EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102823/2023 Hearing Held at Edinburgh on 12, 13, 14, 15, 18 and 19 December 2023, and Members' Meeting on 13 February 2024

Employment Judge: M A Macleod
10 **Tribunal Member: Z Van Zwanenberg**
Tribunal Member: A Matheson

Jossel Eleserio	**Claimant** **Represented by** 15 **Mr M Briggs** **Advocate** **Instructed by** **Mr N Paterson** **Solicitor**
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Morningside Manor Ltd	**First Respondent** **Represented by** **Mr A Sutherland** **Solicitor**
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Thorburn Manor Ltd	**Second Respondent** **Represented by** 30 **Mr A Sutherland** **Solicitor**
35 **Lindemann Healthcare Ltd**	**Third Respondent** **Represented by** **Mr A Sutherland** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is:

1. **That the claims insofar as directed against the second and third respondents are dismissed, having been withdrawn by the claimant;**
2. **That the respondent unlawfully deducted from the claimant's wages the sum of One Thousand Eight Hundred and Eighteen Pounds and Twenty Three Pence (£1,818.23), and they are ordered to pay this sum to the claimant; and**
3. **That the claimant's remaining claims all fail and are dismissed.**

REASONS

1. The claimant presented a claim to the Employment Tribunal on 27 April 2023, in which she complained that she had been automatically unfairly dismissed, discriminated against on the grounds of race and subjected to unlawful deductions from wages.

2. The respondent submitted an ET3 in which they resisted all claims made by the claimant.

3. A Hearing was listed to take place over the course of 8 days on 12 to 15 and 18 to 21 December 2023 in the Employment Tribunal, Edinburgh. As it turned out, the Hearing was concluded by 19 December 2023.

4. The claimant attended and was represented throughout by Mr Briggs, advocate, instructed by Mr Paterson, solicitor. Mr Sutherland, solicitor, appeared for the respondent.

5. The parties presented a Joint Bundle of Productions, upon which they both placed reliance in the course of the Hearing.

6. The claimant gave evidence on her own account, and called Lynne Williamson, Area Organiser, Unison Scotland as a witness.

7. The respondent called Sean Black, Managing Director; Carolyn Millar, Deputy Director of Care and Care Home Manager; Zenab Pauline Banjo,

Senior Care Home Manager; and Kathleen Lyall, Director of Care Services, as witnesses.

8. At the outset of the Hearing, the Employment Judge raised with the parties the identity of the employer in this case, an issue which had been discussed at the Preliminary Hearing before Employment Judge Kemp on 28 June 2023 (60ff), at paragraph 4. Mr Briggs confirmed that the claim is only directed now against the first respondent, Morningside Manor Limited. Accordingly, the claim insofar as directed against the second and third respondents is dismissed upon its withdrawal. All references below to Morningside Manor Ltd shall be to "the respondent".

9. There was also discussion about the scope of the claims being advanced. Mr Briggs confirmed that, with regard to the direct discrimination claim, the claimant relies upon a hypothetical comparator; and that no indirect discrimination claim is being pursued by the claimant.

10. The Hearing did not commence until 2pm on 12 December 2023 as the respondent produced additional documents which the claimant required to consider. In addition, the Tribunal only saw the principal Joint Bundle of Productions, running to 315 pages, on the first morning of the Hearing, and required some reading time in order to familiarise itself with the documents.

The Claims

11. No list of issues was presented by the parties in this case. However, Employment Judge Kemp helpfully set out the claims being pursued by the claimant in this case (62), and it is useful to repeat them here:

    (i) Unlawful deduction from wages under Part II of the Employment Rights Act 1996;

    (ii) Automatically unfair dismissal under section 104 of the Employment Rights Act 1996, or section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992;

(iii) Direct discrimination on the grounds of race under section 13 of the Equality Act 2010;

(iv) Harassment related to race under section 26 of the Equality Act 2010;

5 (v) Unlawful dismissal under section 39(2)(c) of the Equality Act 2010 arising both from direct discrimination and harassment; and

(vi) For a failure to allow representation under the Employment Relations Act 1999.

12. The Tribunal will seek to define the issues more precisely below.

10 13. Essentially, this case concerns a Filipino care worker employed by the respondent, who was dismissed by the respondent after approximately one year's service. The respondent says that the reason for her dismissal was related to performance concerns; the claimant alleges that she was treated unfairly due to her race and to both her wish to be accompanied 15 by a trade union representative at a formal hearing and her membership of a trade union. The claimant also complains that she was unlawfully deprived of wages, including unpaid overtime and deductions made upon termination of employment to recoup training and other costs incurred by the respondent upon her recruitment.

20 14. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

15. The claimant, whose date of birth is 8 August 1988, commenced employment with the respondent on 19 November 2021 as a Senior Care 25 Assistant.

16. The respondent is a limited company which owns and operates a care home, namely Morningside Manor, taking care of vulnerable and elderly residents.

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17. The claimant is of Filipino nationality. She qualified as a nurse in the Philippines, and worked in Qatar prior to moving to the United Kingdom. In 2021, the claimant decided that she wished to move to the United Kingdom. She successfully applied to Lindemann Healthcare Ltd for appointment as a Senior Carer. Lindemann Healthcare Ltd is the parent company of the respondent. She instructed a firm of solicitors based in London, Ians, who acted on her behalf in obtaining the necessary right to remain in the UK in order to take up her appointment with the respondent.

18. The claimant was issued with an offer of employment by Lindemann Healthcare Ltd on 3 September 2021 (90). Her employment was said to be as a Senior Care Assistant at Lorimer House, 491 Lanark Road, Juniper Green, Edinburgh. This was incorrect. She was appointed to work at Morningside Manor.

19. The offer stated that *"You will be contracted to work 39 hours per week and your starting salary is £21,769.80 per annum with 28 days holiday including bank holidays, pension when eligible (in line with legal requirements)."*

20. The claimant was also advised that she would require to work weekdays, week nights and weekends.

21. She required to provide, as a condition of the offer, 2 satisfactory professional references, evidence of meeting the English language requirements for her visa application and a satisfactory criminal record check in all the countries where she had resided for 12 months in the previous 10 years. In addition, she would require to provide a valid skilled worker entry clearance and Biometric Residence Permit (BRP) card confirming that she had permission to work for Lindemann Healthcare Ltd.

22. The offer letter went on:

*"**Lindemann Health Care will provide the following financial support to facilitate your entry to the United Kingdom under the Skilled Worker visa route:***

1. *Immigration Skills Charge at a cost of £1092.00*
2. *Assigning Certificate of Sponsorship at a cost of £199.00*
3. *Skilled Worker Visa application at a cost of £232.00*
4. *Visa Appointment Service User Pay Fee at a cost of £110.00*
5. *Single Flight Ticket*
6. *1 Month Free Accommodation for Single Tenant*

Should you leave your employment within 36 months of your start date you will be required to repay Lindemann Health Care the amount of £6,000.00 less the total amount of repayments made for all the costs incurred in sponsoring you as a Skilled Worker…"

23. The letter bore to be signed by Sean Black, the Managing Director of Lindemann Healthcare Ltd. Thereafter there was a clause which read:

"I understand that I will:

Be required to repay Lindemann Health Care all the relevant costs incurred above as a result of my withdrawal at any stage in the application process from the date I signed this offer letter or if I do not take up employment on the agreed start date or if I leave employment within 36 months of my contract."

