# EMPLOYMENT TRIBUNALS

**Claimant:** LF
**Respondent:** OCS Food Co Ltd

**Heard at:** Reading
**On:** 15, 16, 17, 18, 19 April, 28 May and 22 July 2024
**Before:** Employment Judge Shastri-Hurst,
Mrs F Potter and
Dr C Whitehouse

**Representation**
Claimant: in person (assisted by LR, lay representative)
Respondent: Mr O Tahzib (counsel)

# RESERVED JUDGMENT

1. The claim of ordinary unfair dismissal is well founded and succeeds;

2. The claim of automatic unfair dismissal (s103A Employment Rights Act 1996 ("ERA")) is not well founded and fails;

3. The claims of direct sex, race and age discrimination are not well founded and fail;

4. The claims of harassment in relation to sex, race and age are not well founded and fail;

5. A deduction of 5% will be made to the compensatory award the claimant will receive under s123(6) ERA;

6. There will be no deduction made to the compensatory award in relation to a "Polkey reduction".

# REASONS

## INTRODUCTION

1. The claimant was employed by the respondent as an Assistant Chef at Bristol Court, a care home, as part of the respondent's contract with the London

Borough of Hounslow ("LBH") to provide catering services. The care provider for Bristol Court is London Care.

2. The claimant was employed from 16 December 2019 until the time of her summary dismissal on 20 December 2022. The claimant initially started as a Kitchen Assistant, then was promoted to Assistant Chef on or around 3 August 2020.

3. Early conciliation started on 4 January 2023 and ended on 6 February 2023. The claim form was presented on 27 February 2023, with the claimant bringing claims of:

   3.1. Ordinary unfair dismissal;
   3.2. Automatic unfair dismissal (whistleblowing);
   3.3. Direct discrimination on the grounds of sex, race and age; and
   3.4. Harassment in relation to sex, race and age.

4. The claim relates to the alleged discriminatory treatment the claimant says she suffered primarily at the hands of Danny Barnes ("DB"), the respondent's current Operations Manager. The claimant complains about various comments and conduct by DB, as well as Ann Christie ("AC") who, at the time of the claimant's dismissal, was the Area Support Manager. This treatment resulted in the claimant raising a grievance in July 2022; this grievance was pursued through the respondent's internal process, but was not upheld either at the original hearing, or at appeal. The claimant relies on her grievance as being a protected disclosure; it is conceded by the respondent that this was a protected disclosure.

5. The claimant, in her role as Assistant Chef, worked alongside a volunteer at Bristol Court, who was also a resident there ("the Resident"). The Resident was a vulnerable adult with learning difficulties. The claimant sent an email on 11 November 2022 regarding concerns she had about the Resident working in the kitchen. The claimant says that this email was also a protected disclosure; this is denied by the respondent. The claimant's email was sent to LBH and London Care, as well as being copied to her own personal email account. The respondent conversely argues that this email amounted to a breach of GDPR.

6. The claimant was suspended on 15 November 2022, and was the subject of a disciplinary investigation, carried out by Mary Clinton ("MC"), Senior Operations Support Manager. There was then a disciplinary hearing, chaired by Rachel Matthews ("RM"), Operations Manager, on 14 December 2022. That hearing considered three allegations - [224]:

> "Allegation of bullying a resident at Bristol Court in that you spoke to her in an inappropriate manner.
>
> Breach of GDPR in that you sent a confidential information to external parties who did not have a requirement to know the information contained within and that you sent it to your personal email address outside of the company.
>
> Allegation of bringing the company reputation into disrepute in that you sent information outside of the company that should have been dealt with internally."

7. Following the disciplinary hearing, the decision was made to dismiss the claimant for gross misconduct on 20 December 2023, without notice. The claimant appealed that decision. The appeal process was chaired by Stephen Williams ("SW"), Key Account Director: the appeal was unsuccessful, and the decision to summarily dismiss the claimant was upheld.

8. The claimant was represented at the final hearing by her friend and lay representative, referred to here as "LR" due to the making of an anonymity order, see below. The respondent was represented by Mr Tahzib of counsel.

9. To assist us in reaching our decision, we had a bundle of 312 pages; pages in this Judgment are referred to as [X]. There were some additions to the bundle during the course of the hearing; again, see below for more details.

10. We had statements and heard evidence from the claimant as well as Elvis Thompson ("ET") and Mohammed Patel ("MP") in support of the claimant. ET is a Kitchen Assistant at Bristol Court, employed by the respondent. MP was, at the relevant time, Housing Manager for Bristol Court, employed by LBH.

11. For the respondent we heard from the following witnesses:

    11.1. Danny Barnes – alleged discriminator, Area Support Manager, then Operations Manager;
    11.2. Ann Christie – alleged discriminator, Relief Chef, then appointed to Area Support Manager;
    11.3. Mary Clinton – Investigating Officer, Senior Operations Support Manager
    11.4. Rachel Mathews – Disciplining Officer, Operations Manager;
    11.5. Stephen Williams – Appeal Officer, Key Account Director.

12. The hearing was listed for 5 days. By the end of Day 5, the Tribunal had not concluded our deliberations. We in fact took two further days, on 28 May 2024 and 22 July 2024, to reach our decision.

**Preliminary/ancillary matters**

13. On the first morning of the hearing, there were three preliminary issues the Tribunal had to deal with, as set out below.

14. First, the respondent's name was changed by consent to OCS Food Co Ltd. The respondent changed its name officially on Companies House on 9 October 2023.

15. Second, the claimant applied to have the respondent's witness statements excluded because they had only been received by the claimant 12 or so days before the final hearing began. We refused this application. Oral reasons were given at the time but, in short, we concluded that to exclude the respondent's statements would have been overly prejudicial to the respondent. The result would effectively have been to prevent the respondent from positively defending the claim.

16. Third, the claimant applied to convert the hearing to a video hearing. In part this was due to her having childcare arrangements she needed to meet. The other aspect was that one of her witnesses, MP, would have found it difficult to attend the Tribunal due to travel issues and health concerns. The respondent objected to the application.

17. We determined that we would have a hybrid hearing so that MP could attend remotely. To accommodate the claimant's childcare duties, we agreed to start each day at 1030 hours. This was sufficient to ameliorate the issue, meaning that a full video hearing was no longer necessary.

18. During the course of the hearing, the parties made applications for documents to be added:

    18.1. The respondent made an application for a Catering Training and Development Record and an email dated 20 December 2022 from Rachel Matthews, attaching a note of a conversation she had with "Pim" as part of the disciplinary process. We admitted these as being relevant to the issues. The claimant did not particularly object to these inclusions, but had some questions to ask about them in cross-examination of the respondent's witnesses. Furthermore, the Training Record arose from the tribunal's enquiries. The Training Record is now at [313-316], and the 20 December 2022 email and note are at [317-318].

    18.2. The claimant applied to admit an email she had received as a result of her subject access request, from Laurun Potts (HR) ("LP"), copying in the in-house solicitor. The respondent objected to including this document on the ground that the email was legally privileged. The tribunal determined that this email was indeed covered by legal privilege, and gave oral reasons for that decision during the hearing.

19. At the conclusion of the hearing with the parties, the claimant applied for an anonymity order to avoid her being identified and her family traced to its current location. The respondent did not object to this application. Having satisfied ourselves that the relevant test was met, we granted the request and made an anonymity order in respect of the claimant and her lay representative. Reasons were given during the hearing. In short, we were satisfied that this was a case in which we should move away from the default position of open justice, to preserve the claimant's and her children's right to a private and family life. For similar reasons, we have changed how the Resident is referred to, so that they cannot be identified; both parties consented to this also.

## ISSUES

20. The issues to be determined at the final hearing were set out at a preliminary hearing 14 August 2023. These were discussed on the first morning of the final hearing. Dates for the allegations of discrimination were added by the claimant in compliance with an order made at the August 2023 hearing. Those dates appear at [47]; they have been included in the below list for completeness.

21. Some other minor amendments have been made to the list below, compared to its original format, following clarification from the parties on the first morning of the hearing.

> **"1. Time limits**
>
> 1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened **before 5 October 2022** may not have been brought in time.
>
> 1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
>
> 1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
> 1.2.2 If not, was there conduct extending over a period?
> 1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
> 1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
>
> 1.2.4.1 Why were the complaints not made to the Tribunal in time?
> 1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?
>
> 2. **Ordinary unfair dismissal**
>
> 2.1 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
>
> 2.2 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
>
> 2.2.1 there were reasonable grounds for that belief;
> 2.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
> 2.2.3 the respondent otherwise acted in a procedurally fair manner;
> 2.2.4 dismissal was within the range of reasonable responses.
>
> 2.3 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?
>
> 3. **Remedy for ordinary unfair dismissal**
>
> 3.1 If there is a compensatory award, how much should it be? The Tribunal will decide:
>
> 3.1.1 What financial losses has the dismissal caused the claimant?
> 3.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
> 3.1.3 If not, for what period of loss should the claimant be compensated?

3.1.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
3.1.5 If so, should the claimant's compensation be reduced? By how much?
3.1.6 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?
3.1.7 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
3.1.8 Does the statutory cap of fifty-two weeks' pay or £93,878 apply?
3.1.9 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
3.1.10 Did the respondent unreasonably fail to comply with it?
3.1.11 If so is it just and equitable to increase any award payable to the claimant? By what proportion, up to 25%?

3.2 What basic award is payable to the claimant, if any?

3.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. **Protected disclosure**

4.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

4.1.1 What did the claimant say or write? When? To whom? The claimant says she made disclosures on these occasions:

4.1.1.1 June 2022 – raised a grievance with her employer; [the date the notification of grievance was sent was 21 July 2022, the substance of the grievance being sent on 3 August 2022]
4.1.1.2 On 11 November 2022 – sent an email to her employer.

4.1.2 Did she disclose information?
4.1.3 Did she believe the disclosure of information was made in the public interest?
4.1.4 Was that belief reasonable?
4.1.5 Did she believe it tended to show that:

4.1.5.1 the health or safety of any individual had been, was being or was likely to be endangered?

4.1.6 Was that belief reasonable?

4.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

5. **Automatic unfair dismissal (Employment Rights Act 1996 section 103A)**

5.1 Was the reason or principal reason for dismissal that the claimant made a protected disclosure?

If so, the claimant will be regarded as unfairly dismissed.

6. **Remedy for Automatic Unfair Dismissal**

6.1 What financial losses has the detrimental treatment caused the claimant?

6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

6.3 If not, for what period of loss should the claimant be compensated?

6.4 What injury to feelings has the dismissal caused the claimant and how much compensation should be awarded for that?

6.5 Has the dismissal caused the claimant personal injury and how much compensation should be awarded for that?

6.6 Is it just and equitable to award the claimant other compensation?

6.7 Did the claimant cause or contribute to the dismissal by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

6.8 Was the protected disclosure made in good faith?

6.9 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

7. **Direct sex, age, and/or race discrimination (Equality Act 2010 section 13)**

7.1 The claimant's protected characteristics are as follows:

7.1.1 Age – under 40 years old
7.1.2 Sex – female
7.1.3 Race – Mauritian

7.2 Did the respondent do the following things:

7.2.1 **[12.02.22, 15.01.22, 10.03.22, 19.04.22, 09.06.22, 18.06.22, 02.07.22,04.07.22, 10.07.22, 21.07.22, 14.08.22, 07.09.22, 11.09.22]** When the claimant requested more staff to be placed on days when she was lone working, those requests were refused by Danny Barnes and it was implied that if she did not like it she could find a job elsewhere. This was unlike the situation when the claimant was not working, there would be sufficient staff, or the workforce would be enhanced by agency staff or DB himself – sex, age, race;

7.2.2 **[22.05.22]** When the claimant asked for a day off for her children's birthday, this was refused, whereas DB was able to take the day off for his son's birthday – sex, age, race;

7.2.3 **[10.02.22]** Danny Barnes changed the claimant's payment method from salaried to hourly. When she picked up on this, he had it changed back and denied any knowledge – sex, age, race;

7.2.4 **[April 2022]** Danny Barnes saying "you get paid too much for a woman" – sex, race;

7.2.5 **[April 2022]** Danny Barnes saying "how can a single mother of your background afford to do building works in this financial crisis" – sex;

7.2.6 **[April 2022]** Danny Barnes reneged on a promise to promote the claimant to the Manager's role on it becoming vacant, saying "being a single woman of quite a young age, you do not need the headache of this position and you are already highly paid for your current role" – sex, age;

7.2.7 **[April-June 2022, September – November 2022]** The claimant did the role and duties of Chef Manager for 2 months, with no additional pay – sex, age, race;

7.2.8 **[October 2022]** Danny Barnes saying "he likes eating rice and curry" and "[the claimant] did resemble Indians and [DB] assumed that she got a special recipe for curries" – race;

7.2.9 **[September 2022]** DB failing to send the claimant the application for the Area Support role – sex, age, race;

7.2.10 **[October 2022]** Ann saying "there were only a few black people who applied" for a role with the respondent, and the claimant understanding that "[Ann] was not willing to employ someone from an African background" – race;

7.2.11 **[DATE]** Hiding the application for Chef Manager from the claimant and then, when the claimant found out, advertising it at a lower salary (of £26325 instead of £34,000) – sex, age race.

7.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

For all allegations 7.2.1 - 7.2.11, the claimant relies upon a hypothetical comparator.

The claimant relies on actual comparators as set out below:

7.3.1 Allegation 7.2.2 – Danny Barnes;
7.3.2 Allegation 7.2.6 – Kevin Averley (a white male);
7.3.3 Allegation 7.2.11 – a white woman who is currently employed as Chef Manager.

7.4 If so, was it because of sex, age, and/or race (for each allegation, the relevant protected characteristic(s) are set out)?

7.5 [Age only] Was the treatment a proportionate means of achieving a legitimate aim? The respondent is to set out in its Amended Response if it seeks to run such an argument. [in the event, the respondent did not seek to run a justification defence]

7.6 The Tribunal will decide in particular:

7.6.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

7.6.2 could something less discriminatory have been done instead;

7.6.3 how should the needs of the claimant and the respondent be balanced?

8. **Harassment related to sex, age and/or race (Equality Act 2010 section 26)**

   8.1 Did the respondent do the following things:

      8.1.1 The claimant relies on the same conduct as set out at allegations 7.2.1 - 7.2.11.

   8.2 If so, was that unwanted conduct?

   8.3 Did it relate to sex, age, and/or race?

   8.4 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?

