



EMPLOYMENT TRIBUNALS

Heard at: Ashford (by video) **On:** 6 to 9 February 2024

Claimant: Mrs Emelita Hill

Respondent: C & P Limited trading as Kimberley Residential Home

Before: Employment Judge E Fowell

Mr D Newlyn

Mr S Corkerton

Representation:

Claimant In Person

Respondent Olivia-Faith Dobbie of counsel

JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. The claimant's dismissal on grounds of conduct was both substantively and procedurally fair.
2. Neither the dismissal itself nor the earlier complaints, which concerned the disciplinary process, were acts of discrimination on grounds of race or discrimination arising from disability.
3. The claimant did not make any protected disclosures and so did not suffer dismissal or any detriment as a result.
4. Although the claimant's grievance included a protected act, her dismissal was not an act of victimisation.
5. The dismissal was not in breach of contract.
6. There was no contractual obligation on the respondent to follow its disciplinary procedure, its policy on incident reporting or the claimant's risk assessment and so the other complaints of breach of contract are also dismissed.
7. The claimant did not suffer an unlawful deduction from wages.

8. Accordingly, all of the claims are dismissed.

REASONS

Introduction

1. These written reasons are provided at the request of the claimant, Mrs Hill, following oral reasons given earlier today. As usual a little editing has taken place to avoid any repetition and these written reasons stand as the final version.
2. Mrs Hill worked for the company as a care assistant until her dismissal on 4 May 2022. The company says that this was on grounds of her conduct. They concluded that she had been responsible for abuse of residents. The conduct in question included by shaking them awake, being rude or offensive and on one occasion roughly pulling clothes over someone's head.
3. She disputes this and says that the real reason for her dismissal was her race (Filipina), her disability (a hearing impairment) or because she had raised a number of disclosures about poor care.
4. The full list of complaints presented is as follows:
 - (a) unfair dismissal
 - (b) automatically unfair dismissal for making a protected disclosure
 - (c) direct discrimination on grounds of race
 - (d) discrimination arising from a disability
 - (e) victimisation
 - (f) detriment at work for making a protected disclosure
 - (g) breach of contract in relation to notice pay and other breaches, and
 - (h) unlawful deduction from wages.
5. The issues were set out in the case management orders made following the hearing on 13 June 2023 and we will work through them in due course.

Procedure and evidence

6. This was a hybrid hearing. Mrs Hill was at the hearing centre in Ashford and everyone else joined remotely. A hearing clerk sat in with Mrs Hill and the arrangement seemed to work perfectly well.
7. Although Mrs Hill has a hearing impairment she has a hearing aid and had no obvious difficulty in following the proceedings. We were conscious that English is not her first language but this did not prevent her from participating very fully.

8. We had an agreed bundle of 365 pages and an additional bundle of 69 recent pages which the respondent asked to rely on. This new bundle included the various witness statements, which did not need permission, some documents relating to remedy, which were not needed, and:
 - (a) some entries from a daily handover log or book at the Home
 - (b) some accompanying records on the Home's CMS computer system
 - (c) a copy of the investigation report, which had not previously been disclosed
 - (d) records of their report to the Disclosure and Barring Service (DBS) after Mrs Hill's dismissal, and
 - (e) their response.
9. We could see no prejudice to Mrs Hill in admitting this new material in evidence, it was clearly relevant (as we shall see) and so we allowed it to be used.
10. We heard evidence from Mrs Hill, and on behalf of the company from:
 - (a) Ms Tara Collins (Deputy Manager), who conducted the investigation meeting
 - (b) Mrs Helen Bridgewater (Manager), who held the disciplinary hearing, and
 - (c) Mr Kevin Post (a director of the company), who dealt with the appeal hearing and Mrs Hill's grievance.
11. There was also a further, late witness statement from Mrs Bridgewater, prepared in the last few days. When witness statements were exchanged the respondent was unrepresented and, it seems, did not appreciate the need to address all of the issues in the case management order. The focus of Mrs Bridgewater's original statement had been on the fairness of the disciplinary process and nothing had really been said about the other allegations, including the various alleged disclosures. Hence the further statement. A full response had however been pleaded to those various allegations so Mrs Hill was aware of the company's position and we took the view that these further points would emerge in oral evidence in any event. On that basis we also allowed this additional evidence.
12. The respondent has adopted a policy of redacting the names of the residents to protect their confidentiality. Mrs Hill did not object to that although first names were used during the hearing. These are all vulnerable adults, they were not involved in the investigation process and we see no need to include their names here. For similar reasons we have used initials for those employees who are merely mentioned in passing.
13. We will say at the outset that we found all the respondents' witnesses to be reliable. Their evidence was straightforward and consistent, and also consistent

with the documentary evidence. Mrs Hill has fought her case tenaciously but not always wisely. Her main complaint is about the fairness of the disciplinary process and the fact that the witness statements against her were anonymised. Having adopted the view that there could be no basis to the allegations she has put forward various alternative explanations for her dismissal, hence the number of claims brought. She has also suggested, for example, that Mrs Bridgewater or Ms Collins might simply have invented the statements in question, despite having now been provided with signed and named copies. She is also unwilling to accept that any of the minutes are correct. This is all the more remarkable since the disciplinary hearing was recorded, she has her own copy and she has not produced her own transcript or identified any particular error.