24. The claimant signed this clause on 3 September 2021.

25. She was also sent a "Training Cost Agreement", which she signed by electronic means on 4 October 2022 (95/6), in which she agreed *"to meet the course fees/training costs incurred by the Employee in pursuing the following training course/course of study – Mentoring Workshop."*

26. The course fees/training costs were said to be £200.

27. The claimant received a Statement of Particulars of Employment (112ff). Within that statement it was confirmed that her employment was subject to the satisfactory completion of a 16 week probationary period.

28. Her rate of pay was said to be £21,769.80 per annum, with an annual review, following which her employer would inform her in writing of any pay change. It was also stated that she had no entitlement to an annual increase in her pay.

29. Under "Training Investment Bond", the statement provided that *"We are confident you will enjoy a very successful career with Thorburn Manor Ltd and you will be fulfilled both professionally and personally as part of our supportive community."* It is understood that the reference to Thorburn Manor Ltd was a typographical error. The statement itself was headed with the name and address of the respondent.

30. The statement went on to provide that to cover the training costs the respondent would automatically recover a bond of £100 per month by way of a deposit. This would be *"accrued for a maximum of 24 months from commencement of your employment totalling £2,400 (two thousand four hundred pounds sterling). This bond will be repaid to you in full when you have been employed with us for 2.5 years…Upon completion of 18 months employment with the company 50% of this bond (£1,200) will be repaid to you. the remaining 50% of your bond (£1,200) will be repaid to you after 30 months continuous employment with the Company but will be forfeited should you leave our employment before then."*

31. Further, under the heading "Commitment to 36 months Employment with Thorburn Manor", the statement provided that *"If you do not proceed to 3 years employment with the Company, we will seek recovery of all our investments in your immigration and employment processes to date, up to a potential maximum of £6,000. In such cases we would submit a report to the POEA and seek (through the courts if necessary) to recover from*

you all costs involved. Of course, we very much hope this will never be necessary."

32. The claimant was advised that her normal working week would comprise 39 hours, but that in addition the respondent may require her to perform a reasonable amount of work outside her normal hours of work depending on the needs of the business, including working additional hours at short notice to ensure that the requirements of the staffing schedule were met. It was provided that *"You are entitled to receive payment for this work at your basic hourly rate of pay."*

33. The statement was signed by the claimant on 19 November 2021, and by Anna Reekie, HR Manager, on behalf of the respondent.

34. The claimant commenced employment with the respondent in Morningside Manor on 19 November 2021. Although she was employed as a Senior Care Assistant, she wished to resume her career as a nurse in the UK, having worked in that capacity in Qatar for approximately 10 years. In order to do so, she required to obtain registration with the Nursing and Midwifery Council (NMC). Registration with the NMC for the claimant could be achieved by passing the competency based test (CBT) and the practical examination (OSCE); by providing to them evidence that she had passed a background check (which we understood to be a Disclosure Scotland check or similar); and by demonstrating her capability in the English language, either by passing an English test or by obtaining a reference from her employer after working for 12 months in the UK.

35. The claimant had passed the CBT in Qatar, and required to pass the OSCE and satisfy the other requirements within 2 years of having done so.

36. In addition, the claimant required to register with the Scottish Social Services Council (SSSC) as a professional carer, which she did.

37. The claimant's probationary period was to run for 16 weeks from 19 November 2021. This would conclude, therefore, on approximately 10 March 2022. She was supervised largely by her line manager, Carolyn MacDonald (to whom we shall from now refer as Mrs Millar, following her marriage).

38. Mrs Millar developed some concerns about the claimant's performance as a senior carer within the Home, and started to retain notes for her own use. She created a Word document in which she entered those notes, which were made contemporaneously, for her own reference, which were produced to the Tribunal (122ff). These notes were not provided to the respondent as part of the process which subsequently led to the claimant's dismissal, nor the appeal against dismissal, but were made available to the Tribunal and referred to in evidence by Mrs Millar.

39. In summary, Mrs Millar's concern was not that the claimant was not a competent and caring Carer, but that she was not fulfilling the role of Senior Carer to which she had been appointed by the respondent. Her notes set out examples of areas in which she considered the claimant to have fallen short.

40. We do not set out the entirety of the notes here, but it is helpful to note the following points raised by Mrs Millar therein:

- On 2 December 2021, Mrs Millar raised with the claimant the fact that she was coming up the stairs to the top floor without wearing a face mask, contrary to the guidance in place to avoid the possible spread of Covid-19 within the Home.

- In February 2022, Mrs Millar met with the claimant to discuss with her the fact that she had been observed entering isolating rooms on 2 occasions without apron and gloves. She explained that she did not consider it necessary as she was moving in and out of the rooms quickly.

- In April 2022, beyond the conclusion of the claimant's probationary period, the Deputy Manager, Michael Meme, had engaged with the claimant about concerns with infection control practices, for example carrying dirty laundry herself rather than in a laundry bag.

- On 2 June 2022, Mrs Millar worked with the claimant, and discussed with her concerns about the claimant running the floor. In particular, she noted that some residents' rooms had had their doors left open, and in an untidy state with dishes uncleared. The claimant said that she had not been responsible for doing this, but Mrs Millar pointed out to her that she was responsible for overseeing the staff and ensuring that these matters were promptly attended to. She also noted that the claimant did not subsequently delegate this to the team but attended to the rooms herself.

- On 14 August 2022, Mrs Millar observed the claimant shouting to a colleague in the corridor in their native Filipino language, contrary to the respondent's policy of only speaking in English, in front of residents, who, as confused and vulnerable people, would be likely to be further confused by a different language being used in front of them. The claimant accepted this and indicated that she would not do this again.

41. Further notes were made over an extensive period up to 26 October 2022, raising similar concerns relating, broadly, to the claimant's leadership as a Senior Care Assistant, to her conduct in using her own language and on occasions inappropriate language and comments about residents and to her attitude towards infection control within the Home.

42. During the course of the claimant's probation, the respondent's management conducted milestone meetings to discuss her progress. Mrs Millar met with the claimant on 23 January 2022 (127) and stressed the need for the claimant to take responsibility for tasks, such as completing

notes and paying attention to room cleanliness. She summarised the claimant's position as "developing" in her role, stating that she was a good carer but needed to start taking responsibility in her senior carer role.

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43. In May 2022, an observation was conducted on the claimant's practice by Michael Meme, in which infection control and medication safety, as well as development as a senior carer were raised and discussed with the claimant (137).

44. Mr Meme conducted a further observation of the claimant while serving

10 meals, in particular relating to infection control practices, on 28 June 2022 (148). He noted that the claimant required to be reminded to sanitise her hands after serving each resident's meal, as she was only doing so occasionally. He observed that she was, however, very caring during meal times and encouraged residents to eat, and was organised in

15 ensuring that all received and enjoyed their meal.

45. On 27 September 2022, there was a meeting between the claimant and Mrs Millar, with Ms Reekie in attendance, to ask whether the claimant had attended a party, following which a Covid outbreak had taken place in the Home. The claimant denied this, but subsequent information from other

20 staff suggested that she had in fact been at the party. When confronted, the claimant said that she was disappointed that her colleague had told them this, as they had agreed not to tell management. They raised with the claimant the duty to be candid and honest, and to be supportive of management in such circumstances. Notes of this meeting were

25 produced (161).