   8.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

9. **Remedy for discrimination**

   9.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

   9.2 What financial losses has the discrimination caused the claimant?

   9.3 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

   9.4 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

   9.5 Should interest be awarded? How much?"

## LAW

Protected disclosures

22. S43B ERA provides:

"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

   (a) that a criminal offence has been committed, is being committed or is likely to be committed,

   (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

   (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

23. The EAT recently held in Kealy v Westfield Community Development Association [2023] EAT 96 that:

> "There are two essential terms to consider in deciding whether there has been a protected disclosure. There must first be a "qualifying disclosure".

24. The term qualifying disclosure concerns the nature of the disclosure that is made. The qualifying disclosure must become a "protected disclosure".

25. As to whether there has been a "qualifying disclosure", HHJ Auerbach provided guidance in Williams v Michelle Brown Am UKEAT/0044/19. There are five steps that need to be satisfied in order to find that a qualifying disclosure exists:

    25.1. Disclosure of information;
    25.2. The worker must have a belief in that the disclosure is in the public interest;
    25.3. If the worker has that belief, the belief must be reasonable;
    25.4. The worker must believe that the disclosure tends to show one of the matters in s43B(1)(a)-(f) ERA;
    25.5. If the worker has that belief, the belief must be reasonable.

Disclosure of information

26. A practical example of the difference between a disclosure of information and an allegation was set out in Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325. Placed in the context of a hospital ward, a disclosure of information would be "yesterday, sharps were left lying around", whereas an allegation would be "you are not complying with health and safety requirements". However, the disclosure should not simply be categorised into "disclosure of information" or "allegation". The key point is that a bare allegation, such as the example above, cannot amount to a disclosure of information. It is however possible for an allegation to contain sufficient information to be capable of tending to show a failure (or likely failure) to comply with a legal obligation (for example) – Kilraine v London Borough of Wandsworth 2018 ICR 1850 CA. There must be sufficient facts within a disclosure to be capable, in the reasonable belief of the employee, of tending to show on of the factors in s43B(1)(a)-(f) ERA.

27. The EAT has now also clarified that communication of an expression of opinion is capable of constituting a disclosure of information – McDermott v Sellafield Ltd and ors 2023 EAT 60.

28. An enquiry, or request for information, as opposed to the supply of information, will not amount to a disclosure of information – Blitz v Vectone Group Holdings Ltd EAT 0253/10, Parsons v Airplus International Ltd EAT 0111/17.

Reasonable belief

29. The requirement that a disclosure tended to show, in the reasonable belief of an employee, one of the matters in s43B(1)(a)-(f) is both an objective and subjective test. It requires a tribunal to determine whether the claimant held the requisite belief and whether, if so, that belief was reasonable – Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731 CA.

30. This test will require the Tribunal to look at all the circumstances of the case: someone with professional or insider knowledge will be held to a different standard than lay persons – Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4. For example, the CEO of a supermarket will be held to a different standard than an employee who stacks shelves. The reasonable belief test in relation to "tending to show" is a fairly low threshold but does require a claimant to have some evidential basis for her/his belief, as opposed to, say, unfounded suspicion. It is also not necessary for the belief to be correct, as long as it is reasonable in the circumstances in which the claimant finds themselves.

31. As put in Soh v Imperial College of Science, Technology and Medicine EAT 0350/14, there is a difference between "I believe X is true" and "I believe that this information tends to show that X is true". It is the latter, not the former, that is required here.

32. Regarding the requirement that the claimant had a reasonable belief that the disclosure was made in the public interest, it is important to bear in mind the purpose of making this addition to the legislation. Government added the need for reasonable belief that a disclosure is made in the public interest to avoid protection being received by employees raising private employment disputes (the effect of Parkins v Sodexho Ltd [2002] IRLR 109).

33. This again is a relatively low threshold. A list of factors for consideration as to whether it is reasonable to regard a disclosure as being in the public interest was provided by the Court of Appeal in Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731:

    33.1. The numbers in the group whose interests the disclosure serves;
    33.2. The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;

33.3. The nature of the wrongdoing disclosed; and,
33.4. The identity of the alleged wrongdoer.

34. It is generally considered that disclosures tending to show endangerment to health and safety (as well as the other gateways at s43B other than s43B(B), failings in legal obligations) tend, by their nature, to concern matters in the public interest. However, the question of whether it was in the claimant's own belief that the matters raised were in the public interest will still be a relevant one.

Endangering of health and safety – s43B(1)(d)

35. Under this gateway of s43B ERA, there is no obligation to identify a breach of health and safety requirements. It is sufficient that someone's health and safety is in fact, or is likely to be, endangered. This gateway is therefore wider than that at s43B(1)(b) ERA.

**Automatic unfair dismissal**

36. S103A ERA provides that:

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

37. The reason for dismissal has been held to be the "set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee" - Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA. The burden of proof to demonstrate the reason for dismissal is on the respondent. However, the claimant bears an evidential burden to show that there is at least an issue that requires the Tribunal to investigate further the reason for dismissal, which may amount to an automatically unfair reason for dismissal.

38. The question here is whether the principal reason for dismissal was that the claimant made a protected disclosure; the principal reason being the reason that operated on the mind of the decision maker at the time of the dismissal – Abernethy. This is a question of fact for the Tribunal to determine.

39. When a claimant claims that they were dismissed due to more than one disclosure, the relevant question for the Tribunal is whether, taken as a whole, the disclosures were the principal reason for the dismissal – El-Megrisi v Azad University (IR) in Oxford EAT 0448/08.

40. The requisite causative link under s103A is much stricter than for s47B ERA. It requires that the primary motivation behind the dismissal is the protected disclosure – Fecitt and ors v NHS Manchester (Public Concern at Work Intervening) [2012] ICR 372.

41. In terms of that motivation, the key question is "why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason?" - Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065,

HL, approved in the context of s103A ERA in Trustees of Mama East African Women's Group v Dobson EAT 0220/05.

42. There is an important distinction that can be made when a respondent argues that the reason for dismissal was the manner of the disclosure/conduct surrounding it, as opposed to the disclosure itself. The most recent case in which this issue has been considered is the case of Kong v Gulf International Bank (UK) Ltd [2022] EWCA Civ 941, CA. In that case, the "separability principle", as it is known, was found to have been in play: it was held that the dismissing officer was not motivated by the fact of a protected disclosure, but by their view of the claimant's conduct surrounding the disclosure. The automatic unfair dismissal claim therefore failed.

**Ordinary unfair dismissal**

Reason for dismissal

43. The relevant legislation is found at s98(1), (2) and (4) ERA, which provides as follows:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) The reason (or, if more than one, the principal reason) for the dismissal, and
> (b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it –
>
> (a) relates to the capability or qualifications of the employee for performing work of this kind which he was employed to do,
> (b) relates to the conduct of the employee.
> (c) is that the employee was redundant, or
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under and enactment
>
> (3) ...
>
> (4) Where the employer has fulfilled the requirements f subsection (1), 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 reasonable 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".

44. It is for the employer to show the reason for dismissal and that it is a potentially fair one, such as conduct: this is not a high threshold for a respondent. In Gilham and Ors v Kent County Council (No2) 1985 ICR 233, the Court of Appeal held as follows:

> "The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [s98(4)] and the question of reasonableness."

45. As above, the reason for dismissal is the set of facts known to the decision maker at the time of the decision – Abernethy. In order to get to the bottom of the real reason for dismissal, it is necessary for the tribunal to find the facts that caused the dismissal, regardless of any label given to the reason(s) by the respondent.

Substantive fairness

46. Regarding conduct cases, the case of British Home Stores Ltd V Burchell [1978] IRLR 379 still encompasses the relevant test for fairness:

    46.1. Did the Respondent have a genuine belief that the Claimant was guilty of the misconduct alleged by the Respondent?

    46.2. If so, were there reasonable grounds for the Respondent in reaching that genuine belief? and,

    46.3. Was this following an investigation that was reasonable in all the circumstances?

47. Regarding the question of reasonable investigation, the level or depth of investigation required will depend on the particular facts of the case. Relevant factors include "the time it will take, the expense involved (if any), and the consequences for the employee of the employee is dismissed" – Miller v William Hill Organisation Ltd EAT 0336/12, para 42.

48. The ACAS Code of Practice states that the depth of the investigation correlates with the seriousness of the allegations.

49. In all aspects of such a case, including consideration of sanction, in deciding whether an employer has acted reasonably or unreasonably within s98(4) ERA, the tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances – J Sainsbury plc v Hitt 2003 ICR 111, CA. In other words, the question can be reframed as "would no reasonable employer have dismissed the claimant?" - British Leyland (UK) Ltd v Swifty 1981 IRLR 91, CA. Whether the tribunal would have dealt with the matter in the same way or otherwise is irrelevant, and the tribunal must not substitute its view for that of a reasonable employer – Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT, London Ambulance Service NHS Trust v Small [2009] IRLR 563.

50. In cases of gross misconduct, it is not the case that dismissal will automatically fall within the band of reasonable responses – Brito-Babapulle v Ealing Hosptial NHS Trust 2013 IRLR 854, EAT. For example, the presence of mitigating factors may lead to a gross misconduct dismissal becoming unfair.

Procedural fairness

51. Following the case of Polkey v AE Dayton Services Ltd [1988] ICR 142, it is well established that fairness in procedure is a vital part of the test for reasonableness under s98(4) ERA. It is not relevant at this (the liability) stage to consider whether any procedural unfairness would have made a difference to the outcome: that is a matter for remedy (the issue in Polkey is set out below).

52. If there is a failure to adopt a fair procedure, whether by the ACAS Code's standards, or the employer's own internal standards, this may render a dismissal procedurally unfair.

53. Regarding dismissal for conduct issues, the reasonableness of the procedure rests fairly heavily on the reasonableness of the investigation, and the provision of opportunity for the employee to make his position, explanation and mitigation heard and understood.

54. Procedural and substantive fairness do not stand as separate tests to be dealt with in isolation – Taylor v OCS Group Ltd [2006] ICR 1602. It is, ultimately, a view to be taken by the tribunal as to whether, in all the circumstances, the employer was reasonable in treating the reason for dismissal as a sufficient reason to dismiss. It may therefore be that in a serious case of misconduct, it may be fair to dismiss, even if there are slight procedural imperfections. On the other hand, where the conduct charge is less serious, it may be that a procedural issue is sufficient to tip the balance to make the dismissal unfair.

Polkey reduction

55. In cases where the claimant has been unfairly dismissed on procedural grounds, it is open to the Tribunal to reduce the claimant's compensation to reflect the fact that the employee would have been fairly dismissed in any event, regardless of procedural unfairness – Polkey v AE Dayton Services Ltd [1987] UKHL 8.

56. This rule stems from the case of W Devis and Sons Ltd v Atkins 1977 ICR 662, HL, in which it was held that:

> "it cannot be just and equitable that a sum should be awarded in compensation when in fact the employee has suffered no injustice by being dismissed".

57. Compensation can be reduced as a percentage, if a tribunal considers that there was a percentage chance of the employee being dismissed in any event. Alternatively, where it is found that a fair procedure would have delayed dismissal, compensation should reflect this by compensating the employee only for the length of time for which dismissal is found to have been delayed.

58. The Tribunal must consider what difference a fair procedure would have made, if any. It is for the Respondent to adduce evidence on this point. It is always the case that a degree of uncertainty is inevitable, unless the process was so unreliable it would be

unsafe to reconstruct events. However, the Tribunal should not be reluctant to undertake the exercise just because it requires speculation - Software 2000 Ltd v Andrews [2007] ICR 825, EAT.

59. What about the case in which a dismissal is found to be substantively unfair? The tribunals have held that it is not as straight forward as saying that Polkey reductions can only apply in cases of solely procedural unfairness. However, in King and ors v Eaton Ltd (No2) 1998 IRLR 686, Ct Sess (Inner House), it was held that the distinction between procedural and substantive failings may, in fact, be an important one. It is easier to say with some certainty that, had a procedural step been rectified, the outcome would have been unaltered. Conversely, in cases of substantive unfairness, it may well be harder to hypothesize about what would have happened but for that unfairness. In the latter scenario, the Court of Session found that the tribunal cannot be required to "embark on a sea of speculation".

60. Appellate courts have moved away from distinguishing between substantive and procedural unfairness, and instead focus on the need to consider a Polkey reduction when there is evidence that a claimant may have been fairly dismissed in any event.

Contribution

61. Under s123(6) ERA, it is provided that:

> "(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regarding to that finding."

62. The test as set out by the Court of Appeal in Nelson v BBC (No.2) 1980 ICR 110, CA is as follows:

    62.1. The conduct must be culpable or blameworthy;
    62.2. The conduct must have actually caused or contributed to the dismissal; and,
    62.3. It must be just and equitable to reduce the award by the percentage determined.

63. This requires the Tribunal to look at what the Claimant in fact did, as opposed to being constrained to what the Respondent's assessment of C's culpability was – Steen v ASP Packaging Ltd [2014] ICR 56, EAT.

64. The EAT in **Steen** summarised the approach to be taken under s122(2) and s123(6) ERA – paragraphs 8-14:

    64.1. Identify the conduct which is said to give rise to possible contributory fault;
    64.2. Ask whether that conduct was blameworthy, irrespective of the Respondent's view on the matter;
    64.3. Ask, for the purposes of s123(6), whether the conduct which is considered blameworthy caused or contributed to the dismissal; and, if so,

64.4. Ask to what extent the award should be reduced and to what extent it was just and equitable to reduce it.

**Direct discrimination**

65. Employees are protected from discrimination by s39 EqA:

> "(2) An employer (A) must not discriminate against an employee of A's (B) -
> …
> (d) by subjecting B to any other detriment."

66. Direct discrimination is set out in s13 EqA:

> "(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."

67. There are two parts of direct discrimination: (a) the less favourable treatment and (b) the reason for that treatment. Sometimes however it is difficult to separate these two issues so neatly. The tribunal can decide what the reason for any treatment was first: if the reason is the protected characteristic, then it is likely that the claim will succeed – Shamoon v Constable of the Royal Ulster Constabulary [2003] UKHL 11.

"Because of": reason for less favourable treatment

68. In terms of the required link between the claimant's protected characteristic and the less favourable treatment he alleges, the two must be "inextricably linked" - Jyske Finands A/S v Ligebehandlingsnaevnet acting on behalf of Huskic: ECLI:EU:C:2017:278.

69. The test is not the "but for" test; in other words it is not sufficient that, but for the protected characteristic, the treatment would not have occurred – James v Eastleigh Borough Council [1990] IRLR 288.

