Case Number: 3309904/2022

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms M Chikoto v Gain Healthcare Limited

Heard at: Watford, in person **On**: 19-23 August and, in private, 1 November 2024

Before: Employment Judge Hyams **Members:** Mr A Liburd
Mr M Simon

Representation:

For the claimant: Mr Adam Ohringer, of counsel
For the respondent: Mr Roy Magara, solicitor

UNANIMOUS RESERVED JUDGMENT

1. The claimant's claim of detrimental treatment within the meaning of section 44(1)(c) of the Employment Rights Act 1996 does not succeed.

2. The claimant was not dismissed unfairly within the meaning of section 100 of that Act.

3. The claimant was not treated detrimentally within the meaning of section 47B of that Act.

4. The claimant's dismissal was not unfair within the meaning of section 103A of that Act.

5. The claimant's claim for damages for breach of contract resulting from the fact that the respondent required the payment by the claim of £2,619 before the claimant came to be an employee of the respondent does not succeed.

6. The claimant was wrongfully dismissed, i.e. her summary dismissal was not justified at common law and she is entitled to notice pay in the sum of £479.45.

REASONS

The claims made by the claimant and the procedural history

1 By an ET1 claim form presented on 30 July 2022, the claimant claimed that she had been treated detrimentally and dismissed because of (as it was stated in box 8.1 of the form, at page 7 of the hearing bundle; any reference below to a page is, unless otherwise stated, to a page of that bundle) "Whistle blowing and Health and safety". The claimant was at that time represented by her sister, Ms Jenipher Baber, from whom we heard oral evidence as we describe below.

2 The circumstances which led to the claim occurred in the first half of 2022. The claimant was employed by the respondent for at most just less than a month, which was the month of May 2022. The circumstances were described in box 8.2 of the claim form, at page 8. There was no attachment to the claim form. The complete content of that box was as follows.

> "I came to the UK on a 2 visa facilitated by Gain Healthcare Ltd. Gain Healthcare agreed to sponsor my accommodation for the first month of arrival in the UK until I get paid my first salary. The accommodation they provided was in a very bad state, as a result of the poor living conditions and poor working conditions I became unwell. This was just over 3 weeks after I started working for the company. A colleague whom I work for called an ambulance so that I can get treatment, when the paramedics arrived at the scene, they got concerned at the state of accommodation and raised a Safeguarding concern, during the time the paramedics were attending me, my employer called as she was told I did not go to work as I was not feeling well, She was very upset that I did not go to work and began to insult me shouting abusive language over the phone. I decided to put the phone on speaker so that the paramedics would witness the abuse I was going through with my employer. Upon hearing the conversation, the paramedics called the police as they suspected that I might have been a victim of Modern day slavery. When Olinda Nkomo the director of Gain Healthcare ltd learned that the police were also called to come and attend to me, she got very upset and told me to leave her premises.
>
> I told my family (sister) the situation who then share the information on a social media group with other victims of Modern day slavery, upon learning this, Gain Healthcare Ltd terminate my contract with immediate effect accusing me of sharing company information on social media and exposing the company.

> The main reason why I was dismissed by Gain Healthcare Ltd was that my sister shared the photos of the poor living conditions that I was living in on social media at the accommodation provided by them as part of my employment agreement and the poor working conditions which resulted in my illness.
>
> When I came to the country, I did not get proper induction, I was taken straight to work 2 days after arriving in the company, I reported my concerns to my first line manager but got no response until I fell ill. I suffered a lot of intimidation, treats that my visa would be canceled if I complain about anything, and the working condition was harsh, I worked more that 10 hrs a day and 6 - 8 shift in a row without rest."

3 A claim for notice pay was on one view indicated in the claim form, by the ticking of the box for "No" against the question in section 6.3 of the claim form, on page 6, which was this:

> "If your employment has ended, did you work (or were you paid for) a period of notice?"

4 However, the box for a claim for notice pay in paragraph 8.1 of the claim form, on page 7, was not ticked. It might have been thought, therefore, that the ticking of the "No" box in section 6.3 of the claim form was a simple statement of fact. However, the claimant was not then legally represented.

5 In section 5.3 of the ET3 response form at page 19, the question was asked whether the information given by the claimant about being paid for, or working a period of notice, was correct. The answer to that question was stated to be "No", with the details for that reason, stated in the box for giving such details on page 19, given in these terms.

> "As she was only 3 weeks into employment and has not passed her probational period. Also due to the seriousness of her actions Gain Healthcare Ltd did not owe her any notice period."

6 It therefore appeared that the correct response to the question posed in section 5.3 of the ET3 would have been "yes", but the details of the response set out immediately above showed that the respondent was well aware that the claimant could have claimed that she was owed notice pay. The respondent's position if the claimant had made such a claim was as a result of those details clear: the claimant's conduct was such as to justify her summary dismissal.

7 No claim that the claimant was entitled to anything other than pay was stated in box 6 of the claim form, on page 6. However, in section 5.4 of the ET3 response form, at page 19, the box for "No" was ticked in response to the question:

> "Are the details about pension and other benefits e.g. company car, medical insurance, etc. given by the claimant correct?".

8 The reasons stated for that answer, which were stated in the box on page 19 next to the words "If No, please give the details you believe to be correct", were these.

> "Company Car
> Pension scheme is available after probational period
> Free First Months accommodation".

9 The respondent was not represented at that time. The "Name of contact" stated in box 2.2 of the ET3 form was stated to be "Mrs Olinda Chapel-Nkomo". Box 6.1 of the ET3 form (on page 20) was completed in some detail, and it was clear from the content of that box (including the reference to the writer of the content in the first person singular at the bottom of page 20) that it was written by Mrs Olinda Chapel-Nkomo. The narrative in box 6.1 consisted of five numbered paragraphs, and the narrative was continued on the next two pages of the bundle. In the next paragraph, number 6, at the top of page 21, this was said: "Gain Healthcare had a responsibility to provide accommodation, but nowhere are we obligated or required by law to provide cleaners. The Claimant was failing to clean after herself and to maintain the property to standard."

10 In paragraph 7 of the narrative, on page 21, this was said.

> "When Kudzaishe Mutemerera came back to the property the police attended to interview him and find out if there were any concerns of Modern-day slavery or abuse by Gain Healthcare Ltd and myself as the Director. Kudzaishe denied all of this and was quite surprised by complainants' allegations and behaviour . The case was closed by the police and there were no further investigations."

11 In paragraph 11, on the same page, this was said: "The reference to modern day slavery is denied legally and factually." In paragraph 13, on page 22, this was said.

> "The Respondent acted reasonable in all circumstances in dismissing the Claimant on the grounds of making false allegations about the employer and bringing the Respondent into disrepute."

12 We heard oral evidence from Mrs Chapel-Nkomo as we describe below.

13 There was an early conciliation certificate at page 1. ACAS was notified on 11 June 2022 and the certificate was issued on 13 June 2022. No limitation issues arose, therefore.

14 There was a preliminary hearing by telephone on 27 February 2023. It was conducted by Employment Judge ("EJ") M Salter. The claimant was represented at it by Ms Baber, and the respondent was represented by Mr Magara. At that hearing, the claims were listed for a full merits hearing on 12-16 June 2023. The issues listed in the record of that hearing (the record was at pages 50-66) included whether the claimant was dismissed unfairly within the meaning of section 98 of the Employment Rights Act 1996 ("ERA 1996"), but that was plainly inapt because of the claimant's short period of employment, and that was implicitly recognised in paragraph (e) at the top of page 61. What we will call the real issues in the case were stated accurately on pages 61-64.

15 The day after the hearing of 27 February 2023, Ms Baber sent the email at pages 48-49, in which she wrote that she was in fact unable to attend the hearing in the week commencing on 12 June 2023 because of "work and other commitments", and she sought a relisting of the hearing no sooner than January 2024.

16 The first day of the hearing of 12-16 June 2023 was converted to a preliminary hearing by Cloud Video Platform ("CVP"), and it was conducted by EJ Bansal, whose record of the hearing was at pages 69-77. The respondent was represented by Mr Magara, and the claimant was represented by a solicitor, Miss Jamila Duncan-Bosu. EJ Bansal permitted the claimant to amend her claim to add a claim for breach of contract in the form stated in what EJ Bansal referred to in paragraph 5 on page 70 as "the agreed List of issues".

17 As far as liability was concerned, EJ Bansal listed the issues for the decision of the tribunal in the following paragraphs, at pages 74-77.

> "47. **<u>Unfair Dismissal – s100 Employment Rights Act 1996 ("ERA")</u>**
>
> (a) Was the claimant:
> (i) an employee in a place where:
> (a) there was no representative for health and safety or a safety committee; or
> (b) there was such a representative or safety committee but it was not reasonably practicable for the claimant to raise the matters by those means.
> (b) did the claimant bring to the respondent's attention, by reasonable means, circumstances connected with her work namely the poor standard of living accommodation for the claimant and another employee, and which she reasonably

believed were harmful or potentially harmful to health and safety?

(c) If so, what was the reason or if more than one reason the principal reason for her dismissal?

48. **Detriment – s44(1)(c) ERA 1996**

48.1 Was the claimant subjected to the following detriment, namely;

(i) On 12 May 2022, at a meeting called by Ms Chapel Nkomo, threatened the claimant with dismissal and having her visa revoked if she failed to comply with the company rules.

(ii) On 31 May 2022, Ms Chapel Nkomo was angry with the claimant being unable to attend work and shouted at her, "you are careless, I can't be babysitting you. I'm going to terminate your employment"

(iii) On 31 May 2022 dismissed the claimant.

48.2 If so, was the detriments suffered by the claimant, on the grounds of raising concerns as set out at Para 47(b) above.

...