14. Having considered this evidence as a whole and the submissions on each side, we make the following findings of fact.

Findings of Fact

15. Kimberley Care Home has about 37 staff, most of whom are carers for their elderly residents. We see from a CQC report in 2019 that it had 31 residents. Following Covid the number has reduced, and at the time of Mrs Hill's dismissal there were about 20 residents at the Home.
16. That report shows that they achieved the maximum "Good" rating for the following categories:
 - (a) Effective Service
 - (b) Caring
 - (c) Responsive Service, and
 - (d) Well Led.
17. It 'required improvement' in one category only, Safety, on the basis that some medication was stored in a part of the Home where the temperature was over 25°C. Otherwise, staffing levels were appropriate, the service was well-led and the leadership "promoted high-quality, person-centred care."
18. Mrs Bridgewater is the Manager and she is supported by Ms Collins, who began working there as a carer and is now the Deputy Manager. She completed a Level 5 qualification in Leadership and Management in Social Care in July 2022, shortly after the events in question, and the two of them work closely together. As a director of the company, Mr Post was less involved in the day-to-day running of the Home, but he was involved, for example in arranging HR support and appears to have had oversight of the disciplinary process as well as dealing with the appeal stage.

19. The staff work 12 hour shifts and each shift has a senior carer. When the Home was fuller there were about six members of staff on a shift, plus a senior carer, but by spring 2022 this was usually three or four members of staff plus a senior carer. The ratios were therefore the same although a smaller team may be more stretched at times since it often needs two carers for toileting and other tasks.
20. The Home has an obligation to report any safeguarding issues to the CQC and the local authority Safeguarding team. This has to be done within 24 hours. The Homes' safeguarding policy provides as follows:
 - 1.1 Abuse is wrong and must never be condoned, excused or allowed to continue. We will ensure that in all our actions we will put the rights and interests of service users first.
 - 1.2 We will ensure that service users and staff are protected from harm and not subject to unwanted attention or behaviour that concerns or upsets them.
21. Abuse is defined at section 4.1 as:

Any action (or lack of action) that causes harm or distress to another. These actions may be deliberate or accidental and include: physical, psychological, neglect, sexual or financial.
22. Further, at section 5.6:

All staff should receive training in the recognition of different types of abuse and how to recognise the signs of abuse.
23. (Mrs Hill had training on adult protection and safeguarding in January 2022, not long before the disciplinary allegations were raised against her.)
24. It goes on to state that physical abuse includes shaking and wrongful use of restraint, and that psychological abuse includes frightening or swearing or shouting at a service user, humiliating or intimidating them. Finally section 8 provides:

If any member of staff suspects that abuse might have taken place or is still taking place, they must report it to the Manager without delay.
25. These concerns are reflected in the disciplinary policy too. Examples of gross misconduct include acts of abuse towards clients or colleagues. Mrs Hill's contract of employment makes reference to this disciplinary procedure, although it does not state that the procedure is contractual. There is also a section in the contract headed 'Behaviour at Work' which states.

All employees should behave with civility towards fellow employees and no rudeness will be permitted towards residents and members of the public. Objectionable or insulting behaviour or bad language will render an employee liable to disciplinary action.

26. The contract records that Mrs Hill began work as a care assistant on 28 November 2018, working 36 hours per week, i.e. three shifts per week of 12 hours each.
27. The final background record to mention is a risk assessment carried out in June 2020 at the height of the first lockdown. It records that Public Health England had announced that those from the BAME community were at higher risk of mortality from Covid 19. Consequently, in the event of a break out in the Home, Mrs Hill had to limit the time she spent with residents, stay 2 m away and take other precautions.
28. There were few BAME staff members at the Home but we heard that the senior carer on Mrs Hill's shift, Mr Roberto Sevilla, was also originally from the Philippines. He was a friend of hers and put her forward for the job. Ms Kelly Kumar, who first raised concerns about Mrs Hill, is of Indian heritage.
29. Turning to the events in question there are a number of incidents prior to any disciplinary proceedings which Mrs Hill now points to either as a protected disclosure or as an example of inconsistency on the part of the Home. We will deal with each of them as briefly as possible.

Earlier incidents

30. In early 2021 a patient was admitted to the Home for end-of-life care. She was only there for a few days before she passed away, on 27 January. Mrs Hill says that she kept standing up and would then fall over; Mr Sevilla decided to put her back in her bedroom and used the belt on her wheelchair so she would not fall out. However, the resident kept undoing the belt. She says that she told Mr Sevilla off for using the belt and reported this to Ms Collins, but that when Ms Collins went home Mr Sevilla did it again. Ms Collins denies that any such incident occurred. There is no documentary record of it even though other pages from the daily log show that such things are carefully recorded. And it is not described in any detail in the claim form. The only mention of it gives the date as 24 February 2021, about a month after she passed away, which cannot be right. It is not obvious to us that applying a waist belt in those circumstances is wrong, so although there may have been some debate between Mrs Hill and Mr Sevilla about whether it was appropriate, we do not accept on balance that any allegation was made to Ms Collins about it.

Covid Outbreak

31. No other incidents are mentioned over the course of the next year, during which the Home was continuing to deal with Covid. In late 2021 the Omicron variant surfaced, leading to an increase in infections, albeit less severe ones. In February 2022 the government published its "Living with Covid" guidance, and from 24 February that year the legal requirement to self-isolate following a positive test was removed. People in general were expected to go about their

business. In the Home, however, there was still a concern to ensure that residents with a positive test stayed in their rooms given the increased risk to the elderly.