70. The correct approach is to determine whether the protected characteristic had a "significant influence" on the treatment – Nagarajan v London Regional Transport [1999] IRLR 572. The ultimate question to ask is "what was the reason why the alleged perpetrator acted as they did? What, consciously or unconsciously, was the reason?" - Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48. This is a question of fact for the Tribunal to determine, and is a different question to the question of motivation, which is irrelevant. The Tribunal can draw inferences from the behaviour of the alleged perpetrator as well as taking surrounding circumstances into account.

71. If there is more than one reason for the treatment complained of, the question is whether the protected characteristic was an effective cause of the treatment – O'Neill v Governors of ST Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372.

Burden of proof under the Equality Act 2010

72. The burden of proof for discrimination claims is set out in s136 EqA:

> "(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".

73. In Laing v Manchester City Council and anor [2006] ICR 1519, Mr Justice Elias held that:

> "the onus lies on the employee to show potentially less favourably treatment from which an inference of discrimination could properly be drawn".

74. This requires the tribunal to consider all the material facts without considering the respondent's explanation at this stage. However, this does not mean that evidence from the respondent undermining the claimant's case can be ignored at stage one – Efobi v Royal Mail Group Ltd 2021 ICR 1263. It is not enough for the claimant to show that there has been a difference in treatment between him and a comparator, there must be "something more". In Madarassy v Nomura International plc 2007 ICR 867, Lord Justice Mummery held:

> "The bare facts of a difference in status and a difference in treatment 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".

75. In terms of comparators, the definition is at s23 EqA:

> "(1) On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be no material difference between the circumstances relating to each case".

76. In Virgin Active Ltd v Hughes 2023 EAT 130, it was highlighted by the Employment Appeal Tribunal that the consideration of whether there are material differences in the circumstances of an actual comparator compared to those of the claimant needs to take place before applying the shift in the burden of proof. Regarding a hypothetical comparator, the claimant must show that the comparator would have been treated more favourably. This requires the Tribunal to be able to draw inferences of likely treatment of a hypothetical comparator from the evidence before it.

77. It is only if the initial burden of proof is reached that the burden shifts to the respondent to prove to the Tribunal that the conduct in question was in no sense whatsoever based on the protected characteristic – Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931.

**Harassment**

78. The definition of harassment is set out at s26 EqA:

> "(1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of –

(i) Violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, mediating 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 to have had the effect."

Unwanted conduct

79. It is for the individual to set the parameters as to what they find acceptable, and what is unwanted: "it is for each person to define their own levels of acceptable" – Reed v Stedman [1999] IRLR 299, and more recently Smith v Ideal Shopping Direct Ltd UKEAT/0590/12.

Purpose or effect

80. S26 makes it clear that it is sufficient for the unwanted conduct to have the effect set out in s26(1)(b): it is not necessary for that to be the purpose of the alleged perpetrator. For example, harassment may still be made out where there is teasing, also called banter, without any malicious intent.

81. In terms of effect, the alleged perpetrator's motive is again irrelevant. The test is both subjective and objective. First, it is necessary to consider what the effect of the conduct was from the claimant's perspective (subjective element). If it is found that the claimant did suffer the necessary effect set out in s26(1)(b), the next stage is to consider whether it was reasonable for the claimant to feel that way.

82. Furthermore, it is not necessary for the conduct to be aimed directly at the claimant. A claim can succeed if it was reasonable for the claimant to feel that their environment had been made intimidating, hostile, degrading, humiliating or offensive, whether or not any language or conduct is specifically aimed at them.

Related to the protected characteristic

83. The causal link required for harassment is much broader than that for direct discrimination. The requirement is that the conduct must be related to the protected characteristic, in this case race. There is no protection from general bullying within the EqA; harassment will not be proven where someone is picked on or singled out, unless that treatment is related to a protected characteristic.

84. In Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, HHJ Auerbach reminded tribunals that the claimant's perception that conduct is related to a protected characteristic is relevant to, albeit not determinative of, the issue. The tribunal must:

> "articulate distinctly, and with sufficient clarity, what feature or features of the evidence or facts found have led it to the conclusion that the conduct is related to the characteristic as alleged".

85. It therefore follows that a claimant's understanding and a respondent's intention are not strictly relevant to the issue of causation. The context in which the alleged harassment occurs is a key factor in determining whether the conduct was related to the relevant protected characteristic – Warby v Wunda Group plc EAT 0434/11.

**Time limits**

86. Section 123 of the EqA provides as follows:

> "(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of –
>
> (a) The period of 3 months starting with the date of the act to which the complaint relates, or
> (b) Such other period as the employment tribunal thinks just and equitable.
>
> (2) …
>
> (3) For the purposes of this section –
>
> (a) Conduct extending over a period is to be treated as done at the end of the period;
> (b) Failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) …"

Continuing act

87. There is a difference between a one off discriminatory act that has ongoing consequences, and a continuing act. This comes from the case of Barclays Bank plc v Kapur and others [1991] ICR 298, HL, in which the House of Lords held that, in a situation in which an employer operates a discriminatory regime, rule, practice or principle, then such arrangement will amount to a continuing act. Conversely, where no such arrangement exists, there will be no continuing act under s123(3), even though the effects of an act may be continuing.

88. The requirement of a policy or regime must not be taken too literally, In Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA, the Court of Appeal moved away from the approach of identifying a regime, and instead focused on whether the Police Commissioner was responsible for a continuing state in which (in that case) women of ethnic minorities were treated less favourably than other officers. The decision in Hendricks was later confirmed in Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548, CA. The Tribunal must therefore consider the substance of each allegation, not whether there is a regime or policy in place.

89. One factor that can be weighed in to the question of a continuing act is whether the alleged individual acts of discrimination involved the same or different people – Aziz v FDA 2010 EWCA Civ 304.

90. In South Western Ambulance Service NHS Foundation Trust v King 2020 IRLR 168, EAT, the Employment Appeal Tribunal held that, if any of the acts in an alleged chain of conduct extending over a period are found to be non-discriminatory, they cannot be part of that chain. Those acts must be ruled out of any consideration under s123(3).

Just and equitable extension

91. The issue as to whether a claim is brought within such time as is just and equitable has been established to be one of fact for the first instance tribunal.

92. It is well established that, despite the broad scope of the "just and equitable" test, it remains the case that time limits should be applied strictly, and to extend time remains an exception to the rule – Robertson v Bexley Community Centre [2003] EWCA Civ 576. The burden is therefore on the claimant to demonstrate to the Tribunal that time should be extended.

93. However, the tribunal's discretion is wide: the Court of Appeal commented in recent years that "Parliament has chosen to give the employment tribunal the widest possible discretion" - Abertawe Bro Margannwg University Local Health Board v Morgan [2018] EWCA Civ 640.

94. The Employment Appeal Tribunal in the case of Miller and ors v Ministry of Justice and ors and another case EAT 003/15 held that the prejudice suffered by the respondent in having to answer an otherwise time barred claim is of relevance to the Tribunal's decision.

95. HHJ Tayler, in the case of Jones v Secretary of State for Health and Social Care 2024 EAT 2, remarked that the comments from Robertson are often cited out of context by respondents. He held that Robertson in fact is authority for the principle that the Tribunal has a wide discretion when it comes to the "just and equitable" test; Auld LJ's comments in Robertson should be reviewed within that framework and not taken out of context.

96. The accepted approach to be taken to exercising the tribunal's discretion is to take into account all the factors in a particular case that the tribunal considers relevant, including the length of and reasons for delay – Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23. The strengths and weaknesses of the claim may also be relevant (but not definitive) to a decision on extending time – Lupetti v Wrens Old House Ltd 1984 ICR 348.

97. The tribunal must consider the balance of prejudice to the parties if the extension is granted or refused – Rathakrishnan v Pizza Express (Restaurants) Ltd 2016 ICR 283.

**FINDINGS OF FACT**

Policies

98. The respondent had various policies in place, including a Data Protection Policy - [65]. The paragraphs of relevance to this case are as follows:

> "1.2 Data users are obliged to comply with this policy when processing personal data on our behalf. Any breach of this policy may result in disciplinary action" - [67];
>
> "2.1 This policy applies to all colleagues, officers, consultants, contractors, casual workers and agency workers who we employ and work with. This policy does not form part of any colleague's contract of employment and may be amended at any time" - [67];
>
> "4.3 Personal data means data relating to a living Indvidual who can be identified from that data (or from that data and other information in our possession). Personal data can be factual (for example, a name, address, or date of birth) or it can be an opinion about that person, their actions and behaviour" - [67];
>
> "4.8 Sensitive personal data includes information about a person's racial or ethnic origin, political opinions, religious or similar beliefs, trade union membership, physical or mental health or condition or sexual life, or about the commission of, or proceedings for, any often committed or alleged to have been committed by that person, the disposal of such proceedings or the sentence of any court in such proceedings. Sensitive personal data can only be processed under strict conditions, including a condition requiring the express permission of the person concerned" - [68];
>
> "17.2 If you know or supect [sic] that a personal data breach has occurred concerning personal data held by Atalian Servest, do not attempt to investigate the matter yourself. Immediaely [sic] contact the Data Protection Officer on data.gb.servest@atalianworld.com" - [70].

99. The respondent's disciplinary policy is at [74]. It gives, amongst others, the following examples of gross misconduct at [77]:

> "10.1 The following are examples of behaviour that will normally be considered to be gross misconduct, which could result in dismissal without notice. This list is not exhaustive:
> ...
> 10.1.9 Bringing the organisation into serious disrepute;
> ...
> 10.1.13 Unauthorised use or disclosure of confidential information or failure to ensure that confidential information in your possession is kept secure; ..."

<u>Background</u>

100. The claimant worked as an Assistant Cook in the kitchen at Bristol Court, an extra care housing scheme in Feltham, Hounslow. She commenced that job on 16 December 2019. Bristol Court is run by London Borough of Hounslow ("LBH"), however the care provider for Bristol Court is London Care.

101. The respondent supplies the catering for Bristol Court: their client is LBH.

102. At the beginning of the relevant chronology, DB was Area Support Manager, and was line managed by Sue Perry ("SP"), who was Senior Operations Manager. This role required him to travel between the respondent's 22 sites

in the South East. He did however have a period of being designated to the Saxon Mills site, from April 2021 to August 2022.

103. From August 2022, when SP left, DB changed roles to Operations Manager, which required him to be more on site at Bristol Court. At the point DB became Operations Manager, AC stepped up from Relief Chef to Area Support Manager.

Effect of Covid-19 pandemic

104. The industry in which the respondent operates historically employed many European workers. At the point when the Covid-19 pandemic hit the UK, many of those workers from overseas returned home. This, and the pandemic generally, had a devastating effect on the care industry and hospitality industry. Many establishments had no choice but to close down. The respondent, however, could not close down.

105. There were therefore less staff available to undertake the roles required by the respondent to fulfil its contract to LBH at Bristol Court (and at other sites). It was therefore an "employees' market", and we have heard evidence that the respondent's salaries were not competitive. This meant that the respondent struggled to get the staff it needed to cover its contract to Bristol Court.

106. We accept the evidence from the respondent that this was an extremely difficult time for the industry. However, ultimately, it was the respondent's duty to fulfil its contractual obligations with LBH. If it felt unable to do so, then that was a discussion that the respondent should have had with LBH. We have seen and heard no good evidence that, early in the relevant chronology, DB approached LBH to state that the respondent was struggling to meet its contractual obligations due to staffing levels, even though this was obviously the case.

2021

107. On 5 March 2021, the claimant reported to DB that the kitchen is "quite a tensed [sic] environment" and that she felt staff were "bullying, discrimination etc"- [88].

108. On 23 March 2021, DB requested payroll to deduct thirty minutes from the claimant and ET's shifts for this day, as they had both left early – [90].

109. On 25 March 2021, the claimant sent to DB a statement regarding an incident that occurred on 23 March 2021 – [91-92]. This incident, according to the claimant, related to a fellow employee, Stephen Savy ("SS") being aggressive towards "Lima", the claimant's line manager at the time.

110. On 2 October 2021, the claimant sent to DB and SP a statement regarding an incident that occurred on 27 September 2021 – [93-94]. This incident related to the Resident allegedly coming into the kitchen and demanding to see Lima. At this point, the Resident was not a volunteer, and the claimant considered her (the Resident's) behaviour to be inappropriate and a breach of Health and Safety. The claimant alleged that, when she (the claimant) told

Lima that they should take their conversation outside of the kitchen, the Resident became aggressive towards her.

2022

**Issue 7.2.3 - DB changed the claimant's payment method from salaried to hourly. When she picked up on this, he had it changed back and denied any knowledge**

111. On 10 February 2022, the claimant emailed DB to inform him that there had been a change to her details on "Fourth" - [110]. Fourth is the respondent's HR computer system, which records data such as the method by which employees are paid. The change she reported was that her payment method had altered from salaried to hourly. The claimant's opinion, conveyed to DB, was that this unilateral alteration was a breach of her contract. The claimant in this email reported that she had sought advice from ACAS, and would go back to them if necessary.

112. DB told the claimant that the change in payment method was something that would be done by payroll, not him, and that he would ask payroll to investigate – [108]. The following day, SP responded to the claimant - [114]. She explained that DB had sent the amendment form to Lima for both the claimant and ET to agree and sign, in order to change their payment method to hourly. SP went on to state that Fourth had changed the payment method, but that she would ensure it was changed back if that was what the claimant wanted. SP explained that the logic for the proposed change was that it in fact benefited employees as, on a salaried method, there was a risk of being underpaid for overtime. SP also stated that it was Lima who "does this on Fourth" as the claimant's line manager.

113. It is factually correct therefore that the claimant's payment method was, for a short time, altered, as was ET's.

114. We accept, as set out in SP's email at [114], that DB had sent the consent forms to make this change to Lima for dissemination to the claimant and ET. It appears that this dissemination did not happen but the change went ahead in any event. Given DB had sent the forms to Lima, we accept that, on receipt of the claimant's email, DB should have known what her complaint was about at [110]. We are aware that, at some point during the course of the chronology we are dealing with, DB had a stroke: this may explain some of his memory issues.

115. We accept that having a change made without it being explained would have caused the claimant additional stress. There was a pattern emerging of the claimant being told to go to DB with her issues, and DB not giving her any practical assistance.

116. Factually, we find that DB was not the one who changed the pay method. Although we accept there had to be human input into the computer system, we find that, on balance, it would be someone in payroll following an instruction from another. We have no evidence to show that the person who instructed payroll was DB. In fact, we consider it more likely that this person was Lima: SP at the time wrote to the claimant stating:

> "you would have to take this up with Lima as he does this on fourth and is your line manage and not Danny".