46. In the course of that meeting, the claimant explained that she wanted to work as a nurse for Lindemann Healthcare Ltd. She said that she had passed her OSCE, and needed a recommendation letter to obtain her PIN number with the NMC. Mrs Millar responded that she did not consider

30 that the claimant was ready to work as a nurse yet and needed more training and experience. She gave her some examples of where she felt

that her behaviour and leadership could be improved, and reminded her that she had been employed on a 3 year contract as a senior carer. The claimant also asked if the respondent would provide a recommendation letter (in support of her application to the NMC) in November, and Mrs Millar confirmed that this would be discussed at director level.

47. On 19 October 2022, Mrs Millar asked the claimant to meet with her. She told the claimant that she felt that there was still a lot of room for development for her in her role as senior carer, and considered that this was not new information to the claimant. She said that she had decided to place the claimant on a Personal Development Plan (PDP) in order to see some progress in her development. She handed a copy of the PDP, which she had drafted herself in consultation with the HR adviser, Ms Reekie, to the claimant and went through it with her.

48. The PDP (228ff) set out a number of areas for development.

49. Firstly, room presentation. It was noted that the claimant did not complete basic carer level tasks, leaving rooms on a daily basis in an unsatisfactory state. Mrs Millar proposed that refresher training be given to highlight the expected standard, and weekly audits and feedback to be given to ensure that standards were being consistently met, with final review on 14 November 2022. It was anticipated that the claimant and Mrs Millar would meet weekly to discuss progress and identify challenging areas.

50. Secondly, leadership. Mrs Millar stated that the claimant failed to lead her team on shift, did not communicate a clear plan at the start of shifts and did not delegate tasks daily. It was directed that the claimant would make a list of tasks required at the start of her shift and delegate accordingly, and would follow up on these tasks to check progress and completion. Again, it was anticipate that they would meet weekly to discuss progress and identify challenging areas, and that the final review and completion would be on 14 November 2022.

51. Thirdly, professionalism. Mrs Millar said that the claimant failed to show professionalism during her role as a senior carer, laughing at handover or

using inappropriate language around residents. She would be expected to remind herself of the Lindemann values and reflect on her behaviour to ensure that she met appropriate standards. Weekly reviews were anticipated with a view to completing the PDP on 14 November 2022.

5 52. Fourthly, communication. Mrs Millar noted that the claimant had been observed speaking in her own language in front of residents, contrary to company policy. She stated that speaking in her own language could be confusing and distressing for residents. Weekly reviews were anticipated with a view to completing the PDP on 14 November 2022.

10 53. There was no discussion with the claimant about the terms of the PDP in advance of its being put in place. The claimant did not discuss the terms of the PDP with Mrs Millar in their meeting of 19 October 2022.

54. Mrs Millar was then absent for two weeks to celebrate her marriage and to go on honeymoon, and did not carry out any specific reviews with the 15 claimant after 19 October 2022. Mr Meme did not record any formal reviews in her absence.

55. On 10 November 2022, the respondent wrote to the claimant (166) to invite her to attend a review of her PDP on 14 November 2022. The meeting was to be chaired by Mrs Millar. The letter, though sent and 20 signed by Carol Salton, Care Home Administrator, was drafted by Mrs Millar. It was stated in the letter that as a result of the meeting, the claimant may receive formal disciplinary action up to and including dismissal. It went on: *"A recent review of your conduct has raised concerns around your performance as a Senior Care Assistant as 25 documented in your PDP. Your performance has not been to an acceptable level and has led to a PDP to support you with your conduct and performance. This meeting is being held to discuss your conduct and assessed if any disciplinary action is required as a result."*

56. The claimant was told that *"You may be accompanied at the hearing by a 30 fellow Staff Member for support, if you wish to be. We do not recognise union representation."*

57. The claimant requested that the meeting be postponed until she had a representative available to support her at the meeting, as she had been advised by her trade union (176). Mrs Millar wrote to the claimant to reschedule the meeting to take place on 16 November 2022 (177), and advised her that *"You may be accompanied at the hearing for support, if you wish to be."*

58. The claimant was a member of Unison, the trade union, and her representative, Lynne Williamson, emailed Mrs Millar on 14 November 2022 (174) to express serious concern that the claimant had been advised that she would not be entitled to be represented by her trade union at a meeting at which dismissal was a possible outcome. She referred to section 10 of the Employment Relations Act 1999 and the ACAS Code of Practice. She said that she would attend the meeting with the claimant and if she were refused access, she would refer the matter to their legal team.

59. Mrs Millar replied on 14 November 2022 (173), saying that she was responding as a courtesy, since they did not recognise trade unions. She referred to section 10 of the Employment Relations Act 1999, and pointed out that representation by a colleague was one of the alternatives set out in the section. She continued to assert that the claimant could be represented by a colleague and that they had given fair notice of the meeting for this purpose.

60. Ms Williamson replied quickly (168/9) to thank her for her reply, and to reassert the claimant's statutory right to be represented by a trade union at a meeting which may result in dismissal. She submitted that it was the employee's decision as to who accompanied them to a meeting, and not the employer's, and that if the respondent insisted on barring the trade union from the hearing, they would be in clear breach of section 10. She went on to say that she had advised her member not to attend the meeting on that date.

61. On 15 November, Mrs Millar wrote to the claimant (179) to confirm the meeting taking place on 16 November, and to advise that due to unforeseen circumstances she would be unable to chair the meeting. She said she had arranged for Ms Banjo to chair the meeting. Again, she was advised that she could be accompanied, but no reference was made to a colleague or to a trade union representative.

62. Prior to the meeting, Ms Banjo had a telephone discussion with Mrs Millar about the claimant's performance and conduct, during which Mrs Millar took her through the notes she had made and raised the issues which she had raised with the claimant throughout her employment. Mrs Millar did not send a copy of the notes to Ms Banjo.

63. Ms Banjo had access to some of the documents available on the People HR system relating to the claimant, but did not have a pack of papers for the Hearing nor did she or the respondent provide to the claimant or her representative copies of any documents, other than the PDP.

64. The meeting took place on 16 November 2022 at Thorburn Manor. Ms Banjo chaired the meeting, with Kirsty Peters in attendance to take notes (180ff). The claimant attended, and was accompanied by Ms Williamson, the respondent having agreed to her attendance. Ms Williamson protested that the respondent had "broken the law" by refusing the claimant access to trade union representation. Ms Banjo advised that while Ms Williamson could not interject during the hearing and speak on behalf of the claimant, they could adjourn if the claimant wished any advice at any stage, and Ms Williamson could speak on her behalf at the end of the hearing.

65. Ms Banjo went through the PDP and raised the concerns which had been identified in it. The claimant denied the allegations that she had behaved unprofessionally or inappropriately, asserted that she had attended to the rooms appropriately, had not used inappropriate language in front of residents and had not been treated fairly or supportively. She said that colleagues were willing to speak or write in support of her.

66. After a short adjournment, Ms Banjo confirmed that she had decided to dismiss the claimant for not meeting the criteria of a Senior Care Assistant despite having considerable support over the period of her employment of one year with the respondent.

67. Following the meeting, Ms Banjo wrote to the claimant to confirm the respondent's decision (186) by letter dated 17 November 2022:

"Dear Jossell,

*You attended a meeting to discuss your **Performance not meeting required standards** on Wednesday 16th November 2022, I am writing to inform you of the outcome.*

Having considered all the evidence in detail I have reached a conclusion and decided that the outcome of the meeting is Dismissal as you have not met the standards required of you and discussed with you in your PDP outlayed on 19th October 2022 and at previous performance appraisals and discussions.