32. Mrs Hill came into work on 7 March after a week off. Some new Covid cases had come to light in that time and so Mr Sevilla sent her a text to warn her. Mrs Hill has no particular health problems but given her risk assessment she asked Miss Collins to ensure that she did not come into contact with anyone who had tested positive. That was agreed.
33. When she arrived, the other patients were in the lounge. At some point Mrs Hill became concerned that they may be positive too and further tests were done. She was right. Some of those in the lounge did test positive, and so despite her precautions she had been exposed to the virus. She told Mrs Bridgewater, who was sympathetic. Mrs Bridgewater said that she did not need to stay at work and could take some time off, using her holiday if she wished. Mrs Hill took that option. However, she had run out of holiday. So, it was agreed that she could borrow some holiday from next year, and she went home for a week. A few days later she tested positive herself.
34. She says however that she raised some issues about these events at the time, telling Mrs Bridgewater:
 - (a) that residents should not be left in the lounge to infect each other but should be self-isolating in their rooms
 - (b) that no one was checking them for Covid, and
 - (c) that she, as a BAME member of staff should have been told not to come to work.
35. All this is disputed. We accept that once the first residents in the lounge tested positive there was a need for them to self-isolate in their rooms, but not before. Tests were being carried out every day. And there was no obligation to ensure that she should be told not to come to work whenever covid cases had been detected.
36. It seems to us that this situation was handled speedily and supportively, and the offer that Mrs Hill take some time off was a generous one in the circumstances. We do not accept that Mrs Hill made anything resembling a disclosure to Mrs Bridgewater about this. It was simply an unfortunate turn of events. It seems to us more likely that looking at matters with hindsight Mrs Hill has made too much of it.
37. Another incident said to have occurred that day is that Ms Collins, in the course of helping a resident to the toilet, used green paper towels and soap from the wall dispenser to clean her. Ms Collins was not in fact asked about this in her

evidence and did not deal with it in her witness statement so it is difficult to assess. Suffice to say that this seems a minor matter and involves no legal care issue or risk to health and safety.

38. On 31 March two of the residents had a fall. There is some dispute over the date. Mrs Hill says that it happened on 14 April but the daily handover book or log for 31 March records both incidents. It notes that one resident had a fall but there was no complaint of pain or visible injury, adding “refer to CMS for full details”. The second resident had a fall on the toilet. For that incident we have Mrs Hill’s own CMS report which states:

Carer Found [Resident] on the toilet floor, un-witness. Assessment given, help herself to stand up with, no visible injury. Walked back to the lounge. Few minutes afterwards, [she] was jumping around almost fall over again but carer was managed to catch her, smiling & saluted to rest of the residents in the lounge.

39. The importance level is stated to be ‘low’. Nevertheless, Mrs Hill says that the following day she told Mrs Bridgewater:

- (a) that there had been a lack of staff on the previous day, and
- (b) that two residents had had falls which had not been documented

40. It is not the case that the falls had not been documented, and Mrs Hill must have known that as she documented one of them. She may well have spoken to Mrs Bridgewater about it, and may have said that they were short-staffed, but we are not satisfied that any more was said.

41. On 14 April Mrs Hill noted some bruises on the thigh of a female resident. She told Mr Sevilla, who took photos and made a report on CMS. We did not see that report, but it does not follow that the incident was hushed up in any way. The reason for the bruise, or part of the reason, was that the resident was on blood-thinning medication. That is recorded in the hand-written log book for the day. This states that her bruise was discussed – it is not clear who with - and the decision was to halve the medication for the time being and keep an eye on it. The entry does not indicate any particular cause for concern or suggest, for example, that she had been roughly treated. Mrs Bridgewater saw the bruises for herself. Again, it seems to us more likely that Mrs Hill is making more of this incident than it warrants and she did not disclose any information tending to show any abuse or lack of care.

42. The following day was her last at the Home. On arrival she was annoyed to find that the night staff had not finished all their jobs and that many residents still had to be got up and dressed. She spoke to Mrs Bridgewater about this who put it down to lack of experience on the night shift. Mrs Bridgewater was aware of the numbers of the night shift so this was essentially a grumble, not a disclosure.

43. Mr Post came in that day too, and noticed that one of the residents was in a wheelchair and was trying to get up, but she was penned in at the table by another chair. Mr Sevilla had been sitting with her but when he was called away he should have moved his chair to make sure that she was not penned in. In due course, we heard, he was given a verbal warning over this. Again, this does not appear to have been a disclosure by Mrs Hill. Even on her own account, Mr Post noticed the incident for himself and raised it with her, not the other way round.

The disciplinary allegations

44. Mrs Hill was then off for a few days. At about 5.30 pm on 19 April Ms Kumar went to see Mrs Bridgewater to raise some concerns. She described an incident on 14 April when she and Mrs Hill had been helping a patient to get washed and changed and Mrs Hill had been rough with the resident. Mrs Bridgewater called Ms Collins in to hear about it, and Ms Collins then took it down in the form of a statement. The text is as follows:

I worked alongside Emy last week (Thurs-14-April-2022) I was paired up with her and together we toileted a resident. The resident was resistant to personal care and was sitting on the toilet seat crying. This was in the double toilet off the lounge. Emy seemed to lose her patience with her and began yanking her clothes over her head, I found this to be a bit harsh but Emy is a little intimidating and I felt I couldn't say anything at the time.

It was not the first time I have witnessed this behaviour, I have seen Emy do it to another couple of residents as well.

Emy tells a certain resident to walk down the hallway as she needs to exercise and to drink water instead of juice. Emy's attitude towards residents is abrupt, loud and rude, I don't believe that she treats residents with dignity or respect.

A resident was asleep in the chair in the lounge and at lunchtime, Emy shook the resident awake and shouted in his face to wake up its dinnertime.

45. They agreed it was serious, but Ms Kumar did not want Mrs Hill to know that she had complained. That obviously presented them with a difficulty. It was difficult to raise it without making Mrs Hill aware of who had raised it. Even without giving a name it would have been obvious from the circumstances who had made the complaint. And it was not just about one issue. Ms Kumar was concerned about Mrs Hill's behaviour more generally.
46. The following morning they informed Mr Post, who took advice, and instructed Ms Collins to carry out an investigation. It was clear that this was a potential disciplinary issue. Roles were assigned, with Mrs Bridgewater to handle the disciplinary hearing and Mr Post the appeal.