117. We are satisfied that the change was the result of a miscommunication. The change in payment method was subject to the claimant's consent, and that consent was not received, but someone put the change through anyway. It was rectified as soon as it was raised by the claimant.

118. Also, on the evening of 10 February 2022, the claimant sent DB an email raising concerns about the level of staffing in the kitchen whilst she was on shift - [112]. She stated:

> "When I'm doing cooking, I do not have an assistant cook, which is putting lots of emotional and physical pressure on me. ... The shortage of staff problem has been an ongoing issue which I did understand and cooperate until now. I have to inform you that this is affecting my health and wellbeing. I intend to take this matter further",

119. DB forwarded the claimant's email to Glen Middleton ("GM"), HR Adviser, saying - [112]:

> "This is another Bristol Court issue from the assistant chef. I really need some help to reply to this as they seek to be taking everything to acas. ..."

120. On 12 February 2022, the claimant emailed DB and SP complaining again about the level of staffing, explaining that on her shift the next day, as matters currently stood, she would only have one Kitchen Assistant – [119]. She set out:

> "This is always happening, when I have some issues, I approach Lima, then send over to Danny.....and I am being told Lima is the Manager and so....To conclude the issues are never resolved and comes back to me".

121. Once again on 10 March 2022, the claimant emailed DB regarding a shortage of staff for the weekend shift - [124]. She set out that these issues have been going on for "more than a year". From DB's response on [123], we find that DB was beginning to get annoyed with the claimant in raising these issues regularly:

> "As discussed on Tuesday did you speak to Lima and discuss this with him as he is your line manager and also does the Rota at site? I did also ask you to put this in writing to him did you do this?
>
> If Lima is aware that you will be short staffed this weekend have you discussed with him the action plan for this?"

122. On 30 March 2022, the claimant reported to DB an incident between her and SS that occurred on 28 March 2022, in which SS was allegedly aggressive – [126/127]. Within the same report, she raised concerns about his conduct generally within the kitchen, which she claimed was affecting her mental and physical health.

123. On 19 April 2022, there appears to have been another shortage of staff during the claimant's shift. On this day, she sent DB a text stating - [129]:

> "Hi Danny
> Didn't hear from you, we won't be able to serve in the restaurant. There is a lot to do in the kitchen.
> Thanks".

124. There was no text reply to that message. The following day, the claimant again texted DB to ask where a worker was:

> "Hi Danny
> Bev is not here yet. Is she on her way?
> Thanks".

**Issue 7.2.4 - DB saying "you get paid too much for a woman" - April 2022 – sex, race**

125. It was common ground that this allegation had not been raised by the claimant prior to her ET1. DB's evidence was that he would never say words like this. He told us that "everyone does the same job and deserves the same pay".

126. We accept DB's evidence. We have no contemporaneous evidence of either the alleged incident, or a complaint from the claimant recording these events. We find that, on the balance of probabilities, the claimant would have complained internally about such conduct: she is not shy about raising complaints. She also had opportunities to air this issue; she knew how to raise complaints/a grievance. Specifically, in the grievance appeal process, the claimant raised the suggestion that she was paid less than others, and that she had the feeling the respondent thought she was paid more than she deserved - [163]. This would have been an appropriate place to raise this specific allegation: the claimant did not do so.

127. We therefore reject this allegation on the facts.

**Issue 7.2.5 - DB saying "how can a single mother of your background afford to do building works in this financial crisis" - April 2022 – sex**

128. As with Issue 7.2.4, the claimant accepted that she did not raise this allegation prior to her ET1. In her statement, the claimant told us that ET had witnessed this incident – [C/WS/12]. However, it is not mentioned in ET's statement, nor was it raised in oral evidence; therefore the claimant's allegation not corroborated.

129. Furthermore, the evidence in the claimant's statement at [C/WS/12] is somewhat different to the allegation in Issue 7.2.5:

> "[DB] said how was it possible for me to do building work, being a single woman from an ethnic background".

130. DB's evidence to us was that a conversation took place about extensions and building works being expensive, as well as comments about the mess they make.

131. The claimant accepted in cross-examination that this conversation did take place, but she said that it went further, as per the specific allegation.

132. We accept DB's evidence on this point. The claimant's evidence is uncorroborated and does not align precisely with the Issue as recorded. We find it more likely than not the the claimant has genuinely misremembered this conversation.

133. We therefore reject this allegation on its facts.

**Issue 7.2.2. - when the claimant asked for a day off for her children's birthday, this was refused, whereas DB was able to take the day off for his son's birthday – 22 May 2022 – sex, age, race**

134. On 22 May 2022, the claimant again sent DB a text enquiring as to staff attendance, specifically regarding a worker called "Jack" – [129]. DB's response was:

> "Jack isn't coming so I will have to come so will be there about 11 as its my sons [sic] birthday today".

135. We heard that DB at this time was working Monday to Friday but, given his role, he would come in at the weekends on occasion to help out. He had therefore booked Sunday 22 May 2022 off as a precaution to ensure that the respondent was aware that he could not come in on that day.

136. On 22 May 2022, DB, as we can see from the text cited above, agreed to come in to help at work. However, we have heard that SP, as DB's manager at the time, managed to find some cover. This meant that DB, in the event, did not have to attend - [DB/WS/5].

137. Regarding the claimant's request for leave for her children's birthday in January, it was not clear from her witness statement who made the decision to refuse that request; DB or SP. In any event, DB provided us with the reason why the claimant was not permitted those days off at [DB/WS/6]:

> "Her request for holiday in early January 2022 was refused because the Chef Manager had booked time off then. The Chef Manager had worked over Christmas because [the claimant] had refused to work over the Christmas period. He had then take holiday in early January which meant that [the claimant] could not be off at the same time".

138. We accept this evidence, there was no good evidence to challenge that rationale. We find that, factually, the claimant had been refused leave when DB had not, however the reason was as provided by DB direclty above.

139. On 2 June 2022, the claimant requested a supervision meeting with DB "to discuss about the work situation and my responsibilities" - [130]. In response to DB's question for more detail, the claimant told him she wanted to discuss staffing issues, her responsibilities and her pay in light of those. No such meeting ever took place.

140. Unfortunately, the claimant continued to experience staffing issues in June 2022, as can be seen from the texts she sent to DB on 9 June 2022, enquiring as to whether a third staff member would be on shift – [134].

141. Yet again, on 18 June 2022, the claimant texted DB to state that there had only been two of them on shift and that, if an agency worker had been booked, they had not shown up – [134]. This situation led the claimant to email DB and SP to highlight the staffing issues, namely that she did not wish to have to continue doing understaffed shifts.

142. Two weeks later, on 2 July 2022, the claimant sent another email to DB and SP on the same subject. This email set out that, in her view, health and safety had been compromised, given the shortage of staff - [137]. DB evidently sent a reply, although we do not have it in the bundle, as the claimant sent a follow up email on 4 July 2022, in which she stated – [138]:

> "...Could you please provide the name of the agency which you have booked, whether payment is being done or not. It has been several times that the "agency" did not turn up and although I contacted you, nothing was done. ...Every time you say the same thing, but you do not take appropriate action".

143. We have an example of a week's shift pattern on [139] for week ending 10 July 2022. During that week, there were three staff on duty on Monday, Tuesday and Wednesday, and only two staff members on duty on Thursday and Friday. Over the weekend there were three staff members on duty. The claimant worked Monday to Friday this week.

144. Yet again, the claimant raised the issue of staff shortages by email to DB and SP on 21 July 2022, stating that "no positive actions [sic] been taken" - [140].

145. Later than day, the claimant raised a grievance "regarding my working conditions" - [142]. No further detail was given at this stage, however the claimant expanded on her grievance in a letter dated 3 August 2022 – [147]. The headline of this letter was:

> "I have ongoing shortage of staff issues, breaks, lack of communication and support from the management".

146. The claimant sent more texts to DB whilst on shift, stating she was short staffed, as the month progressed – 14 August 2022 [150].

<u>The Resident becoming a volunteer</u>

147. On 30 August 2022, MP met with Kevin Avery ("KA"), Chef Manager at the time, and the Resident in order to discuss the Resident's desire to volunteer within Bristol Court – reference [151]. Bristol Court had a KPI unique to it out of the 22 sites under DB's supervision, that it would commit to having a resident volunteer completing a minimum of 10 hours per week - [155]. The agreement was that the Resident was to work "in the delivery part of the service (not in the kitchen)". On 1 September 2022, notification of the Resident's voluntary service was sent to DB and the Bristol Court generic email address, as well as other employees of LBH - [151]. The agreement was that she was to work "in the delivery part of the service (not in the kitchen)".

148. However, despite this clear instruction, the Resident did end up working in the kitchen. We have seen no evidence about how this transition occurred, or who approved it. We also have not seen any documentation to set out the training that the Resident was to have to ensure she was safe to work in the kitchen. On this particular point, it was the respondent's position that there is a twelve-week grace period within which one can work in a kitchen without training. It produced a document part way through the hearing to support this contention; the respondent's own "Catering Training and Development Record" at [313-316]. However, on scrutinising this document, there is no reference to a twelve-week grace period. It sets out instead what training needs to be done and when. The first entry is "first day", which sets out the training required for those working in a kitchen environment from the moment they start their first shift. The list of training that needs to be done by Day One is:

    148.1. Food Safety Information booklet issued;
    148.2. Natasha's Law Video via Saffron (must be before any food handling commences);
    148.3. Think Allergy Poster location;
    148.4. Food Production and avoiding cross-contact;
    148.5. Labelling – where to find labels and date marking;
    148.6. Introduction to work environment;
    148.7. Manual Handling – Back to Basics;
    148.8. Introduction to Main Emergency Provisions – Gas/Electric shut off
    148.9. Location of First Aid Box;
    148.10. Fire Evacuation procedure – route and muster point;
    148.11. Location of COSHH PPE.

149. We have heard much about a risk assessment that we are told was done regarding the Resident's volunteering: we have not seen that assessment, as we were told it was not a document within the control or possession of the respondent, but was the property of LBH. In terms of a risk assessment, the evidence we have is as follows:

    149.1. MP in cross-examination, as part of LBH, told us that he did not see a risk assessment. He also told us that, when he saw the Resident working in the kitchen, he raised objection to this – [MP/WS/10];

    149.2. Mary-Ann Carr ("MAC") of LBH had never seen a risk assessment. At [185] she stated "I still haven't received the risk assessments that you say you have completed for [the Resident]";

    149.3. AC's evidence to us was that DB said there was a risk assessment;

    149.4. RM in the disciplinary hearing said "there will have been a risk assessment completed" - [234]. The use of "will have been" instead of "was" implies that she herself had not seen it and was making an assumption;

    149.5. In the grievance appeal outcome at [172], it is recorded that DB confirmed there was a risk assessment done by the client (LBH) and

held on file by LBH. This contradicts what MAC said in [185], referenced above;

149.6. DB's evidence was that a risk assessment was done. He said KA should have disseminated the relevant information gleaned from that assessment to the claimant. We have no evidence that this happened. Indeed, the claimant's evidence was that no detail at all around the risk assessment had been shared with her.

150. We accept that a risk assessment of some description was done, but the salient information was not disseminated to those who were working with the Resident, those who really needed to be aware of any particular points raised in any risk assessment.

151. This meant that the claimant, in attempting to manage the Resident whilst in the kitchen, had not been provided with the information necessary to manage her effectively. The lack of sharing of this information meant that the claimant was prevented from being able to manage the Resident, as she did not have the benefit of any action points from the risk assessment. We find that, in failing to share the findings of the risk assessment with the claimant and others working with the Resident, the respondent failed in their duty of care to both their volunteer resident and their employees.

152. On 7 September 2022, the claimant again texted DB stating that she and "Pimm" were the only staff on shift, and that "no agency turned up". DB's response was - [153]:

> "I have called every agency and they are working on it I really am trying".

153. On 10 September 2022 at 0858hrs, DB informed the claimant by text that he had booked an agency worker to attend for the 1000hrs shift. Unfortunately the agency worker did not attend. The text communications between the claimant and DB that morning became somewhat short - [154]:

> Claimant at 1005: "No agency turned up";
>
> Claimant at 1006: "You have to send someone, as I can't continue working like this. I am mentally and physically stressed. This situation is ongoing for too long";
>
> DB at 1007: "Who would you like me to send";
>
> DB at 1008: "Everyone is cooking today";
>
> Claimant at 1015: "I cannot tell you who to send".

154. The following day, 12 September 2021, the claimant again reported being on her own to DB by text – [154].

155. On 16 September 2022, the claimant raised concerns with DB by email about the "chaos" in the kitchen, primarily due to having the Resident in the kitchen - [155]. The claimant also reported that staff are behind on their training, and

do not listen to her. DB's response was less than sympathetic, simply stating - [156]:

> "Can you please explain more as I cannot deal with things with such a brief email".

156. Once the claimant had set out more detail, DB did provide a fuller response – [155]. In reality, that response did not offer any solutions; DB explained that he could not get agency staff to attend Bristol Court, allegedly due to the "bad atmosphere" in the kitchen. DB did place on record his appreciation of the claimant's hard work.

157. On 26 September 2022, the claimant was sent the outcome of her grievance – [158/159]. It was agreed that the grievance would be dealt with without a formal meeting. In summary, the outcome was as follows:

    157.1. Ongoing shortage of staff issues – this was partially upheld. It was recognised that the kitchen was short staffed, but the general indication was that there was little that could be done about this.

    157.2. Break entitlements – the claimant was told that she was entitled legally to a break of 20 minutes when working six hours or more. Therefore, her grievance was partially upheld.

    157.3. Not receiving SSP when testing positive for COVID-19 – this was not upheld.

    157.4. Blame culture in the workplace – this was not upheld.

    157.5. Pay and job prospects – this was not upheld.

    157.6. Challenging behaviour of a staff member – this was not upheld.

    157.7. Work issues contributing to the claimant's deterioration in mental health – this was mainly encompassed under the title of "ongoing shortages".

158. Various recommendations were made as follows:

- "[DB] to review the rota and look at shifts to ensure that flexibility is in place to cover gaps in the rota;
- Rota to be issued a minimum of 4 weeks in advance where practicably possible;
- Shift times to be added to rota for staff to take to ensure cover at all times;
- Confirm to [DB] the period of sickness relating to Covid from October 2021 and [DB] to review this and if paid incorrectly for this to be rectified;
- [DB] to arrange a formal supervision with you to discuss your concerns in further detail and agree a plan of action to move forward;
- Referral to a mental health first aider if required."