50 **Public interest disclosure**

50.1 The Claimant relies upon the following as purported qualifying disclosures;

(ii) messages sent to her sister Jenipher Baber and brother Anthony Choto on 02 May 2022

(iii) discussions with her sister Jenipher Baber on 03 May and 30 May 2022

(iv) discussion with Lesley Chizuna on or around 05 May 2022 and between 06 – 30 May 2022

50.2 In any or all of these purported disclosures, was information disclosed, which in the claimant's reasonable belief tended to show that;

50.2.1 the respondent had failed to comply with a legal obligation to provide the claimant with suitable accommodation; and/or

50.2.2 the health or safety of the claimant had been put at risk by the provision of poor living conditions.

50.3 If so, did the claimant believe that the said disclosures were made in the public interest? (The claimant contends the disclosures were in the public interest to raise public awareness of the respondent's recruitment of employees from Africa and the standards of accommodation they received in England.)

50.4 Did the claimant believe it [tended] to show that;

50.4.1 a criminal offence had been, was being or was likely to be committed;
50.4.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;
50.3.3 the health and safety of any individual had been, was likely to be endangered;
50.5 Was that belief reasonable?

51. If the claimant made qualifying disclosures;
51.1 were the disclosures made to Lesley Chizuna made to a person within the meaning of s43C-F ERA 1996;
51.2 were the disclosures made to Jenipher Baber and Anthony Choto made in circumstances compliant with s43G;

52. Was the making of any proven protected disclosure the principal reason for the claimant's dismissal.

...

54. **Breach of Contract**

54.1 Did the respondent charge the sums as claimed?
54.2 If so, were these charges properly incurred pursuant to a written or oral agreement between the parties?
54.3 If not, is the respondent in breach of contract?
54.4 If so, how much should the claimant be awarded in damages?"

18 What was not pressed at that time was a claim for notice pay. On 24 August 2024, during closing submissions, EJ Hyams pointed out that the justification of the summary dismissal for the claimant (i.e. whether or not she was in fundamental breach or repudiation of her contract of employment) was a relevant issue for the tribunal, given that it would be a factor of which the tribunal would need to take account if it had to decide whether Mrs Chapel-Nkomo's decision to dismiss the claimant was done to any material extent because the claimant had made one or more protected disclosures or satisfied the conditions in sections 44(1)(c) and 100(1)(c) of the ERA 1996. It was possible that that question would not arise, because it was possible that the tribunal would not find in the claimant's favour in the latter regard, but at the time of submissions the tribunal had of course not come to a view on those issues.

19 EJ Hyams therefore pointed out that it was possible that the tribunal would in the course of determining the existing claims need to come to a view on the issue of whether there was justification for the claimant's summary dismissal, and if the tribunal concluded that there was not such justification then the respondent would have been determined to have dismissed the claimant wrongfully. After discussion with Mr Magara and Mr Ohringer, it was clear that the claim was worth

only a week's pay (which, by our calculations, was £25,000/365 x 7, i.e. £479.45), as that was the claimant's contractual entitlement and she had no right to anything more under section 86 of the ERA 1996. EJ Hyams then left it to parties to consider what, if anything, they wished to do about the situation. After a break, Mr Ohringer submitted that, reading the claim form as a whole, there was already a claim for notice pay before the tribunal which had been overlooked when the list of issues was agreed. Alternatively, he sought permission to amend the claim form by the addition of a claim for such pay. Mr Magara, on behalf of the respondent, opposed the application. He said that the claimant should be required if she wanted notice pay to make a claim to the county court. EJ Hyams pointed out the possibility of the application there of the "rule" in *Henderson v Henderson* (1843) 3 Hare 100. Mr Ohringer said that that rule was now applied more flexibly than it used to be, but it appeared to us on reviewing the case law to which reference was made in PI[1030]-[1043.2] of *Harvey on Industrial Relations and Employment Law* that it would probably preclude a claim in the county court made after these proceedings had been concluded.

20 Mr Magara accepted that all of the evidence which could conceivably be adduced in relation to a claim for unpaid notice pay was already before us. As EJ Hyams pointed out to him, the approach taken by the Court of Appeal in *Abercrombie v Aga Rangemaster Ltd* [2014] ICR 209 and the decision of His Honour Judge ("HHJ") James Tayler sitting in the Employment Appeal Tribunal ("EAT") in *Vaughan v Modality Partnership* [2021] ICR 535, showed that the main issue was prejudice to the parties by the grant or as the case may be the refusal of permission to amend, and that if there was no more than the addition of a new head of claim which required for its determination the consideration of no additional evidence, and no additional evidence could have been adduced, then that suggested that the application to amend was a strong one. EJ Hyams said that we would decide whether to permit the claimant to amend her claim when deliberating on the rest of the issues, and that we would give our decision and our reasons for it on the application to amend in the reserved judgment which, by that time, it was clear was required. We then heard submissions on the question whether, if we permitted the amendment, the claim for notice pay was well-founded. We return to that claim below.

21 When considering whether to give the claimant permission to pursue a claim for unpaid notice pay (assuming that such permission was required), we took into account what Underhill LJ said in paragraphs 42-52 of his judgment in *Abercrombie*. In fact, that was in effect the judgment of the Court of Appeal, as the other two judges (Kitchin LJ and Sir Terence Etherington C) agreed with it.

22 Having considered all of the circumstances and the factors to which we refer in the preceding four paragraphs above, we concluded that the claimant should be permitted to advance a claim for unpaid notice pay, either on the basis that it was already before us, as submitted by Mr Ohringer, or on the basis that it required

an amendment but that it was appropriate to give the claimant permission to amend her claim because

22.1 there was no need for any further evidence to be adduced, so that there was here "real" prejudice of the sort referred to by HHJ Tayler in paragraph 21 of his judgment in *Vaughan v Modality Partnership* as far as the respondent was concerned only because of the need for the respondent to, as stated in paragraph 24.2 of that judgment, "face a cause of action that would have been dismissed as out of time had it been brought as a new claim",

22.2 not permitting the claimant to claim the unpaid notice pay was likely to result in her losing the right to claim such pay, but even if it did not have that effect, if our findings of fact about the circumstances in which the claimant was dismissed were such that we had in effect found in her favour on the substance of the unpaid wages claim then she would need to make a separate claim to the county court, and

22.3 applying the overriding objective in rule 2 of the Employment Tribunals Rules of Procedure 2013, it was just to give permission to amend the claim.

The evidence before us

23 We initially had before us the hearing bundle, which had 620 pages plus an index, and witness statements in the names of (1) the claimant, Ms Baber, Mrs Chapel-Nkomo, all of whom gave oral evidence to us, and (2) two people who did not in the event give evidence. The latter were Ms Dorothy Botha, who was intended to give evidence on behalf of the claimant, and Mr Lesley Chizunza, who was intended to give evidence on behalf of the respondent.

24 Mr Margara submitted initially that we should refuse to hear the evidence of Ms Botha because it was capable of being relevant only if it could properly be regarded as being similar fact evidence of the sort discussed in *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534. Having read the witness statement of Ms Botha, we concluded that we should hear her oral evidence and then consider submissions about its relevance, but on Thursday 22 August 2024, Mr Ohringer told us that Ms Botha's travel arrangements had gone awry and that she was not being called to give evidence after all.

25 The content of Mr Chizunza's witness statement was directly relevant, but (1) he was no longer in the respondent's employment, and (2) he had informed the respondent the week before the hearing of 19-23 August 2024 that he was not going to be able to attend the hearing because (1) he was abroad in connection with the death of his mother and (2) he was not in a fit state to give evidence because he was in mourning. On 19 August 2024, Mr Magara applied for the

postponement of the hearing as a result, but after discussion with him and Mr Ohringer, we decided with their agreement that we would start the hearing and that after all of the other evidence had been heard, the respondent would consider whether it wished to apply for the adjournment of the hearing. If the respondent did so apply, then, we indicated, we would be likely to state a date no sooner than two months later for the resumption of the hearing and (1) issue a witness summons for Mr Chizunza's attendance at it and then (2) resume the hearing on that subsequent date whether or not he attended. After the evidence of Mrs Chapel-Nkomo had ended, which was at lunchtime on Thursday 22 August 2024, Mr Magara told us that the respondent was not applying for the adjournment of the hearing and that the respondent was not calling Mr Chizunza to give oral evidence.

26 Both parties disclosed further relevant documents and put copies of them before us during the hearing before us. We refer to those documents in the course of setting out, or as the case may be describing, the evidence before us in the following section of these reasons. Unusually, we have in the first part of the next section below stated the evidence before us and only subsequently stated our findings of material fact. That is because of the stark conflicts of evidence on some material parts of the factual background. We acknowledge, however, that some material facts were either expressly agreed or the subject of assertions to the like effect from both parties, and therefore in effect agreed.

The evidence before us about the manner in which the claimant came to be employed by the respondent

What was in the claimant's witness statement about that manner

27 The claimant's witness statement contained the following passage.

> "*Respondents Adverts on Social Media*
>
> 2. In or around April 2021, I saw an advertisement broadcast on Facebook by Ms Olinda Chapel-Nkomo who is the director of the respondent. In the advertisement Ms Chapel-Nkomo explained that the respondent was a business providing care assistance based in the UK. Ms Chapel-Nkomo explained that she was recruiting care workers to work in the UK and that care workers could expect to receive up to £2,500 a month and would be provided with accommodation for a month until they received their first salary and so could then find their own accommodation.
>
> 3. It seemed like a good offer of employment. At that time, I was employed as a Nurse aide, working [in, we interject, in Zimbabwe] in a laboratory processing Covid PCR tests. I was earning around 250

US dollars per month on which to support myself and my 3 children, so I thought that working for the Respondent was a real opportunity for me to earn a good living.

