



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102867/2023

**Held in the Edinburgh Tribunal on 11-15 December 2023
and (deliberations in chambers) on 21 December 2023**

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**Employment Judge L Murphy
Tribunal Member G Powell
Tribunal Member M Watt**

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Ms R Silweya

**Claimant
Represented by:
Mr R Wachtel,
Solicitor**

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Gowrie Care Limited

**Respondent
Represented by:
Ms A Stobart,
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant's complaints of direct race discrimination and harassment related to race are not well founded and are dismissed.

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REASONS

Introduction

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1. The claimant is of Black (African) ethnicity. She complains direct race discrimination under section 13 of the Equality Act 2010 ("EA") and harassment related to race under section 26 of the EA. The respondent denies the allegations in their entirety.

Amendment application

2. During the preliminaries the claimant sought leave to amend the claim to advance a case that her dismissal was directly discriminatory because of race and/ or that it was an act of harassment related to race. The respondent opposed the application. Leave to amend was granted and oral reasons were given.
3. It was also identified during the preliminary discussion that the tribunal would require to decide whether certain allegations were time barred. After obtaining clarification from the claimant of the alleged dates of the incidents averred in the claim, it appears that the question of time bar arises only in relation to one of the allegations against Ms T Hope. Mr Wachtel explained that he says any potentially time barred conduct formed part of a continuing act which ended after 29 November 2022, rendering it within the applicable time limit, while Ms Stobart confirmed the respondent denies this characterisation.
4. There was a preliminary hearing on 5 July 2023. The ensuing Case Management Note included a summary of claims and issues with the claimant being ordered to set out the specific acts relied upon in connection with direct discrimination complaint and the specific unwanted conduct relied upon in relation to the harassment complaint. The claimant's representative entered a response, and the claimant was subsequently further ordered to provide additional clarification by way of a Scott Schedule, which her representative did. During the preliminaries at the final hearing on 11 December, further clarification was sought regarding the dates and identities of those said to be involved in each of the claimant's pleaded allegations.
5. A List of Issues had been prepared by the claimant's representative before the hearing. I explained that, however, that with the addition of the time bar issue, the issues that the Tribunal would decide would be as characterised by Employment Judge Hoey in his Case Management Note of 5 July 2023 which characterisation reflects in plain terms the legislative provisions in sections 13 and 26 of the Equality Act 2010 ("EA"). Neither party raised an issue with the questions for the Tribunal identified in that document.

6. The claimant gave evidence on her own account and led evidence from Ms O Oligbile (agency nurse), Ms A Pasternak (care assistant), Ms N Thomson (care assistant) and Mr V Boston (the claimant's husband). Ms Pasternak required the services of a Polish interpreter, and we are grateful to Ms [Dizi] who assist who assisted the Tribunal remotely with her interpreting skills. The respondent led evidence from Ms T Hope (care assistant), Ms A Scott (care assistant), Ms P Carlin (care assistant) and Ms G Christie (care home manager and dismissing officer). We were referred to a joint bundle of productions running to 176 pages.
7. We are grateful to Mr Wachtel and Ms Stobart for their assistance with the case.

Issues to be decided

8. The updated and comprehensive list of issues in the case, as clarified in responses to orders and during the preliminaries, is as follows:

Time bar

- (i) Early conciliation with the respondent was notified to ACAS on 28 February 2023. The EC Certificate was issued on 4 April 2023. The ET1 was presented on 3 May 2022. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 29 November 2022 may not have been brought in time.
- (ii) Were the discrimination and harassment complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
 2. If not, was there conduct extending over a period?

3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
- i. Why were the complaints not made to the Tribunal in time?
 - ii. In any event, is it just and equitable in all the circumstances to extend time?

Harassment related to race

9. Did the respondent engage in conduct, namely:
- i. On three occasions between November 2022 and around February 2023, did Tracey Hope, care assistant, tell the claimant that she (the claimant) was putting the kettle back in the wrong place after making tea for residents?
 - ii. On or about 24 January 2023, did Ms Hope snatch the kettle away from the claimant as the claimant went to return the kettle to what the claimant alleges was its rightful place?
 - iii. On a date between 24 January and 1 February 2023, did Ms Hope accuse the claimant of using milk and sugar intended for residents of the care home?
 - iv. On a number of occasions, the last of which was shortly after 31 January 2023, did Ms P Carlin, care assistant who worked on day shifts, leave the unit filthy at the end of her shift for the claimant's arrival with dirty dishes in the sink and full to overflowing bins for the claimant to deal with?
 - v. On 31 January 2023, did Ms G Christie dismiss a complaint of discrimination made by the claimant as 'petty' after the claimant gave her examples of the incidents

described in the preceding paragraphs (i) to (iv)? Did Ms Christie tell the claimant, “that is a big accusation”?

5 vi. On 2 February 2023, was the claimant asked by Ms A Pasternak to leave the Islay unit to which she (the claimant) had been assigned by Janice, the agency nurse on duty, and asked to go to work at another unit? Did Ms Pasternak insist the claimant leave because it was ‘her unit’ and she had been working for the respondent for 2 years?

10 vii. On 3 February 2023, did Amber Scott, care assistant, while in a resident’s room:

15 a. complain to the claimant that another resident who had pressed the buzzer earlier for a continence change had required to be dealt with by two members of staff and that the claimant had left her to deal with it on her own?

b. make this complaint, knowing the claimant had been busy assisting another resident by looking for juice for them?

20 c. yell at the claimant, raising her hand and using the ‘F’ word?

viii. On 6 February 2023, did Nicola Thomson, care assistant, approach the claimant and ask her to work in a different unit because Ms Thomson was already working there?

25 ix. On 6 February 2023, did Ms Thomson, later in the shift:

a. yell at the claimant in the corridor, “Why are you staring at me? Why did you not pick up the buzzer?” in relation to a resident’s buzzer which was going off or had recently gone off?

30 b. when the claimant tried to explain she was not staring at her but had hurt her ankle, did

Ms Thomson continue to accuse the claimant of doing so in loud tones, before eventually saying “let’s just agree to disagree”?

5 x. On 9 February 2023, at a meeting with the claimant, did Ms G Christie:

10 a. tell the claimant that L Brophy had received information from ‘most of [the claimant’s] colleagues’ that they were scared to work with the claimant because they feared she would report them to Ms Christie and that they were feeling vulnerable?

b. decline to give a straight answer when the claimant asked: “report them for what?”

15 c. reply to the claimant: “No, no, no – you can’t say that. That is their own complaint” when the claimant told her that she should be the one feeling vulnerable?

20 d. insist the claimant must accept what had been said about her and ignore the claimant’s suggestion that one of her colleagues had coordinated the complaints against her?

25 e. tell the claimant that some of the senior carers had complained that the claimant said she did not report to them but instead to the duty nurse?

f. insist the claimant must accept she was wrong and disregard whatever explanation the claimant tried to make?

30 xi. On 10 February 2023, at a meeting with the claimant, did Ms G Christie:

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- a. and Ms L Brophy make no response when the claimant told them that she felt she had been bullied and discriminated against?
 - b. tell the claimant that she was unhappy that the claimant had requested the presence of agency nurse Janice as a witness before the meeting?
 - c. tell the claimant that sending that request showed the claimant had no remorse?

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 - d. stop the claimant when she tried to query why she should have remorse when her complaints were true?
 - e. refuse to talk about the claimant's complaint of bullying?

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 - xii. At the conclusion of the meeting on 10 February 2023, did Ms Christie dismiss the claimant with immediate effect and tell her not to attend for her shift the following day?
 - (i) If so, in each case, was that unwanted conduct?
 - (ii) If so, in each case, was it related to race?

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 - (iii) Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
 - (iv) If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of

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 - the case and whether it is reasonable for the conduct to have had that effect.

Direct race discrimination

10. Did the respondent subject the claimant to the treatment set out in paragraph 9(i) to (xii) above?

11. If so, was that treatment 'less favourable treatment', i.e., did the respondent treat the claimant less favourably than they treated, or would have treated, others ("comparators") in materially the same circumstances?

5 12. If so, was this because of race?

Findings in Fact

13. The following facts, and any further facts found in the 'discussion and decision' section, are found to be proved on the balance of probabilities.

10 14. The claimant is of Black African ethnicity. She was employed by the respondent as a care assistant in Gowrie House from 10 October 2022 until she was dismissed on 10 February 2023.

