race. We are satisfied that this was an unfortunate and potentially dangerous error which the claimant dealt with and averted.

Applicable legal principles

239. The claimant brings claims of direct discrimination on grounds of race, victimisation for having done a protected act and harassment related to race.

240. The term 'race' (EqA 2010) refers for the purposes of this case, to colour, nationality or ethnic or national origins.

241. We have reminded ourselves that the term racial group can include two or more different racial groups. If those not of that group are treated advantageously by comparison with those who are, there is a difference of treatment and a difference of national origin: *'… discriminating against someone because he or she is not Bermudian, or indeed on grounds of nationality or citizenship, is discrimination on the grounds of "race, place of origin, colour or ethnic or national origins*"', see per Lord Neuberger MR in *Thompson v Bermuda Dental Board (Human Rights Commissioners intervening) [2008] UKPC 33, 73 WIR 122*, *24 BHRC 756, at [26]*.

242. The Equality Act 2010 defines direct discrimination generally as less favorable treatment 'because of a protected characteristic', s 13.

243. Section 13(1) EqA provides that:

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

244. It is for a claimant to prove facts from which, in the absence of any other explanation, a Tribunal could conclude that unlawful discrimination had occurred: section 136(2) EqA. After that, the burden shifts to the respondent to show that it did not discriminate: section 136(3).

245. The mere facts of (i) a difference in treatment and (ii) a difference in protected characteristics, without more, will not discharge a claimant's burden under section 136(2) EqA: ***Royal Mail v Efobi*** [2021] UKSC 33, para 46.

246. Section 39(2) EqA prohibits an employer from discriminating against an employee *inter alia* by subjecting them to *"any other detriment"*. The concept of 'detriment' in this context is relatively broad, but is not unlimited. Thus:

246.1. not every instance of discriminatory conduct will give rise to a detriment: ***Whitley v Thompson*** (UKEAT/1169/97); and

246.2. the conduct in question must be such as a reasonable employee could consider to be to their detriment: ***Chief Constable of West Yorkshire Police v Khan*** [2001] UKHL 48, ¶53 (applying an analogous concept under the old law of victimisation).

247. There are two elements in direct discrimination: (1) the less favourable treatment, and (2) the reason for that treatment. In *Glasgow City Council v Zafar [1998] ICR 120 at 123*, Lord Browne-Wilkinson put the matter this way:

> "Although at the end of the day, s 1(1) of the Act of 1976 requires an answer to be given to a single question (viz has the complainant been treated less favourably than others on [the ground of that protected characteristic]?) … it is convenient for the purposes of analysis to split that question into two parts—(a) less favourable treatment; and (b) [on grounds of that protected characteristic]."

248. In some cases, and the issues in this claim are examples we think, it may not be possible to disentangle the issue of 'less favourable treatment' from the 'reason why' issue (See for example per Lord Nicholls of Birkenhead at [8]; Lord Rodger of Earlsferry at [125] in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 [2003] ICR 337*). In that case the House of Lords determined that if a tribunal decides that treatment was on the basis of the proscribed ground, then the finding of a

suitable comparator is unlikely to prove much of a difficulty to the establishing of liability.

249. The issue, then, is one of less favourable, not merely different, treatment.

250. We have reminded ourselves that, where relied upon, it is for the claimant to show that a hypothetical comparator would have been treated more favourably. In so doing the claimant may invite the tribunal to draw inferences from all relevant circumstances, but it is still a matter for the claimant to ensure that the tribunal is given the primary evidence from which the necessary inferences may be drawn. We bear in mind that in cases where there is prime facie evidence of discrimination, we should consider how a hypothetical comparator would have been treated, even if the claimant has identified real comparators. (cf *Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting [2001] EWCA Civ 2097*, *[2002] ICR 646*).

251. We have reminded ourselves of the legal principles relevant to the task of deciding how a hypothetical comparator would be treated.

252. We remind ourselves that the evidence of how real individuals were actually treated by the respondent, is likely to be crucial for our determinations, and that the closer the circumstances of those individuals are to those of the complainant, the greater the weight we are likely to attribute to the significance of any difference between their treatment, and the treatment of either of the claimants.