Investigation

47. Mrs Hill was due back at work on the 21st which left just that day (20th) to carry out the investigation before she came back. Ms Collins managed to speak to her colleagues on the day staff that day, and to ring around the others that she worked with. In each case she took down a note of their views and so assembled 13 witness statements, each one a few paragraphs on a single page. One member of staff declined to give a statement. Another was not available and provided a short statement later on, bringing the total to 14.

48. Mr Sevilla said this:

I am finding it very hard at present to hold my temper with Emy, although she is polite to me, she is very argumentative and her attitude towards staff and clients is wrong. She can be rude, she shouts and swears and can come across as demanding. It's hard for staff to report their concerns as the way that she reacts makes it difficult.

A resident asked Emy for help to get her slippers for her, Emy responded by shouting at them to not ask her as she has not started work yet (it was the beginning of the shift at approximately 07:40). I felt Emy's response was very abrupt and rude.

49. Summarising the other statements.

- (a) Another colleague, DH, said that Mrs Hill said things about a resident's weight that made her want to cringe, such as her needing to get up and exercise because of her weight. However, she enjoyed working with her and said Mrs Hill was very passionate.
- (b) EH said that Mrs Hill had woken a resident in his chair by grabbing his jumper then shouting "come on get up I'm not having all that". She also said Mrs Hill told a resident to get up and get a drink because she was putting on weight and that this was shouted across the room.
- (c) RL had also heard her shout at residents including one in particular who was told to walk around because she was getting fatter. She felt that Mrs Hill was quite forceful and did not treat the patients with dignity and respect.
- (d) SW said that she did not work very often with Mrs Hill but had witnessed her shout at a resident sleeping in the lounge and had woken him up by shaking his shoulders. On another occasion she had whipped the quilt off him, shouting "it's time to get up" then being quite forceful in getting him out of his pyjamas.
- (e) DO also saw Mrs Hill shake a resident in his chair and shout "come on get up" and on another occasion say to a resident "get up and get it yourself, you're fat and lazy". But she had never heard Mrs Hill swear in front of the residents.

- (f) CE was supportive. She did not work alongside Mrs Hill but said she had never witnessed her being horrible to the residents, but she was loud, that was just her way and she believed that she treated the residents with dignity and respect.
- (g) LM had not witnessed any physical abuse but felt that Mrs Hill belittled the residents and had heard her say to them “fucking get up”. To another resident she had said “you don’t need to eat any more; you are big enough” and “you’re lazy” and asked her to walk around the dining area for exercise. She had also seen her pull a resident upright from the sloping position in quite a forceful way.
- (h) AH had witnessed her being argumentative to staff and residents but didn’t think she meant any harm by it. He felt that her attitude needs improvement as she was often swearing and he once had to ask her to stop shouting at a senior member of the night staff. He said her work ethic was good but she was very loud, will say what she thinks and is often not appropriate.
- (i) PL worked on opposite weekends so had not really worked with Mrs Hill very much but she had helped her with toileting a resident and found her to be quite forceful and abrupt, placing her hands on his shoulders and shouting at him to sit down, then removing his trousers quite forcibly which she thought at the time seemed a bit harsh.
- (j) EH also felt that she swore quite a bit, was loud, demanding and very abrupt. She heard her say to a male resident who raised his arm to her “[don’t] fucking raise your arm with me” then saying “you are the reason this lady has bruises.”
- (k) SM had witnessed her swear in front of the residents too, very frequently, and make demeaning comments to them including “stop scratching your fanny”. She forcibly put food in their mouth and staff were intimidated by her.
- (l) AS, who provided the later witness statement, also said that Mrs Hill was rude towards a resident, pointing her finger at him when he would not stand up, was rude and difficult, always shouting and giving staff orders and shouted at a resident to get up and walk as she is overweight. She confirmed what must be the same remark to a resident that “it’s your fault she has bruises”.

50. We have set out this detail to show that the recollections are very similar in places, raise common and consistent themes, and also that they are not universally critical. There are some supportive comments in there too, indicating that this was not an attempt just to gather negative feedback about her.

51. Having assembled this material, two letters were hand-delivered to Mrs Hills address that evening. The first notified her of an allegation of abuse against patients and invited her to an investigation meeting on 26th. It explained that Mrs Bridgewater would be there to take a note and advised her of her right to be accompanied. The statements were not included. With it was a letter of suspension, informing her that she should not contact any of her colleagues about it. All this was of course very upsetting news. Nevertheless she attended the meeting, unaccompanied.
52. We are satisfied with the accuracy of the minutes of that meeting, though they are quite brief – 3 pages for a meeting which lasted an hour and 50 minutes. Our overall view is that the managers concerned went to considerable efforts to ensure that the process was thorough. The minutes of the disciplinary hearing are much longer, at over 30 pages, and Ms Collins took several days to transcribe them. Mr Post carried out a similar exercise for the appeal hearing. Mrs Hill has not pointed out any specific issue with any of the comments recorded in those later meeting.
53. It might have been better to open the meeting with some explanation of the nature of the allegations. Instead, they emerged piecemeal from the questions which were asked. And in this first meeting Mrs Hill was quite forthcoming. She was asked how she woke a particular resident and admitted that she sometimes shook him, and would “shake his shoulders, gently at first”. She accepted that she had made comments about the overweight resident needing to exercise, comments like “you don’t want to end up in a hoist like [other residents]”. She accepted that she swore a lot but not at the residents and in particular she denied saying “fucking get up” or similar. She did not specifically deny swearing in front of the residents though. She remembered the recent incident in which she had used force to remove someone’s clothes and a scab coming off their arm. She said that the clothes were too tight and the scab came off accidentally. She said she reported it to Mr Sevilla, the resident was being resistant and it was very difficult to get her undressed. Understandably, she also asked for a copy of the reports or statements and wanted to know what the complaints were exactly.
54. Based on this discussion, Ms Collins prepared the investigation report which set out again in full the text of the witness statements and concluded (1) that the allegations were substantiated and (2) that Mrs Hill should be invited to a disciplinary hearing. That report therefore adds little but it was not disclosed to Mrs Hill at the time.