I have based this decision on the following reasons:

- *Performance: after 12 months of support and guidance by line manager and reviewing the observations, supervisions and PDP notes there has not been recorded significant improvement on development in this area.*
- *Communication: use of appropriate language when on duty, as discussed in the meeting is not acceptable and inappropriate. Talking in native language when on duty this is discussed at length at all induction training by numerous senior managers that this is not acceptable yet this continues.*
- *Leadership: although when working with management there are times when you are in the supervisor role and leadership of the junior team has not been observed as having developed to the*

standard we would expect of a senior at this stage of employment.

Your dismissal will take effect as of 16th November 2022 and you will be paid one week's pay in lieu of your notice period. Payroll will be in touch with you separately to discuss your final salary and contractual obligations. Your P45 will be sent to you shortly after.

You have the right to appeal against this decision if you wish to. If you choose to appeal, please do so in writing to Kate Lyall, Director of Care within 7 days of receiving this letter. Please send any correspondence either to the above postal address or to morningside@lindemann.healthcare.

Yours sincerely,

Zenab Banjo

Senior Care Home Manager"

68. The claimant was unhappy and upset that she had been dismissed, and submitted an appeal against Ms Banjo's decision by letter dated 21 November 2022 (189). Her reasons for appeal were:

- *"The outcome was disproportionate and has left me feeling that I was dismissed for different reasons than those cited in the letter of dismissal.*
- *Myself and my Unison representative were not permitted to see the evidence that Zenab used to dismiss me.*
- *Between the 19 October, the implementation date of the PDP and 14 November 2022, the review date of the PDP, I did not meet with my manager or deputy manager to discuss my progress, despite the PDP advising that I was to have weekly meetings with a manager. I was therefore not given the opportunity to improve prior to being dismissed.*

- *I believe that I was dismissed and made an example of due to being a member of Unison and exercising my legal right to be accompanied to the disciplinary hearing by my Unison representative. I will provide evidence of this at the appeal hearing."*

69. She confirmed that she would be accompanied at the appeal hearing by Ms Williamson of Unison.

70. Kate Lyall, Director of Care Services, wrote to the claimant on 21 November 2022 (190) inviting her to attend an appeal hearing on 24 November 2022. She noted the claimant's intention to be accompanied by Ms Williamson. The meeting did not in fact take place until 28 November 2022.

71. The appeal hearing was chaired by Kate Lyall, with Kirsty Peters in attendance to take notes (203). The claimant attended and was accompanied by Ms Williamson.

72. The claimant complained that she had never been shown any evidence being relied upon by Ms Banjo at the hearing or in making her decision. She accepted that she had had access to documents on People HR but maintained that there were items missing there.

73. She also put forward her complaints about the process and denied that there were any substantial issues about her performance. Ms Williamson suggested that it looked like the claimant had been dismissed for having a union representative.

74. Ms Lyall gave consideration to what had been said at the appeal hearing, and issued her outcome letter dated 2 December 2022 (210):

"Having considered all the evidence in detail, I have reached a conclusion and decided that the outcome of the meeting is to uphold your dismissal. You have not met the standards required of you as discussed with you in your PDP outlayed on 19th October 2022 and at previous performance appraisals and discussions."

75. She went on to consider each of the heads of appeal put forward by the claimant.

76. The first point of the appeal was that the outcome was disproportionate and that the claimant was left with the feeling that she had been dismissed for different reasons than those set out in the letter of dismissal. Ms Lyall advised that she had reviewed the minutes of the PDP meeting with Ms Miller, and the minutes of the meeting with Ms Banjo. In addition, she referred to her appraisal, supervision and observation documents contained in her personnel file, and pointed out that there was evidence that she was observed between 19 October and 16 November 2022. She recorded the reasons for the claimant's dismissal, though from Ms Banjo's email to Ms Miller (184) and not from the letter of dismissal itself.

77. The second point of the appeal was that the claimant and her trade union representative were not permitted to see the evidence which Ms Banjo relied upon in dismissing her. Ms Lyall pointed out that she could have had access to her documents on the People HR online system, and that further evidence was provided to her following an adjournment of the hearing of 16 November. She rejected this point.

78. The third point of the appeal was that while the PDP said that she was to have weekly meetings with a manager, she did not meet with her manager or deputy manager, and therefore was not given the opportunity to improve prior to being dismissed.

79. Ms Lyall noted that management did not formally meet with her during that period, but that there was evidence in her staff file that she had been observed and supported in that time. Ms Lyall then focused on the period before the PDP meeting. This was not the point raised. However, she rejected this point of appeal.

80. The fourth point of the appeal was that she was dismissed and made an example of due to being a member of Unison, and exercising her legal right to be accompanied to the disciplinary hearing by her Unison

representative. Ms Lyall agreed that she had exercised her legal right to be accompanied but rejected the point. She pointed out that the respondent was not aware that she was a member of Unison until she was invited to the disciplinary hearing.

81. Finally, Ms Lyall observed that the claimant's representative had argued that there was a crisis in the care sector, and that the respondent was "a disgrace" for dismissing her in that climate. She responded by saying that the respondent had a duty of care to residents and other staff, so that under no circumstances could they accept sub-standard performance or relax standards due to her trade union representative's opinion that they should not manage performance in a staffing crisis.

82. She confirmed that the appeal was not upheld and that the claimant's dismissal would take effect as of 16 November 2022. She was paid one week's pay in lieu of notice.

83. That concluded the internal process and there was no further right of appeal available to the claimant.

84. Sean Black then wrote to the claimant on 11 December 2022 (215) to provide details of the claimant's final salary payment, and a response to the pay query she had raised for her previous pay in November 2022. He advised that the details in the letter set out her pay and the "fix of the error", for which they apologised. He also confirmed that the respondent had cancelled her sponsorship (in relation to her visa) as of 16 November 2022.

85. In October 2022, he said that the claimant had worked 215 hours, and deducted from that figure the 171 hours paid in the previous pay; and in November 2022, Mr Black said that the claimant had worked 149 hours, including 39 hours in respect of notice; and in addition, confirmed that she had untaken holiday entitlement of 20.46 hours.

86. Mr Black went on:

"Your nett pay would be £1818.23 you also have a training bond of £1200 ie £3108.23 total.

You have a total of £4503 cost deductions due to the company in relation to recruitment (£4,303) and Mentorship (£200). As this leaves you owing the company £1484.77 please can you write with your proposal to pay this sum back at your earliest convenience."

87. The claimant replied on 12 December 2022 (216) advising that she had been left "financially destitute" due to being dismissed and the respondent taking the whole of her November wage to recover contractual costs. As a result, she said that she was unable to pay the money back at that time. She proposed a repayment plan, which would be drawn up with the assistance of the Citizens' Advice Bureau.

88. The following day, the claimant submitted a grievance to the respondent (217), raising "serious concerns regarding the handling of my dismissal and the subsequent appeal".