4. I did not know a great deal about the Respondent's Director, Ms Olinda Chapel-Nkomo at that time. But there was a lot of publicity around her and the Respondent, because they were even offering to train people who had never working in healthcare to be able to take up job opportunities in the UK with the Respondent. All that was needed was to register interest on the Respondent's website.

5. I did not have proper access to the internet as I could not afford to have it at home. I contacted my sister Jenipher who was based in the UK and told her that I was interested in taking a role with the respondent. Jenipher and I discussed my coming to the UK and Jenipher thought that it was a good opportunity especially as I am a qualified Care Worker, the qualifications I held before coming to the UK are at pages 78 to 80 of the bundle.

6. There was a fee of 102 dollars to register on the Respondent's website. I wasn't able to pay this fee, but Jenipher agreed to pay the 102 dollars. I thought that once I was employed by the Respondent, I would easily be able to re pay Jenipher.

7. Once the fee was paid, I uploaded copies of my qualifications and healthcare certificates to the Respondents website.

8. Some months later I saw that Ms Chapel Nkomo was again on Facebook urging people to apply for jobs as she was able to offer certificates of sponsorship to work for her in the UK.

9. I mentioned to Jenipher that Ms Chapel-Nkomo was still advertising but I had not been contacted yet. Again, because of my difficulty accessing the internet Jenipher agreed to contact her.

10. After Jenipher had spoken to Ms Chapel-Nkomo she told me that there was work for me, but there were fees of £2219 that needed to be paid before I could apply for my visa and come to the UK. I did not have access to this sum of money but my sister, Jenipher and my brother Anthony agreed to pay it on my behalf so that I could take up employment. Jenipher contacted Ms Chapel-Nkomo regarding the payments and was then told that I needed to pay an additional £400 to cover some online training courses. Again, my sister and brother agreed to pay this sum and so the total of £2,619 was paid to Ms Chapel-Nkomo. I intended to repay the fees once I was working for the Respondent and receiving a regular salary.

11. I did the online training as requested and was provided with the certificates at pages 81 – 115 and 170 -172 of the bundle.

12. Because my sister and brother were able to help with the fees required by the Respondent, I was able to use the little that I had to cover visa fees and the costs of TB and language tests required before I could travel to the UK.

13. In the adverts for employment in the UK the Respondent referred to the first month of accommodation being provided. I understand that when Ms Chapel Nkomo spoke to my sister she mentioned that part of the fee charged was for accommodation, but because we never received anything in writing it is not clear to me exactly what the charges were for.

14. My intention was to stay in the accommodation provided by the Respondent and then rent somewhere once I had my first salary, where I could live with my 3 children. Once the fees had been paid to the Respondent, I sold personal items so that I could cover the costs of my children's flights and passports. I also made arrangements for them to stay with relatives until they could join me.

Travelling to the UK

15. I travelled to the UK on 29 April and stayed with my sister in Kettering for a couple of days before she drove me to Tamworth where the Respondent's office was."

What Ms Baber said about the manner in which the claimant came to be employed by the respondent and related evidence

28 Ms Baber's witness statement contained the following passage which was material to the manner in which the claimant became an employee of the respondent.

"*Fees to take up employment*

5. I contacted Ms Chapel Nkomo in or around April 2021, via the Facebook Messenger function. I explained that I was getting in contact on behalf of my sister and wanted to know more about the requirements to take up employment. Ms Chapel Nkomo responded, asking if I was able to support my sister once in the UK. I assumed that this meant with initial housing etc so I said yes. I then got a phone call from Ms Chapel Nkomo. She explained that there was a fee of

£2219, she told me that this was a fee charged by the Home Office as she did not charge any administrative fees and would cover 'the rest'. I assumed that this meant that there were other fees involved in employing workers from abroad and these fees were being paid by the Respondent. The Facebook page for the Respondent listed what the fees covered (page 599). I made the payment on 17 January 2022. [We interject to say on the basis of what was said in paragraph 7 of this witness statement, which we set out below, and the undated documents at pages 277-279 to which reference is made in that paragraph, that that date of 17 January 2022 was probably an error and the date was probably 7 January 2022.] It was only much later did I discover that the advert did not reflect the reality of the situation.

6. Ms Chapel Nkomo explained that Moreblessing [i.e. the claimant] would need to upload her Zimbabwean qualifications and training documents to the Respondent's website and provided the details of the account in which she wanted the administration fee to be paid.

Additional fee

7. On 7 January 2022 I received another message from Ms Chapel Nkomo explaining that Moreblessing needed to pay an additional £400 to undertake some online training. I spoke to my brother Anthony and he agreed to contribute to the costs. In total, I sent the sum of £2,619.00 to an account in the name of Ms Chapel Nkomo. I was willing to do this in order to help my sister take up what we thought was a good offer of employment. The messages regarding the payments made to the Respondent in order to enable my sister to take up employment are at pages 277-279 of the bundle.

Visa application

8. Once the Respondent provided my sister's Certificate of Sponsorship, she was able to apply for a visa. I can recall having a discussion with Ms Chapel Nkomo about the visa application as there was a question about whether the employer would be supporting the worker. Ms Chapel Nkomo referred to the fact that she would be providing the first month's accommodation and that Moreblessing should tick yes to this question. A copy of Moreblessing's application is at pages 229 – 240 of the bundle, and the question we were discussing is at page 237 of the bundle

9. I can recall we discussed the fact that Moreblessing's children would be joining her in the UK. I remember that Ms Chapel Nkomo explained that she would not be able to include her children on the visa

application being made at that time, but once in the UK and working she would be able to apply for their visas."

29 The relevant question at page 237 was "Has your sponsor agreed to certify your maintenance on your certificate of sponsorship?", and the answer to that question, given by the claimant was "Yes". The documents at pages 277-279 were screenshots of messages sent on mobile telephones. The messages related to the payment of money and the "International mandatory training".

Mrs Chapel-Nkomo's witness statement evidence and related evidence about the manner in which the claimant came to be an employee of the respondent

30 Mrs Chapel-Nkomo's witness statement contained the following relevant passage.

"**Prior to the Claimant's employment with the Respondent**

4. I rarely had direct contact with the Claimant. I recall some direct queries into her Certificate of Sponsorship prior to her employment, and also another time during her tenure in order to highlight her need to complete her training. The last notable time being on 31 May 2022. For the record, I rarely have such one-to-one direct contact with the Respondent's staff directly unless there is a requirement to do so (for example, if a grievance or workplace policy requires it). Communication from me a typically via a group WhatsApp chat or via email where general updates about the company, training or relevant notifications are broadcast).

5. The Claimant applied directly through the Respondent's website. It was her sister, Jenipher Baber who got in touch with me directly asking me to help progress the application. She also paid associated fees for the application and for online training.

6. The first time I spoke to the Claimant directly was around mid-May 2022. ...

8. Her Certificate of Sponsorship was processed without issue and her Home Office visa was approved accordingly. As far as I am aware, there would not be a lawful way for the Claimant to work for the Respondent in this country without Home Office approval.

...

Claimant's accommodation

10. Her accommodation (100 Commercial Street, Stoke on Trent) was supplied to her for free as part of the Certificate of Sponsorship. There was no tenancy agreement in place and we did not collect any rent from her nor did we assume any responsibilities as a Landlord."

31 On 21 August 2024, the claimant disclosed and sent by the claimant's solicitors to the respondent and the tribunal an email sequence and a separate email. The sequence of emails was as follows, taking them chronologically.

31.1 The first email was sent at 06:14 on Friday 7 January 2022 by Ms Chapel-Nkomo to the claimant, in the follwing terms.

> "Hi
>
> Please find attached your CoS. [That was the Certificate of Sponsorship for the claimant]
>
> Diana please issue offer of employment and International training.
>
> Kind Regards,
>
> Olinda Chapel-Nkomo| CEO"

31.2 On 11 January 2022, at 09:13, the claimant replied, in the following terms, copying the email to "diana@gainhealthcare.co.uk" and to Ms Baber.

> 'Dear Olinda
>
> Thank you so much for the Certificate of Sponsorship. I have noticed however that where it's written "Tick to certify maintenance of migrant" there is "N" for No. I was wondering if this is the correct position, because that will mean that I have to provide proof of funding for my maintenance in the first month.
>
> Please advise.
>
> Kind Regards
> Moreblessing Chikoto'

31.3 Mrs Chapel-Nkomo replied at 11:48 on the same day, copying the email to all of the other addressees in question, including "diana@gainhealthcare.co.uk":

> "Diana

Can you fix this."

32 In cross-examination, Mrs Chapel-Nkomo said that she "could not recall" what she meant by saying "Can you fix this" to Diana, who was at the time employed by the respondent. When pressed on it, she said that did not know what she meant by saying "Can you fix this". When it was suggested to her that she was asking Diana to change what was said on the certificate of sponsorship, she said that that could not have been meant as there was at the respondent only "one level one user", and that was her.

33 The separate, single, email which the claimant's solicitors sent to the respondent and the tribunal on 21 August 2024 was an email from the claimant to "Diana and Olinda" which was timed at 10:04am on 1 February 2022. Its text was as follows.

> "Dear Diana and Olinda
>
> I am currently doing my Visa Application, and I would like to enquire about the following.
>
> 1. The arrival address that I should use for purposes of Visa application if any
> 2. The arrangement for BRP Collection, is it delivered to your offices or I choose the nearest post office?
> 3. My CoS still has "N" on sponsor certifying maintenance, will this not affect my application?
> 4. Any other information that I may need to know before submitting my application?.
>
> Thank you very much for your usual support.
>
> Kind Regards
> Moreblessing"

34 No reply to that email was put before us.

35 The certificate of sponsorship for the claimant was at pages 536-537. At page 537, there was this line:

> "Tick to certify maintenance for migrant (and dependants, if applicable): N"

36 On 22 August 2024, the respondent disclosed to us emails from Ms Ariola Thomas dated 9 June and 19 October 2022 and a certificate of sponsorship for her (Ms Thomas) dated 14 July 2022 in which, on the second page, there was this line.