15 15. Gowrie House is a care home which provides long term care and short stay respite care for older people, including those with physical frailty and / or dementia. It has the capacity to care for up to 60 adults. Overall, the respondent employs around 67 members of staff at the care home. Of that number, approximately 30 employees are not of white British nationality / ethnicity. This number includes employees from Ghana and other parts of Africa, St Lucia, the Philippines and Poland. The respondent runs an overseas nurse program whereby it offers sponsorship to nurses and care staff who are foreign nationals to enter the UK to work for the respondent.

20 16. The claimant, when she began her employment, had around 3.5 years' previous experience of working in the care sector both in residential and community settings.

25 17. Ms G Christie was the Care Home Manager at Gowrie House and Ms L Brophy was the Deputy Manager. The care home accommodation is laid out over three storeys. On the top floor, where the claimant worked initially, were units called Lewis and Tiree. On the middle floor, where the claimant worked latterly, there were three units, known as Jura, Islay and Arran.

30 18. Each unit included resident bedrooms and a lounge area for the residents within which there was a small area with a fridge, a sink and tea and coffee making facilities and crockery. This could be used by the care staff to make tea and coffee for the residents and for themselves. The care home had a

separate central kitchen where kitchen staff prepared the meals for all of the residents.

19. The residents required round-the-clock care so the respondent employed employees to cover day shifts and night shifts. Care assistants usually worked 12-hour shifts. Most of those on day shift were contracted to work from 8 am until 8 pm and most of those on night shift were contracted to work from 8 pm until 8 am. However, a minority of care assistants were contracted instead to work from seven until seven.
20. The staffing complement during the day differed to the respondent's night time staffing numbers. During the day shift, the respondent allocated 5 members of staff to the middle floor units alone. One care assistant was allocated per unit on that floor and a staff nurse was also allocated to the middle floor who was also responsible for covering clinical issues on the other floors. There would be a 'floater' who was a senior care assistant or a care assistant not allocated to a specific unit but available to assist as required in any of the units on that floor. In addition, during the day, the respondent employed a hostess who was responsible for delivering lunch and dinner and domestic staff whose duties included cleaning and emptying the bins.
21. On the night shift, the respondent employed a total of five members of staff on duty across the whole building. These included a nurse and two carers on the middle floor with the other two care assistants allocated to the remaining floors.
22. During the day shift, the residents were allocated key workers from those care assistants on shift. These were care assistants who had responsibility for managing the individual resident's day-to-day needs including ensuring that they had sufficient toiletries and the necessary clothing in their wardrobes. The key workers liaised with the residents' families regarding any sundries which might need brought in and gave continuity as an initial point of contact for families to discuss any issues. Care assistants who were key workers tended to be allocated to the same unit for each shift because of their key worker responsibilities for the residents in that unit.

23. The care assistants who worked night shifts were not allocated as key workers for any specific residents. There was not sufficient staffing capacity overnight and there was not the same requirement for key worker duties during night shifts.

5 24. At the interview before commencing employment, the claimant was told that she would require to complete between around 15 – 17 e-learning modules online in her own time. She was advised she required to do so within the first 6 weeks of her employment (i.e. by around 21 November 2022).

10 25. On commencing her employment, the claimant was provided with a contract of employment which she signed on 14 October 2022. It specified that she was contracted to work 38.5 hours per week. It also included the following clauses, so far as relevant.

15 *“4.2 You are employed on a probationary period of 6 months during which time your performance will be assessed. Your employment may be terminated by either party at any time during this by giving the required notice as stated in the notice section.*

20 *4.3 The Company may extend your probationary period in order to assess your suitability in the role. A successful probationary period will be confirmed in writing. An unsuccessful probationary period will also be confirmed in writing and will result in the termination of the employment.*

...

15 Notice

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15.3 You are entitled to receive the following periods of notice from the company:

- *over one month but during your probationary period - 1 week.*

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15.5 *At the absolute discretion of the Company, payment in lieu of working notice may be made and all benefits owing, including holidays, car allowance and private medical insurance, are paid as accrued at the actual date of termination.*

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19. Professional Qualifications / Registration & Fees

You are solely responsible for keeping appropriate qualifications and registration up to date. The company reserves the right to suspend you without pay and / or may terminate employment without notice or payment in lieu of notice if you fail to maintain such qualifications and registration ...

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23. Training

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23.1 You agree to undertake with reasonable prior notice, such training and / or work experience as the Company deems necessary to develop your skills to enable you to perform properly your duties and any additional duties the company may reasonably require you to perform. Continued failure or refusal to attend such training may result in a period of unpaid suspension and / or disciplinary action up to and including dismissal from employment.

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23.2 We actively encourage additional and updating training and this will be discussed between you and the manager at reviews and appraisals...

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26. The claimant was initially employed to work on day shift from 8 am to 8 pm. She was initially allocated to units called Lewis and Tiree on the top floor. In or around November 2023, the claimant requested to be moved from night shift to day shift. Ms Christie asked why, and the claimant explained it was because she wasn't bonding with her colleagues on the day shift. Ms Christie agreed to the request and the claimant switched to working night shifts, starting at 8 pm and finishing at 8 am. Her shift pattern

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was 7 shifts per fortnight (four nights one week then three nights the following week).

27. At some time between November 2022 and January 2023, the claimant moved from the top floor (Lewis and Tiree) to work on the middle floor (Islay, Arran and Jura). The background to this move was that , on the top floor, the claimant frequently had care of a resident on the nightshift who had advanced dementia. The particular resident was incontinent and soiled her continence pads overnight. She was prone to picking at the soiled pads, causing her fingernails to become dirty and posing a hygiene risk. The resident's family had requested she be bathed every morning because of this issue. There was no stipulation as to whether the bathing would take place before or after the shift changeover at 8 am each day. The claimant had concerns about bathing the resident in the morning and preferred not to do so on the grounds she felt the resident's balance was not good enough to walk to the bathroom supported by the claimant alone. The claimant felt it would be preferable that this resident be bathed in the afternoon or the early evening.

28. Every day the senior carer would ask the claimant at the end of her shift whether the resident had been bathed. The claimant felt uncomfortable about these daily enquiries and felt concerned there was pressure on her to bathe the resident. She contacted Ms Christie about the matter and Ms Christie suggested a change of floors to the claimant so that she would no longer have care of the resident in question. The claimant agreed to move to the middle floor.

29. By 21 November 2022, the claimant had not completed the e-learning modules which she had asked to complete within 6 weeks of her employment starting. She was granted an extension to complete the modules in November and the time limit was extended until 19 January 2023. By 19 January 2023, the claimant had not completed all of the e-modules. The claimant had made a start on a number of the modules, but she hadn't completed those which she had worked on so as to make them 'turn green' on her training record on the respondent's portal.

30. Tracey Hope was a care assistant who worked day shift at the material time from 8 am to 8 pm. She always worked in the Islay unit on the middle floor. Occasionally, she arrived early for her work because she took a lift from her partner who left early in the morning. She sometimes arrived as early as 6.30 am. On a small handful of occasions, she overlapped with the claimant who was finishing her nightshift in the Islay unit. On the occasions when Ms Hope arrived early, she did not begin work early but would make herself a coffee and go outside for a cigarette. She did not work alongside the claimant on shift and barely knew her. She did not tell the claimant on three occasions between November 2022 and around February 2023, that she (the claimant) was putting the kettle back in the wrong place after using it to make tea for residents in the Islay lounge area.
31. Ms Hope did not snatch the kettle away from the claimant or about 24 January 2023 in the Islay lounge as the claimant went to return the kettle to what the claimant thought was its rightful place.
32. Ms Hope did not, on a date between 24 January and 1 February 2023, accuse the claimant of using milk and sugar intended for residents of the care home in the Islay lounge.
33. Ms P Carlin was a care assistant who worked on the day shift for the respondent between 8 am and 8 pm. She worked, at the material time, on the middle floor in the Arran unit, where she was a key worker for some residents. She worked a shift pattern of 4 day shifts one week and three the next. On a handful of occasions, the last of which was shortly after 31 January 2023, Ms Carlin left unwashed cups in the sink and items in the general bin in the lounge and in the sluice bin when concluding her day shift at 8 pm.
34. The care assistants used the facilities in the lounge area of the unit to make tea and coffee for themselves and for the residents. The normal practice was for the care assistants either to rinse the mugs out after use and put them back in the cupboard in the lounge, or to put them on a tray and take them down to the kitchen where the kitchen staff would load them into the dishwasher. Occasionally, if there was a busy shift, other duties

involving attending to residents would take precedence over the clearing of the mugs and, although a care assistant was supposed to try to leave the area tidied when they completed their shift, occasionally it was not possible before handover time. On a small number of occasions, Ms Carlin left unrinsed cups and mugs in the sink area at the conclusion of her shift.