89. In her grievance, she set out a number of points, including the following observations:

- *"Lindemann Healthcare could have dismissed me without following procedure as I had under 12 months' service on the 16 November 2022 – the date of the Disciplinary Hearing. However, Lindemann Healthcare decided to put me through a Disciplinary Hearing and Appeal Hearing, after learning I was a Unison member. I believe this was done to make an example of me for being a Unison member. I informed Kate Lyall verbally and by email that I was a member on 9 November 2022…*

- *As per the Disciplinary Procedures I was not provided with written copies of the evidence and relevant witness statements in advance of the Disciplinary Hearing or those referred to in the Appeal Hearing…*

- *The policy states 'no employee will be dismissed for a first breach of discipline except gross misconduct.' I have never been through the disciplinary process before or received a verbal or written warning.*

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- *Evidence that supports my good practice could not be located and was therefore not considered.*

- *I was not given the opportunity to work through the PDP with my manager and no practical support was put in place by my manager, ie, being mentored. Nor was I permitted to see the*

10 *observations that took place between 19 October and 16 November 2022 that were used as evidence to dismiss me…"*

90. The claimant continued to add further points. She said that Kate Lyall stated in her letter of 2 December 2022 that she did not know that the claimant was a member of Unison until she was invited to the disciplinary

15 hearing. She referred again to an email sent to Ms Lyall on 9 November 2022 advising that she was seeking support from Unison.

91. She also refuted Ms Lyall's suggestion that the process had been objective and transparent.

92. She forwarded the grievance to the respondent by email dated 14

20 December 2022 (220).

93. Mr Black responded on 14 December 2022 (222), referring to the claimant's "post termination grievance". He denied her assertion that she had been dismissed on the basis that she was a member of a trade union, and pointed out that she was allowed to be represented twice by a

25 union representative. He suggested that she had to recognise that she was given the opportunity to state her case, which the company did not need to do, since she had less than 12 months' service. He stressed that managers had attempted to support her in meeting the standards required of her role as a senior carer, but that she did not meet those

30 standards.

94. He concluded:

"Pursuing a false narrative that you were dismissed for being a member of a union is clearly not true…

5 *As you state you have less than 12 months service and as such I did not need to follow our disciplinary procedure and answer your grievance. However I chose to reply as it is concerning to me that a fair dismissal is being portrayed falsely. Your letter appears to be raising the same issues you raised previously and which were answered clearly in your appeal hearing. As per the policies after your appeal the 'decision is final and you* 10 *have no further right of appeal. As such my decision is not to uphold your grievance."*

95. The claimant's final payslip, dated 15 December 2022 (249), discloses that the claimant's basic pay was £1,449; her extra rate payments amounted to £703.50; and her holiday pay was £235.29. Her total pay 15 was, accordingly, £2,387.79 (gross). From that sum, the respondent made a number of deductions: Employee's Pension, £93.39; Employers' Pension £56.03; Training Bond £100; Cost Agreement £1,818.23; Tax £227.40; and National Insurance Contributions £148.77. Total deductions were, therefore, £2,443.82. The final sum payable to the claimant was Nil.

20 96. The difference between £2,387.79 and £2,443.82 is £56.03. We did not hear evidence as to the reason for this difference, nor was there any explanation in submissions. However, we deduce that the reason for this sum is that it represents the employer's contribution to the claimant's pension, which, by definition, is a payment made directly by an employer 25 into an employee's pension, and not a deduction from that employee's salary. Quite why it is shown as such was not explained to us.

97. As Mr Black had stated, the claimant's net pay on termination would have been £1,818.23, and the deduction on the final payslip under "Cost Agreement" appears to be the amount she would otherwise have 30 received. In his letter, he made clear that there was a further balance to be recovered from the claimant, but that was not the subject of any further

deduction by the respondent and accordingly not a matter upon which we require to dwell.

98. Following the termination of the claimant's employment, the claimant applied for a number of positions, and was successful not only in obtaining a PIN number, representing registration with the Nursing and Midwifery Council as a nurse, but also employment with NHS Lothian. She was notified by email dated 29 March 2023 of her successful interview (301), and commenced employment as a Staff Nurse in the Acute Medical Ward in the Royal Infirmary of Edinburgh on 26 June 2023. Her earnings exceed those received in her employment with the respondent, and she is also a member of the NHS Superannuation Scheme. Her employment is full time, for 37.5 hours per week, at £15.46 per hour. Her interview took place in February 2023.

99. On 2 February 2023, the claimant received an email from the Registration office at the SSSC with regard to the ending of her employment with the respondent (230). The email stated:

"The Scottish Social Services Council has been notified by your employer that your employment on the part of the Register for Supervisors in a Care Home Service for Adults in Morningside Manor Care Home for Morningside Manor Limited has ended. The countersignatory providing this update advised this had ended due to: Change to employment.

If this is incorrect please contact us and your employer. Should you have any new employment or wish to advise us of any other changes relevant to this or any other part of the Register, please update this through MySSSC.

If you do not update your details, you may be removed from the Register and this may affect your ability to work."

100. Ms Millar was responsible for notifying the SSSC of the termination of the claimant's employment, and it is probable that she was the one who did so on behalf of the respondent. When this was put to her in cross-

examination, she noted that "Change in employment" was incorrect, and that it should have been recorded as a dismissal. She was unable to explain why the wrong category was entered, though she advised that in completing the process online, a drop down menu is offered, from which a selection can be made. Her explanation was that in completing this, she accidentally clicked on the wrong option. It was put to her on behalf of the claimant that she had deliberately sought to avoid telling the SSSC that the claimant had been dismissed for performance reasons in order that the SSSC did not scrutinise the standards in place at the Home, but she denied that and insisted that there would have been no disadvantage to the respondent by not being candid about this matter.

101. We concluded that it was more probable than not that the wrong item was selected from the drop down menu in error, and that Ms Millar's reaction when shown this email – immediately pointing out that it was incorrect – supported her evidence that it had not been deliberate. For reasons which we set out below, we found Ms Millar to be an entirely credible and professional witness, and, further, considered that the suggestion put to her was speculative and lacking in foundation.

Submissions

102. Both parties' representatives tendered written submissions to which they spoke. The Tribunal had reference to the terms of those submissions in our deliberations. We do not set out the submissions at this stage but where relevant we refer to them in our discussion and decision section below.

Observations on the Evidence

103. We consider it appropriate to make some short observations on the evidence which we heard.

104. The claimant presented as a straightforward witness who sought to be helpful to the Tribunal. We found that she was adamant that she had not been guilty of the failings in performance of which she was accused, and

appeared to be very reluctant to accept any criticism of her actions. Her version of events was flatly contradicted at times by others, in particular Ms Millar.

105. Ms Williamson's evidence was helpful so far as it related to the facts of the case. Her demeanour in giving evidence was somewhat combative, but she impressed the Tribunal as a trade union representative quite determined to represent her member's interests to the best of her ability. We had no reason to doubt the veracity of her evidence.

106. For the respondent, we heard evidence from Sean Black, Zenab Banjo, Carolyn Millar and Kate Lyall. Mr Black, Ms Banjo and Ms Lyall all emerged as witnesses who were seeking to be helpful and to give truthful evidence to the Tribunal. We found that they were heavily dependent on the information provided by Ms Millar, which diminished the weight to be attached to their evidence, but we had no cause to consider that they were not telling the truth in their evidence.

107. Ms Millar we found to be a compelling and impressive witness. Her grasp of detail was excellent; her record-keeping was of considerable value in tracing, contemporaneously, the concerns she had about the claimant's ability to carry out the senior role for which she was recruited; and she was willing to give thoughtful evidence about how the process was conducted. She was candid enough to say that in her view the claimant should perhaps have been given more time to improve, and it was clear to us that she had some concern that following the PDP being issued, very little clear monitoring took place with the claimant while she was away from the workplace on honeymoon. She emerged as honest and articulate, and where her evidence differed from that of the claimant, we concluded that we should prefer Ms Millar's evidence.