253. We remind ourselves that in constructing a hypothetical comparator it is permissible to consider and compare how individuals in non identical but not wholly dissimilar cases have in fact been treated. (See for example *Chief Constable of West Yorkshire v Vento [2001] IRLR 124, EAT*, per Lindsay J at [7].

254. In this case the claim has been put primarily as a hypothetical comparator case, and the claimant has referred us to the treatment of others, some of whom have been in materially different circumstances. we have

nonetheless considered whether the treatment of others in materially different circumstances might be evidentially useful in constructing how a hypothetical other would be treated.

255. In *London Borough of Islington v Ladele [2009] ICR 387, EAT* and upheld by CA: *[2009] EWCA Civ 1357*, *[2010] ICR 532* the EAT gave the following guidance:

"The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:

(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572, 575*—"this is the crucial question". He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in *Nagarajan* (p 576) as explained by Peter Gibson LJ in *Igen v Wong [2005] EWCA Civ 142*, *[2005] ICR 931*, paragraph 37.

(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in *Igen v Wong*.

(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. …

(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test: see the decision of the Court of Appeal in *Brown v Croydon LBC [2007] EWCA Civ 32*, *[2007] IRLR 259* paragraphs 28–39. …

(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in *Anya v University of Oxford [2001] EWCA Civ 405*, *[2001] IRLR 377* esp paragraph 10.

(7) As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in *Watt (formerly Carter) v Ahsan [2008] IRLR 243*, "

256. Where less favourable treatment is in issue , the question of whether the alleged treatment is capable of amounting to 'less favourable treatment' is a question for the tribunal to decide. It is not enough for a complainant to simply assert that it *is* less favourable. On the other hand, the case-law suggests that the test for determining what constitutes less favourable treatment should not be too onerous and should not disregard the perception of the complainant: *'R v Birmingham City Council ex parte Equal Opportunities Commission* , *[1989] IRLR 173*

257. In respect of harassment, section 26 EqA provides in the material part that:

"(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

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

(a) the perception of B;

(b) the other circumstances of the case;

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

258. In ***Richmond Pharmacology v Dhaliwal*** [2009] ICR 724 (EAT), Underhill P held that it is a *"healthy discipline"* for any Tribunal faced with a harassment claim to make specific findings in respect of each of the three essential constituent elements of such a claim, namely:

258.1. did unwanted conduct occur?

258.2. if so, did it have the prescribed purpose or effect?

258.3. if so, did it relate to a protected characteristic?

259. The first of these questions is typically a straightforward question of whether the conduct occurred and if so whether it was unwanted. The second question is about the claimants view of or response to the conduct at the relevant time.

260. When considering the second question , we remind ourselves that dignity is not necessarily violated by things said or done that are trivial or transitory, especially if it ought to have been clear that offence was not intended: *ibid*, para 22;

261. We also bear in mind thatthere is a difference between an *"environment"* and an incident: ***General Municipal and Boilermakers Union v Henderson*** [2015] IRLR 451, para 99, and remind ourselves that isolated acts may constitute harassment, but must reach a degree of seriousness before they do so: *ibid*;

262. We remind ourselves that he test for whether the requisite environment has been created has both objective and subjective elements: ***Pemberton v***

Inwood [2018] ICR 1291 (CA) para88 and that whether conduct was or was not intended to produce the proscribed effect will be relevant to the question whether it was *"reasonable"* for it to do so: ***Dhaliwal***, para15.

263. The question whether conduct is related to a protected characteristic is one of fact. A claimant's subjective opinion in that regard is not determinative: ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** [2020] IRLR 495 (EAT), para 21.

264. When considering the allegations the claimant makes of harassment we remind ourselves that not only did the conduct have to have been 'unwanted', but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (*Bakkali-v-Greater Manchester Buses* [2018] UKEAT/0176/17).

265. The claimant brings a number of her claims as claims of Victimisation contrary to s. 27 Equality Act, which provides in the material part that:

> *"(1)A person (A) victimises another person (B) if A subjects B to a detriment because—*
>
> *(a) B does a protected act, or*
> *(b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act—*
>
> *…*
> *(c) doing any other thing for the purposes of or in connection with this Act;*
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act. …"*

266. In this case, the claimant relies upon complaints she has made and issues she has raised which she says were protected acts.