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35. Domestics emptied the bin in the lounge area every morning. Care assistants were discouraged from taking out these bins and the sluice bins if these were half full because of the wastage of bin liners. If, however, the bins were full or overflowing the care assistant was supposed to take them out. Ms Carlin forgot on a small number of occasions to empty the bin in the lounge when it was full. When the bins were half full or three quarters full, Ms Carlin deliberately left them unemptied on the basis they could be used during the nightshift and would be emptied the following morning by the domestics.

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36. On the occasions when Ms Carlin left cups unwashed or bins unemptied, she was not aware which care assistant would succeed her on the night shift in the Arran unit. She was not aware that the claimant would take over in that unit. She did not leave the lounge with unwashed cups and full bins with the intention of generating additional work for the night shift staff generally, or for the claimant specifically. She did so a small number of times either because she was too busy with other care work to attend to these things or because she simply forgot to take out a bin.

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37. On 26 January 2023, the respondent wrote to the claimant in the following terms.

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Dear Rita

Probationary Review

I would like to invite you to a probationary review meeting to discuss your performance and progress to date.

The meeting will take place at Gowrie House on Tuesday 31st January at 11 am.

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The meeting will be conducted by myself Gwyneth Christie and Lorraine Brophy, deputy, will be present to take notes.

Actions, which are available to the company, are:

- *That your permanent employment with the company will be confirmed.*
- *That your probationary period will be extended for an agreed period, to enable you to attain the standards expected; or,*
- *That your employment will be terminated with an appropriate notice period*

You are entitled, should you wish, to be accompanied by a fellow employee or an accredited trade union official of your choice. If you require assistance in making arrangements to be accompanied, please contact me, as a matter of urgency.

It would be beneficial if you could let me know in advance if there are any specific issues that you would like to discuss at the meeting, for example if you have encountered any problem areas in your new job, or if you are unclear about anything.

Should you be able to attend, without good cause, this could result in the meeting proceeding in your absence and the decision, regarding your continued employment taken without the benefit of your input.

Kind regards

- 25 38. This invitation was not prompted by any particular concerns at the time about the claimant's performance, although Ms Christie did have an agenda of items she wished to discuss with the claimant. This included the claimant's failure, as yet, to complete the training modules and to update her SSSC registration, as well as a word about the claimant's absence record which Ms Christie regarded as relatively high. She had no concerns about the genuineness of the claimant's reasons for her absence or about her reporting of it. The claimant did not, in advance of the meeting, contact Ms Christie regarding any specific issues she wished to discuss.
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39. On 31 January 2023, the claimant attended the interim probationary meeting with Ms Christie. She chose not to be accompanied. Ms Brophy was not in attendance as she was required elsewhere. Ms Christie explained the review was normal process and that they do a review for everyone three months into the probationary period. Ms Christie discussed the completion of the training modules. The claimant was given a further extension to complete these by 14 February 2023. It was identified during the meeting that there was a final step the claimant had to take in relation to each of the modules she had been working on in order for the module to show as completed on the system.
40. Ms Christie noted that the claimant had not changed her registration details with the SSSC to record her place of work as Gowrie House. She asked the claimant to do so as soon as possible and the claimant agreed.
41. Ms Christie then discussed the claimant's attendance. She didn't query the legitimacy of the reasons for her absences but she noted that she had taken 4 days off across three separate absences in her 16 weeks with the respondent. Ms Christie suggested this was a high percentage and that she wished to see improvement. She advised the claimant not to take on any overtime until her attendance during her contractual hours had improved.
42. They discussed an incident where the claimant had left a resident double padded, a practice which was discouraged by the respondent. The claimant explained the background and that she had informed the senior carer. Ms Christie asked the claimant not to do this again to which the claimant agreed.
43. The claimant was asked if she wished to discuss anything. She informed Ms Christie (for the first time) that she was nursing her husband who was seriously ill and that she may need support at time with this.
44. The claimant also raised concerns about the condition of the sink area in the lounge in the unit when she arrived at work. She named Ms Carlin as repeatedly leaving the area in an unsatisfactory condition after Ms Carlin finished her day shift. She said that when she identified areas for improvement with the other staff this was not well received. She showed

Ms Christie photos she had taken in the Arran unit showing a full bin in the lounge, a half-full sluice bin and around 10 or so unwashed cups / tumblers in the sink area. Ms Christie was not unduly concerned by what she saw in the photos because she knew that, on occasion, in a 24/7 care environment, there could be good reason why a care assistant might not manage to attend to these matters. She nevertheless agreed to speak to Ms Carlin about the claimant's concerns.

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45. During this meeting, the claimant did not say she believed she was being racially discriminated against by Ms Carlin or anybody else. Ms Christie did not respond, "that's a big accusation". At the conclusion of the meeting, Ms Christie did not inform the claimant she had passed her probation. This was an interim meeting and it was not the respondent's practice to tell any probationer that they had passed their probation when they were part way through the 6-month probationary term. As the meeting drew to a close, the claimant asked if there was any feedback for her and Ms Christie said words along the lines: "This is it. If there were any issues, they were going to be raised in this meeting. Please just complete the modules". Ms Christie advised the claimant that the next probationary review meeting would be held on 10 March 2023.

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46. During the meeting, Ms Christie typed up a brief note on the respondent's template probation review form. It recorded the items discussed. It did not record that the claimant made any allegation of race discrimination. The claimant signed the form.

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47. Shortly after the meeting, Ms Christie spoke to Ms Carlin. She asked Ms Carlin to make sure the unit was clean for the night staff. She didn't say specifically why she was raising this, just that there had been an incident. She didn't mention the claimant's name.

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48. Ms A Pasternak, was a fellow care assistant, who also worked on nightshift. She worked two nightshifts every two weeks. She worked on the same floor and shift as the claimant on just two or three occasions. On 2 February 2023, the claimant arrived for her shift. She was allocated by Janice, the agency nurse on duty, to the Islay Unit. Ms Pasternak was already working in the Islay unit, unbeknown to Janice. Ms Pasternak

advised the claimant that she was already allocated to that unit and that the claimant would require to work on one of the other units.

49. Ms Pasternak had been working there for an hour before the claimant arrived. Unlike the claimant who started at 8 pm, she was contracted to work 7 pm to 7 am. In that hour, she had already segregated the residents' laundry in their rooms, attended to personal care they needed, given them supper and responded to buzzers. Personal care tended to be required on a 2-4 hour cycle. She told the claimant that she would have to work on a different unit because it would not be fair to her if she required to go and repeat all these initial duties in another unit. Overnight, only one care assistant was allocated per unit.
50. The claimant was unhappy. She went to speak to Janice, who spoke to the claimant and then separately to Ms Pasternak. Ms Pasternak explained she had already started working in the unit at 7pm, Janice agreed with Ms Pasternak that she should remain working in Islay for the rest of her shift, and that the claimant should be allocated elsewhere.
51. On 3 February 2023, the claimant was working with Amber Scott, a fellow care assistant. They were both working on the night shift, starting at 8 pm, on the middle floor. Not long into the shift, they were both serving supper to residents in the lounge when a buzzer went off. Ms Scott went to see the resident. The resident (A) was lying on her back and was in pain. She asked to be moved on to her side. This was a job which required two care assistants to ensure the safety of both the resident and the care assistants carrying out the manoeuvre (a "double" job).
52. Ms Scott returned to the lounge where she and the claimant agreed they would attend to this shortly, after supper was served. The duty nurse then asked Ms Scott to briefly assist her with another resident (B). The claimant, in the absence of Ms Scott, decided to attend to another resident (C) who had also pressed his buzzer. C wanted a glass of cranberry juice and the claimant went off looking for the juice which wasn't available in the fridge in the unit she was in. She found the juice, gave it to C, then went to fetch toast for C when he subsequently requested this. In the meantime, resident A continued to be in pain and pressed her buzzer on further

occasions. Ms Scott responded to the buzzer. The claimant was not around and the resident was complaining of her pain to Ms Scott. She ultimately decided to reposition resident A onto her side by herself. She was frustrated with the claimant for not making herself available to assist.