108. We do not consider that the claimant was being deliberately untruthful; however, we did not find her evidence, overall, to be entirely reliable, partly due to her unwillingness to accept any criticisms, and partly due to her focus on becoming a nurse.

The Relevant Law

109. The claimant makes a number of claims, which were confirmed to the Tribunal by her representative at the Preliminary Hearing before Employment Judge Kemp on 28 June 2023, and set out in the Note following that Hearing (62/3).

110. Firstly, the claimant complains of unlawful deductions from wages under Part II of the Employment Rights Act 1996 (ERA).

111. Section 13 of ERA provides:

> *“(1) An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
>
> *(2) In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—*
>
> *(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
>
> *(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
>
> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.”*

112. Secondly, the claimant complains that she was automatically unfairly dismissed under section 104 of ERA, or section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

113. Section 104 of ERA provides:

"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was."

114. Section 152 of TULRCA provides:

"(1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—

(a) was, or proposed to become, a member of an independent trade union, . . .

(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, . . .

(ba) had made use, or proposed to make use, of trade union services at an appropriate time,

(bb) had failed to accept an offer made in contravention of section 145A or 145B, or

(c) was not a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, or had refused, or proposed to refuse, to become or remain a member.

(2) In subsection (1)"an appropriate time" means—

5 *(a) a time outside the employee's working hours, or*

(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;

10 *and for this purpose "working hours", in relation to an employee, means any time when, in accordance with his contract of employment, he is required to be at work."*

115. Thirdly, the claimant claims that she was directly discriminated against on the grounds of race under section 13(1) of the Equality Act 2010 (EqA):

15 *"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."*

116. Fourthly, the claimant claims that she was harassed on the grounds of race under section 26(1) of EqA:

20 *"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

25 *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…"*

117. Fifthly, the claimant claims that she was unlawfully dismissed under section 39(2)(c) of EqA, arising both from direct discrimination and harassment:

30 *"(2) An employer (A) must not discriminate against an employee of A's (B)—*

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

5 *(d) by subjecting B to any other detriment."*

118. Finally, the claimant claims that the respondent failed to allow her representation under the Employment Relations Act 1999 (ErelA). Section 10 provides:

"(1) This section applies where a worker—

10 *(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and*

(b) reasonably requests to be accompanied at the hearing.

(2A) Where this section applies, the employer must permit the worker to be accompanied at the hearing by one companion who—

15 *(a) is chosen by the worker; and*

(b) is within subsection (3).

(2B) The employer must permit the worker's companion to—

(a) address the hearing in order to do any or all of the following—

(i) put the worker's case;

20 *(ii) sum up that case;*

(iii) respond on the worker's behalf to any view expressed at the hearing;

(b) confer with the worker during the hearing."

25 119. Section 11 of ErelA provides that a worker may complain to an Employment Tribunal that her employer has failed, or threatened to fail, to comply with section 10 (2A), (2B) or (4).

120. The Tribunal also took account of those authorities to which the parties referred us in submissions.

Submissions

121. The parties made detailed submissions to us in support of their respective cases. We do not consider it necessary to repeat or summarise these submissions in any detail at this stage, but where appropriate, reference will be made in our decision section to submissions made.

Discussion and Decision

122. In the absence of a List of Issues, the Tribunal has determined that it is appropriate to address the claims as they are made by the claimant. Parties appeared to be in agreement as to the heads of claim, in their submissions, though they took them in different orders.

123. We noted that Mr Briggs, acting for the claimant, submitted that the claims were:

(1) That placing the claimant on the PDP was directly discriminatory;

(2) That the dismissal was either discriminatory or automatically unfair;

(3) That the claimant suffered a series of unlawful deductions throughout the course of her employment in relation to "extra payments";

(4) That the claimant suffered a further unlawful deduction of her final salary;

(5) That the respondent threatened to breach her right to be accompanied by a Trade Union representative.

124. We were concerned to ensure that in determining the claims, we did so on the basis of the claims actually before the Tribunal. It was notable that the claimant abandoned parts of the claim which were contained within the paper apart to the ET1. However, we have sought to identify below the complaints actually before us, of which the respondent has had fair notice. In doing so, we reminded ourselves that the claim was presented

on the claimant's behalf by experienced solicitors, and not by the claimant herself.at para

125. We follow the order set out by Employment Judge Kemp, and noted above.

5 **(i) Unlawful deduction from wages under Part II of the Employment Rights Act 1996**

126. At paragraph 57 of the ET1 paper apart (30), the claimant complained that she suffered an unauthorised deduction from her wages in November 2022 when the respondent deducted sums from her salary in reliance 10 upon a repayment clause; and at paragraph 59 (31), the claimant maintained that she did not receive payment in accordance with the Additional Hours Clause but instead was paid £1 per hour less than the contractual rate.

127. We deal with these complaints in turn.

15 128. Firstly, the sum deducted from the claimant's wages in November 2022. The claimant's final pay was in fact paid to her on 15 December 2022, and the payslip (249) confirms that the sum due was £2,387.79; and that the total deductions made amounted to £2,387.79. As a result, she received nothing.

20 129. The deductions made from the claimant's salary were comprised of the employer's and employee's pension contributions (though it is unclear why the employer's contribution is shown as a deduction from the claimant's pay); the training bond of £100; and the "cost agreement" representing £1,818.23.

25 130. The respondent appeared to suggest that there was an outstanding balance beyond this deduction, for which the claimant would be pursued, but we heard no evidence that this had happened since dismissal.

131. Accordingly, as we understand it, the deduction complained of here must be restricted to the two deductions relating to the training bond and the

cost agreement; the pension contributions were not mentioned as being unlawful deductions by the claimant.

132. The submission made on behalf of the claimant did not specify precisely what was claimed under this heading. The schedule of loss is silent on the matter (310ff).

133. The sum of £2,387.79 represents the full gross pay paid to the claimant, under the headings of basic pay, extra rate and holiday pay. The payslip records, under the summary of the month, that the gross taxable amount was £2,194.40, and that PAYE tax of £227.40 and National Insurance contributions of £148.77 were deducted. The discrepancy between the full gross pay and the gross taxable pay was not explained to us, and amounts to £193.39.

134. In any event, it appears to us that the deductions which are complained of here are the two indicated above in paragraph 131, amounting to £1,918.23. The logic of these figures, which according to the respondent did not cover the full extent of the sums due to them, was simply that it represented the balance payable to the claimant, and was all that was available to them to deduct from the final salary.

135. As a result, we consider that the sum sought by the claimant under this part of the claim is £1,918.23.

136. The basis upon which the deductions made was, according to Mr Sutherland for the respondent, both the offer letter and the contract, both signed by the claimant.

137. The contract of employment dealt with this under the heading Training Investment Bond (114/5). It provided that the sum of £100 per month would be automatically recovered from her wages by way of a deposit, accruing for a maximum of 24 months. The bond would then be repaid in full when she had been employed for 2.5 years.

138. The deduction of £100 was, therefore, contractual, and not unlawful.

139. The offer letter (90ff) did contain a provision which set out the costs incurred by Lindemann Health Care to facilitate her entry into the United Kingdom. A variety of payments, some with specific figures attached and others not, were listed. The offer then said: *"Should you leave your employment within 36 months of your start date you will be required to repay Lindemann Health Care the amount of £6,000.00 less the total amount of repayments made for all the costs incurred in sponsoring you as a Skilled Worker."*

140. The offer was made in the name of Lindemann Health Care, not the respondent; further, the letter of offer was headed "Lorimer House Nursing Home", which was not where the claimant worked.