267. When considering whether an act amounts to a protected act, we remind ourselves that although there is limited case-law as to the meaning of limb

(2)(c), It is likely that the language is to be given a fairly broad, purposive interpretation

268. Where the claimant says that the protected act is *an allegation (whether or not express) that A or another person has contravened this Act* the complaint must at least identify some criticism, grievance or complaint that is *"in some sense an allegation of discrimination or otherwise a contravention of the legislation"*: ***Beneviste v Kingston University*** (EAT/0393/05), para 29. The fact that a complaint does not reference a protected characteristic will be a relevant consideration: ***Fullah v Medical Research Council*** (EAT/0586/12).

269. We have made findings that she did do protected acts on a number of occasions throughout the course of her employment.

270. Where we have also found that the respondent did subject the claimant to detriment, the primary focus of our consideration has been the cause or reason for the detriment.

271. The test of causation under s. 27 is similar to that under s. 13 in that it required us to consider whether the Claimant has been victimised '*because*' she had done a protected act. We remind ourselves that this is not a but for test; (*Chief Constable of Greater Manchester Constabulary-v-Bailey* [2017] EWCA Civ 425); the act had to have been an effective cause of the detriment, but it does not have to be the principal cause. However, it has to have been the act itself that caused the treatment complained of, not issues surrounding it.

272. In order to succeed under s. 27, a claimant needs to show two things; that she was subjected to a detriment and, secondly, that it was because of the protected act(s). We have applied the 'shifting' burden of proof s. 136 to that test as well.

273. An employee will be constructively dismissed if their employer commits a repudiatory breach of their employment contract that they accept by resigning: ***Société Générale v Geys*** [2012] UKSC 63.

274. An act of unlawful direct discrimination will often amount also to a repudiatory breach of the implied term of trust and confidence in an employment contract, but not always: ***Clements v Lloyds Banking*** (UKEAT/0474/13), paragraphs27-28.

275. Constructive dismissal will arise only where an employee resigns in response to a breach, i.e. where the breach is an effective cause of the resignation. In some cases, even discriminatory conduct may form an immaterial part of wider conduct amounting to repudiatory breach: *ibid*. If so, it will not be an effective cause of any resignation in response to that breach.

276. An employee who affirms their contract after a repudiatory breach will lose the right to resign in response to it. A significant delay between raising a grievance and resigning may indicate that a person has affirmed any related breach: ***Fereday v South Staffordshire NHS Primary Care Trust*** (EAT/0513/10), paragraphs 44, 50.

Interaction between claims

277. Claims of harassment are mutually exclusive with claims of: (i) discrimination, insofar as the discrimination claim is based on an allegation that the claimant was subjected to a detriment contrary to section 39(2)(d) EqA; and (ii) victimisation. That is because section 212(1) EqA provides *inter alia* that the concept of 'detriment' *"does not, subject to [an irrelevant exception], include conduct which amounts to harassment"*. All victimisation claims rely on the existence of a relevant detriment, as do discrimination claims brought in reliance on section 39(2)(d).

Jurisdiction

278. The primary time limit for the claims in issue is three months from the date of the alleged act (subject to any extension of time for ACAS early conciliation): section 123(1)(a) EqA. As Employment Judge Gray noted at the preliminary hearing on 18 August 2023 (p.72), this means that a

complaint about any act before 28 December 2022 in respect of Apex, Ms Taylor and Mr Lillywhite, or 30 December 2022 in respect of Enthuse, is potentially out of time.

279. An omission to act is taken to have occurred when a person decided on the omission: section 123(3)(b) EqA. Per section 123(4), absent evidence to the contrary a person is to be taken to have decided not to do something:

279.1. when they do an act inconsistent with doing it; or

279.2. if there is no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it.

280. Conduct extending over a period is to be treated as done at the end of the period: section 123(3)(a) EqA. In ***Lyfar v Brighton and Sussex University Hospitals Trust*** [2006] EWCA Civ 1548, at ¶17 the Court of Appeal endorsed earlier EAT authority to the effect that, when considering whether conduct extended over a period:

> *"the focus should be on the substance of the complaints that [a respondent] was responsible for an ongoing situation or a continuing state of affairs … The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."*

281. If a complaint is brought after the expiry of the primary time limit, the Tribunal may consider whether it would be just and equitable to extend time such that the claim can be determined in spite of its *prima facie* lateness: section 123(1)(b) EqA.