The disciplinary hearing

55. On 27 April Mrs Bridgewater invited Mrs Hill to a disciplinary hearing on 3 May. The letter set out four allegations:

- verbal abuse, swearing and using critical and demeaning comments towards residents
 - using excessive force to wake a resident up by shaking and shouting at them
 - not treating the residents with dignity and respect
 - being contentious towards staff and residents and causing others to feel intimidated to report their concerns.
56. It also enclosed the text of the witness statements but without giving any names.
57. On receipt of this letter Mrs Hill wrote to Mrs Bridgewater to complain about the way things were being handled. She was unhappy that Mrs Bridgewater had been in the investigation meeting rather than a member of the HR team, that there had been no agenda, that the minutes were inaccurate and that she should have been sent “the full report”. She was unhappy that the witness statements were simply typed out in this way and wanted to be accompanied by a friend from outside work, Mr Barrow. Mrs Bridgewater responded that there was no separate HR Department, asking her to identify any parts of the minutes which were inaccurate, said that she and Ms Collins had separate roles and that they were happy for Mr Barrow to attend.
58. Mrs Hill also got in touch with a former manager at the Home, Ms Skinner. She must have sent her the witness statements because Ms Skinner responded by email with her views on them. She thought it was wrong to have contacted so many members of staff, that this was a breach of confidentiality and a witch-hunt. Mrs Hill seems to have misinterpreted this, particularly the opening line - “Tara has spoken to all staff”. She assumed that Ms Skinner had heard this directly from Ms Collins, and so the investigation had been announced at work. That was not the case. They were all asked for their views, but in confidence.
59. Mrs Hill then sent Mrs Bridgewater a further letter. It is undated but seems to have been sent on 2 May. This one was much longer at eight pages and set out her response to the allegations. As before she complained about the lack of any agenda or questionnaire in the investigation meeting, the fact that the witness statements were not signed and the wording of the invitation letter which stated that the company “is considering dismissing you”. She mentioned for the first time her hearing impairment [105] and the fact that it meant she had a loud voice - “I do have a loud voice, (I am deaf in my right ear)”. It also stated that she had raised things herself on numerous occasions to make sure that there was no abuse of any kind at the Home: the two recent falls, one of which involved an ambulance attending; the lack of staff; that Tara had used hand soap and green paper; that she had found bruises on a resident’s leg; and the incident when a resident was hemmed in at the table in her wheelchair. She said the incident with

the scab was totally false. The general thrust of the letter is that lots of such issues arise and that she was conscientious about reporting them.

60. Before leaving that letter, it also contains an allegation of discrimination. That relates to a written warning which Mrs Hill had received in February 2021. It played no part in the disciplinary process but she said that in the past she had been discriminated against over that incident, being forced to apologise to someone who had assaulted and bullied her at work. This was, she said, because she was not white. We heard no more about this past incident and this passage was only pointed out to us because Ms Dobbie conceded that it amounted to a protected act. It was not mentioned during the disciplinary hearing.
61. Mrs Bridgewater allowed the hearing to be recorded. As already noted, the minutes are very extensive. It was a difficult encounter and lasted two hours and 25 minutes. Mrs Bridgewater found it difficult to get Mrs Hill to address the particular allegations. Mrs Hill adopted the approach that the investigation meeting had not been done properly, that she should have been given the witness statements in advance and a full report and that she could not respond to witness statements presented in this way. There were just typed up and there was to show that they were genuine. She needed the specific allegations to respond to. Mrs Bridgewater listened patiently to her points, up to a point, at one point commenting that they had been there for an hour and made no progress. Exchanges of the “Yes you did, no you didn’t, yes you did” variety appear several times. The expression “going round in circles” appears nine times and the request for a full report over 30 times. Ms Collins intervened to try to clarify matters, without success.
62. In the absence of this report Mrs Hill simply denied everything. The only contribution of Mr Barrow was to keep tell her to keep her voice down. (She accepted that when she was under stress she raised her voice). At no point did she suggest any reason why people would say such things if they were not true. The only mention of a whistleblower was in connection with Ms Kumar, and she was aware by then from the circumstances that Ms Kumar had first raised her concerns.
63. Faced with this blank response and given the 14 statements (largely) to the contrary Mrs Bridgewater concluded that this was gross misconduct. The dismissal letter dated 4 May 2022 [148] set out again the four headings, noted that there were eight statements supporting the allegation of verbal abuse etcetera, five relating to excessive force, four statements about lack of dignity and respect and eight which described her being contentious or causing others to feel intimidated. She was therefore summarily dismissed on grounds of gross misconduct.