141. At the conclusion of the letter, a signing schedule was made available to the claimant (92), which she signed on 3 September 2021, stating:

"I understand that I will:

Be required to repay Lindemann Health Care all the relevant costs incurred above as a result of my withdrawal at any stage in the application process from the date I signed this offer letter or if I do not take up employment on the agreed start date or if I leave employment within 36 months of my contract."

142. This letter of offer cannot form the basis for a deduction from the claimant's salary, for the simple reason that the respondent was the claimant's employer, not Lindemann Health Care, and that there was no contractual obligation in this document between the claimant and the respondent. The respondent's representative made clear at the outset of the Hearing that Lindemann Health Care should not be a party to the proceedings as they were not the employer, but a separate, though related, legal entity. There is no contractual agreement in this document between the claimant and the respondent which could justify the deduction made on termination of employment.

143. However, the respondent also relies on the contract of employment, which was between them and the claimant (112ff).

144. At 115, the relevant provision is set out, under the heading "Commitment to 36 months Employment with Thorburn Manor". Clearly, the claimant was not employed by Thorburn Manor – again, this was stressed to be the position at the start of the Hearing – but by the respondent.

145. Nevertheless, the contract provided: *"If you do not proceed to 3 years employment with the Company, we will seek recovery of all our investments in your immigration and employment processes to date, up to a potential maximum of £6,000. In such cases we would submit a report to the POEA and seek (through the courts if necessary) to recover from you all costs involved."*

146. Leaving aside that nowhere within the contract is "the Company" defined – the contract consistently refers to the employer as "the Home" – this does not provide the foundation for a deduction from wages. The claimant has not signified in writing her agreement that the monies may be deducted from her wages. What the contract provides is that the respondent may seek to recover undefined sums up to £6,000 from the claimant, through the courts if necessary. Unlike the offer letter, there is no specific clause signed by the claimant agreeing to deductions being taken from her wages.

147. Accordingly, we have reached the conclusion that the contractual documentation supplied here has not provided the basis for a lawful deduction from the claimant's wages. It has provided the basis for the respondent to seek recovery of the outstanding sums, but not the deduction of a substantial sum from the claimant's wages.

148. As a result, we consider that the respondent has deducted the sum of £1,818.23 from the claimant's final salary, and we order the respondent to pay this sum to the claimant.

149. The second aspect of the unlawful deductions claim is that the claimant did not receive proper payment of her salary in respect of additional hours. We found the evidence on this confusing and unsatisfactory.

150. The basis for this claim is found in paragraph 59 of the paper apart to the ET1, namely that the claimant did not receive payment in accordance with the "Additional Hours Clause". That clause is found in the contract of employment (115). Normal hours of work were 39:: *"The Home may require you to perform a reasonable amount of work outside your normal hours of work, depending on the needs of the business. In particular, you may be required to work additional hours at short notice to ensure that the requirements of the staffing schedule are met. Due to the nature of our business, this would be viewed as a reasonable management instruction. You are entitled to receive payment for this work at your basic hourly rate of pay."*

151. The contract does not specify a basic hourly rate of pay. It is stated that her rate of pay was £21,769.80 per annum.

152. The respondent's submission was that the rate of pay differed between 33 and 39 hours per week, based on what she was told in the interview. We have reference to the contract, however, which relates to additional hours outside normal working hours. There appeared to us to be an understanding about pay between the parties which was unclear and not reflected in the contractual documents. Even if there were a different discussion in interview, that was superseded by the contract of employment.

153. The only document which we have been referred to which maintains a difference between rates of pay was issued by the respondent on 29 March 2022, by Mr Black, following the annual salary review (159). That was a unilateral message issued to the respondent's staff, confirming that the new rate of basic pay was £11.50 per hour from 1 April 2022, and overtime pay was £10.50 per hour from that date.

154. Precisely what constituted overtime pay is entirely unclear to us.

155. The claimant's schedule of loss does not specify how much she is seeking in this regard. It is correct that the extra rate noted in the payslip is paid at a lower rate than the basic rate.

156. There is, however, a lack of clarity as to what the claimant is complaining about here. It is uncertain as to whether or not the sums sought relate to hours worked over 39 hours, or between 33 and 39 hours, per week. It is also unclear whether the claimant agreed expressly to work at the new rate set out in the March communication from Mr Black, but she continued to work for the respondent thereafter and at no stage raised this as a complaint to them.

157. We are not satisfied that the claimant has proved that there was a difference between her pay and what was properly payable to her under the contract of employment, and therefore we have concluded that the claimant's complaint that she suffered unlawful deductions from wages in this regard is not well-founded. It is therefore dismissed.

(ii) Automatically unfair dismissal under section 104 of the Employment Rights Act 1996, or section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992.

158. The paper apart to the ET1 (31) contended that the claimant's dismissal was automatically unfair (paragraph 62), and that she was dismissed because she had asserted her statutory right to be represented by Unison, and that she was a member of a trade union or had made use of their services.

159. Section 104 of the 1996 Act provides that an employee shall be regarded as having been unfairly dismissed if the reason, or if more than one the principal reason, for dismissal was that she had alleged that the respondent had infringed a statutory right. Section 152 of the 1992 Act provides that an employee shall be regarded as unfairly dismissed if the reason, or if more than one the principal reason, for dismissal was that she was a member of a trade union or had made use of their services.

160. This is the claimant's central claim about her dismissal. When she was asked in evidence what she believed was the "real" reason for her dismissal, she answered immediately that it was because she was a trade union member.

5 161. Ms Banjo, the dismissing officer, gave 3 reasons for her dismissal in the letter confirming her decision (186), namely: performance, communication and leadership. She was candid in placing considerable reliance upon the information she was provided by Ms Millar, but she considered the material on the claimant's personal file and took into account what was
10 said on her behalf at the dismissal meeting.

162. In such a case, it is for the Tribunal to establish, based on the evidence, whether there is any basis for the claimant's assertion that the reason was in fact that she was a member of a trade union. Ms Banjo denied this. She said that she was only aware that the claimant was a trade
15 union member when Ms Millar advised her, the day before the hearing, that the claimant would be represented by her trade union representative. She denied that this had any influence over her decision.

163. The claimant's position seemed to be that the respondent in general took a hostile approach to trade union representation. At no stage, however,
20 does she suggest that Ms Banjo was responsible for such a view, and we heard no evidence to this effect. Indeed, while at times Ms Banjo's evidence was a little vague and unfocused, we found her credible and had no reason to doubt her denial that trade union involvement was an issue at all. She said that working in the nursing and care sectors it is
25 common to have colleagues who are trade union members, and she regarded it as a private matter.

164. There was evidence that Ms Millar had said, in her letter of 14 November 2022 (173), that the claimant had the right to be accompanied by a colleague, and that the respondent did not recognise trade unions. The
30 meeting was rearranged, with the agreement of the respondent, to allow someone to attend for her. Ms Williamson, the claimant's trade union

representative, responded strongly to assert the claimant's statutory right to be accompanied in terms of section 10 of the Employment Relations Act 1999, and to confirm that she would accompany the claimant to the meeting. The respondent then permitted Ms Williamson to attend the meeting with the claimant, and to speak on her behalf.