"Tick to certify maintenance for migrant (and dependants, if applicable): Y"

37 The email from Ms Thomas dated 9 June 2022 was headed "Issues with company accommodation at Stoke on Trent", and its text was this.

"Good day Olinda,

Please find below details of what transpired when i stayed over at the company accommodation in Stoke on Trent as requested.

I was posted to work at Stoke on Trent from the 2nd till 5th of May 2022 and i immediately called Lesly informing him that it wil be impossible to go there daily due to transportation challenges, he suggested there a company accommodation and i am to pay 5 pounds per night as that was the only available option.

I slept alone in one of the rooms at the company accommodation on the 2nd of may 2022 and after the day's work on 3rd of May i got to the company accommodation to find a new staff who just arrived and already had her belongings in the room, we exchanged pleasantries and when it was time to sleep we both slept on the available bed. On the 4th of may 2022 i retired to the company's accommodation after the day's job and we again slept on the same bed.

I got a call on the 5th of May 2022 from Olinda asking why i stayed at the company's accommodation as this was strictly meant for new staffs who just arrived the country and other staffs who reside in the United Kingdom are not expected to live there, i immediately informed her Lesly suggested via a text message that i stay at the accommodation due to transportation challenges moving To and fro from my location.

I later got a call from Lesly informing me that Olinda has instructed that henceforth i should not be posted to Stoke on Trent again due to various challenges as discussed.

Thank you."

38 The email of 19 October 2022 was headed "Letter of resignation" and its text was this.

"Dear Olinda,

Please accept this email as notice of my resignation from the position of Senior Healthcare Assistant at Gain Healthcare Ltd effective immediately. I

> would like to thank you for the job opportunity. I learned a great deal working here and I felt the emotional and work support of all my colleagues.
>
> Unfortunately, I have decided to leave because the company has failed to help resolve the issues associated with the assigned certificate of sponsorship even after several escalations.
>
> Thank you for giving me the opportunity to work with Gain Healthcare Ltd and I wish you and the team the best of luck. I look forward to staying in touch and continuing a professional relationship in the future.
>
> Sincerely,
>
> Abiola Thomas".

39 It was put to Ms Baber in cross-examination that Mrs Chapel-Nkomo "never told [the claimant] to tick 'Yes'" in answer to the question on page 237 which we have set out in paragraph 29 above. Ms Baber stood by what she said in the third sentence of paragraph 8 of her witness statement (which we have set out in paragraph 28 above) about that. It was not put to Ms Baber that it was not true that (as Ms Baber said in the same sentence of her witness statement) Mrs Chapel-Nkomo had said that "she would be providing the first month's accommodation". We assumed that that meant that those words were agreed to be correct, but for the avoidance of doubt and in the light of Mrs Chapel-Nkomo's oral evidence, EJ Hyams asked Mrs Chapel-Nkomo about that at the end of her cross-examination. Mrs Chapel-Nkomo's response that those words were "not correct".

40 When it was put to Mrs Chapel-Nkomo in cross-examination that she (i.e. the respondent) was "responsible for electricity" at the accommodation, Mrs Chapel-Nkomo agreed, but said that while she had told the occupants to let her know via WhatsApp when the electricity was running out, "they never did that".

Mrs Chapel-Nkomo's oral evidence about knowledge of the involvement of the police and them raising the issue of modern day slavery

41 Without prompting, during cross-examination on 22 August 2024, Mrs Chapel-Nkomo said this (as noted by EJ Hyams and tidied up for present purposes).

> "Up to today, the police, modern day slavery, social services, have not contacted us and we knew about them only when we saw that in the bundle."

42 That was said in the following sequence (as so noted and tidied up).

"Q: It is right is it not that when speaking to the claimant on the phone on 31 May you were very worried about what was happening?
A: I was worried about her health, yes.

Q: And she was telling you that it was the conditions in the property which made her ill?
A: That is incorrect.

Q: And you knew that the paramedics had called the police?
A: I was not aware of that.

Can I add to that?

Q: Okay.

A: Up to today, the police, modern day slavery, social services, have not contacted us and we knew about them only when we saw that in the bundle."

Our conclusions about the material legal obligations of the respondent in relation to the claimant

43 We found the evidence of Mrs Chapel-Nkomo on the manner in which the claimant came to be employed by the respondent to be unreliable in some respects, if only because the answer which we set out at the end of the preceding paragraph above was directly contrary to what was in the ET3 form as described by us in paragraphs 8 and 9 above. It seemed to us from what the respondent had said in the parts of the ET3 to which we refer in those paragraphs and paragraph 10 of Mrs Chapel-Nkomo's witness statement, which we have set out in paragraph 30 above, that the claimant was entitled as a matter of contract to free accommodation for a month when she started her employment with the respondent. We doubted that we could lawfully have come to any other conclusion, but in any event we arrived at that conclusion.

44 In addition, what we say in paragraphs 41 and 42 above showed in our judgment that Mrs Chapel-Nkomo's recollection was unreliable. That was if nothing else because of the content of the ET3 which we have set out in paragraph 10 above. In our view, if only for that reason, we concluded that the contemporaneous documents were likely to be the best evidence of what Mrs Chapel-Nkomo said and did at material times. Given

44.1 the emails set out in paragraph 31 above,

44.2 what we say in paragraph 32 above, and

44.3 the words of Ms Thomas in her email set out in paragraph 37 above "the company's accommodation ... was strictly meant for new staffs who just arrived the country",

we concluded that Mrs Chapel-Nkomo realised that newcomers from abroad were unlikely to have much money and that the respondent would need to ensure that the house was habitable during the newcomers' first month of employment. Keeping a house habitable in this context meant, in our judgment, ensuring that it had a continuous (or at least nearly continuous) supply of electricity.

45 That conclusion was borne out by the fact that Mrs Chapel-Nkomo herself accepted (see paragraph 40 above) that she was responsible for the electricity at the house. It was also borne out by the fact that she herself expected to keep the pre-paid electricity meter topped up, as was shown by what happened during the month of the claimant's employment, to which we now turn.

What happened during the claimant's employment

The start of the employment and the respondent's accommodation in which the claimant stayed during the employment

46 The claimant described what happened when she came to the United Kingdom ("UK") and then started work for the respondent in paragraphs 15-23 of her witness statement. So far as material, she was taken to the respondent's Tamworth office by her sister, Ms Baber early in May 2022, and when she arrived she was introduced to (1) Mr Chizunza, one of the respondent's care co-ordinators, and (2) two other employees. Mr Chizunza asked her whether she could stay with her sister and commute to work, but the distance was too far. Mr Chizunza then said that there was no bed linen at the accommodation which the respondent provided for the employees who had just arrived in the UK. The claimant and Ms Baber therefore went to buy some, together with toiletries and what the claimant referred to as "other provisions". Ms Baber then dropped the claimant back off at the Tamworth office and went home.

47 In paragraph 18 of her witness statement, the claimant said that she "was told that the office dealt with any concerns so under no circumstances should [she] contact Ms Chapel-Nkomo". That was not challenged in cross-examination, nor was it contradicted by anything said in Mr Chizunza's witness statement, but in any event, we accepted it.

48 Mr Chizunza drove the claimant to the place where she was going to stay for the first month of her employment. The claimant's witness statement contained the following material passage about the accommodation.

"*Accommodation*

20. Mr Chizunza took me into the property and then pointed to where my bedroom was. I remember I was really shocked at the state of the property. The bedroom I had been allocated had a double bed and two chairs but there was no other furniture in the room and there were no curtains, meaning that anybody on the street could see into the room. There was a strong smell of damp, and the paint was peeling. The living room had a sofa and chairs, but both were damp and there was a really strong smell. The kitchen had a microwave and a fridge freezer but there was a rusty, broken cooker that was not plugged in, and I was later told that it did not work. There was also lots of exposed pipework and the window in the kitchen did not lock, it was broken with a large crack in it. There were packets of food on the windowsill and junk strewn all over the garden.

21. The bathroom had no light and there was no hot, running water. I can remember I was really upset. I had been expecting that the accommodation would be of a good standard. I rang Jenipher and told her that the place was in a real state. Jenipher seemed really surprised and asked if I could send some pictures. I took some pictures of the property and sent them to Jenipher and my brother, Anthony, as we have a family WhatsApp group together. The I [sic] was not sure what to do as I felt the place was in such a state that I did not want to stay there. I was worried that it would damage my health, particularly as there was such a strong smell of mould. I can remember Anthony and my sister saying that the only option was to speak to the Director the following day. The photographs that I took of the accommodation on the day I moved in are at pages 496-511 of the bundle.

Sharing a bed

22. I went up to my room and began making the bed. At this point a woman came in and introduced herself as Abiola. Abiola explained that this was in fact her bedroom but that she was happy to share it with me. There were two other bedrooms, but these were taken by two male workers, Mr Kudzaishe Mutenerewa (Kudzie) and Mr Snead Takaendesa. The living room was damp and smelly, so I felt that I had no choice but to share the bedroom with Abiola. There was no linen on the mattress and Abiola had been sleeping on it as it was so she was extremely pleased that I at least had bed linen that she could use. I felt really unhappy about having to share a bed with a strange woman I had never met before, but I felt that I had no choice. I can recall that I was about to plug in a small heater and Abiola, looked really worried and asked me not to because we would run out of electricity. I agreed because Abiola looked so worried."