5 53. The claimant subsequently presented herself to Ms Scott and said she was ready to assist. Ms Scott told the claimant she had already repositioned resident A on her own. Ms Scott was unhappy with the claimant about this. Ms Scott and the claimant went together to attend to the next buzzer. It was a continence change for resident D. This was
10 another 'double' job, requiring two care assistants. D is a resident who does not speak but who is able to hear.

54. As they approached D's room, Ms Scott said to the claimant words along the lines, 'you know that that job [referring to resident A] was a double. I shouldn't have been doing that [repositioning] alone.' The claimant said,
15 'it's fine'. Ms Scott was irritated. She responded, 'it's not fine. It was putting me and the resident in danger'. She felt frustrated with the claimant and there was tension between them. Ms Scott felt the claimant was pulling faces at her in D's room. She said the "F" word under her breath in the presence of the claimant and resident D. She did not shout this. The
20 claimant left and went to find the duty nurse, Janice, to report the incident. The claimant was upset. Ms Scott joined them. The claimant told Janice what had occurred and that Ms Scott had sworn at her in the presence of a resident. The claimant said words to the effect "I will not be bullied in the workplace" and Ms Scott replied "I apologize if that's how you feel."

25 55. Janice did not say: "honestly, you guys. You cannot continue bullying her", or words to that effect. Nor did Janice later tell the claimant when they were alone, "I know why they're doing this. It's because you're black". With the agreement of Janice, Ms Scott worked the rest of the shift upstairs.

56. On 6 February 2023, the claimant was on shift with Nicola Thomson, a
30 fellow care assistant. Both were working on the middle floor. The claimant and Ms Thomson worked only a couple of shifts together in the course of the claimant's employment. On arrival, the claimant gave Ms Thomson a hug and said I'm pleased to be working with you. The claimant was

originally allocated to Islay unit by the nurse. Ms Thomson asked her if she could work on Islay unit instead and the claimant could work in Arran unit. The claimant agreed.

57. Later in the same shift, the claimant and Ms Thomson were in the corridor. Ms Thomson was Hoovering. A buzzer went off. The claimant did not go and answer it. Ms Thomson was confused by this and gesticulated at the claimant while still Hoovering as if to say, "Why are you not getting the buzzer?" It appeared to Ms Thomson that the claimant, who was initially stationary, was staring down the corridor at her instead of responding to the buzzer. This confused Ms Thomson. She turned off the Hoover and the two walked towards each other and met in the middle. Ms Thomson asked "Why are you staring at me?" She did not yell this. The claimant said, "I'm not staring at you." Ms Thomson answered, "We'll have to agree to disagree". The claimant did not mention she'd hurt her ankle or attempt to do so. Ms Thomson was not accusing the claimant in loud tones.

58. Between 31st January and 3 February, a number of supervision meetings took place between L Brophy and three or four of the claimant's fellow carers at the Home, including one of the senior carers with whom the claimant worked. Supervision meetings are meetings which are held approximately quarterly between management and individual members of the care team at Gowrie House to discuss their work including any training needs and to provide them with an opportunity in a confidential setting to raise any issues or concerns they may have. They are arranged by management for employees who have passed their probation and had their employment confirmed. (Probationers are expected to raise any issues at their interim probationary reviews). These individuals raised with Ms Brophy concerns about their experiences of working with the claimant.

59. It was raised by one or more team members that whenever they raised issues with the claimant during the shift, she would counteract this by making complaints about them. It was raised that sometimes staff found that when a buzzer required the assistance of two care workers, the claimant was reluctant to assist. The senior care assistant reported that he found the claimant was not taking direction from him, that she was

reluctant to change units when asked by him and often refused to assist with residents in any other unit apart from the one she was allocated to.

60. When Ms Brophy reported these issues to Ms Christie following the supervision meetings, Ms Christie decided to call the claimant to a further interim probationary review meeting. On 6 February 2023, the claimant was given a letter inviting her to a meeting. The letter purported to be dated 3 February 2023 and was in materially identical terms to the invite the claimant had received from the respondent to attend the meeting on 31 January 2023. The respondent uses a standard template for these probationary review invite letters. On receiving the letter, the claimant was confused by it and emailed Ms Christie the following day (7 February) to ask whether the letter was meant to be for the meeting she had already attended. Ms Christie clarified that this related to another meeting she had arranged with the claimant.

61. On 9 February 2023, the claimant attended the meeting with G Christie. Ms Brophy was also present and took handwritten notes which she later typed. The claimant was unaccompanied. The meeting lasted between 1.5 and 2 hours. Ms Christie raised with the claimant the issues which had been reported to her following the supervision meetings. Ms Christie did not share with the claimant the identities of the colleagues who had raised the concerns. She told the claimant some colleagues felt vulnerable and scared to work with her in case she reported them. The claimant said she should be the one feeling vulnerable and referred back to the complaints she had raised about Ms P Carlin concerning the dirty cups and unemptied bins.

62. Ms Christie told the claimant about the concerns raised that, when her colleagues asked the claimant for assistance requiring two people, the claimant was reluctant to assist. The claimant told Ms Christie about the recent incident on 3 February involving Ms A Scott using the F word. She explained that, on the occasion in question, another resident had asked for cranberry juice and she had gone to find the juice.

63. Ms Christie reminded the claimant that she had been moved from day to night shift because she was having trouble bonding with her colleagues

on the day shift. She also referred to the claimant being moved from the top to the middle floor. She told the claimant about the concerns raised by the senior carer about the claimant not taking direction from him, about her reluctance to switch units and about her reluctance to help with residents in other units.

5

64. The claimant refused to accept the criticisms of her because she didn't feel they were justified. She said she only had issues with one carer but that carer would tell their friends and they would have a problem with her. The claimant did not elaborate and became upset and teary. Ms Christie latterly asked the claimant how they could move on and what help she needed to be able to move on and the claimant said that she didn't have any issues with anyone and she can just do her work and go home. Ms Christie was dissatisfied with this response. She felt the issues were not really resolved. She knew that the care home environment is one where constructive team work is essential. Care assistants often have to 'double up' on jobs to comply with their regulatory and health and safety requirements and for the good of the residents. In light of the claimant's state of upset and because she felt the meeting wasn't going anywhere, Ms Christie decided to adjourn the meeting until the following day. The claimant left, still very upset.

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65. During that meeting on 9th February, the claimant didn't raise her concerns about Ms Pasternak asking her to move unit. Nor did she discuss with Ms Christie and Ms Brophy her concerns about Ms Thomson asking her to move unit or an allegation about Ms Thomson gesticulating / yelling at her in the corridor while hoovering. The claimant did not allege she believed she was the victim of race discrimination during the meeting. She did not mention her race.

25

66. After the meeting on 9 February 2023, the claimant sent an email to Ms Christie at 2.14 pm. It read:

30

Hi Gwyneth

Please I forgot to mention, an agency nurse from staff scanner who has been working at night by the name of Janice, I am not sure of her surname has been the witness of the many things that I have

been going through. She has seen me being mistreated many times. Please contact her and hear her side of the story.

Kind regards

...

5 67. The claimant received no response to this email from Ms Christie.

68. On 10 February 2023 at 12.04 pm, the claimant sent a further email to Ms Christie in the following terms:

Good morning Gwyneth

Please accept my apologies for today's meeting.

10 *I am unable to come over today. I have had a bad headache since yesterday and I would like to put it down after returning from the hospital.*

Please arrange another day for me.

Kind regards

15 69. Ms Christie was aware the claimant was due to attend her next shift on Saturday 11 February. She was concerned that she did not wish the claimant to return to her shift without the issues being resolved to her satisfaction. Ms Christie replied:

Hi Rita

20 *It is very important you attend today's meeting as I need to discuss further with you before the weekend.*

If you fail to attend decisions will be taken in your absence.

Kind regards

25 70. Later on the 10th February, the claimant duly attended the meeting with Ms G Christie. Ms L Brophy, Deputy Manager was also present. Ms Brophy took handwritten notes during the meeting which was brief, lasting around 10 to 20 minutes.