165. It was difficult to know precisely what to make of this exchange. Ms Millar knew by the end of October that the claimant was a trade union member – the claimant informed her that she wanted to seek advice from her trade union about the PDP – but that having checked with the Managing Director, she had advised the claimant that she could not be accompanied by a trade union representative at the meeting. She accepted that "with hindsight" the claimant should have been allowed to be accompanied, and she confirmed that this would be the case prior to the meeting. There was some evidence within the bundle of correspondence some months before which tended to show that Ms Millar had been aware in a different case that trade union representation at a disciplinary hearing was a statutory right, but she was not cross-examined on this point. It was our impression that Ms Millar did not see this meeting as precisely a disciplinary meeting, perhaps influenced by the fact that the claimant lacked one year's continuous service, but she did alter her position when Ms Williamson pointed out the claimant's right to be accompanied.

166. Further, both Ms Millar and Ms Banjo insisted that Ms Millar had not told Ms Banjo what outcome she was seeking or what decision she should come to, and we accepted this as credible evidence. Indeed, Ms Millar expressed slight misgivings about the timing of the decision, when she said in evidence that she might have been inclined to allow the claimant more time to improve her performance than Ms Banjo gave her. ultimately, she was supportive of the decision.

167. We have concluded that the reason for dismissal was not that the claimant had asserted that a statutory right had been denied her, nor that she was a member of a trade union and had used their services. The

reason for dismissal was based on substantial reasons, with the information provided by Ms Millar to Ms Banjo giving a comprehensive basis for the performance concerns which the former had about the claimant's work.

168. The diary of issues raised by Ms Millar, which formed the basis of the information given to Ms Banjo, was a full and contemporaneous record of the issues which she was raising with the claimant. We found Ms Millar's evidence compelling on this subject. Ms Millar emerged as an experienced and mature professional whose priority was to ensure compliance with high standards of care for the residents under her care. Her record was specific and clear, and confirmed that she addressed her concerns with the claimant at each time. The claimant's approach was to issue a blanket denial that she had done anything wrong, and to maintain that Ms Millar had been extremely unfair in her approach. We were mindful that the claimant was a Senior Carer, and that Ms Millar was particularly concerned that she was unable to work to that standard, while being a caring employee towards the residents.

169. We concluded that the reason for the claimant's dismissal was that she was not performing to the standards expected of a Senior Carer, and had been guilty of a number of acts which fell below the level required of her. Ms Millar's evidence on this matter was clear and convincing, and we were persuaded that Ms Banjo took the same view, having given the claimant the opportunity to defend herself with her representative.

170. We have found no evidence to support the assertion that the real reason, or even one of the reasons, for the claimant's dismissal, was that she had asserted that the respondent had breached a statutory right, nor that she was a member of and had used the services of a trade union.

171. We recognise that this is not an ordinary unfair dismissal claim, in which considerations of fairness would require to be addressed. Mr Sutherland acknowledged this in his submission, when he said that if this had been an ordinary unfair dismissal claim, "I would not be sitting here". The

question is whether the reason for dismissal given by the respondent was in fact the real reason for dismissal. We have concluded that it was.

172. These claims therefore fail and are dismissed.

(iii) Direct discrimination on the grounds of race under section 13 of the Equality Act 2010;

(iv) Harassment related to race under section 26 of the Equality Act 2010;

(v) Unlawful dismissal under section 39(2)(c) of the Equality Act 2010 arising both from direct discrimination and harassment.

173. We take these claims together. It was a peculiar feature of this case that the claimant's race hardly featured at all in the evidence, or even in the submissions by the parties.

174. The claimant is Filipino, and her race is certainly relevant to the circumstances of this case, in that she and a number of her compatriots were recruited not only by the respondent but across the wider care sector in Scotland in an attempt to fill vacancies. The respondent clearly committed a considerable amount of time and expense to recruiting the claimant and other Filipino staff, to some effect.

175. Dealing firstly with the claim that the claimant's dismissal was unlawful under section 39(2)(c) of the 2010 Act, the basis for this assertion appears in paragraph 63(2) of the paper apart to the ET1 (32), as "She had been talking in her native language".

176. It appears that the claimant's complaint is that the reference to this in the letter of dismissal rendered her dismissal unlawful because such a reference amounted to both direct discrimination and harassment.

177. It is correct that the respondent asked the claimant not to speak in her native language, but the letter of dismissal reminds us of the context, which in our view is critical in this respect. The letter of dismissal confirms that the claimant was told not to speak in her native language while on

duty. The explanation given by the respondent was, in our judgment, an entirely reasonable one: the residents for whom the respondent, and therefore the claimant, requires to care, are elderly and often confused, suffering from dementia. Clear communication is a high priority among such residents, in order to avoid further confusion to them. Speaking in a language unknown to those residents is likely to cause further confusion and possibly distress. Asking staff to speak in English at least avoids that risk.

178. The claimant was not, so far as we are aware from the evidence, prohibited from speaking in her native language with other Filipino staff when outwith the hearing of the residents or during breaks in private areas, but the instruction from the respondent was one which we considered was reasonable in the circumstances.

179. We were completely unclear as to whether the claimant regarded this as an act of race discrimination, or merely unfair towards her. In any event, on the basis of the explanation we heard, we considered that this did not amount to less favourable treatment on the grounds of race, nor indeed less favourable treatment of any sort. It was a sensible requirement in the workplace, given the context. Further, it fell far short of amounting to harassment on the grounds of race.

180. In any event, when the claimant was asked why she believed that she had been dismissed, she made no mention of her race, and we therefore conclude that she simply did not regard this as an act related to her race. We were completely unconvinced by her representative's argument that the dismissal was thereby unlawful.

181. Finally, we found that the reason for dismissal was that given by the respondent, and that the dismissal was not for a reason related to the claimant's race, on the evidence that we heard.

182. These claims therefore fail and are dismissed.

(vi) Failure to allow representation under the Employment Relations Act 1999.

183. This complaint is located at paragraphs 71 and 72 of the paper apart to the ET1 (35). The claimant complains of "the Respondent's failure to allow her union representative to accompany her at the disciplinary hearing" and of "the Respondent's failure to allow her union representative to address the disciplinary hearing".

184. Based on these pleadings, these claims must fail. The respondent did not fail to allow the claimant's union representative to accompany her at the disciplinary hearing; Ms Williamson was, after a delay, permitted to accompany her to the dismissal meeting, and did so. Further, the respondent did not fail to allow her union representative to address the disciplinary hearing. Ms Williamson was in attendance, and did speak at the hearing.

185. The claimant's submission before us, at paragraph 43, rather altered the basis of the complaint, by suggesting that the respondent had threatened to fail to comply with the statutory duty, in terms of section 11 of the Employment Relations Act 1999.

186. The respondent objected to this assertion on the basis that they had not had fair notice of the claim in these terms. We accept that it would be unfair and contrary to the interests of justice to allow the claimant to advance this claim when it does not appear in the extremely long and detailed complaint presented to the Tribunal by the claimant's legal representatives in the ET1. No application to amend the claim has been made at any stage by the claimant to include such a claim, and accordingly we do not consider it necessary to address it.

187. However, we note in passing that we did not consider the correspondence relied upon by the claimant's representative as containing a threat. It seemed to us to represent a misunderstanding of the construction of the legislation in section 10, and an erroneous interpretation of that legislation.

188. This claim is dismissed.

Murdo A Macleod
Employment Judge

14 February 2024
Date of Orders

Date sent to parties 15/02/2024

I confirm that this is my Note and Orders in the case of Eleserio v Morningside Manor Ltd and others and that I have signed the Note and Orders.