64. For reasons which are unclear to us, Mr Post decided to treat Mrs Hill's letter of 2 May as a grievance. These points might have been better addressed in the course of an appeal hearing. Nevertheless he invited her to a grievance meeting to take place on 10 May to discuss it further.
65. There was then an unusual exchange. Mrs Hill wrote back saying that she was in the process of appealing but would like to speak to him personally and asked whether there would be a charge for doing so. It is still not clear to us what she hoped to achieve but this may have been a settlement overture. He offered to meet her informally, away from the office, perhaps on the seashore for a walk. She then wrote back declining and then failed to attend the grievance hearing on 10 May.
66. She did however attend an appeal hearing with him on 16 May. This time the respondent went so far as to organise a Tagalog interpreter for the hearing who was to attend by video. In the event she was not used. Once again, Mr Barrow attended as her companion and this time Mr Post asked his wife to take notes. The minutes run to 50 pages. Despite the effort made in producing them they did not feature to any great extent in the evidence we heard. Essentially, Mrs Hill went over the same ground again, complaining about the procedure followed, that it was not in accordance with the ACAS code of practice, and that she needed full copies of all of the statements with signatures. She referred to the ones presented as fictional. No new line of defence was put forward and ultimately Mr Post dismissed the appeal for the same reasons as Mrs Bridgewater. He was faced with a bare denial and his view was that the evidence was overwhelming. He was surprised that there had been no statements submitted in support of Mrs Hill and was conscious of how the CQC or Safeguarding would view the matter. They had the power to close down the Home if they felt that the residents were unsafe.
67. There is an obligation to report these matters and DBS were duly informed by Mrs Bridgewater on the day of dismissal. They were then provided with the documentary evidence, including her file which included the previous written warning. Their initial response, in a detailed consideration, was that they were "Minded to Bar" her from practice in the sector, i.e. to place on the adult barred list. However their ultimate conclusion was not to do so.

Disability

68. The final factual dispute is in relation to Mrs Hill's hearing impairment. To shorten matters, we are satisfied that this amounted to a disability at the time of her dismissal. She was first diagnosed with hearing loss on a routine trip to an opticians (who also did hearing tests) in 2019 or 2020 but could not at that time afford a hearing aid and was not able to get one until about a year after her dismissal in 2023. It is clear therefore that this is a long-standing condition. The test of disability requires a "substantial adverse effect on normal day-to-day

activities” - substantial being defined as “more than minor or trivial”. And the effect of an impairment has to be judged in the absence of any treatment or auxiliary aid such as a hearing aid.

69. This not something that can be judged in hindsight but she had a hearing test on 4 June 2022, exactly a month after her dismissal, and although the results in the bundle at page 273 are unclear, there are readings in the “red zone”, i.e. a loss of about 45 db. The red box appears in black on the page and so is difficult to decipher but those results are supported by an accompanying pair of graphs on page 274. Applying the guidance supplied by the respondent, that would put her hearing loss in the moderate category which provides, for example, that many household sounds may be missed or appear far away. That meets the threshold for more than minor or trivial.

Applicable Law and Conclusions

Unfair Dismissal

70. This important right is set out in s.94 Employment Rights Act 1996 (ERA), and by s.98 the employer has first to show a fair reason for the dismissal, such as conduct.
71. This, of course, is the key issue. Was Mrs Hill dismissed because of the disciplinary allegations against her or because, for example, of her race, her previous allegations or perhaps because of her loud voice - the effect of her hearing loss?
72. Our starting point has to be the evidence of the 14 witness statements. This is a considerable body of evidence, reflecting individual perceptions, expressed in their own language, and combining to form patterns of behaviour which clearly meet the definition of abuse in the Home’s disciplinary policy. The reaction of the DBS to this information confirms that it was taken very seriously. It is hard to see any reason to doubt that these are genuine concerns on the part of those who raised them and were of concern to management as well. And many of the points were accepted in the investigation meeting. If the statements were not genuine there must have been a wholesale effort on the part of all of the staff who worked with Mrs Hill to invent or exaggerate shortcomings on her part. It is difficult to imagine what could prompt such an exercise.
73. Taking the various alternative explanations in turn, we can see no basis for race playing a part in this decision. Several of the examples relied on by Mrs Hill as showing that she was treated more severely than others concerned Mr Sevilla who is also from the Philippines. There is no suggestion of any existing animosity between groups at work based on ethnicity. Indeed it is hard to detect any underlying conflicts or animosity between her and her colleagues or her managers for whatever reason. Several of her colleagues made supportive comments in their witness statements and attempted to excuse or minimise the

effect of her approach on the basis that it was just her way and she didn't mean any harm by it. The most pointed remark in fact comes from Mr Sevilla, when he said that he was struggling to keep his temper with her recently. We also heard that there had been three previously dismissals at the Home for conduct, none of whom was BAME, the last of whom had simply sworn in front of the residents.

74. The same points could be made with equal force with regard to her loud voice. There are some mentions in the witness statements of her shouting, but shouting requires some effort. No one has suggested that she shouted all the time. In the disciplinary hearing she explained that she was speaking loudly because of stress, rather than any other reason. The comments in the witness statements about her loudness are always coupled with reference to her being rude or abrupt, which was perhaps the main concern. Taken as a whole, the volume of her voice seems to us a very minor part of the concerns expressed.
75. There is also a victimisation claim, based on the point raised in the grievance letter, in which Mrs Hill said that she had previously been a victim of discrimination in connection with her earlier written warning. Again, this was simply not mentioned in the disciplinary hearing or at this hearing.
76. The final alternative concerns the various whistleblowing allegations she relies on. We will come to them in turn, but if they were protected disclosures they are all addressed to Mr Sevilla, or Ms Collins or Mrs Bridgewater. They do not explain why her other colleagues would have taken against her.
77. We also bear in mind that Mrs Hill has since been provided with the names and signatures of each witness, and no further explanation has been put forward as to why they would say such things without proper cause.
78. Accordingly we are satisfied that the alleged misconduct was the real reason for the dismissal. Returning to the tests required in a claim of unfair dismissal, once a fair reason for dismissal has been shown, then by s.98(4)

...the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

79. This is a relatively small employer with two main on-site managers and no internal HR department, so it is not to be expected that they have the staff or resources to complete everything as they would like. Some compromises had to be made,

such as the need for Mrs Bridgewater to attend the investigation meeting as a notetaker.