71. Ms Christie explained she had invited the claimant back in because she (the claimant) was getting upset and because she (Ms Christie) felt the meeting the day before was not coming to any resolution. The claimant said she felt she was being 'bullied around'. Ms Christie asked why she thought this and by whom but the claimant did not answer. Ms Christie said she felt the claimant had had a good deal of support but the same issues were continuing to arise. She referred to moving the claimant from day to night shift and between floors but advised she didn't feel the claimant had settled into being a team player. Ms Christie also referred to the claimant's continued failure to complete her e-learning modules. She told the claimant that, having consulted with the respondent's HR department, it had been decided that the claimant's probationary period would be ended.
72. At the conclusion of the meeting, Ms Christie verbally terminated the claimant's employment with immediate effect. The claimant did not, during the meeting on 10 February, allege race discrimination or mention her race. There was no discussion about the email the claimant had sent regarding Janice attending as a witness. Ms Christie's view was that the claimant had no right to be accompanied by Janice because she was an agency nurse as opposed to a direct employee of the respondent.
73. In due course after her employment terminated, the claimant received one week's pay in lieu of notice. She did not receive a dismissal letter or copies of the respondent's notes of the meetings on 9 and 10 February until these were disclosed by the respondent in connection with the present proceedings.
74. The claimant's average net weekly pay while employed by the respondent was £453.27 per week.
75. The claimant sought alternative employment following her dismissal. She successfully secured employment as a Senior Customer Advisor with Lloyds Banking Group which she commenced on 11 April 2023. The claimant's net pay with her new employer is higher than that which she received while working in the respondent's employ and she has no

continuing economic loss from and after 11 April 2023. The claimant does not pursue any pension loss or other loss of benefits.

5 76. The claimant was very upset by her dismissal. She was tearful for a couple of days. She experienced dark thoughts. She consulted her GP on 12 April 2023. She had tried to obtain an appointment in the days before this consultation without success. She told the staff at the surgery that she was having dark thoughts and they suggested she contact a help line for someone to talk to. The claimant declined to do so.

10 77. At the consultation, she explained to the doctor that she was having problems with anxiety and depression. She explained she initially had dark thoughts though these had subsided somewhat. She explained she still felt flat and tearful and was experiencing a loss of appetite and trouble sleeping. She was prescribed Mirtazapine 15 mg tablets for approximately 12 weeks. On 21 June, the claimant's prescription was repeated for a
15 further 12 weeks. Her medication had run out in or around September 2023 and, at the time of the hearing in December '23, the claimant had not returned to her GP to seek a repeat prescription or otherwise in connection with her mental health.

20 78. Prior to her dismissal by the respondent, the claimant had not experienced symptoms associated with anxiety and depression. The claimant has caring responsibilities for her husband who is seriously ill and has been so for some years. She had not, despite these challenging personal circumstances, experienced dark thoughts or the other symptoms she described to her doctor on 12 April 2023 until February 2023, after she
25 was dismissed.

Submissions

79. Mr Wachtel gave an oral submission and Ms Stobart handed up written notes to which she also spoke.

30 80. Mr Wachtel said he accepted that management was not told about the claimant's concerns about the incidents at work until 31 January 2023. He noted the respondent disputes that management was told on that date about any matters other than the full bins and dirty crockery in the sink and

that they denied that other complaints were mentioned until 10 February 2023. Mr Wachtel identified this conflict in the evidence as a crucial issue of fact in the case.

5 81. In his submission, if the Tribunal accepted the claimant's evidence of what was said on 31 January, then the Tribunal could draw inferences regarding Ms Christie's motives for everything that happened after 31 January. According to Mr Wachtel, the fact that between 31 January and 3 February, a number of the claimant's colleagues suddenly and spontaneously reported issues about the claimant to the respondent was useful circumstantial evidence. He said the explanation was that the claimant had made the allegations included in this claim to the respondent on 31 January and this prompted the respondent to look into matters and to inform the claimant's colleagues of the concerns she had raised about them.

10 82. Mr Wachtel invited the Tribunal to accept that the claimant raised the allegations fully on 31 January, describing them as race discrimination, and that, in response, Ms Christie said that was "a big accusation". He also submitted that most of the claimant's allegations predating the 31 January were established on the evidence. He said these amounted to a campaign against the claimant or a hostile environment. He said there was a lot of evidence that "things were going wrong" in this period and that the question for the Tribunal was whether it was possible to draw an inference that the conduct was racially motivated. He argued that Ms Oligbile' evidence went to establishing the conduct was indeed racially motivated. He said it was possible to do so in respect of this period but he 'accepted he was on stronger ground' in relation to the allegations after 31 January.

15 83. If the Tribunal accepted the claimant's account of the meeting with Ms Christie on 31 January, Mr Wachtel said it was not hard for the Tribunal to infer a racial motivation for events after that.

20 84. On the question of remedy, Mr Wachtel agreed the figure of of £453.27 per week as representing the claimant's net loss between 17 February 2023 and 11 April 2023. He agreed that the claimant had no continuing economic loss thereafter. He submitted there was evidence that the

claimant was very upset that would justify an award for injury to feelings and for injury to health.

5 85. Ms Stobart spoke to some written notes which she helpfully handed up. She invited the Tribunal to make findings in facts preferring the evidence of the respondent witnesses and the other former colleagues of the claimant who Mr Wachtel called. She set out the statutory basis for complaints brought under sections 13 and / or 26 of the EA.

10 86. She said that the events the claimant pleaded either did not happen or did not happen in the way the claimant described. The respondent's position was that the allegations against T Hope did not happen at all. Any occasion when Ms Carlin left the unit untidy was not caused by or related to the claimant's race (or indeed to the claimant at all). Likewise, Ms Stobart said Ms Pasternack's request that the claimant change unit was because she had been carrying out duties there since an hour before the claimant's shift began. She said the buzzer incident with Ms Scott was not as described by the claimant and was not because the claimant was black. Ms Thomson did not ask the claimant to change unit on the occasion in question at all. Nor, according to Ms Stobart, did she verbally abuse the claimant.

20 87. Ms Stobart said the respondent's position is that the claimant did not allege race discrimination at any of the meetings on 31 January or 9 or 10 February. Ms Christie dismissed the claimant because she was not able to work as a team. She observed that, when she'd pressed the claimant in cross-examination, the claimant almost withdrew the complaint of discrimination against Ms Christie; she didn't really feel Ms Christie had done anything because of her race.

30 88. She said nothing that was done was done because of the claimant's race. Nor did it relate to the claimant's race. She said Ms Oligbile (who is Black) said she had not personally experienced race discrimination and gave no view as to whether the claimant's experiences were racially motivated.

89. With regard to remedy, Ms Stobart noted Mr Wachtel agreed there was no continuing loss after 11 April. She did argue an unreasonable failure to mitigate in the period from 10 February to 11 April. She acknowledged

that, if the claimant was successful, the claimant would be eligible for an award for injury to feelings but said this would be to a lesser degree than that sought in the claimant's Schedule of Loss.

Observations on the evidence

5 90. Mr Wachtel made submissions about the evidence of some of the claimant's colleagues. Of Ms P Carlin, he said she knew 'nothing about nothing' and suggested she was the least impressive of all the witnesses. He noted that Ms A Scott had said she had no issues with anyone other than the claimant and suggested inferences might be drawn from this
10 evidence. He said that Ms Scott's evidence of the incident on 3 February was much less reliable than the claimant's. Regarding Ms A Pasternack, Mr Wachtel said he "got nowhere" but he suggested the evidence of the others supported the claimant's case. Regarding the claimant's politeness in her post-dismissal email correspondence with the respondent, Mr
15 Wachtel said this was explicable with reference to the claimant's dependence on the respondent for a reference in connection with her job search.

20 91. Ms Stobart also addressed us on the credibility and reliability of the witnesses. She said the respondent's witnesses were straightforward in the way they gave their evidence. She noted that Ms Scott conceded having used the 'f word' albeit in different circumstances to those described by the claimant. She referred to the evidence of Ms Hope and Ms Carlin that they barely knew the claimant. She said Ms Carlin's evidence that she didn't know who would take over from her in the unit was supported by the
25 fact that she and the claimant both worked a variable 4 / 3 shift pattern in alternate weeks.