49 That passage in the claimant's witness statement was in almost all respects not challenged. For example, it was not challenged that there were no curtains in place in the bedroom, but when Mrs Chapel-Nkomo was being cross-examined she said that there were curtains in the bedroom which the claimant used. She (Mrs Chapel-Nkomo) said that she had herself bought the curtains and that she was with the respondent's "maintenance guy" when he was painting the property. There was at page 504 a photograph of a wall in the kitchen with paint peeling, showing bare plaster where it had peeled, and with the paint which had peeled off the wall below it, on the carpet.

50 In no witness statement was mention made of a hoover, but if there had been a hoover at the property, then it had plainly not been used to hoover up the flakes of fallen paint shown at page 504. In cross-examination, the claimant said that there was no hoover at the property, and in cross-examination, Mrs Chapel-Nkomo said that there was one there. She said that it had been "bought across the street", and that it was blue and grey.

51 Mrs Chapel-Nkomo said very little in her witness statement about the accommodation. All that she said about the accommodation was in paragraphs 10-13. We have set out paragraph 10 of that witness statement in paragraph 30 above. We accepted that paragraph's text except for the words "nor did we assume any responsibilities as a Landlord" to the extent that they were an assertion of the legal impact of what happened. We accepted that nothing was said or written about those responsibilities.

52 The next three paragraphs of that witness statement were as follows.

> "11. The Claimant and Jenipher has [sic] gone to great lengths to bring the Respondent into disrepute by commenting on the state of the property the Claimant resided in during her tenure with the Respondent. What they negate to highlight is that the responsibility for cleaning the property is for those living within the property. The Respondent does not provide cleaners for its staff's accommodation. The Claimant would have also been responsible for ensuring the electricity in the accommodation was 'topped up'.
>
> 12. The Claimant stated that she had to spend some nights in the same bed as another staff member at the beginning of her tenure. I was informed about this in early May 2023 by another staff member (not the Claimant) a couple of days after the co-sleeping began. Once this was brought to my attention, I immediately telephoned that staff member and told her that her conduct was not appropriate; that she should not be residing at that property, and certainly not sleeping in other staff members' beds.

13. The Claimant never raised any complaints to the Respondent (or me directly) with regard to her accommodation until I first heard about various allegations from Jenipher Baber on 31 May 2022 (discussed below)."

53 In paragraph 24 of her witness statement the claimant said that on the second day of her employment by the respondent, she spoke to Mr Chizunza and "told him that [she] was not happy about the state of the accommodation." She continued:

> "I asked him how we were meant to live like that, when there was no proper heating, no cooker and no running water. I said that I did not think it was right and could we survive and stay well living like that. Lesley told me that he would speak to Ms Chapel-Nkomo and that he was sorry as he had not known what state the property was in."

54 Given that Mr Chizunza had himself taken the claimant to the accommodation, we rather doubted the truth of that statement by Mr Chizunza, and that doubt was reinforced by what the claimant said in the next paragraph (number 25) of her witness statement, which was this.

> "I can remember Snead and Abiola being amused by Lesley's response and explaining that he had also lived in the same property at one point so was well aware that it was in a bad state."

55 Whether or not the property was in a "bad state" was a matter of judgment. We accepted that the photographs at pages 496-511 were taken by the claimant on the first day of her employment and that they showed the state of the accommodation accurately. They were sent to her siblings along with the text shown on page 495 from her to them, and they were responded to by them as shown by their texts on that page, of which there were translations on page 494. The whole of the text on page 494 was as follows.

> "Image 1
>
> 3/5/2022
> Showing a cooker, kitchen sink, kitchen top with several bottles with cleaning liquid, on top and the last picture is a settee.
>
> Good morning 22.40
> Anthony: mmm it looks really bad 22.40
> Tariro: Is this where you live? 22.41
> More [i.e. the claimant, we guessed]: Grass and Junk everywhere in the yard(garden)
> This is scary: 22.41

Yes: 22.41

Image 2

3/5/2022

Anthony: Haaa. You should call Olinda and tell her. 22.42
Tariro: Call the boss in the morning and tell her about the state of the place.
I don't think I can live here. 22.41
Anthony: true 22.43
Tariro: Coming from Zimbabwe does not mean that one is poor. 22.43
More: There is no light in the toilet. 22.44"

56 During cross-examination, Mrs Chapel-Nkomo said (for the first time to us and the claimant) that the accommodation was used by the respondent as a result of "a colleague" permitting the respondent to use the house. That was said in response to a proposition advanced to her for her response by EJ Hyams, which was that by her actions, she was not enabling the continued usage of electricity. When EJ Hyams said that what Mrs Chapel-Nkomo had said about the property being owned by a colleague and occupied as a result of the permission of that colleague was new evidence, in that we had not heard that before, Mrs Chapel-Nkomo said that the electricity meter was in the name of the colleague and that she (Mrs Chapel-Nkomo) had subsequently discovered that the colleague's account with the electricity supplier was in debt, so that "a certain amount would be paid off every time [the meter was topped up, so that for example if] £40 was paid, say, then say £5 was deducted from the debt".

57 We had no experience of that being possible, and we clarified with Mrs Chapel-Nkomo how she expected the meter to be kept topped up so that the supply of electricity did not run out. She said that all car users had a bank debit card for use when refuelling the vehicles which they were using for the respondent's purposes and that those cards could be used to top up the credit on the meter. She said that the cards had all been frozen at one point because of misuse by one employee who took out £300 without authorisation to do so. There was a copy of a WhatsApp exchange about that freezing of the cards at page 519. In the first in the sequence, in the left at the top of the page, Mrs Chapel-Nkomo had written this.

> "I have had to freeze all company bank accounts due to misuse of funds. When you need to top up fuel please let me know and I will unfreeze the cards for that purpose."

58 In the next screen, copied in the middle of the three at the top of page 519, there were two messages from members of staff, one saying that the member of staff was "stuck at the office because the Cannock car has no fuel" and the other

saying: “Morning, I also need fuel for the Stoke car.” There were then the following two questions asked by another member of staff.

> “Are we not crippling the work here?
>
> Is there no better way to hold those who abuse cards accountable?”

59 At the bottom of the page, on the right of the two copied screens, plainly written by Mrs Chapel-Nkomo, there was this text.

> “I do not enjoy having people call or text asking for fuel money or for me to unfreeze the cards.
>
> Also why are waiting until the cat is empty empty to refuel? [sic] Why should fuel be left to being at less than a quarter?
>
> Yesterday morning when I was travelling and you couldn’t get hold of me why didn’t you go ahead and top up even £10 fuel to ensure that you start your calls? This would have been helpful than waiting and running an hour behind.
>
> Why did the last driver leave the car without fuel yet they knew the next driver will require a fuelled car?”

60 We were told during the hearing by Mr Magara after EJ Hyams asked him about how the electricity meter could in practice be topped up otherwise than by Mrs Chapel-Nkomo at a distance, that it was the respondent’s position that the meter had a removable plastic key which had on it a bar code and a number and that it could be taken out of the meter by anyone and taken to for example a local corner shop or a superstore and topped up by paying there for it to be topped up. The claimant did not accept that she could in practice have topped up the meter, but that was because, she said, she did not have access to the company debit card as she did not drive.

61 That was not a complete answer, of course. The claimant at no time accepted that she could herself in practice have topped up the meter. We return to the question of how the meter could have been topped up below, when describing what happened at the end of the claimant’s employment with the respondent.

62 In the meantime, we record here that we accepted the following passage in the claimant’s witness statement.

> “*New Items for the Property*

29. About 2 weeks after I had spoken to Lesley he arrived at the property with an electric hob plate in place of the broken cooker. It was a single plate on which you could put one saucepan. Lesley left the electric plate in the corridor and also said that there were new mattresses and left. Kudzie and I then realised that there were some mattresses in the alleyway next to the house. We were surprised as we had not been told anything about new mattresses or what to do with them. They were single mattresses and so too small for my bed. I ended up propping it up against the window so that I had some privacy from passers-by.

30. These were the only attempt at improvement that was made. Nothing was done about the limited electricity, poor condition and lack of hot, running water. Around this time Snead left the property and moved to new accommodation so there was just me and Kudzaishe living in the property.

...

Obtaining Electricity

33. Electricity to the property was provided by a meter. We would have to contact Lesley when the electricity was low and Lesley would in turn contact Ms Chapel-Nkomo who would add between £10 to £15 of electricity to the meter. A code would then be sent via text message so that we could type it into the meter to activate the top-up.

34. I think it was during the first two weeks of employment that I was shown how to activate the meter once a payment had been made but I was not given any other information about how electricity could be obtained. I can remember that Abiola and Kudzie regularly told me to be careful with the amount of electricity that was being used. They explained that if Ms Chapel-Nkomo became angry she would not top up the electricity and there had been an occasion where they had been in the dark for 3 days without electricity because Ms Chapel-Nkomo had become angry with them. I can remember that during the first 2 weeks we ran low on electricity and Kudzie asked me to contact Lesley because I was new and he thought it was less likely that Ms Chapel-Nkomo would then become angry and refuse to top up the electricity. It was at this point I understood why Abiola had been so worried about me putting on the electric heater.

35. Because we had no hot running water we had to boil a kettle and wash that way. The fridge, microwave and hotplate all required electricity as did the lights so we had to be extremely careful with electricity."

63 We accepted that passage in part because it was consistent with the documentary evidence before us. That evidence included the WhatsApp messages on the right hand side of page 512, which were written on 19 May 2022 and were in the following sequence. The first was from "Kudzie" to, it appeared, the claimant, and was this: "Good day, did you manage to getnhold [sic] of lesley [i.e. Mr Chizunza] on the electricity issue". The next one was from the claimant to Mr Chizunza, which she had forwarded to Kudzie, and was in the following terms.

> "Hie Leslie, we are running out of electricity at 100 commercial, we could not use a cooker fearing that will end up in the dark, but I don't know if the electricity will last for the day. Thanks".