Conclusions

282. Having made our findings of fact, and before drawing the conclusions which we have set out, for convenience within the body of the judgment, we have looked at the whole chronology of events, and considered whether the circumstances as a whole might be facts from which we could conclude that discrimination had taken place.

283. We have asked whether the failures of the organisation, by several people, might point to a prejudicial or negative attitude towards the claimant, by one or all of the respondents. We have also considered whether, when looked at as a whole, we might find that there was a pattern of treatment, which raises concerns such as to require an explanation from the respondent.

284. We have considered the allegations the claimant makes about the start of her employment and whilst we consider that there was a series of unfortunate events, we conclude that the poor communication with the claimant at the outset of her employment and the failure to respond to her concern that she might have been treated as she was because of her race, was the result of a shambolic and disorganised organisation. we find that there was poor communication between departments that the procedures for taking on staff and ensuring that they were suitably qualified and had carried out sufficient shadowing work, were far from clear, but that primarily everybody was working very hard to provide care to vulnerable adults in an ever-changing environment.

285. We find that the difficulties that the claimant encountered were not to do with her race or the fact that she had made complaints which amounted to protected acts, but more often than not weather result of poor policies and practises and a busy and constantly changing work environment.

286. Whilst we understand why, from the claimant's point of view and in the absence of any explanations having been given to her previously, she considered that her treatment over the course of her employment was related to her race, we do find that it was not.

287. When we look at the entire chronology, and all the facts we have found, what we find is a failure by the respondent to operate proper procedures, which has led to number of unfortunate errors having been made. The failures were not, we conclude specific to the claimant, but were endemic within the organisation.

288. We have considered the evidence we have , that there were a number of failings and unfortunate events, which occurred involved the claimant who is a Black West Indian lady. WE remind ourselves that we have found that there are many instances where we accept the respondents explanation as a complete answer and nothing to do with race. In a number of other instances, we have found that the claimant has failed to prove any facts which might shift the burden of proof.

289. In respect of those instances, looked at together, we have asked, I do the number of issue and the fact the claimants race amount to facts from which we can draw an inference? We all agree that they do not. Instead we conclude that the fact that all the matters, is enough to move the burden of proof to the respondent.

290. We considered whether the protected acts done by the clamant have been an effective cause of any of the detriments she has alleged, which we have found proved. We have not made findings of fact from which we could conclude, in the absence of an explanation, that any of the things we have found occurred, were on grounds of race, related to race, or because the claimant had done a protected act.

291. If we are wrong about that, we have heard evidence which explains most of the adverse actions , and we have accepted them as being genuine and nothing to do with race or any protected act.

292. We conclude that the claimant was not discriminated against on grounds of race, she was not harassed for a reason related to race and she was not victimised by any of the respondents.

293. We conclude therefore that whilst we accept that the claimant did resign in respect of these matters, her constructive and wrongful dismissal claim as it relate to race does not succeed.

294. In summary our conclusions are as follows in respect of each issue:

1. The claimant was not offered the job that she had applied for but the reason was nothing to do with the claimants race and was because the respondent needed to be sure that the claimant understood domicilary care prior to allocating her work as an assessor. The respondent had treated other white men in the same way and we dismiss this allegation.

2. The claimant was not excluded from group chats, in fact she removed herself from the chats and the respondent agreed not to add her back into those which were not of direct relevance to her work. This was not a less favourable treatment and nor was it a detriment. It was done to facilitate the claimant's own preferences and was nothing to do with her race. We dismissed the claim of direct discrimination and we dismiss the claim of victimisation.

3. From 17 June 2022 to 6 January 2023 and the third Respondent did not offer the claimant as much assessment work as she would have liked but this was the cause of the time which the claimant chose to do her shifts when the bridging work was less likely to be available. The claimant was treated in the same way as any other person would was or would have been treated with a similar shift pattern to herself and the allocation of shifts was nothing to do with claimants race. The claim of direct discrimination is dismissed.

4. The claimant was bitten by a dog and the respondents response was to remove the contract from the service user. The respondent did respond to the claimant, and any shortcomings in that response with nothing to do with the claimants race but indicative of the way the company operated. There is no evidence of different treatment and we dismiss the claimant’s claim of direct discrimination.