30 92. Ms Stobart said Ms Pasternak had good recall of the events on the date she asked the claimant to work in another unit and was a credible witness. Ms N Thomson was also credible in Ms Stobart's submission. Ms Thomson, she said, accepted the essence of what happened but was clear that she had not shouted and that the claimant had embellished the incident. She observed that the evidence given by Ms Oligbile of an incident she witnessed was not the same incident the claimant has

pleaded concerning Ms Thomson. It was not clear that Ms Oligbile's evidence related to the same shift or to Ms Thomson as Ms Oligbile could not recollect the names of the two individuals she said were involved.

5 93. According to Ms Stobart, Ms Christie was straightforward and didn't shy away from questions but answered clearly and credibly. On the other hand, Ms Stobart said the claimant was prone to embellishment. She observed that she introduced new allegations which had not been foreshadowed in the pleadings despite multiple opportunities to clarify the claim before the final hearing.

10 94. On the whole, we preferred the evidence of the claimant's colleagues to her own in instances of conflict. The claimant, when giving her evidence, expanded upon the case set out in the ET1 and subsequent iterations. She alleged, for example, that agency nurse Janice (who she did not call) told her she believed the claimant's treatment was because she was black.
15 Contrary evidence was led from Ms Christie who said she spoke to Janice during the week of the hearing when this allegation first surfaced and that Janice (who was not available to attend as a witness at short notice) denied having made such a statement. We found it improbable that the claimant would omit to include details of such an alleged conversation in
20 her pleadings and that she would omit to call Janice to speak to it, when she had sought witness orders for various others.

25 95. We were also struck that a theme stranded through the evidence of the claimant's colleagues was that almost all of them seemed to us to be genuinely bemused by the allegations against them with a number of them describing having only a very fleeting acquaintance with the claimant. Ms Carlin and Ms Hope worked opposite shifts to the claimant (days to the claimant's nights) and both described very limited contact with her as a result. We noted the claimant did not, before the hearing, know Ms T Hope's surname. Ms Pasternak and Ms Thomson worked nightshift but
30 the former only worked two shifts per fortnight and both said they had only worked alongside the claimant on two or three occasions. With their varied shift patterns, a number of them confirmed they also had very limited acquaintance with one another.

96. In relation to the content of the meetings on 31 January and 9 and 10 February, we noted that Ms Christie's evidence was supported by written notes taken by her (on 31 January) and by Ms Brophy (on 9 and 10 February). While it was unfortunate that the respondent did not share, or
5 was unable to produce evidence of having shared, Ms Brophy's notes with the claimant at the time, we accept on balance that those notes – which were detailed in nature - were indeed contemporaneously made. The claimant herself accepted Ms Brophy was there and took notes during the meeting. We find it improbable that if, as the claimant alleges, she had
10 accused her colleagues of race discrimination in these three separate meetings, Ms Christie and Ms Brophy would both have omitted to detail such important comments in the notes. We noted the claimant herself had signed off Ms Christie's brief note of the meeting on 31 January which made no reference to any such allegation.

15 97. An exception where we preferred the claimant's account related to Ms Scott's whereabouts when she said the 'f' word. We accept that she did so in front of the claimant and the resident on 3 February. Although we believed Ms Scott was generally honest about the incident, we find it more probable, on balance, that her irritation at the claimant got the better of her
20 while she was in the claimant's presence and that her use of the 'f' word would more likely be audible (which it plainly was) if said in the same room, rather than muttered in the adjacent en suite.

Relevant Law

Harassment

25 98. Section 26 of EA deals with harassment and is in the following terms, so far as material:

26 Harassment

(1) A person A harasses another (B) if –

30 *(a) A engages in unwanted 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.*

...

99. Section 136 of EA deals with the burden of proof. It is set out in full below under the heading 'Direct discrimination', where the provisions are discussed more fully. Although the provisions are most commonly invoked in relation to direct discrimination complaints, they are equally applicable to harassment complaints and indeed apply to any proceedings relating to a contravention of the EA.

100. Section 212 of the EA provides, in effect, that the prohibited conduct of harassment and direct discrimination are mutually exclusive, given the definition of "detriment" which is a necessary ingredient of direct discrimination (s.39). See further paragraphs 106 and 107 below.

Direct discrimination

101. Section 13 of the EA is concerned with direct discrimination and provides as follows:

"13 Direct discrimination

(1) *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."*

102. Section 9 EA deals with the protected characteristic of race. It provides:

"9 Race

Race includes

(a) *colour*

(b) *nationality;*

(c) *ethnic or national origins.*”

103. According to section 23 EA, “on a comparison for the purposes of section 13, ... there must be no material difference between the circumstances relating to each case”. The relevant “circumstances” are those factors
5 which the respondent has taken into account in deciding to treat the claimant as it did, with the exception of the element of race (**Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11). A person can be an appropriate comparator even if the situations compared are not precisely the same (**Hewage v Grampian Health Board** [2012]
10 UKSC 37). The claimant does not need to point to an actual comparator at all and may rely only on a hypothetical comparison.

104. Very little direct discrimination today is overt, and it can be necessary to look for indicators from a time before or after a particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally
15 was not, affected by racial bias (**Anya v University of Oxford** [2001] IRLT 377, CA). Sometimes evidence is led of so-called ‘evidential comparators’. These are actual comparators but whose material circumstances in some way differ from those of the claimant. Their evidential value is variable and is inevitably weakened by differences in material circumstances from the
20 claimant’s (**Shamoon**).

105. For a direct race discrimination complaint to succeed, it must be found that any less favourable treatment was because of the claimant’s race, though the discriminatory reason need not be the sole or even the principal reason for the respondent’s treatment. In **JP Morgan Europe Ltd v Chweidan**
25 [2011] IRLR 673, CA, LJ Elias summarised the position as follows:

“5 ... This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial - must be the claimant’s disability. ...”

106. Section 39(2) of EA provides among other matters that an employer must
30 not discriminate against an employee as to the terms on which employment is offered or the way in which he affords access to training or other benefits, or by dismissing him or subjecting him to ‘any other detriment’. There is, therefore, a requirement for an element of detriment

in any discrimination claim (which does not concern terms of employment, access to benefits or dismissal).

107. 'Detriment' is not defined in the legislation, save that it is said to exclude conduct amounting to harassment (s.212). A claimant seeking to establish a 'detriment' needs to show that a reasonable employee would or might take the view that they had been disadvantaged in the circumstances in which they had to work (**Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland)** [2003] UKHL 11).
108. The dicta of Peter Gibson LJ in **Jiad v Byford** [2003] IRLR 232), CA is that 'detriment' is to be given a wide meaning and it means no more than to put under a disadvantage. Although a trivial disadvantage would not suffice, it is not necessary to find some physical or economic consequence. ACAS describes detriment as describing 'damage, harm or loss'.
109. Section 136 of EA deals with the burden of proof. It provides, so far as material, as follows:

"136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

...

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

..."

110. The effect of section 136 is that, if the claimant makes out a *prima facie* case of discrimination (or harassment), it will be for the respondent to show a non-discriminatory explanation.

111. There are two stages. Under Stage 1, the claimant must show facts from which the Tribunal could decide there was discrimination (or harassment). This means a 'reasonable tribunal could properly conclude' on the balance of probabilities that there was discrimination or harassment (**Madarassy v Nomura International plc** [2007] IRLR 246, CA). The Tribunal should take into account all facts and evidence available to it at Stage 1, not only those which the claimant has adduced or proved. If there are disputed facts, the burden of proof is on the claimant to prove those facts. The respondent's explanation is to be left out of account in applying Stage 1. However, merely showing a protected characteristic plus less favourable treatment is not generally sufficient to shift the burden and progress to Stage 2. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. 'Something more' is required (**Madarassy**).
112. Depending on the facts and circumstances, various types of evidence have been found by tribunals to have supplied that 'something more' which has allowed an inference of discrimination to be drawn.
113. Although, at Stage 1, a tribunal must exclude the substance of the employer's explanation, it is not excluded from drawing inferences from the fact that there are inconsistencies in an employer's explanation (**Veolia Environmental Services UK v Gumbs** EAT/0487/12/BA).
114. If the claimant shows facts from which the Tribunal could decide a discriminatory act has occurred, then, under Stage 2, the respondent must prove on the balance of probabilities that the treatment was 'in no sense whatsoever' because of the protected characteristic or protected act (**Igen v Wong** [2005] IRLR 258).
115. There are cases where it is unnecessary to apply the burden of proof provisions. These provisions will require careful attention where there is room for doubt as to the facts necessary to prove discrimination but they have nothing to offer where the Tribunal is in a position to make positive findings one way or the other (**Hewage**).