64 Mr Chizunza had replied "Okay i will inform Olinda", i.e. Mrs Chapel-Nkomo, and the claimant had forwarded that response to Kudzie, who had responded "Thats what he alwats [sic] does", with a grinning face emoji.

65 We also accepted the passage in the witness statement of the claimant which we have set out in paragraph 62 above because the WhatsApp messages to which we refer in paragraphs 57-59 above showed in our judgment in themselves that Mrs Chapel-Nkomo was bad-tempered and when angered hit out at those who had angered her without thought for the consequences. She then blamed her staff for the difficulties which she had then caused to them.

Training requirements and what happened in relation to the training of the claimant and her colleagues during May 2022

66 The claimant's witness statement contained the following passage about training.

> "*Meeting about Care Quality Commission*
>
> 41. On 12 May 2022, a meeting was called for all of the workers. Ms Chapel-Nkomo explained that the Care Quality Commission were going to carry out an audit. I remember that she was quite distressed during the meeting and kept saying that she was pleading with us to help her and make sure that she did not lose her licence. One of the issues was that not all of the workers had completed training. I can remember people raised the fact that it was difficult for them to carry out this training when they were working all the time. I remember an issue also came up around the fact that the fuel cards were frozen, and this was also impacting on people's ability to work.
>
> 42. During the meeting Ms Chapel-Nkomo kept saying that there were rules and if these rules were not followed that people's visas would be cancelled and they would have to leave the country. I remember she

made a comment along the lines of "*Abiola and Moreblessing seem to want to change the rules*". This comment was related to the fact that we had complained about the state of our accommodation. I do not think this was a comment around complying with Home Office rules. It was a threat because I had made it clear that I was not happy with the accommodation and the impact on my health.

43. During the meeting one of the issues raised was that there was not time available to attend the training. In response, shifts were withdrawn to force the workers to pay for and attend the training. I was given no shifts on 12,13 & 14 April 2022. [That was plainly an error: the month must have been May 2022.] I had not been paid yet. I had been told that I would not get my first salary until 07 June 2022. My children were due to join me so I could not afford to have days with no shifts. I spoke to my brother Anthony and he lent me £100.00 to cover the cost. It was an online training course, but I did not have proper access to the internet. I would look at the questions on my phone, write an answer and send it to my sister-in-law Hope who would type up and upload the answer for me. It was a lengthy process, but I had no choice as I would not be given shifts otherwise. The certificate I obtained is at pages 172 of the bundle [which, we noted, was dated "14th May 2022"].

44. I don't think anyone objected to having to do training. The difficulty was having to cover the costs ourselves and shifts being taken away until we had done so. The messages at page 518 were sent after someone else had complained that she was being threatening. If Ms Chapel-Nkomo had only been asking people to meet Home Office rules, then no one would have taken what she said as a threat."

67 There were at page 518 copies of three undated WhatsApp message screens. The first was from a "Lee Orlinda", whom the parties agreed was not Mrs Chapel-Nkomo using a different name. It contained the following two messages, which were sent at different times but apparently on the same day.

"Nyasha and Snead can you call me on direct call not WhatsApp"

"Hi all, CQC will be calling you individually to discuss your work in the community. Please represent the company well."

68 The next screen (from "Gain Healthcare Staff") contained this text.

"I was on the phone with one of your colleagues and they raised a point that my messages feel like I am threatening everyone.

I am not making threats I am stating the facts and what the consequences are and you guys need to be aware and understand them.

To work in the care sector you need to be compliant. It's not an Olinda requirement but it's a Legal requirement and if I don't implement this as the Owner of GHC I am breaking the law. I am putting vulnerable people at risk.

11:17

To maintain your visa you are meant to adhere to your contract it's not an Olinda requirement but it's a Home Office requirement. You can't work part time."

69 That read as if it had been written by Mrs Chapel-Nkomo, so EJ Hyams asked her whether she had written it. She said that she could not remember writing it. She said that she was not saying that she did not write it: only that she could not remember writing it.

70 The third and final screen on page 518 was also a print of the Gain Healthcare Staff WhatsApp account. Its text, ignoring the mobile telephone numbers shown, was as follows.

"We have a CQC inspection on Monday.

12:28

This is very serious and I need everyone's online training completed by Sunday.

12:29

[From "Manu"}

Yeah dont worry we will do

12:34

Before Monday

12:34

[To Abraham, Peter and Meyiwa] guys im going to be asking for documents. I understand for some of you is your day off. But I really need you guys on the ball with me on this.

Rest of staff i will also be contacting you for documents. Some have already of [sic] been done".

71 Mrs Chapel-Nkomo agreed that she held a meeting with the respondent's care staff in the middle of May in advance of a forthcoming CQC (i.e. Care Quality Commission) inspection. She accepted that the text set out in paragraph 68 above was reflective of what she said at the meeting. She said that the meeting was held via WhatsApp. The claimant said that it was an audio-only meeting. We did not need to decide which of those recollections was correct, as we saw no material difference between them. As noted by EJ Hyams, and tidied up for present purposes, there was then this exchange between Mr Ohringer and Mrs Chapel-Nkomo.

> "Q: Was it your intention to put pressure on staff to do their training?
> A: I was just reminding them of their obligation to be trained. But some were complacent and difficult.
>
> Q: In that meeting did you say that if people did not complete their training then their visa would be at risk?
> A: Yes; and that would be at a huge cost to company, which had to pay a lot of money to get their certificates of sponsorship. That was for about 20 members of staff so it would be a huge loss to the company. I was very much in a space where I needed to protect them and the company's licence."

72 Mrs Chapel-Nkomo did not recall saying anything to the effect that the claimant and Abiola seemed to want to change the rules. There was no contemporaneous record of that being said. The first time it was claimed that it had been said was in the proposed amended details of the claim, which was headed "Further & Better Particulars of Claim", at pages 600-605, and was dated 12 June 2023. Therefore, the allegation that it was said by Mrs Chapel-Nkomoe was made first in writing over a year after the date when it was claimed to have been said. We saw that at page 597 there was a further WhatsApp screen showing message from "Gain Healthcare Staff". Our attention was not drawn to it by either party during the hearing, but in our view it was a contemporaneous document which helped to illuminate the situation. It appeared to have been captured just after 1am (it had at the top of the screen "01:06") and had the following messages in the following sequence (ignoring the telephone numbers shown).

72.1 First there was a message from Lee Orlinda in the following terms:

> "I am still waiting on @Abiola Thoms, @Manu @Moreblessing to book their training and confirm it's been booked. 20:48"

72.2 There was then a message from Manu in the following words.

> "Olinda i have not enough money to book my training i promised you i wll complete my training within my holiday 20:51"

72.3 The final message was from Lee Orlinda. It was incomplete but such as it was it was as follows.

> "Please can you send me your email address privately for
>
> Abiola
> Grace
> Abraham
> Emmanual
> Peter
> Harrison
> Iphie
> OluwaSola
> Moreblessing"

73 That sequence was consistent with any comment made to the claimant and Abiola Thomas having been about their attitude towards the training requirements of the respondent and their visas. Certainly, it would have been odd if they had been singled out for a comment about wanting to change the rules because of their reaction to being forced to sleep in the same (double) bed at 100 Commercial Street, a week or so before the meeting at which that comment was claimed to have been said. It would have made no sense to make such a comment. Nor would it have made any sense for Mrs Chapel-Nkomo to make a critical comment directed at the claimant and Ms Thomas of the sort alleged in paragraph 42 of the claimant's witness statement (which we have set out in paragraph 66 above) because the claimant had complained about the state of the accommodation. Having said that, the documents to which we refer in paragraphs 57-59 above showed that Mrs Chapel-Nkomo was capable of doing things which, objectively, made no sense and therefore were capable of being classified as irrational.

74 The meeting about the training which was described in paragraph 41 of the witness statement of the claimant (which we have also set out in paragraph 66 above) was said during the hearing before us to have taken place at about midnight. Mrs Chapel-Nkomo said that she took medication which (speaking metaphorically) knocked her out and that she would be asleep by about 10pm every night as a result. We could not see anything relevant in the timing of the meeting, not least because Mrs Chapel-Nkomo accepted (as we record in paragraph 71 above) that she had said at it words to the effect of the WhatsApp message on the left hand side of page 518.

75 In the circumstances, we concluded (on a balance of probabilities and despite Mrs Chapel-Nkomo's capacity for irrationality) that a comment was made by Mrs Chapel-Nkomo which was directed towards the claimant and Ms Thomas but that

(1) it related to training requirements and (2) it had nothing to do with, in the sense that it was in no way influenced by, the fact that the claimant had complained about her accommodation. However, the content of paragraph 43 of the claimant's witness statement (which is set out in paragraph 66 above) was not challenged, and it was in fact put to the claimant in cross-examination as support for the proposition that she was given time to undertake the necessary training. That suggested that there was no objective justification for singling the claimant out in regard to her completion of any necessary training.

The quality of the claimant's work

76 There was no suggestion in the documentary evidence before us of concerns about the quality of the claimant's work, and there was no such suggestion in the witness statement evidence adduced by the respondent. When Mrs Chapel-Nkomo was giving oral evidence, EJ Hyams said that he could see nothing in the evidence before us which showed that there were any concerns on the part of the respondent about the standards of the claimant's work and asked Mrs Chapel-Nkomo whether it was right that the respondent had no such concerns. In reply, Mrs Chapel-Nkomo said, simply: "Correct".

<u>What happened at the end of the claimant's employment</u>

The relevant evidence before us

77 On 30 May 2022, the claimant was dropped off at 100 Commercial Street by Snead Takaendesa at about 10pm. She found that there was no electricity at the property because the meter had run out of money. As described by her in her witness statement, what happened next was as follows (ignoring the heading between paragraphs 50 and 51, which amounted to an assertion and was irrelevant).