80. Applying this test, the question is not whether Mrs Hill was guilty of the misconduct, but - broadly speaking – whether it was reasonable of the company to conclude that she was, and that she should have been dismissed as a result.
81. As is well established, that question can be broken down further as follows:
 - (a) Was there a genuine belief on the part of the decision-maker that Mrs Hill did what was alleged?
 - (b) Was that belief reached on reasonable grounds?
 - (c) Was it formed after a reasonable investigation?
 - (d) Was the decision to dismiss within the range of reasonable responses open to an employer in the circumstances?
82. This “range of reasonable responses” test reflects the fact that whereas one employer might reasonably take one view, another might with equal reason take another. Tribunals are cautioned very strictly against substituting their view of the seriousness of an offence for that of the decision maker. This applies not just to the reasonableness of the decision to dismiss but also to the process followed in coming to that conclusion. If a failing is identified in the disciplinary process it is necessary to ask whether the approach taken was outside that range, i.e. whether it complied with the objective standards of the reasonable employer: **Sainsbury's Supermarkets Ltd v Hitt** [2003] ICR 111
83. Dealing with each of these points in turn, we have no doubt that Mrs Bridgewater had an honest belief that Mrs Hill had acted as described in the various witness statements. Without repeating points already made, the number of those witness statements, the readiness of people to come forward, and the range and relative seriousness of the concerns raised clearly provided a reasonable basis for that belief.
84. The question of a reasonable investigation is usually the main issue in unfair dismissal cases. It is well established that where admissions are made there is less need to carry out further investigations. Had this been a case where, for example, three or four people had come forward with concerns and Mrs Hill had been able to suggest some plausible reason why those concerns had been raised or exaggerated, it would certainly have been appropriate to re-interview those members of staff and put to them what Mrs Hill had to say. Had the evidence focused about a particular incident or small number of incidents and there was some issue about the date, or the witnesses present, that might also have meant that further investigation was needed. We accept that it would have been difficult for Mrs Hill to make a full response in the circumstance, before she was given

copies of the statements. But some of the points she recognised; some she disputed, such as saying “fucking get up”. Given the various admissions, the decision to proceed to a disciplinary hearing seems to us well within the range of reasonable responses.

85. The main procedural concern was that she was interviewed before the witness statements were provided, and that when they were provided they were anonymous. The obvious concern on the part of the respondent was the confidentiality of those concerned, particularly of Ms Kumar who had first come forward. That is a legitimate concern which applies in any case of whistleblowing. People are more reluctant to come forward if their identity becomes known, and if people do not come forward then potential abuse carries on undetected.
86. We were referred by Ms Dobbie to some particular cases on the difficulties which arise when complaints are made anonymously. The Employment Appeal Tribunal set out guidelines for employers in **Linfood Cash and Carry Ltd v Thomson and ors** 1989 ICR 518, EAT. That case concerned a single anonymous whistleblower, It was emphasised that “the most stringent inquiries should have been made by management to ascertain that the informer was not actuated by any improper motive”. That concern is obviously very much reduced, if not extinguished, given the number of witnesses in this case who provided a statement.
87. **Ramsey and ors v Walkers Snack Foods Ltd** and anor 2004 IRLR 754, EAT, was a case involving multiple informants working in the factory who were unwilling to sign statements for fear of reprisals. The Employment Appeal Tribunal held that it was reasonable not to disclose their identities in those circumstances since otherwise no information would have been forthcoming.
88. Our view is that it would have been better for the redacted copies of the statements to have been provided at the outset, in advance of the investigation meeting, in order for Mrs Hill to have the opportunity to consider the totality of the allegations and make a more considered initial response. However, we can understand that Ms Collins was reluctant to go so far straightaway. Had there been some explanation which allayed these concerns it would be better for Mrs Hill to be able to return to work without knowing the number of people who had made statements and what they had had to say. She wanted to obtain an initial response on general lines before deciding whether to proceed to a disciplinary hearing.
89. We bear in mind that this was a small and close-knit workforce, many of whom were friendly with Mrs Hill, so we understand Ms Kumar’s initial reluctance to be named and the respondents reluctance to insist on it. The same considerations apply to the other members of staff too, and it would have raised obvious difficulties to name some and not others. Overall, we accept in the circumstances

that it was within the range of reasonable responses not to disclose their identities.

90. More generally, this is a small employer and the ACAS code of practice does not insist on an initial investigatory meeting. Of course in the disciplinary hearing Mrs Hill laid repeated stress on the fact that she had not been given the statements before the previous hearing but by then of course there was no going back. She also made repeated requests for the full report although even in the most extensive disciplinary process the investigation meeting with the person accused is part of the investigation and it is only when all of the interviews are completed that an investigation report is prepared to address the question about whether the allegations should proceed to a disciplinary hearing. In this case the statements were essentially the full report and she did have the before the disciplinary hearing. In several cases, if not all, she was aware of who had said what. Overall therefore we are satisfied that the investigation and procedure was fair.
91. The final stages the 'range of reasonable responses' test, i.e. whether dismissal was justifiable in the circumstances. Again, it is not for the tribunal to substitute its view of the seriousness of a particular allegation, although in this particular case we have no difficulty in accepting the view taken by Mrs Bridgewater and upheld by Mr Post, that this was a clear breach of the company's disciplinary policy and met the definition of abuse. The view taken by the DBS makes clear that any other outcome would have been difficult for the Home to justify.