Section 39: Discriminatory dismissals

116. Section 39 of the EA, so far as relevant, is in the following terms:

39. Employees and applicants

5

(1) ...

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

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

10

(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;*

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

(3) ... (6)

15

...

117. Section 40 of the EA, so far as relevant, provides:

40. Employees and applicants: harassment

(1) *An employer (A) must not, in relation to employment by A, harass a person (B)—*

20

(a) *who is an employee of A's;*

...

Discussion and Decision

T Hope Allegations (tea and coffee related matters)

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118. We have found that the allegations involving Ms Hope did not occur as described by the claimant, or at all. It is unnecessary, therefore, to decide the question of time bar. The complaints of direct race discrimination and harassment related to race involving Ms T Hope's alleged conduct are dismissed.

P Carlin Allegation (Filthy unit)

30

119. We have found that on a number of occasions, the last of which was shortly after 31 January 2023, Ms Carlin left unwashed cups in the sink

and items in the general bin in the lounge and in the sluice bin when concluding her day shift in the Arran unit at 8 pm. We have found that, on the occasions when she did so, was not aware that the claimant would take over in that unit. She sometimes forgot to empty a full bin and other times deliberately did not empty bins which were not full. She sometimes did not have an opportunity due to competing priorities to attend to the cups. We have found as a matter of fact that, on the few occasions when she left unwashed cups or unemptied bins when she left her shift, Ms Carlin did not do so with the deliberate intention of generating additional work for the claimant (or any other member of the night shift team).

120. This is a case where it is unnecessary to apply the burden of proof provisions, applying **Hewage**. The Tribunal has been able to make a positive finding that the conduct of Ms Carlin was in no sense whatsoever because of race or related to race. Ms Carlin was unaware of the race or ethnicity of the person who would be assigned to the Arran unit on the night shift after she completed her day shift. The protected characteristic of race therefore could not and did not influence her behaviour in any way. The complaints of direct race discrimination and harassment related to race involving Ms Carlin's conduct are, therefore, dismissed.

20 Allegations regarding Ms Christie's conduct at 31 January 2023 meeting

121. We have found that, on 31 January 2023, the claimant did not, during her interim probationary review meeting articulate an allegation of race discrimination. We have made a finding in fact that Ms Christie did not respond to any such complaint by dismissing it as 'petty' or by telling the claimant: "that is a big accusation".

122. We have, therefore, found that the allegations involving Ms Christie on 31 January 2023 did not occur as described by the claimant, or at all. The complaints of direct race discrimination and harassment related to race involving Ms Christie's alleged conduct at the meeting on that date are, therefore, dismissed.

A Pasterak allegation (instruction to work on a different unit)

123. We have found that on 2 February 2023, the claimant was asked by Ms A Pasternak to leave the Islay unit to which she (the claimant) had been assigned by Janice, the agency nurse on duty. We have found that Ms Pasternak asked the claimant to go to work at another unit. However, we did not find, as the claimant alleged, that Ms Pasternak insisted the claimant leave because it was 'her unit' and she had been working for the respondent for 2 years.
124. Ms Pasternak advised the claimant that she was already allocated to that unit and that the claimant would require to work on one of the other units.
125. Only one care assistant was allocated to each middle floor unit for the night shift. We have found Ms Pasternak had been working there for an hour before the claimant arrived and had attended to various initial duties. We have found she told the claimant that she would have to work on a different unit because it would not be fair if she, Ms Pasternak, required to go and repeat these initial duties in a different unit. We have no hesitation in making a positive finding that this was the reason for Ms Pasternak's insistence that the claimant be allocated elsewhere and that it was in no sense whatsoever because of or related to the claimant's race. We readily find that Ms Pasternak would have equally insisted that any other care assistant of whatever ethnicity who started at 8 pm and presented themselves in the Islay unit an hour into her shift, go elsewhere.
126. Again, it is unnecessary to be concerned with the burden of proof provisions standing the positive findings at which we have arrived in relation to Ms Pasternak's reasons for her conduct on 2 February 2023 (**Hewage**). The complaints of direct race discrimination and harassment related to race involving Ms Pasternak's conduct on that date are, therefore, dismissed.

A Scott allegation (Yelling / F word)

127. We have found that, on 3 February 2023, Amber Scott, on the way into a resident's room, complained to the claimant that another resident who had pressed the buzzer earlier ought to have been dealt with by two members

of staff and that the claimant had left her to reposition that resident on her own. (We have not found the original job about which AS was complaining was a continence change as pleaded by the claimant).

- 5 128. We did not find that Ms Scott made this complaint, knowing the claimant had been busy assisting another resident by looking for juice for them. We did not find that Ms Scott yelled at the claimant or that she raised her hand to the claimant. However, we have found that she muttered the 'F' word while in the resident's room with the claimant because she was unhappy with the claimant.
- 10 129. We accept that Ms Scott's expletive was unwanted conduct for the purposes of section 26 of EA and that it was capable of amounting to a detriment for the purposes of a section 13 complaint.
- 15 130. The next question for the Tribunal is whether Ms Scott's conduct related to race for the purposes of a harassment complaint or, in the alternative, whether it was 'because of' race for the purposes of a direct discrimination complaint.
- 20 131. We find that Ms Scott's conduct was neither related to nor was because of the claimant's race. We accept her evidence that the reason she behaved as she did towards the claimant on 3 February 2023 had nothing at all to do with the claimant's race but was because Ms Scott felt frustrated with the claimant for failing to assist her in attending to a 'double' job and because the claimant appeared dismissive when Ms Scott raised the incident, simply responding "It's fine".
- 25 132. It is unnecessary to be concerned with the burden of proof provisions standing the positive findings at which we have arrived in relation to Ms Scott's reasons for her conduct on 3 February 2023 (**Hewage**). In any event, were it necessary to apply section 136, there would be no factual basis on which we could reasonably and properly infer that Ms Scott's actions were connected to race, even leaving her explanation out of
- 30 account. The burden of proof would not shift. The complaints of direct race discrimination and harassment related to race predicated upon Ms Scott's alleged conduct on 3 February are dismissed.

N Thomson allegations

(i) instruction to move unit

133. We have found that, on 6 February 2023, Nicola Thomson asked the
5 claimant to work in the Arran unit because Ms Thomson wanted to work
in Islay unit (where the claimant had been assigned) and that the claimant
agreed.

134. We accept the claimant's evidence that this was unwanted conduct for
the purposes of section 26 (despite her agreement to the proposal) in that
10 the claimant did not welcome Ms Thomson's request. However, we do not
accept it had the purpose or effect of violating the claimant's dignity or of
creating an intimidating, hostile, degrading, humiliating or offensive
environment for her.

135. In coming to this finding, we have taken into account the claimant's
15 perception, the other circumstances of the case and whether it was
reasonable for the conduct to have that effect. The claimant gave no
evidence about the effect of this incident upon her. Her only comment on
the matter was that she had given Ms Thomson a hug but that she was
still asked to leave. She did not describe feeling the environment created
20 was intimidating or humiliating, offensive, hostile or degrading. Nor did she
use any other words that might convey she experienced the incident in
such a way.

136. It is relevant, we think, to bear in mind that there was never any question
of both care assistants being assigned to work together in the same unit.
25 That was not the respondent's staffing practice overnight. Ms Thomson
did not 'send [the claimant] away' in the sense of saying she did not want
the claimant working closely beside her in the unit; only one carer was
ever going to be assigned to the Islay unit that night.

137. It is worthy of mention too that Ms Thomson had only worked with the
30 claimant on two or three occasions and there was no evidence of any
pattern of previous conduct towards the claimant that might paint another
context to this incident on 6 February. The claimant made no protest at
Ms Thomson's proposed allocation but agreed to it. There was no

evidence before us that the tone of Ms Thomson's request was aggressive or domineering or indeed in any way worthy of comment. We are satisfied that Ms Thomson's proposal did not have the purpose of violating the claimant's dignity or of creating an environment of the sort prohibited by section 26. We are also satisfied, having regard to all relevant circumstances, including the claimant's perception, that it did not have that effect.