Race related Harassment

5. The claimant was offered a post as a domiciliary care worker following a change in contracts and a shortage of assessment and bridging work. The claimant was not treated differently to anybody else and the decision to offer

her alternatives to make up her income was nothing to do with her race we dismiss this claim.

6. The claimant's rota was changed on 3 August and additional work was allocated to her but this was because the claimant and others had a light workload that day the claimant was treated to the same as other workers and the reason was nothing to do with her race.

7. On 7 August 2022, the Fourth Respondent was frustrated with the Claimant when she said that she had been schedule to work on a Monday. The frustration was a reaction to the late notification of an error in the rotor which meant that Mr Lillywhite had to do a large amount of work at very short notice. This was the reason for his frustration and it was not related to the claimants race.

8. In September 2022, Ms Anderson sent messages to the Claimant in the whatsapp retainer group, this was not a disrespectful message although it was curt and was sent because the claimant kept using disappearing messages which impacted on other users of the whatsapp group. This was not related to the claimant's race and was not capable of amounting to Harassment.

9. On 7/8 November 2022, Ms Anderson did opt to complete the Claimant's return to work form with her and say that "completing the form is the professional thing to do". This was a requirement and the comment was not capable of amounting to harassment since it was related to the need to complete a form and was not related to the claimants race.

10. In late November/early December 2022, the Third Respondent did not pretend not to see the Claimant and leave her standing in the rain for three minutes. We find the claimant has not proved the unwanted treatment and therefore dismissed the claim.

11. In December 2022, the Fourth Respondent did say "you are walking away from an apology? I wouldn't walk away!" when the Claimant attempted to apologise to a colleague, Mr Manley and During the same

interaction, did the Third Respondent say "aww bless". We find that this is not Of violating the claimant's dignity or creating an adverse environment for the claimant, and in any event it was not related to the claimants race.

12. On 28 December 2022, the Fourth Respondent did not answer the Claimant's calls until 20:30, when she was dealing with an incident involving a service user. This was unwanted conduct, but it did not have the purpose of creating an adverse environment even if the claimant considered it to create one, nor did it violate her dignity. It was not related to the claimants race. It was the result of a pre notified absence from the duty rota and other methods of contacting staff for help were available.

13. On 6 January 2023, the Third Respondent did respond to messages in the Retainer group chat stating "...dog was too unprofessional for the chat ... To get a life .... I'd like to put an incident form in for bullying in the workplace ... It's not bullying M its character-building" with laughing emojis. Whilst the conduct was unwanted by the claimant in that she found it offensive it was not written with the purpose of violating the claimants dignity or creating an intimidating hostile degrading humiliating or offensive environment for her nor we find did it have that effect.

Victimisation

14. The claimant did report chatter about a service user on 18 August 2022, but it was not discriminatory. Even if this was capable of being a protected act, the Claimant was not excluded from two work group chats between 5 January until 22 February 2023, but was not added back in, following her self removal from the groups. The decision not to add her back in was nothing to do with her complaint.

15. Between 17 and 22 February 2023, the third Respondent did not inform the Claimant that she had to give up one of her shifts on the retainer team so that some of her colleagues could make more money, but asked her. Along with a number of other workers, if they would be willing to share some of the more lucrative work. This conversation was nothing to do with the claimant having made any complaints.

Constructive wrongful dismissal

16. The First Respondent did not commit a repudiatory breach of the Claimant's contract of employment, by discriminating against her on grounds of race.

17. The Claimant asserts that adding a service user to her list on the 22 February 2023, she had no alternative when a service user was added to her list, she had no choice but to resign,. We find tat the service user was added and that it caused the claimant distress. We find that this was the reason she resigned. This was not an act of race discrimination but was the result of an error. The claimant does not have 2 years' service and cannot bring a claim for ordinary unfair dismissal.

295. We therefore dismiss all the claims in their entirety against each of the respondents.

296. We have not therefore needed to consider whether any matters were within time but we also do observe that there appeared to have been a number of complaints made which were not linked to one another as they were by different individuals, but we have not had to and have not drawn any conclusions about whether we might have found any continuing act had we found any claims of discrimination to be proven.

Employment Judge Rayner
Date: 23 February 2024

Reasons sent to the Parties: 23 February 2024

FOR THE TRIBUNAL OFFICE