> '47. ... I came out and I told Snead that there was no electricity, and I was not sure what to do. Snead said that all I could do was contact Lesley, the Care Co-ordinator and Snead left. My mobile phone had no battery left as I had been out all day.
>
> 48. I walked to the local corner shop and explained that I had very little battery and needed to make an urgent phone call. The shop assistant was kind and agreed to plug in my phone so that I had a little bit of battery and could make some calls. However, he said that I couldn't stay in the shop and wait as he would be told off. So, I waited outside. When there was enough charge to make a call, I telephoned Lesley and I explained that there was no electricity and I needed him to contact Ms Chapel-Nkomo. Lesley told me there was nothing that he

could do and suggested that I contacted Ms Chapel-Nkomo directly. I started telephoning Ms Chapel-Nkomo but there was no response.

49. I have seen the statement from Snead at page 270 of the bundle it is correct that we arrived home around 10pm but it is not correct that he was there when I contacted Lesley and Ms Chapel-Nkomo. This all happened after he had left.

50. I have also seen the statement of Lesley Chizunza at page 271 of the bundle. It is not true that we had a discussion about using a fuel card to get electricity. I did not have a fuel card and Lesley would have been aware of this. I was not with Snead at the time so I could not ask him for his fuel card.

51. I then phoned my sister, Jenipher. I told her that there was no electricity, the house was freezing and that I could not even eat as I could not turn on the hotplate or microwave and the food I had was frozen. Jenipher and I did not really know what to do. By this time, it was after 11pm so there was no way she could come to me from Kettering or that I could get to her. We agreed that I would go home and see what could be done in the morning. It didn't occur to me at the time to see if there was a way for Jenipher to pay for some electricity for me. I wasn't really clear how it all worked, only that once something had been done by Ms Chapel-Nkomo then a code would come through.

52. I went back home. I had £10.00 in the bottom of my suitcase, but in the dark I could not find it. By this time, it was really late and I was worried about going out in the dark again. I took my blood pressure medication and went to bed. The house had been without any heating and was extremely cold. I am aware that the Respondent has criticised me for taking my medication without eating, but it would have been worse for me not to take it, given the risk of stroke or a heart attack.

53. When I woke up in the morning I was shivering and having palpitations. Snead was due to collect me for work that morning so I texted Snead to say that I had to take medication on an empty stomach and was not feeling that well so I could not work.

54. Snead came to the property around 6.30am. I think he had not been able to speak to Lesley about a replacement and so came to collect me anyway.

Calling an Ambulance

55. When Snead saw the state I was in he was worried. He contacted Lesley and then telephoned an ambulance for me. Snead then left to collect Iphe, another worker to carry out my jobs that day with him. Whilst I was waiting for the ambulance to arrive, I finally got the message from Ms Chapel-Nkomo providing the details to enable me to top up the electricity. When the ambulance crew arrived, they were really concerned at the state of the property. I remember they walked through the house looking at it and asking me why it was so cold. I explained the situation and the fact that I had spent the night with no electricity and no food because I had not received any response to my calls to Ms Chapel-Nkomo.

Threat to terminate employment

57. Whilst the ambulance crew were there Ms Chapel-Nkomo telephoned and I began speaking to her. I think the ambulance crew could see that I was upset because they gestured to me to put the phone on loud speaker so that they could hear what was being said. I remember she was shouting “Why haven’t you gone to work?” I started explaining that I wasn’t well and she began shouting “You are careless. I can’t be baby-sitting you. I am going to terminate your employment”. It was really difficult to speak, she kept shouting over me and getting louder and louder. Eventually Ms Chapel-Nkomo hung up the phone on me. I was really upset after this call. The ambulance crew were concerned and told me that they were contacting the Police and Social Services.

58. I understand that Lesley Chizunza says that he was on the phone to the ambulance crew during the time that they were with me. I don’t think this is true. I don’t recall the ambulance crew speaking to anyone by phone other than the Police and Social Services.

The Police

59. When the Police arrived they asked me if there was anywhere I could go and they drove me to my sister’s place in Kettering. It was the Police who were concerned that my treatment amounted to modern slavery and referred me to the Single Competent Authority (see pages 181 -184). The Respondent has suggested that I raised slavery and tried to make a false complaint (see page 515 of the bundle) this is not true.

...

Social Services

61. Social Services were also called and a Social Worker looked around the property and asked me some questions. Later on, Social Services were involved in my referral for identification as a victim of trafficking and linked me to the Salvation Army.

Ms Chapel Nokomo's Facebook Livestream

62. As I was being driven to Kettering, I received a phone call from Kudzaishe. Kudzie asked me what was going on. I started explaining that I was unwell and that an ambulance had come and I was now on my way to my sister's house. Kudzie told me that Ms Chapel-Nkomo was doing a livestream from the property.

63. I was shocked when I saw the livestream. It looked as if Ms Chapel-Nkomo had strewn even more rubbish around the property. She was saying that I was filthy and that the mess in the property was due to me. I have found it really hard to look at the messages. I am a private person, so I was really upset to see strangers talking about me and my sister.
64. When my sister came home from work I told her about the videos and she was really upset. Particularly as we had both been mentioned by name. Jenipher did a live stream responding to some of the things that Ms Chapel-Nkomo had said. I did not ask her to do this, but I know she was so appalled about the way I had been treated and what Ms Chapel Nkomo was saying, that she wanted to make sure others didn't go through the same.

...

Termination Letter

66. The following day I discovered that a termination letter had been posted on Facebook. A copy of the letter is at pages 261 to 263 of the bundle. It was only after the post that a copy was then sent to me by email. The previous day Ms Chapel-Nkomo had made comments to me and my sister suggesting that she had terminated my employment, but I had not received anything in writing until I saw the letter on Facebook. I was really upset that it had been posted so publicly and people were making comments underneath the post.

...

69. It is said that I shared confidential information with relatives. This is not true. I never provided any information about the clients or the

> workings of the Respondent's business. The only information I shared were photographs showing that the property was in a bad state and my concerns about the impact of the housing on me and the other workers. This demonstrates to me that Ms Chapel-Nkomo's real cause for anger was that I had complained about the state of the property and the impact on my health."

78 At page 270, to which the claimant referred in paragraph 49 of that passage, there was an email from Mr Takaendesa, sent at 11:59 on 1 June 2022, in which he said this.

> 'On monday 30 May 2022 I picked up Moreblessing at 100 Commercial street, Stoke on Trent at 0630hrs to start our duty for the day. We worked fine throughout the day. We finished our duty and got back to 100 Commercial street just before 2200hrs.
>
> While Moreblessing went to open her door I got out of the car and walked to a pharmacy nearby. I got back to the car and standing by the house door Moreblessing told me there was no electricity in the house and that she had called Lesley and Olinda to notify them of the situation.
>
> I suggested to More blessing that she goes to the next street with shops and find something to eat.
> I then proceeded to drive to my place.
> When I woke up the next morning Tuesday I saw a message on my phone send by Moreblessing at 0548hrs which read "cant make it for work today ndikuita dzungu, I took medication on an empty stomach".
>
> I called Lesley to arrange for someone to replace Moreblessing. He initially did not answer the phone. I drove to 100 Commercial street and knocked on the door. Moreblessing took time to come to the door and struggled to open it. She said she was feeling cold. She was not looking well. Lesley called back and I updated him on the matter. Lesley said he was calling an ambulance to attend to Moreblessing and was calling Ifeyinwa to ask her to stand in for Moreblessing at work.
>
> I left 100 Commercial street and drove to Ifeyinwa's place."

79 On the next page, page 271, there was an email from Mr Chizunza to Mrs Chapel-Nkomo. It was dated 18 August 2022 (which was the day after the ET1 claim form was, we saw from pages 14-15, sent to the respondent). Its text was as follows.

> "On the 30th of May I received a call from Moreblessing. It was after 22h00 and I was asleep already. That day I slept early as I was not feeling well, I

had a terrible headache, and I really wanted some rest. On the call she told me that the electricity was finished. I asked her why she waited till that late to let me know. I informed her to call Olinda because I was not feeling well and I was asleep already. Some of the reasons why I had that headache is people call me late hours and early mornings so I was not getting enough time to rest and I had informed Olinda about it the day before hence she had told all staff members in the meeting that all concerns after hours should be addressed to her as Lesley does not work 24 hours a day. Moreblessing called me back saying she can't get hold of Olinda. I then told her to use the company card they had (her and the other colleague that had taken her home) or use her own money and the company will reimburse her the next day. She then said she will look for the money in her bag and buy the electricity. I then went to bed. The next morning I received a call from the staff member who had gone to pick her up to go to work, the staff member informed me that Moreblessing was not feeling well. I then called Olinda and she told me to call the ambulance and she Olinda herself called the next of kin. I was in contact with the paramedics until they got to the house where Moreblessing was living."

80 There were two WhatsApp message screens on page 520. On the left hand side was a blurred text which was sent at 07:18 on 31 May 2022 in these terms (under the name "Lee Orlinda").

> "Payment on 31/05/2022 07:18
> You have successfully credited your Electricity meter ([for which a series of about 20 numbers and possibly characters was given]) by £15.00
>
> Payment Summary
>
> Payment amount £15.00"

81 On the right hand side of page 520, there was this undated WhatsApp message, which was plainly written by Mrs Chapel-Nkomo and was sent at 07:22, which we concluded was only four minutes after the WhatsApp message on the left hand side of page 520.

> "I am extremely disappointed by you guys. You do not check if you still have enough electricity whilst occupying the house. Instead there are phone calls after 10pm to say there is no electricity. You have the company cards and you could have gone and bought electricity but instead you go to your families and you complain as if I am abusing you. You don't even call me or text me asking for electricity but I get this instead.
>
> I don't have to top up electricity. It's not a must. But I do because I am trying to make sure everyone is okay."