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138. The request by N Thomson that the claimant work in Arran so she could work in Islay was not, therefore, conduct that was capable of amounting to harassment for the purposes of section 26 of EA. That complaint is, therefore, dismissed.

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139. We considered whether it was, in the alternative, capable of amounting to direct discrimination contrary to section 13 of EA. We began by assessing whether or not the act in question was capable of amounting to a 'detriment' (a necessary ingredient of direct discrimination).

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140. We are not persuaded that a reasonable employee would or might take the view that they had been disadvantaged in the circumstances in which they had to work as a result of this incident, so as to establish a detriment (**Shamoon**). There was no evidence of disadvantage in having to work in Arran unit rather than Islay in terms of the nature or extent of the work entailed as between the respective units. Insofar as we understood the claimant's objection to the conduct (based on what little evidence she gave about it), it was the principle of being asked by a fellow care assistant to change units after being allocated to one by the nurse to which she took exception.

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141. We accept that, as a matter of fact, the claimant felt some sense of grievance about being asked to work elsewhere by Ms Thomson. However, we are unpersuaded that this sense of grievance was justified or that any disadvantage occasioned by the request went beyond a trivial one. As mentioned, there was no evidence of a domineering tone to the request or of any history of antagonism and the request was agreed to without protest.

142. In the absence of a detriment, the request by N Thomson that the claimant work in Arran so she could work in Islay is not conduct that is capable of amounting to direct discrimination for the purposes of section 13 of EA. That complaint is, therefore, dismissed.

5 143. With respect to the alleged later incident on 6 February involving Ms Thomson in the corridor, we have not found that this occurred in the way the claimant alleges. We did not find that Ms Thomson yelled at the claimant. We found that Ms Thomson was confused by the claimant's failure to respond to a buzzer while she was Hoovering and that she gesticulated at the claimant as if to say, "Why are you not getting the buzzer?" while still Hoovering. It was not in dispute that the claimant would have and did appear to Ms Thomson to be delaying in attending to a buzzer going off.

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144. We found that Ms Thomson asked the claimant why she was staring at her when she had switched off the Hoover and the two had walked towards each other, but we have not found that Ms Thomson yelled the words, as the claimant alleges. We have found the claimant replied that she was not staring and that Ms Thomson responded, "we'll have to agree to disagree". We have not found, as a matter of fact, that Ms Thomson accused the claimant in loud tones while the claimant tried to explain she'd hurt her ankle. We have not found the claimant made this explanation, or that she attempted to do so. Ms Thomson was unaware of the alleged injury to the claimant's ankle prior to these proceedings.

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145. In relation to this allegation, the Tribunal is able to make a positive finding that Ms Thomson's conduct in the corridor was in no way influenced by the claimant's race. We accept Ms Thomson's account that she was confused by the claimant's apparent inaction following the resident's buzzer going off. She could see the claimant and could see that she did not appear to be responding or to be engaged on other duties. We accept this prompted Ms Thomson to gesticulate as if to say, "Why aren't you responding?" It seemed to us highly plausible that the scenario would prompt just such a reaction. It was not controversial that Ms Thomson was busy Hoovering at the time. We likewise accept that when Ms Thomson enquired: "Why are you staring at me?", it was because it seemed to her

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that this was what the claimant was doing. The claimant had been motionlessly facing her in the corridor.

146. We accept Ms Thomson's account of her reasons for responding to the incident in the way she did and that this was not because of or related to or in any way whatsoever influenced by the claimant's Black ethnicity. The claimant's complaints of direct race discrimination and harassment relating to race arising from the alleged incident are, therefore, dismissed.

Allegations regarding G Christie's conduct at 9 February meeting

147. We have found that Ms Christie was prompted to arrange a further probationary review meeting with the claimant following reports from Ms Brophy about concerns raised by the claimant's colleagues during supervision meetings. We have found that Ms Christie told the claimant some of her colleagues felt vulnerable working with her in case she reported them and that there were concerns that, when she was asked for assistance requiring two people, she was reluctant to assist. We have also found Ms Christie told the claimant about concerns from the senior carer that the claimant was unwilling to take direction from him.

148. The claimant, we have found, did not accept the criticisms of her behaviour, and she responded by stating she should be the one feeling vulnerable and referring to her complaints about Ms Carlin concerning the dirty cups and unemptied bins. In response to the concern about her reluctance to assist on 'doubles', she also told Ms Christie about the incident when Ms A Scott used the F word.

149. We don't accept, as a matter of fact, that Ms Christie ignored the claimant's suggestion that one of her colleagues had coordinated the complaints against her. We have found that the claimant said she only had issues with one carer but that person would tell her friends. However, our finding is that she did not elaborate and became teary.

150. Nor is it our finding that Ms Christie insisted the claimant must accept what had been said about her or that she was wrong. Nor have we found that Ms Christie disregarded whatever explanation the claimant tried to make.

151. We accept, however, that Ms Christie's, by her own account, she was dissatisfied with the claimant's response to the concerns raised. The claimant's response was to reiterate her complaint about Ms Carlin and to refer to the incident with Ms Scott. Ms Christie considered team work to be essential in the care environment where many personal care tasks require collaboration between colleagues. We accept that Ms Christie did not feel the claimant's colleagues' concerns were addressed by the claimant making these counter criticisms of Ms Carlin and Ms Scott. The claimant went on later to say that she didn't have any issues with anyone, and she could just do her work and go home. We accept that Ms Christie did not have confidence in that statement or believe that the issues were truly resolved. We further accept that, for this reason and because of the claimant's state of upset, Ms Christie decided to adjourn the meeting to the following day.

152. We are in position to make positive findings, on the balance of probabilities, that Ms Christie arranged and conducted the meeting on 9 February 2023 in the manner she did for the reasons she explained to the Tribunal. We make a positive finding, on the balance of probabilities, that the claimant's race had no bearing whatsoever on the matter. It is, therefore, not necessary to apply the burden of proof provisions in this case (**Hewage**). The claimant's complaints of direct race discrimination and harassment relating to race arising from Ms Christie's alleged conduct during this meeting are, therefore, dismissed.

Allegations regarding G Christie's conduct at 10 February meeting

153. On 10 February 2023, we have not found, as the claimant alleges, that Ms G Christie and Ms L Brophy made no response when the claimant told them that she felt she had been bullied and discriminated against. We have found the claimant did not say she felt she had been discriminated against. The claimant said she felt she was being 'bullied around'. We did not find that no response was made; Ms Christie asked why the claimant thought this and by whom but the claimant did not answer. Therefore, the allegation that no response was made to an assertion of bullying and discrimination is not upheld.

154. We have not found, as a matter of fact, that Ms Christie told the claimant she was unhappy the claimant had requested the presence of agency nurse, Janice, as a witness before the meeting. Nor have we found that Ms Christie told the claimant that sending the request showed a lack of remorse. We have accepted, on the balance of probabilities, that there was no discussion of the previous email request that Janice attend during the meeting. Accordingly, the allegation about unhappiness being expressed or criticism being made of the claimant's request for Janice to be contacted is not upheld.

155. We have not found, as alleged by the claimant, that Ms Christie refused to talk about the claimant's complaint of bullying. As discussed above, we have found, on the contrary, that Ms Christie asked why the claimant thought this and by whom but that the claimant declined to answer. This allegation is not, therefore, upheld.

Ms Christie's dismissal of the claimant at 10 February meeting

156. It is not disputed that Ms Christie dismissed the claimant at the conclusion of the meeting on 10 February 2023. Having considered carefully all of the facts and circumstances, we accept that Ms Christie did so because of her concerns about the claimant's performance in the role and specifically her ability or willingness to work collaboratively and effectively with her fellow members of the care staff. She took the decision following a pattern of difficulties in the short period of the claimant's employment. We make a positive finding, on the balance of probabilities, that the claimant's race had no bearing whatsoever on the matter. It is, therefore, not necessary to apply the burden of proof provisions in this case (**Hewage**). The claimant's complaints of direct race discrimination and harassment relating to race arising from her dismissal are, therefore, dismissed.

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L Murphy

Employment Judge

9 January 2024

Date of Judgment

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Date sent to parties

10/01/2024