159. The claimant appealed, and an appeal meeting was held on 25 October 2022. The appeal officer was Gina Rowbery ("GR"), Operations Manager. The notes made at the appeal meeting are at [162-163] and appear as red text underneath the relevant points of the claimant's appeal points, which are in black.

160. GR sent the claimant the outcome from the appeal, in which it was communicated that the appeal was not upheld - [167-173]. We only set out the elements of the letter that are pertinent to the claims:

    160.1. The claimant alleged that she was being paid only 55p more than the Kitchen Assistants and that there was an implication that this was to overpay her. In this allegation she raised that the Acting Chef Manager role had been discussed with her but not in fact offered to her when Lima left. The outcome letter records that, when Lima left, the staff were informed that the claimant would be stepping up to the Assistant Manager role. DB also told GA that the claimant was encouraged to apply for the role. In terms of the role when Kevin left, DB told GA that he had had a discussion with the claimant around taking the role in an acting manager capacity. He told GA that the claimant had requested more money than the Chef Manager role was advertised at, and that it was left that the claimant would think about it and get back to DB. In the appeal outcome letter, it records that the role was still vacant, and that the claimant should contact DB to register her interest.

    160.2. The claimant reported to GA that she was having difficulty with a resident volunteer (the Resident) in the kitchen, and that no risk assessment had been completed. GA recorded that DB had said that there was a risk assessment in place that had been completed by the client (LBH) that remains filed with them. The claimant had also raised that the Resident did not have a uniform, She was informed that a uniform had been ordered, and that the Resident would be receiving training.

161. The relevant parts of the claimant's appeal that were upheld were:

    161.1. The need for DB to hold a meeting with the claimant, as per the recommendation arising from the original grievance outcome;

    161.2. A pay analysis needed to be conducted.

**Issue 7.2.1 - When the claimant requested more staff to be placed on days when she was lone working, those requests were refused by DB and it was implied that if she did not like it she could find a job elsewhere. This was unlike the situation when the claimant was not working, there would be sufficient staff, or the workforce would be enhanced by agency staff or DB himself – various dates January to September 2022 – sex, age, race**

162. The specific dates of this allegation span January to September 2022.

163. There is evidence, as set out in our findings above, that the claimant was regularly on her own, or with only one supporting staff member. There is also evidence that DB was unsympathetic to the claimant's position, showing no acknowledgement of the mental and physical stress she was experiencing. For example, on [154], he sent what appears to be a fairly sarcastic response to one of the claimant's requests for support: "Who would you like me to send. Everyone is cooking today".

164. We find that it was the respondent's responsibility to ensure it had sufficient staff available to fulfil its contract with LBH. It is not enough for DB to say he was phoning around agencies to get support. Clearly, the attempts to get agency staff did not work and did not provide the respondent with enough staff to perform its contractual obligations without negatively impacting their permanent staff.

165. Turning to the specific allegation, the first element is that DB "refused" the claimant's requests. We have not seen or heard evidence of any refusals and therefore reject this part of the allegation.

166. The second part of the allegation is that DB implied that the claimant could find a job elsewhere. In her evidence to us, the claimant was equivocal on this point. She told us that DB did not say these words but she read it in his body language, and that it was implied. She said DB would say "there is a list of people out there who would want a job". However, that is not the allegation in front of us. We are not satisfied that DB's actions or words could reasonably be said to imply that the claimant should look for a job elsewhere.

167. The third aspect of this allegation is specific to the claimant's rotas: that the difficulties with staffing only happened when she was working. We only have a copy of one week's rota at [139]. That rota demonstrates that on three out of five of her working days she had a kitchen assistant and chef. On the two remaining days there was no chef. At the weekend, when the claimant did not work, there were all three members of the team present.

168. ET's evidence to us was as follows:

> Question: "is it fair to say that these were problems happening all the time, when the claimant was working and when she wasn't?"
>
> Answer: "I would say yes".

169. Similarly, MP's evidence on this point was as follows:

> Question: "it was equally the case that there were staff shortages when the claimant was not working?"
>
> Answer: "Yes, equally. Like i said, the two staff members that were working in the kitchen were KA and the claimant. There were no other chefs I came into contact with. KA was working on his own a lot of the time".

170. MP also told us that a lot of the agency staff that did initially come to work at the respondent soon left as they could not cope with the pressures.

171. We accept that, as Assistant Chef, a lot of the pressure and work load fell to the claimant. We find that the reason for this was simply that, for the majority of the time the claimant was on duty, she was the most senior person in the kitchen. We are not satisfied that the lack of sufficient staffing was targeted at the claimant as a personal attack on her.

172. We find that there were staff shortages that affected the claimant, and others working in the kitchen. Thes shortages affected the kitchen team generally. The reason behind these shortages was the general state of the hospitality

industry during and post-COVID-19. The hospitality industry was hit extremely hard by the pandemic, and did not recover quickly. There was a very limited pool of possible recruits, and the respondent's rates were not competitive. As such, the respondent became short staffed, with no good way of recruiting to those staffing gaps.

**Issue 7.2.9 - DB failing to send the claimant the application for the Area Support role – September 2022 – sex, race, age**

173. It is the respondent's case that AC was promoted to the ASM role without the respondent advertising the vacancy. We have not seen the advert for the Area Support Manager ("ASM") in the bundle. We therefore assume one does not exist given, if it did, it would be disclosable. A lack of advert is consistent with the respondent's case.

174. DB's evidence was that AC started going site to site as training for the ASM role in around June 2022. She was doing the Relief Chef role at the time, which means going to any sites which needed chef support across the estate.

175. The claimant was unable to challenge this evidence; she candidly said that she simply did not know what was happening with AC in the run up to her getting the ASM role.

176. AC's evidence in cross-examination was initially that she had an interview with SP. This evidence then changed to her being asked whether she wanted to do the role permanently as opposed to temporarily by SP. AC told us she never saw an advert for the role, although she thought it had been advertised.

177. We accept that AC had been doing the Relief Chef role and had started to train to do the ASM role shortly before SP stepped down. It was SP stepping down that led DB vacating his role as ASM, at which point AC was asked to do the job of ASM on a permanent basis without a recruitment exercise.

178. Therefore, on a strict interpretation, factually this allegation fails, as there was no application for ASM to send to the claimant.

179. The claimant was not considered for the ASM. There was no recruitment process, which means that the claimant was unable to apply for the role. However, this was because the role was always, in reality, intended for AC. AC had effectively been groomed to take the role when it became vacant; she had started to train several months before her appointment.

**Issue 7.2.8 - DB saying he likes eating rice and curry and the claimant did resemble Indians and DB assumed that she got the special recipe for curries – October 2022 – race**

180. The claimant's evidence in cross-examination was that on a day in October 2022, DB came to the kitchen and complimented her on her curry, to which she responded that it was stroganoff. The detail about stroganoff is missing from the claimant's witness statement. This allegation appears at [C/WS/15]:

> "[DB] comments surprised me and I did not understand what he meant at the moment he was talking about curry and rice. I was left wondering and felt he was making fun of me and being racist".

181. DB's evidence was that he walked into the kitchen one day and saw the claimant was cooking curry; he thought it smelt nice and so complimented her. The claimant then gave him a bowl, to which he said "you make a wicked curry" - [DB/WS/13]. DB denied saying anything further, specifically about the claimant's heritage.

182. We are not satisfied that the incident occurred as the claimant told us at the hearing. We find it inherently unlikely that DB would confuse curry and stroganoff. Also, this detail was not in the claimant's witness statement.

183. We are not satisfied that the comment was made as pleaded. There is no contemporaneous evidence, and the claimant did not raise this as a complaint until her ET1, four months after the alleged event, despite knowing how to raise a grievance. There were also no witnesses to this conversation.

184. We accept that DB complimented the claimant on her curry, and that it was in fact a curry, not a stroganoff. We further accept that the claimant gave DB a portion of food; this is consistent with her nature of going above and beyond. That action of giving DB a portion does not indicate that she took offence to anything DB had said at the time.

185. We find that, on occasion, and in retrospect, the claimant has a tendency to misremember and therefore hyperbolise. This is one of those occasions. We find that the claimant was put under so much stress during the early days of this chronology that she on occasions would over-think and read too much into situations.

186. We therefore reject this allegation on the facts. To the extent DB said anything about the claimant's curry, it was a genuine compliment made about her cookery skills.

**Issue 7.2.10 - AC saying "there were only a few black people who applied" for a role with the respondent, and the claimant understanding that "AC was not willing to employ someone from an African background" - October 2022 – race**

187. This comment is said to have been made in the context of a discussion around recruiting more Kitchen Assistants. This allegation appears in both the claimant's witness statement, and that of ET, as follows:

> [ET/WS/3]: "not responding to applications from African background people";
>
> [C/WS/17 ]: "only a few black people who had applied".

188. In their cross-examination, both witnesses' evidence changed slightly:

> ETXX: "a few blacks and she giggled";
>
> CXX: "there is only a few people from African background who applied for the role"

CXX (later): "in response to "have many applied", AC said "only a few"."

189. The claimant was asked in cross-examination "which one is it black or African?". The claimant's answer was "I can't remember. It was 1.5 years ago, she must have said African, she did say that".

190. The claimant and ET both said that they did not raise this alleged comment from AC at the time, as they did not think it would go any further; they had no faith in the respondent's system. The claimant notably did not raise it in her grievance appeal, which was after this incident.

191. AC denied making the comment. At [AC/WS/3], she said that there was a conversation between the claimant and herself about recruiting kitchen assistants, but that AC's answer was that there was no budget left for more recruits.

192. In her cross-examination, AC told us:

> "It didn't happen, I didn't call anyone black, I would have employed anybody because I had to work there all the time"
>
> and
>
> "We work in care: every staff has different nationalities...every site has every nationality you can think of".

193. We also heard that two kitchen assistants had already been appointed to start in October 2022, meaning that there was no more in the budget for further recruits. This evidence was from DB, and appears corroborated by notes from the grievance appeal, in which it is noted that "2 [kitchen] assistants are not trained to assist with food preparation" - [162]. We accept this evidence that there had been two recent recruits to the role of kitchen assistant by the time of this alleged conversation.

194. On the balance of probabilities, we find that AC did not make the alleged statement. We find that she made the point to the claimant that there was no budget for more kitchen assistants. We prefer the respondent's evidence over the claimant's on this point: there was a lack of consistency in the claimant's evidence, and also between her evidence compared to ET's. Furthermore, there is no contemporaneous evidence to support the allegation.

**Issue 7.2.11 - Hiding the application for Chef Manager from the claimant and then, when the claimant found out, advertising it at a lower salary (of £26,325 instead of £34,000) – October 2022 – sex, age, race**

195. In October 2022, the role of Chef Manager for the respondent was advertised by the agency, Indeed – [296]. The salary at that point was advertised as £26,325.

196. In November 2022, the role was advertised again – [299]. In this advert, the annual salary had been increased to £30,000.

197. Given that the role was openly advertised, we reject the allegation that there was any "hiding" by the respondent. Furthermore, we have seen no evidence that the role was ever advertised at £34,000: although DB's evidence was that the advertised role's salary did then go up again from £30,000 to £34,000.

198. The respondent's evidence was that the reason for this incremental increase in salary was that it was not receiving sufficient applications, and it needed to make the role more appealing and competitive. Any increase had to be approved by LBH – [DB/WS/15].

199. The claimant argued that the salary was initially low to put her off applying. Then, once she was suspended, the respondent pushed the salary up. There is no good evidence to prove this alleged motivation. We have heard evidence from DB that supports his written statement, that there was a need to negotiate any increase in salary with LBH. The timing, we find, was purely coincidental.

200. We therefore accept that the reason for the increase in salary on the advert for the Chef Manager role was in order to increase the number of applications received by the respondent. The number had initially been pitifully low (two or three).

**Issue 7.2.6 - DB reneged on a promise to promote the claimant to the Manager's role on it becoming vacant, saying "being a single woman of quite a young age, you do not need the headache of this position and you are already highly paid for your current role" - April 2022 (and September 2022) - sex, age**

201. The allegation regarding reneging on a promise in fact spans two time frames. In terms of permanent Chef Managers, Lima left in April 2022. The role remained vacant until June/July, when KA was recruited to the role. KA left the respondent's employment in September 2022.

202. The claimant was effectively acting up as Chef Manager therefore in two periods: April to June 2022 and September to November 2022.

203. We understand that it is the Operations Manager who is responsible for recruitment. In April through to June 2022, the Operations Manager was SP. The Chef Manager's role, on the evidence we have, was not advertised at the point Lima left. It was in fact only advertised in October/November 2022 once KA had departed – [296/299]. This corroborates the claimant's evidence that KA got the role in September not via a recruitment campaign but by way of a reference.

204. If any promise had been made by DB to the claimant regarding the period when Lima left, we find that this would not have been a binding promise, as he was not in the position of Operations Manager. He therefore had no authority for making such recruitment decisions/promises. There is some detail around this issue in the grievance outcome letter at [171], in which it is recorded that DB told Gina Rowbery ("GR") that he remembered that the

kitchen staff were told that the claimant would be acting up as Assistant Manager, and that they would report to the claimant on an interim basis.

205. In relation to the specific allegation that DB made reference to her being a young single woman, we find on the balance of probabilities that this was not said. We therefore reject this part of Issue 7.2.6. Again, there is no internal complaint from the claimant about this alleged statement by DB. Further, there is no corroborative evidence, whether verbal or written. Again, at [C/WS/13], the claimant told us that ET had witnessed this conversation: again, this detail was absent from ET's written and oral evidence. We also note that [C/WS/13] appears to focus more on the September 2022 period, when this alleged statement is said to have been made in April 2022.

206. In relation to the April 2022 period, we find that the alleged statement was not said by DB, and there was no reneging on a promise; he did not have authority to make such a promise. We do however accept that the lack of advertising of the role did lead to the claimant being disadvantaged as she could not apply for the Chef Manager role. DB accepted that existing staff would have not had that opportunity.

207. Turning to the September 2022 period, the role was advertised as stated above. The role appears still to have been vacant at the time of the claimant's grievance appeal outcome dated 2 November 2022. She was advised in that outcome to declare her interest to DB. The claimant's evidence was that she did do this and she and DB spoke, but nothing was put in writing. DB's evidence was that he never had an email from the claimant about the Chef Manager role in this period.