Discrimination claims

92. Although we have concluded that the reason or principal reason for the dismissal was on grounds of conduct we should say a little more about the test for discrimination. It is possible for example that a decision to dismiss may still be tainted by discrimination even if dismissal is within the range of reasonable responses.
93. A number of different allegations of discrimination so made, including direct race discrimination, discrimination arising from disability and victimisation. Starting with the claim of direct discrimination, the test under section 13 Equality Act is as follows:
 - (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.
94. The test for discrimination arising from disability under section 15 Equality Act is as follows:
 - (1) A person (A) discriminates against a disabled person (B) if—
 - (a) A treats B unfavourably **because of** something arising in consequence of B's disability, and

- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

95. Here, the “something arising” is Mrs Hill’s hearing loss and the test is therefore whether her dismissal was because of that hearing loss.

96. The test for victimisation is as follows.

- (1) A person (A) victimises another person (B) if A subjects B to a detriment **because** —

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

97. Again the test is “because or because of”. There is also a particular provision at section 136 Equality Act 2010 dealing with the burden of proof:

- (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.

98. In **Ayodele v CityLink Limited** [2017] EWCA Civ 1913, the Court of Appeal explained that this involved a two stage approach. The first stage involves hearing all of the evidence, not just the claimant’s case, and then making appropriate findings. If those findings suggest that there *might* have been some discrimination involved, if some explanation is called for from the respondent, the burden then shifts to them to prove otherwise. That is in keeping with the previous guidance in **Madarrassy v Nomura** [2007] ICR 867 that it is not enough for a claimant to show that she had a protected characteristic and was dismissed - “something more” is required.

99. So the starting point is to consider whether the dismissal or other treatment mentioned was at all unexpected in the circumstances or out of the ordinary – whether something more is needed to explain it. At the risk of repetition, we can see nothing here out of the ordinary given the body of evidence assembled relating to Mrs Hill’s behaviour towards residents and colleagues. In those circumstances it is unsurprising that it ended in her dismissal and there is no need to cast around for other explanations to explain this outcome. We therefore dismiss these various claims under the Equality Act.

Public interest disclosures

100. The final main area concerns alleged protected disclosures. The first requirement is that the disclosure is a “qualifying disclosure”, as defined by section 43B Employment Rights Act 1996. It has to disclose information which in the

reasonable belief of the employee is made in the public interest and tends to show one of a number of statutory grounds. In this case the relevant ones are either:

- (a) that a person has failed ... to fail to comply with any legal obligation ... or
- (b) that the health or safety of any individual has been ... endangered.

101. It is not enough therefore to point to a bruise, for example, since that does not in itself indicate any wrongdoing of this sort. Given our existing findings of fact it follows that most of the alleged disclosures do not qualify. That includes the issue in February 2021 regarding the restraining belt, comments made on 7 March 2022 about the covid outbreak, the use of also been green paper towels that same day, or pointing out that a resident had two long bruises.
102. A complaint about the level of staffing may arguably amount to a protected disclosure. But the disclosure also must be of "information". The mere making of an allegation is insufficient, unless some concrete factual information is also conveyed. So, saying: "you are not complying with health and safety requirements" discloses no information, but adding: "because the wards have not been cleaned for two weeks", does: **Cavendish Munro Professional Risk Management Limited v Geduld** [2010] IRLR 38.
103. More recently, in **Kilraine v London Borough of Wandsworth** [2018] ICR 846, the Court of Appeal stressed that 'information' and 'allegation' are not mutually exclusive and that Tribunals should consider instead whether the disclosure has "a sufficient factual content and specificity such as is capable of tending to show one of the six relevant failures". Applying the guidance it does not seem to us that raising the staffing levels is sufficient. It is too broad a statement.
104. We have already found as a fact that the two falls on 31 March 2022 were documented.
105. The final alleged protected disclosure is Mrs Hill complaining about shortcomings in the disciplinary process during the course of the investigation meeting. Here, the main problem is the public benefit test. It is a concern which is entirely personal to Mrs Hill, and so without setting out any further guidance of the point we are satisfied that it is not met in the circumstances.
106. Accordingly, the complaints of automatically unfair dismissal and of having suffered detriments for raising such disclosures must also be dismissed.

Breach of contract

107. Mrs Hill also complains that the dismissal was in breach of contract. It is therefore for the respondent to show, on the balance of probabilities, that she was guilty of a repudiatory breach of contract (gross misconduct) which entitled them to dismissal without notice. Given the volume of evidence presented and the lack

of any specific response we satisfied on balance that the conduct in question took place and that it amounted to a fundamental breach, given the clear terms of the contract of employment.

108. None of the other documents relied has any contractual force. The disciplinary policy, for example, is not stated to be contractual. We were not provided with any policy on incident reporting, and the risk assessment which dates back to June 2020 not impose any obligation on the employer, for example, to ensure that she does not contract Covid or to furlough her at their own expense.

Unlawful deduction from wages

109. The last issue relates to her final pay statement. It appears that because she took some advance holiday in order to have time off following the covid outbreak, when her employment was terminated shortly afterwards she had taken more holiday than she was entitled to and a deduction was made. We cannot dispute the respondent's entitlement to make that deduction.
110. It seems then that this caused difficulties with HMRC and DWP when assessing her entitlement to Universal Credit, on the basis that her final pay statement indicated that she had received a loan. That seems to us accurate description and any dispute over tax deductions or entitlement to benefits is outside our jurisdiction.
111. Accordingly, and for the above reasons, all the claims must be dismissed.

Employment Judge Fowell

Date 06 February 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

7th March 2024

For the Tribunal Office

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