208. Again, there is some detail in the grievance outcome letter on [171] around this. GR recorded that DB and the claimant had a conversation around the claimant acting up, but DB's recollection was that the claimant had requested a raise to more than the advertised salary at the time. That was the last discussion as far as DB could remember, and it was left that the claimant would come back to DB.

209. This second period does not strictly form part of the allegation at Issue 7.2.6, given that the claimant attached the date of April 2022 to it. However, to the extent necessary, we find that the claimant never put in an application for the Chef Manager role in autumn 2022; as such, she could not have been considered for that position.

210. The claimant told us that she did not put in an application as the salary as it was initially advertised (around £26,000) was too low – see Issue 7.2.11 below. This is consistent with DB's recollection that the claimant asked for more money than the salary of the advertised role.

211. In any event, given the claimant did not apply for the advertised role, it cannot be that she was in the mix to be recruited. Therefore, the reason for the failure to recruit her was a lack of application.

212. The claimant mentioned in evidence someone called "Rachel", who she says walked into the Chef Manager job after only a few weeks of being employed in a lesser role. DB's evidence was that a Chef Manager had been due to

start, but had dropped out. Rachel had stepped in. We have no evidence of Rachel's ethnicity and sparce evidence of her age, other than DB saying she was younger than him.

213. In summary, this allegation in its entirety is rejected on the facts.

**Issue 7.2.7 - the claimant did the role and duties of Chef Manager for 2 months , with no additional pay - April to June and September to November 2022 – sex, age, race**

214. This again applies to the two periods in which there was no Chef Manager, April to June 2022 and September to November 2022.

215. It is common ground that the claimant did not receive any increase pay during these two periods. The claimant accepted that there had never been any agreement by the respondent to pay her more: she had asked DB for a meeting/discussion around this, but no discussion/meeting ever took place.

216. The claimant's evidence was that, in these two periods, she was doing all the duties of a Chef Manager, other than the rota. The respondent's evidence was that the claimant did not do the rota, but also that she did not manage the kitchen staff, which is part of the Chef Manager role. We accept that, on the days when there was no Chef Manager, the claimant undertook all the practical duties of the Chef Manager: there was no-one else to fulfil those responsibilities, and the claimant stepped up.

217. We find that the claimant was evidently doing more and taking on more responsibility than her role of Assistant Chef dictated. We find that the claimant's good will, and her desire to do well in her role, were exploited by the respondent. The claimant had stayed loyal to the respondent through the Covid-19 lockdowns, and during periods of understaffing, despite the toll it was taking on her personally.

218. Factually, this allegation is proven: the claimant did most, if not quite all, of the Chef Manager duties with no additional pay. We turn to the reasons for this in our Conclusions below.

**Incident 11 November 2022**

219. The claimant and the Resident were working together on this day, which led to an incident occurring between the two.

220. The evidence in front of us in relation to what happened between the two individuals is as follows:

    220.1. The claimant's witness statement;
    220.2. The Resident's complaint email – [181/182];
    220.3. The claimant's complaints email (alleged disclosure) - [183];
    220.4. A short statement from SS – [179];
    220.5. A short statement from AC – [178];
    220.6. Investigation meeting notes – [195/196]

221. On the basis of this evidence, we find that the incident occurred as follows:

221.1. The Resident came into the kitchen before the beginning of her shift on 11 November 2022 and made a coffee; in the process she opened a new carton of milk;

221.2. The claimant admonished the Respondent for opening a new milk container when it was not necessary, as there was at least one carton already open. This was possibly said by the claimant with more frustration than the isolated event required, but we consider the history between the two individuals.

221.3. That history is that, we find, the claimant had been to an extent abandoned by her managers. She was overworked and experiencing mental health issues due to the kitchen being understaffed. Despite having raised these issues many times, and through a grievance process, no solution had been found. She was effectively told that the understaffing was just tough luck. The claimant had also told her managers about issues pertaining to the Resident's alleged behaviour in the kitchen and again, nothing happened following those complaints.

221.4. We also find that the Resident talked to the claimant in a manner that escalated the tension between the two.

221.5. We find that the claimant had a right to say to the Resident not to use a new milk. The claimant was Assistant Chef, and had a responsibility to manage junior staff and volunteers.

221.6. We find that no one person was more to blame than the other: the Resident had her own difficulties controlling her own emotional responses, and the claimant had understandable frustrations.

221.7. Ultimately, if any blame is to be apportioned, we find that it would rest with management for failing to appropriately manage the involvement of a volunteer in the kitchen area, and set up expectations about how that volunteer should be managed on shift. We note that Bristol Court was the only home to have the KPI regarding having a volunteer. Despite this formal KPI, we consider that there was no infrastructure in place for assimilating that volunteer into the team, and no accountability for ensuring that the volunteer had the appropriate uniform/PPE or training.

<u>Protected disclosure – 11 Nov 2022</u>

222. Following the incident on 11 November 2022, the claimant had to leave work for a short while to attend a GP appointment. She returned to work following that appointment to complete some routine paperwork following the lunchtime service.

223. The claimant then used the staff computer to send the email at [183/184] to AC and Michelle Dent at London Care. She copied into the email:

223.1. DB;

223.2. Saynab Mohamed ("SM") at LBH;
223.3. Edward Amissah ("EA") at London Care;
223.4. The claimant's personal Hotmail address.

224. A note at this stage on the use of the staff computer. The claimant did not have an individual work email account, as was standard for kitchen staff. They all used the generic "bristol.court@..." email address for which the inbox was on the staff computer. The laptop was accessed by a general Bristol Court login. There was some dispute about whether those details were taped to the laptop, but regardless of this detail, it was common ground that the details would be known to the Chef Manager and Assistant Chef. The laptop was routinely out in the dining room during the day for use, then locked in the kitchen in a cupboard over night: the key for the lock was kept with the kitchen key. This appears to demonstrate that the respondent had a somewhat looser grip on the need to ensure that data was secure than it purported to have during the claimant's disciplinary process.

225. The email warrants being set out in full:

> "Re: [the Resident], flat [X]
>
> Dear all the recipients of this email,
> I am writing to you further to the ongoing confrontations, arguments and challenging behaviour of [the Resident] in the kitchen with myself and other staff members. I have discussed about many incidents verbally in the past with my managers. I have put that in writing to the concerned parties, as I have to face ongoing arguments, verbal abuse and challenging behaviour and need action to be taken. This every day situation is detrimental to my overall health. We had an argument today and this is the reason I have to write this email.
>
> - [The Resident] comes in the kitchen although she is not on the rota. (As per [DB], Atalian Servest has a contract which instructs them, they need to have a volunteer from Bristol Court for 10 hours a week, however she is on the rota for more than 20 hours), I find it difficult to work with her as she cannot take simple instructions and do whatever convenient [sic] to her and causing upsetting situations in the kitchen.
> - She comes in without any uniform, hair net and safety shoes, (when asked to, she argues and says she is a volunteer).
> - Swearing at me, using high tone when asked to follow simple instructions, such as, put the milk back in the fridge when finished, do not open something which is there already, first come first serve basis in terms of expiry dates, close the freezer door properly...
> - Banging trays and other cutleries [sic] when upset.
> - Not washing hands after cigarette breaks.
> - Being around when there is hazard and put staff members in danger, for example: when I am taking a heavy pot from fire to drain in the sink, she is around and she takes time to move from the area as she seems confused, this puts myself and her at risk because the pot is already heavy and hot and I have to wait for her and safely do my work. Kitchen is quite a fact pace work with a lot of hazard around, and with situations like this, it becomes more difficult.
>
> I would like the people concerned to take this email into consideration and have a plan how to move forward safely with the above situations. I find it more stressful to work in this situation as I am already facing ongoing difficulties. I hope this matter is resolved and I do not have to have any confrontations."

226. This email was forwarded by SM to Mary-Ann Carr ("MAC"), Interim Extra Care Manager at LBH on 11 November 2022 – [185].

227. Further, DB forwarded it to GM also on 11 November 2022 – [186]. In turn, GM forwarded the email to LP, stating – [186]:

> "Hi Laurun,
>
> As discussed,
>
> - [The claimant] has emailed the client and also the care team (this is a different company who the client contracts in so no reason why they need to be aware – these are Michelle Dent and Edward Amissah – London Care).
>
> - The client is not happy with this as the Resident is upset and the Resident has now put a complaint in against [the claimant] for bullying.
>
> - This all stems on the back of [the claimant's] appeal as she raised about the resident in this and we explained that she is a volunteer and an additional pair of hands for a couple of hours to support.
>
> Danny is on his way to site to speak to the client."

228. Also on or around 11 November 2024, both SS and AC provided a short statement regarding the confrontation that had occurred between the claimant and the Resident - [178/179].

229. On 12 November 2022, the Resident sent an email to DB and AC, at [181/182], filing a complaint about the claimant, accusing her of having a "bullying manner".

230. On 13 November 2022, MAC sent DB an email in response to having read the claimant's email - [185]:

> "Good morning Danny,
> I have read the email below and feel concern if this [is] going on in the kitchen.
> I still haven't received the risk assessments that you say you have competed for [the Resident].
> Please can you send them over asap.
> Also I get the impression [the Resident] seems to work better with [AC]? Maybe [the Resident] should only be on shift when she is working?
> I really don't think that [London Care] care providers needed to know that this is going on at present in the kitchen. As this could cause more negativity, yes she may need more support in regards of what the role consists off [sic].
> Also maybe your staff need training on how to support a person with [learning difficulties].
> It could be a good idea if you came to the building and had a meeting wtih your team and [the Resident] to work out the differences and to see if the situation can be resolved.
> Please feel free to give me a call to discuss."

231. The following day, MAC sent a follow up email stating - [183]:

> "Good afternoon [DB],
> I have read your email that a member of your team has sent.

> I really don't think [London Care] care providers needed to know that this is going on in the kitchen. As this could cause more negativity, yes JK may need more support in regards of what the role consists off [sic].
> This to me is a beach [sic] confidentiality and I also think crossing professional boundaries.
> Your staff should be raising concerns with yourself first, not with [London Care] care providers. We as your client would only need to know if this situation becomes an issue, that can't be sorted out.
> Please can you investigate this and report back to me on the outcomes of your findings. As I am concerned that this email will have negative repercussions on [the Resident]. Who has not once, come up to me and implied that there has been problems in the kitchen.
> Please feel free to give me a call to discuss."

232. The claimant suggested that MAC's second email on [183] was instigated by a call between MAC and DB after the first email on [185]. In other words, she alleges that DB spoke to MAC to put her up to raising a complaint so that the claimant could be investigated.

233. We are not satisfied on the evidence before us that this allegation is made out. It is based on an assertion by the claimant; an assertion that DB denied.

234. We do however find that the sequence of these two emails does demonstrate to us that MAC's initial reaction was not primarily concern about GDPR or a breach of confidentiality. She was instead focused on the set up in the kitchen regarding the Resident, and her (th Resident's) welfare.

Disciplinary process

235. On 15 November 2022, DB forwarded the Resident's complaint about the claimant to Glen Middleton - [180/181]. This led to Danny Barnes sending to the claimant a letter confirming that she was suspended to allow for an investigation - [192]:

> "into alleged allegations of breaching GDPR and allegations of bullying".

236. The claimant was then invited by Glen Middleton, HR Adviser, to an informal investigation meeting to take place on 21 November 2022 by Microsoft Teams – [193]. That investigation meeting took place as planned; the investigation officer being Mary Clinton, Senior Operations Support Manager. The note of the meeting is at [194]. The two issues discussed were allegations of bullying and harassment, and an alleged breach of GDPR.

237. On 23 November 2022, MC received a statement from SS. Then on 25 November 2022, MC received a statement from AC also.

238. MC's investigation report is at [219], dated 29 November 2022. MC concluded that:

> "The statements given by [the Resident] AC and SS and also given the tone of [the claimant's] emailed complaint all indicate that [the claimant] does raise her voice with and harass [the Resident], although she denies it. Although this does appear to be borne out of frustration with her perception on the lack of support from her line managers and alleged lack of consideration for Health and Safety. However

> many of the issues were responded to prior to the incident in her grievance and appeal.
>
> With regards to breaches of GDPR, it is clear that, [the claimant] has breached the GDPR regulations by copying in those who do not work for the company as well as her own personal email into the email that contained personal data regarding [the Resident]. There would be no reason for the email to be sent to her personal email address as all data was held on the company computer and email which she had access to".

239. MC recommended that a disciplinary hearing be undertaken, based on both allegations that the claimant faced at the investigation stage.

240. Following this recommendation, the claimant was sent an invitation on 7 December 2022 to a disciplinary hearing to be heard by RM, to take place on 12 December 2022 – [224]. In this invitation, the number of allegations had increased from two to three, as follows:

> - "Allegation of bullying a resident at Bristol Court in that you spoke to her in an inappropriate manner.
> - Breach of GDPR in that you sent a [sic] confidential information to external parties who did not have a requirement to know the information contained within and that you sent it to your personal email address outside of the company.
> - Allegation of bringing the company reputation into disrepute in that you sent information outside of the company that should have been dealt with internally."

241. The invitation warned of the risk of summary dismissal if it was found that the claimant had committed acts of gross misconduct.

242. The disciplinary hearing notes appear at [228]; RM was the Disciplinary Officer. The claimant produced a prepared statement for the hearing – [239].

243. On 20 December 2022, RM approached "Pim", who had been another witness to the incident between the claimant and the Resident on 11 November 2022. The note of this call between RM and Pim was not originally in the bundle, but was produced part way through the hearing and was added at [317/318]. Pim's evidence to RM was limited, and she made it clear she did not wish to get involved. The record of Pim's evidence stated as follows:

> "[the Resident] walked into the kitchen and made a coffee for herself. [The claimant] made comment to [the Resident] saying you could do some work before you have a coffee.
>
> [The Resident] [said] you can't tell me what to do a [sic] I am a volunteer.
>
> An argument broke out I do not want to get involved so I left the kitchen I don't really know what was said but I saw both [the Resident] and [the claimant] were crying".

244. The outcome of the disciplinary hearing is at [245]. In short, RM found as follows:

244.1. The bullying allegation – RM found that there was insufficient evidence to uphold the allegation of bullying, but found that the

claimant had used an inappropriate tone. As such, she decided to issue a written warning;

244.2. The breach of GDPR allegation – RM upheld this allegation "on the grounds of Gross Misconduct";

244.3. The disrepute allegation – RM upheld this allegation and recorded that she would issue a final written warning.

245. In her reasoning, RM wrote as follows:

> "I have considered all avenues open to me in relation to an outcome for this disciplinary and unfortunately can not satisfy myself that a situation in relation to GDPR would not reoccur. This is based on the fact that you had previously been given responses in your grievance to your frustrations and chose to ignore these and provide information not only to others outside of the client and company but also to send private information to your personal email address. Overall, I have concluded that your employment with [the respondent] should be terminated for gross misconduct without notice".

246. This decision was emailed by RM on 20 December 2022 to the incorrect email address for the claimant (RM used ".com" instead of ".co.uk"). It was brought to RM's attention that the claimant had not received the decision letter, which was then sent by RM to the claimant's correct email address on 9 January 2023.

247. In her evidence, RM explained that, when she found out that she had sent the letter to the wrong email address, she was mortified. She offered to resign as she considered that she herself had breached GDPR. Nothing was done about RM's error, no investigation or disciplinary action was undertaken. RM's resignation was not accepted.

248. The claimant was informed that her last day of employment was 20 December 2022. Her leaver's form recorded that the reason for leaving was gross misconduct – [81]

249. The claimant appealed the outcome by letter/email of 14 January 2023 – [254-257]. An invitation to an appeal hearing via video followed thereafter for a meeting on 15 February 2023 – [263].

250. The appeal was heard by SW. Unfortunately, we do not have any appeal notes, or indeed an appeal outcome letter. It appears that the Human Resources employee connected with the appeal process, Emma Craig, left the respondent, and with her went any possibility of unearthing these documents. The correspondence we have demonstrates that, on 22 February 2023, the respondent was still undertaking investigations - [266]. The claimant chased the outcome of the appeal on 5 April 2023 – [266]. We have not seen a response to that email.

251. SW's evidence in his statement was that he upheld the sanction in terms of the alleged GDPR breach on the basis that - [SW/WS/5]:

> "...it was clear that she had sent confidential information and personal data about a resident at Bristol Court to her personal email account. This was a breach of data

protection and was also confidential information that should not have been sent outside of the business".

252. Regarding the disciplinary findings that the claimant had spoken to the Resident in an inappropriate manner and brought the company into disrepute, SW was "not comfortable with the disciplinary sanctions that she had been given in relation to those allegations" - [SW/WS/6]. SW spoke to both DB and RM regarding these allegations: again, we have no notes of these meetings. SW told us that he attempted to speak to Human Resources, but no-one got back to him. This meant that the appeal was not concluded, and no outcome letter was sent.

Reason for dismissal

253. There were three allegations raised against the claimant in the disciplinary hearing. RM in her witness statement, when discussing her decision only referenced the alleged bullying and the GDPR breach. She made no mention of the reputational damage. This ties in with the outcome letter, as in relation to the second bullet point (GDPR) the respondent stated "...I have made the decision [to] uphold this allegation on the grounds of gross misconduct".

254. This is mirrored in SW's evidence regarding his decision-making at the appeal stage. SW in his witness statement makes it clear that, although he was not comfortable with the allegations of bullying or bringing the company into disrepute, he was satisfied that the claimant did breach GDPR. He was satisfied that this was sufficient reason to dismiss her – [SW/WS/5].

255. Therefore, on the face of it, the reason for the claimant's dismissal seems to have been the alleged GDPR breach. The other two allegations, of bullying and bringing the respondent into disrepute, were not the cause of her dismissal.

256. The claimant's case is that it was the protected disclosures that were the reason (or principal reason) behind her dismissal. We therefore turn to interrogate that argument, reminding ourselves it is for the respondent to prove the reason for dismissal, as long as there is some evidence to suggest the reason could be whistleblowing.

257. The fact that one of the allegations of misconduct is bringing the respondent into disrepute gives us pause for thought. The meaning of that allegation can only be that the respondent was embarrassed and concerned that alleged failings in health and safety at Bristol Court had been disclosed to London Care and LBH. The respondent could then be said to have punished the claimant for raising health and safety concerns to a wider audience, and the respondent was embarrassed by that.

258. This could be sufficient for the claimant to have met the evidential burden of proof. However, we are satisfied on the evidence we have heard and seen from both RM and SW that the claimant was not dismissed for bringing the respondent into disrepute. This appears to have been very much a side issue for both RM and SW.

259. As such, even if we were satisfied that the raising of the allegation of disrepute was *because of* the protected disclosure made on 11 November 2022, as opposed to the manner in which that disclosure was made, we accept that it was not that allegation that led to the claimant's dismissal.

260. Furthermore, we are not satisfied that the July/August 2022 grievance was causative of the claimant's dismissal. The only relevance of the grievance to the disciplinary was the respondent's understanding that the claimant had already aired her complaints and been given answers to them.

261. Therefore, we find that the reason or principal reason for the claimant's dismissal was purely RM and SW's understanding that she was in breach of GDPR.

Investigation

*Breach of GDPR*

262. RM told us that she satisfied herself that the claimant's email constituted a breach of GDPR by asking LP whether she had confirmation from the GDPR team that this was a breach. LP told RM that the team had indeed confirmed it was a breach. That is the extent of the detail as to the alleged breach. There is no mention in any of the evidence we have seen, whether written or verbal, as to what parts of the GDPR the claimant had allegedly breached, or what parts of the 11 November 2022 email constituted confidential information, the sharing of which was allegedly a breach.

263. There is no medical information disclosed in the email. There is reference to matters which may or may not be connected to the Resident's underlying medical issues, however the email did not seek to draw any causal link between the difficulties the claimant was experiencing and the Resident's medical situation. Other than the Resident's initials and address, it is not clear to us what confidential information can be said to have been shared. Matters that are mentioned, such as challenging behaviour and not taking instructions are not specific to people who share the Resident's medical position.

264. In terms of the appeal stage, SW upheld the breach of GDPR. He based his decision on his own understanding of the GDPR, what he had seen in evidence and his discussion with Human Resources: this was his evidence to us. He did not take any further steps to satisfy himself, using for example the Data Protection Team, as to the precise nature of the breach.

*RM's rationale*

265. From her decision letter and oral evidence, the main rationale for RM's decision that dismissal was appropriate appears to have been that:

    265.1. The claimant had been given responses to her concerns through the grievance process, but ignored those responses and shared her complaints with a wider group, despite knowing the correct process to follow; and,

    265.2. RM was not satisfied that such a breach would not occur again.

266. In relation to the first point, interrogating the grievance process and outcome, the reference to the Resident comes in the grievance appeal. The appeal outcome set out the following in relation to this allegation:

> "You informed me that you have had challenging encounters with a resident who is volunteering in the kitchen and that no risk assessment had been completed. I have discussed this with [DB] as part of the investigation and he has confirmed that said resident does have a risk assessment in place which has been completed by the client and is filed with them. [DB] has informed me that you have requested to see the risk assessment of which he cannot provide to you as the resident is not our employee and the information including any medical information on the risk assessment is protected by GDPR, therefore legally you would not have a right to see this. You also told me that the resident does not have a uniform. [DB] has informed me that a uniform has already been ordered and he is waiting for this to be delivered. The resident will also be receiving one to one training on health and safety, food hygiene, and allergens including Natasha's law.
>
> I do also want to make you aware that the reason the resident works as a volunteer in the kitchen is due to this forming part of the commercial contract that is in place. I would like to think that this can be seen as positive as it is additional support especially given that you have raised concerns around being short staffed and not having additional support".

267. We find this outcome to be dismissive of the claimant's concerns, in effect telling her she should be grateful for the support given by the Resident, even if that support is sub-standard. Specifically, no recommendations were made relating to the claimant's concerns around the Resident.

268. There was nothing put in place in terms of recommendations following the grievance appeal to ensure that the Resident (for example) did in fact receive training, or that her uniform was received. GR appears just to have accepted that a risk assessment was put in place without interrogating that issue any more closely.

269. RM, at the disciplinary stage, did not scrutinise the issue regarding a risk assessment any further. She did not do any investigation into whether the Resident was appropriately trained or had by now received her uniform. In other words, she did not look into the veracity of the claimant's concerns. RM, in turn, seems to have simply accepted what is in the grievance appeal outcome.

270. RM did not explore the claimant's suggestions that she had repeatedly gone to DB with concerns, who had repeatedly done nothing. The claimant made this point clear in the disciplinary hearing, for example:

> "I have reported everything to [DB] on numerous occasions – [233]";
>
> "I had reported these issues to [DB] and I had no response" - [233];
>
> "[DB] never helps" - [233];
>
> "I just wanted help and [DB] wasn't providing that" - [237];

> "I have contacted [DB] on many occasions for help and support and when my grievance outcome was received I noticed that [DB] had said there was a diary clash but there wasn't and no attempts made" - [237].

271. RM, in her evidence to us, was troubled that the claimant had not used what RM considered to be the appropriate channels to raise her concerns. RM believed that the claimant knew that there were more appropriate channels available to her. The evidence RM had before her was from the disciplinary meeting, in which the follow exchange occurred - [237]:

> "RM: Who did you raise your grievance with?
>
> C: HR
>
> RML So why didn't you go to HR with this or [DB's] line manager?
>
> C: I didn't know I could. If I had known I would've. But to be honest I have lost trust as I just feel like I keep getting ignored."

272. Although SW did speak to DB (SW/WS/6), his recollection was that this was mainly around the stakeholders involved in the email, as opposed to understanding what had happened to address the claimant's concerns about the Resident.

273. In terms of RM's second point, that she could not be satisfied that the claimant would not breach GDPR again, the evidence in front of RM at the disciplinary hearing included the following comments from the claimant:

> "I am admitting to making an error in judgement by sending this email" - [231];
>
> "I know now that I shouldn't have sent the email to them. I sent the email in haste as I had reported these issues to [DB] and I had no response. These people are involved with [the Resident] which is why I sent them" - [233];
>
> In response to "you should know that you can't share personal information, especially without consent", the claimant said "But I didn't realise that. At that point, I thought it was the right thing to get help from the people who I sent it to as [DB] never helps and we received emails with personal information in from them".

274. RM also had in front of her the investigation meeting notes, in which there was the following exchange:

> "MC: Do you understand that it's a breach of GDPR by copying those people in? When they don't have a right to see it.
>
> C: But this comes back to what I have. I have been saying for me. I. Because it has been a culture in this place to copy these people. So for me, I just took it this way because that has been done in the past and this will be the only reason why I've done it. And if I knew it would be a breach of the [GDPR] then absolutely I wouldn't. But because it has been done constantly in the past and I thought this is OK to do it".

275. Another element that weighed on RM's mind when making her decision was her belief that the claimant's actions on 11 November 2022 were suspicious. The specific conduct of the claimant she considered suspicious was the fact that the claimant had come back to work after her GP appointment to do

some paperwork. RM believed that there was no reason why that paperwork had to be done on 11 November 2022, and felt that the claimant had come in again deliberately to send the 11 November email. The suggestion from RM was that this was "calculated" - RM/WS/9.

276. We are not clear on the point being made by RM, or the respondent, here. If an employee has a GP appointment, we would expect that the default would be to go back to complete a shift. Evidently, the claimant's action in sending the email of 11 November 2022 was deliberate, it could hardly be done by accident. Other than that, we do not find that there was anything particularly "calculated" or suspicious about the claimant returning to work. On the contrary, we find that the claimant returning to complete work for that day's shift, even if it could be done the next day, is consistent with her level of commitment to the respondent.

## CONCLUSIONS

### Direct discrimination and harassment

**Issue 7.2.1 - When the claimant requested more staff to be placed on days when she was lone working, those requests were refused by DB and it was implied that if she did not like it she could find a job elsewhere. This was unlike the situation when the claimant was not working, there would be sufficient staff, or the workforce would be enhanced by agency staff or DB himself – sex, age, race**

277. Our findings are set out at paragraphs 162 to 172 above. To the extent that there were staff shortages, we have found that this was not targeted at the claimant, but was a problem that affected all those working in the kitchen.

278. The reason for the staff shortage we have set out at paragraph 172, and comes back to the detrimental effect of the pandemic on the hospitality industry.

279. In light of those findings, the claimant was not less favourably treated, she was not targeted. There is no good evidence from which we could infer that a white, or male, or older comparator would have been treated any differently.

280. As such, the initial burden of proof is not satisfied and the s13 claim fails.

281. We accept that there is unwanted conduct in the shortage of staffing, but find that this was not connected to sex, race or age, as this was a shortage that affected the respondent's staffing of the kitchen at Bristol Court generally. We therefore also reject the s26 claim.

**Issue 7.2.2. - when the claimant asked for a day off for her children's birthday, this was refused, whereas DB was able to take the day off for his son's birthday – sex, age, race**

282. We have set out our findings at paragraphs 134 to 138. In short, the factual allegation is upheld, but the reason why the claimant was refused leave was because of a clash with the Chef Manager's pre-booked annual leave. The reason therefore was not sex, race or age.

283. The claimant cited DB as a comparator here, however he is not an appropriate comparator. The situation when DB booked his son's birthday as leave was factually very different from that at the time of the claimant's request for leave.

284. We therefore look at a hypothetical comparator, who must be a white, and/or male, and/or older ssistant Chef. Further, however, that individual must find themselves in the same circumstances as the claimant; with a Chef Manager who had pre-booked leave at the same time as that individual wanted to take holiday.

285. We have no good evidence from which we could infer that such a comparator would be treated more favourably than the claimant. As such, the initial burden of proof is not met, and so the claim under s13 fails.

286. Similarly, regarding the s26 claim, there is no evidence from which we could infer that the treatment was connected to sex, race or age. As such, the s26 claim fails as well.

**Issue 7.2.3 - DB changed the claimant's payment method from salaried to hourly. When she picked up on this, he had it changed back and denied any knowledge**

287. Our findings on this are at paragraphs 111 to 117 above.

288. Factually, we are not satisfied it was DB who changed the claimant's payment method, and so the allegation fails at that hurdle. We are not in fact clear who it was who made the change. We therefore cannot interrogate the decision-maker's motives.

289. However, there is no evidence from which we could safely draw inferences that this change was because of, or related to, the claimant's sex, race or age. In fact, ET was treated in the same way, which rebuts the suggestion certainly that sex was any influence on the decision-maker.

290. The claimant has not discharged the initial burden of proof and as such both allegations under s13 and s26 are rejected.

**Issue 7.2.4 - DB saying "you get paid too much for a woman"**

291. We have rejected this allegation on its facts. See paragraphs 125 to 127.

**Issue 7.2.5 - DB saying "how can a single mother of your background afford to do building works in this financial crisis"**

292. We have set out our findings on this allegation at paragraphs 128 to 133. We have rejected it on its facts.

**Issue 7.2.6 - DB reneged on a promise to promote the claimant to the Manager's role on it becoming vacant, saying "being a single woman of quite a young age, you do not need the headache of this position and you are already highly paid for your current role"**

293. We have rejected this allegation on its facts, at paragraphs 201-213.

**Issue 7.2.7 - the claimant did the role and duties of Chef Manager for 2 months , with no additional pay - sex, age, race**

294. We have factually upheld this allegation at paragraphs 214-218 above.

295. We turn then to consider the reason for this conduct by the respondent, and conclude that there is no good evidence from which we can safely infer that the respondent's actions in failing to pay the claimant more were discriminatory.

296. A hypothetical comparator would be someone who does not share the claimant's protected characteristics, but is in every other way the same. This would include the comparator having the same work ethic as the claimant, the same good will.

297. There is no good evidence before us that this comparator would be treated any more favourably than the claimant. Likewise, there is no good evidence to demonstrate that the respondent's conduct was in relation to the claimant's protected characteristics.

298. As such, we conclude that the claimant has not discharged the initial burden of proof, and so the claims under ss13 and 26 fail.

299. If we are wrong on this, and the burden shifts to the respondent to prove a non-discriminatory reason for this treatment, we are not satisfied that we have been given a satisfactory, non-discriminatory reason on the balance of probabilities.

**Issue 7.2.8 - DB saying he likes eating rice and curry and the claimant did resemble Indians and DB assumed that she got the special recipe for curries – race -**

300. We have set out our findings on this allegation at paragraphs 180 to 186. In short, we rejected this allegation on its facts.

**Issue 7.2.9 - DB failing to send the claimant the application for the Area Support role – September 2022 – sex, race, age**

301. We have set out our findings on this allegation at paragraphs 173 to 179. There was no application for DB to send, as such the allegation on its strict interpretation fails.

302. The claimant was however denied the chance to apply for the role of ASM. There is no evidence from which we could safely draw an inference that the claimant being denied that chance was in any way discriminatory. There is no good evidence to suggest to us that someone of a different sex, race or age would have been treated any differently.

303. In any event, we have accepted the respondent's non-discriminatory reason for the claimant not having the chance to apply. We have found that the

reason was that the role was intended for AC in any event, and she was being trained up to do the role for several months before the role opened up.

304. The reason was therefore not the claimant's sex, race or age.

**Issue 7.2.10 - AC saying *"there were only a few black people who applied" for a role with the respondent, and the claimant understanding that "AC was not willing to employ someone from an African background"* - October 2022 – race**

305. Our findings are at paragraphs 187 to 194. We reject the allegation on its facts.

**Issue 7.2.11 - Hiding the application for Chef Manager from the claimant and then, when the claimant found out, advertising it at a lower salary (of £26,325 instead of £34,000 – October 2022 – sex, age, race**

306. We have rejected the assertion that there was any "hiding". There was an increase in the advertised salary for the Chef Manager role. We have accepted the respondent's reason for this increase, namely the need to make the role more competitive and appealing, to attract more applications. We have set out our findings at paragraphs 195 to 200.

307. The reason is therefore not on the ground of or in relation to sex, age or race. There was no good evidence from which we could draw such an inference and so the claimant has not discharged the initial burden of proof. In any event, we have accepted the respondent's non-discriminatory reason.

308. The claimant has specifically relied on a comparator of "a white woman who is currently employed as Chef Manager". This is "Rachel", referred to in our findings above at paragraph 212. We have no evidence of Rachel's ethnicity and sparce evidence of her age, other than DB saying she was younger than him. We also are not aware of what salary Rachel is on. In any event, she is not an appropriate comparator. Rachel took up the role of Chef Manager several months later in 2023 when a hire fell through. She was not in the materially the same position as the claimant, as she was not an Assistant Chef, on suspension, at the time the adverts were going live from October 2022 onwards.

309. We therefore reject the allegations under both s13 and s26.

**Time limits**

310. The argument regarding time limits related solely to some of the claims of discrimination. Given we have rejected them all on the merits, we do not consider it necessary to deal with the issue of time limits.

**Protected disclosures**

311. The respondent accepted that the grievance set out across communications of 21 July and 3 August 2022 was a protected disclosure.

312. In terms of the email of 11 November 2022, the respondent denied it is a protected disclosure purely on the basis that it denied that, in the reasonable belief of the claimant, the email was in the public interest.

313. We conclude that, in sending the email, the claimant did have a reasonable belief that she was doing so in the public interest.

314. The email contained disclosures relating to health and safety within a kitchen environment; including matters that could affect not only kitchen staff, but also the residents, such as:

314.1. Not washing hands after a cigarette break;

314.2. Not wearing a hair-net and safety shoes, and stock rotation (milk for example).

315. The threshold for demonstrating reasonable belief regarding public interest is a relatively low bar, to protect against claimants seeking protection from detriments arising from private contractual disputes.

316. We consider the guidance in Chesterton:

316.1. The numbers in the group whose interests the disclosure serves – this would cover all staff members in the kitchen, and those who eat the food served by the kitchen, as well as all residents;

316.2. The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – the wrongdoing disclosed, in short, puts the health and safety of consumers and kitchen staff at risk;

316.3. The nature of the wrongdoing disclosed – the nature of the wrongdoing relates, not just to the Resident's conduct, but the conduct of those responsible for her in her capacity as a volunteer;

316.4. The identity of the alleged wrongdoer – although the disclosure relates to an individual, namely the Resident, it reflects also on those with responsibility for her in her role as volunteer. The care sector and its operation will always attract public interest.

317. We are satisfied that the claimant believed what she was saying was in the public interest. Further, we find that that belief was reasonable. This is a care home for vulnerable residents: kitchen safety and hygiene is evidently of key importance.

318. Therefore, we are satisfied that the email of 11 November 2022 was a qualifying disclosure. It was made to the claimant's employer and so was a protected disclosure.

**Automatic unfair dismissal**

319. We have set out our findings as to the reason for the claimant's dismissal at paragraphs 253 to 261 above. The reason for the claimant's dismissal was purely RM and SW's understanding that she was in breach of GDPR.

320. Given this finding as to the reason for the claimant's dismissal, this claim fails. The reason, or principal reason, for her dismissal was not the protected disclosures.

**Ordinary unfair dismissal**

Genuine belief

321. As set out above, we are satisfied that the reason for dismissal was RM (and SW's) genuine understanding that the claimant had breached GDPR.

322. It was RM's conclusion that breach of GDPR was gross misconduct. Her evidence to us was that she understood that an allegation of gross misconduct led automatically to dismissal.

323. SW upheld the decision to terminate employment on basis that "it was clear that [the claimant] had sent confidential information and personal data about a resident at Bristol Court to her personal email account" - SW/WS/5.

324. We accept that RM and SW had a genuine belief that the claimant was guilty of the misconduct alleged. There is no good evidence to challenge this, and we found them to be credible in terms of that belief.

Reasonable belief following a reasonable investigation

*Breach of GDPR*

325. We have set out our findings on the investigation into breach of GDPR at paragraphs 262 to 264 above.

326. We consider that RM should have satisfied herself as to the precise basis on which a breach of GDPR was said to have occurred: what regulation it is that is said to have been breached and what information within the email is said to have breached that regulation. This failing was not remedied by SW at the appeal stage. He did nothing to explore what precise parts of this email were said to be breaches of which specific part of the GDPR.

327. This lack of scrutiny of the GDPR Regulations and what aspects of the email were allegedly in breach undermines the grounds on which RM and SW reached their genuine belief, and demonstrates a lack of investigation into this area. It was not enough to accept third-hand information from the GDPR department that this email breached GDPR.

*RM's rationale*

328. We have set out in our findings the two main points that we find led to RM's rationale for dismissal on the basis of gross misconduct; these are at paragraphs 265 to 272.

329. We conclude that the claimant was reasonable in understanding that the grievance process was going to do nothing to address her concerns about the Resident: those concerns were in effect dismissed.

330. In turn, we conclude that there were not reasonable grounds for RM's belief that the claimant's concerns had already been addressed through the grievance process. Further, RM did not have reasonable grounds for concluding that the claimant knew of more appropriate channels to raise her complaints/concerns.

331. In terms of the second limb to RM's rationale, that she determined that she could not be satisfied that the claimant would not breach GDPR again, we have set out our findings as to what was said on this topic during the disciplinary process at paragraphs 273 to 274.

332. The contents of the minutes of the disciplinary and investigation meetings appear at odds with RM's finding on this issue. We conclude that there were not reasonable grounds for RM to reach her conclusion that she could not be satisfied that the claimant would not breach GDPR again.

333. Therefore, we conclude that there were not reasonable grounds for RM to reach her genuine belief that the claimant's conduct amounted to gross misconduct.

334. We also conclude that the investigation was not reasonable, and that the respondent at some stage should have explored further:

    334.1. What precise words of the email constituted a breach of what precise regulation of the GDPR;

    334.2. The assertion by the claimant that she had continuously raised issues with DB and nothing had been done.

335. These matters could reasonably have an impact on whether the claimant was guilty of gross misconduct. They could also reasonably act as mitigation in terms of sanction.

336. A third matter that we have found weighed on RM's mind in making her decision was her belief that the claimant's actions on 11 November 2022 were suspicious. We have set out our findings on this point at paragraphs 275 and 276.

337. In light of those findings, we conclude that there were no reasonable grounds for RM to consider the claimant's actions on 11 November 2022 to be "calculated" or suspicious.

<u>Procedural fairness</u>

338. The claimant raised three procedural issues:

    338.1. MC not taking a statement from Pimm;

338.2. Not sending the claimant the disciplinary outcome on 20 December 2022;

338.3. Not sending the claimant an appeal outcome letter.

339. As a fact, all three of those matters arose. Two out of the three we consider to be breaches of procedure, falling foul of the ACAS Code of Practice, namely:

339.1. Sending the dismissal letter to a wrong email address, which RM herself considered to be a breach of GDPR. This meant that there was a delay in the claimant receiving the outcome letter. At paragraph 22 of the Code, it states "The employee should be informed as soon as possible of the reasons for the dismissal, the date on which the employment contract will end, the appropriate period of notice and their right of appeal".;

339.2. Failing to conclude the appeal, including failing to inform the claimant of the outcome of the appeal. At paragraph 29, the Code provides that "employees should be informed in writing of the results of the appeal hearing as soon as possible".

340. Regarding the statement from Pim, we accept that she did not wish to get involved; there is no good evidence to dispute RM's evidence on this, and it is clear from the note of the conversation RM had with Pim. There is nothing that RM could reasonably have done to make Pim discuss the matter further. In any event, Pim's evidence was relevant only to the bullying allegation. The claimant was not dismissed for that allegation. Pim's evidence did not go to the GDPR allegation and was therefore not relevant to the dismissal in any event.

<u>Sanction</u>

341. We conclude that the sanction of dismissal was not within the band of reasonable responses for the following reasons:

341.1. It was not reasonable for the conclusion RM reached that the claimant's conduct on 11 November 2022 was underhand, or calculated to have been a factor in RM's decision-making. This conclusion by RM was ill-founded;

341.2. RM believed that other routes were available for the claimant to raise her concerns about the Resident. However, this was not based on reasonable grounds. Had a reasonable investigation been conducted, we are satisfied that RM would have found that the claimant was reasonable in saying she had raised issues but gotten nowhere;

341.3. RM said that she was not satisfied that the claimant would not act like this again. On the evidence RM had before her, this was not a reasonable conclusion based on the words used by the claimant in both the investigation and the disciplinary meetings;

341.4. The claimant had a clean disciplinary record, and RM knew that. Furthermore, we have set out already that the claimant went above and beyond her role in difficult circumstances, with limited if any support.

342. We conclude that, taking all the above circumstances into account, the respondent did not act reasonably in treating the claimant's conduct as a sufficient reason for her dismissal. As such, we conclude that the claimant was unfairly dismissed

Contributory fault

343. We accept that there was some blameworthiness on the part of the claimant in sending the email of 11 November 2022. The claimant seemed to accept this during the disciplinary when she said (to paraphrase) that she would not act in the same way again. However, we consider that there was limited contributory conduct, given that:

343.1. We are not satisfied on the evidence before us that that there was in fact a breach of GDPR;

343.2. We consider the claimant had explored reasonable routes available to deal with her concerns about the Resident, and continued to work with her. The claimant had discussed her concerns in a grievance process, and raised them with her manager, DB;

343.3. The respondent had done very little to support the claimant in her management of the Resident, which fed into why the claimant felt she had no other option than to send the email.

344. We consider that a 5% reduction is appropriate.

Polkey

345. The procedural failures relied upon by the claimant were:

345.1. MC not taking a statement from Pim;

345.2. Not sending the claimant the disciplinary outcome on 20 December 2022;

345.3. Not sending the claimant an appeal outcome letter.

346. We have already found that, even if more detail had been received from Pim during the disciplinary process, that detail would only go to the first allegation of bullying. This was not the cause of the claimant's dismissal. We are not satisfied that any evidence from Pim would have fed into the reason for dismissal, which was the allegation of a breach of GDPR.

347. We find that the failure to send the dismissal letter to the correct email address on 20 December 2022, therefore delaying the receipt of that letter for the claimant, was not causative of the dismissal. Similarly, the failure to provide an appeal outcome letter was not causative of the dismissal.

348. In other words, even if all three procedural errors had been rectified, they would not have altered the outcome for the claimant. She would still have been dismissed.

349. The respondent therefore argued that we should reduce the compensatory award by 100%.

350. However, this is a case in which we have found that the dismissal was not only procedurally but also substantively unfair. We consider that, in those circumstances, to reduce the claimant's compensatory award in line with Polkey would be to provide the respondent with a windfall by reducing the amount of money they are to pay in compensation.

351. In other words, this is not a case in which we find that, but for the procedural errors, all else being equal, the claimant would still have been dismissed. Conversely, we have found that, even if the procedural errors were rectified, the claimant would still have been substantively unfairly dismissed. It is not possible for us to look beyond the substantive unfairness to hypothesize to what extent it is possible that the claimant would have been dismissed in any event. Indeed, we are not required to undertake such a speculative task.

352. As such we make no reduction under the rule set out in Polkey.

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Employment Judge Shastri-Hurst

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Date 6 September 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

2 October 2024

FOR EMPLOYMENT TRIBUNALS