82 Ms Baber's witness statement contained the following passage.

'*Second discussion with Ms Chapel Nkomo*

18. The following morning, I received a phone call at around 7.00am. It was Ms Chapel Nkomo and she told me that an ambulance had been called to Moreblessing as a carer had found her unwell and shivering. I remember I made a comment along the lines of "I hope she is OK, maybe it was because she was cold last night". I told Ms Chapel-Nkomo that Moreblessing had called me to explain that there was no electricity in the house and that she had spent the evening attempting to get hold of her. I said I was concerned that she was unwell because she had spent the night sleeping in cold. When I said this Ms Chapel Nkomo became extremely angry and started shouting at me. I can remember that she was shouting that "Moreblessing is an adult she shouldn't have to wait until late to realise that there was no electricity". I responded that Moreblessing had left the house before 7.00 am and had come back after 10.00 pm and perhaps that's why she had not been able to contact her any earlier about the electricity. I pointed out that Moreblessing had followed her procedure and had contacted Lesley her supervisor and he had been the one to say that she should contact Ms Chapel-Nkomo. When I said this Ms Chapel-Nkomo hung up the phone. I attempted to call her back several times but Ms Chapel Nkomo would not pick up the phone. I sent her a message as I was so shocked at her comments and the way in which she had spoken to me. My message is the first at page 513 of the bundle. Ms Chapel Nkomo, responded blaming Moreblessing for being unwell and repeating that she had access to the company bank card. This is the longer message at page 513 of the bundle. I was so shocked at her attitude. Moreblessing had previously told me that she and the other workers were very wary of Ms Chapel Nkomo, after the way in which she spoke to me, I could see what the workers had been concerned about. My very short response is at the bottom of page 513.

My face book posts

19. I posted a message on a Facebook Women's group for Zimbabweans and I explained that people should be careful taking up work in the UK (page 269 of the bundle). There are many individuals who advertise for care workers in Zimbabwe. My intention in posting the messages was simply to alert people to look very carefully into any offers of employment. I did not mention the Respondent by name, or the Respondent's Director. However, Ms Chapel Nkomo entered the conversation and started making comments see pages 264 to 269 of

the bundle. It was at this point that people became aware that the Respondent company was in some way involved. The Facebook group I had posted on was one for Zimbabwean women. I did not know that Ms Chapel-Nkomo was part of the group.

Ms Chapel Nkomo's facebook posts

20. Ms Chapel Nkomo then posted a message suggesting that the issue was that my sister had failed to top up the electricity, despite having a bank card provided by the Respondent for expenses. This is the first message at the top of page 514 of the bundle. I re-edited my post to include pictures of the property in which my sister had been living, pages 269 & 496-511. I knew that this was not true, and I knew that Moreblessing had no money. The only money she had on her was the few pounds that I had given her in the previous week because she had not yet received her salary."

83 Page 269 was the text of the Facebook page which Ms Baber opened up on 31 May 2022, with the pictures at 496-511 evidently below it. The text was as follows.

> "ADMIN, NDOKUMBIRAWO KUITA LIVE. I think people deserve to know what's happening behind doors. I tried to keep quiet and be professional but I think things are going out of hand. This is about TIER 2 VISA sponsorship. Please allow me. Rich Aunty for you guys! I've been quiet ndichiti shingirira till you get your first pay wotsvaga pako pekugara. She never cooked in the house achitya saving electricity, the place is inhabitable [sic]. She finished work at 10pm only to find magetsi pasina. Honestly that big cooker haishande and rich Aunty bought that one plate on the window seal, Honestly! How do people sleep at night? Ndosponsorship yacho here nhai guys? Yes takapfugama mabvi nemagokora begging for sponsorship but does that mean you have to be abused to such an extent? PHOTOS TAKEN ON FIRST DAY of Arrival. Mazoe ndasponsor ayo akaexpire kare kare. Plus she had to share a bed with another Nigerian carer."

84 The message on the right hand side of page 513, from Mrs Chapel-Nkomo to Ms Baber, was timed at 07:36 and was in the following terms.

> "Firstly your sister is an adult. She doesn't not need us to hold her hand
>
> 1. She didn't have to wait till 10 pm to realise she doesn't have electricity. She has a responsibility to ensure she has everything she needs whilst there. As no one else is there physically with her.
>
> 2. She didn't call me as I instructed in the team meeting.

3. She told care coordinator she had some money on her and they both agreed she'd go and buy electricity at the store and she will be reimbursed the next day. But she didn't.

4. Instead she went to charge her phone and call you. Which is very irresponsible as she was at the store where she could have easily topped up. Why didn't she ?

5. She has access to the company bank card in Stoke and it's PIN number. The card is kept there and she could have used it to top up without even leaving the house. But she didn't. Why didn't she ?

I am NOT responsible for her lack of initiative and her making bad decisions. She needs to do better and I am extremely disappointed in" [sic; the rest of the message was not in the bundle.]

85 The message at the top of page 514 was in the following terms.

"**Olinda Chapel-Nkomo**
Employee who is her relative came on my visa. I gave her Accomodation. Electricity is [sic] this house is top up. This lady is alone there at the moment. She calls care coordinator at 10 to say no electricity. Coordinator told her to call me (she didn't). Coordinator told her to use the company card to go to shop and top up. (All cars have bank cards for expenses) she didn't. Instead she went to the store to charge her phone. Woke up this morning and says she is unwell because akatonhorwa.

I will not be spoon feeding adults !"

86 Below that, on the same page, there were the following messages from Mrs Chapel-Nkomo to Ms Baber, timed, respectively, at 07:53, 08:00 and 08:11 on 31 May 2022.

86.1 "Yes. You don't threaten me with your live ku LUK !"

86.2 "Yes I have taken all screenshots. As soon as that live happens your sister is in breach of our social media policy and its immediate gross misconduct.

I am done with being walked all over. She is an adult and not a child."

86.3 "Collect your relative today ! I am not playing."

87 The text of the letter stating the termination of the claimant's employment at pages 261-263 was as follows.

“Following our board meeting on 01 June 2022 during which we confirmed that it has been decided that your employment with Gain Healthcare Ltd is terminated without notice.

Your dismissal is due to: Gross Misconduct by yourself. You failed to utilize our policies and procedure of raising any concerns with us directly. From the first day of your employment, you have breached company policies which include

Complaints Policy
Social Media Policy
Confidentiality Policy

You have engaged your family to post slanderous, malicious, and false information about Gain Healthcare Ltd and about myself as an Employer. There are numerous posts that have been viewed by thousands of people on social media. You did not follow our complaints’ procedure which you have been given several times. Instead, you have brought the company into serious disrepute.

Social Networking
Employees are not permitted to use social media during work hours . We require all our staff to avoid and refrain from engaging in any conduct on social media (i.e . Facebook, Twitter, WhatsApp, etc.) either during or outside working hours which brings the company into disrepute, or

- Is derogatory or critical of the business
- Results in adverse publicity
- Could constitute any form of bullying or harassment of a colleague or Service User
- Would be a breach of our Equal Opportunities Policy
- Would cause us to question your suitability to be working with our Service users

The above list is not exhaustive, and employees must be careful to avoid any inappropriate or adverse references to the business or their work colleagues.

Employees should remember that they always represent Gain Healthcare Ltd. You can refer to the AB52 - Social Networking Policy and Procedure

Staff handbook clearly states:

Business Expenses

We will reimburse you for authorised and legitimate expenditure, reasonably incurred by you, during the proper performance of your duties, i.e., travel, accommodation, and other pre-agreed out-of-pocket expenses. You will be required to complete an expense claim form and support such a claim by submitting valid receipts. You should have prior approval from Olinda Chapel-Nkomo before incurring any expenses.

You were given the go ahead by a Senior member of staff to top up electricity using either the company card or personal funds which you failed to do but instead posts where put on Facebook making false allegations of abuse.

You have shared confidential company information with your relatives which was shared on social media platforms, breaching our Confidentiality policy. The staff handbook clearly states:

Confidentiality

You must not disclose any trade secrets or other information of a confidential nature relating to Gain Healthcare Ltd or any of its associated companies or their business or their clients/Service Users and employees in respect of which Gain Healthcare Ltd owes an obligation of confidence to any third party during or after your employment except in the proper course of your employment or as required by law.

Given that you have less than 2 years' service, there is no obligation on Gain Healthcare Ltd to apply the disciplinary procedures set out in the Staff Handbook."

88 The claimant appealed against her dismissal in the email at pages 272-273, which was sent on 2 June 2022. The appeal was dismissed in the email at pages 274-275, which was sent on 11 June 2022. We found the whole of the latter letter to be of particular importance. Its text (after an introductory line) was as follows.

"The decision to terminate your employment contract is stayed and enforced on the following basis;

1. Your conduct in failing to observe the rules and procedures of your employment contract. As an employee of Gain Healthcare, you were compelled to comply and apply the Grievance procedure section 4.1, in your case when you experienced issues relating to electricity and gas in the home you share with other employees. You were required to communicate with the care coordinator to get this resolved. Further to this requirement, you had access to an expenses debit card that is provided for

purposes of purchasing fuel and other expenses including topping up electricity and gas in the home which you could have requested for this purpose. Had you experienced difficulties in getting the top-up for gas and electric, you could have used your own money that would have been reimbursed the following working day in your bank account. You informed both the Care Coordinator and another member of staff that you had some money on your person. Gain Healthcare take seriously the welfare of its workforce in the accommodation it provides.

2. Sharing of your employment grievances with third parties that include family members and the social media when you had not exhausted the grievance procedures brings Gain Healthcare Ltd into disrepute and disproportionate to your grievance. We never received in writing any complaints by yourself as per our policy and neither did you make any attempts to speak with myself. My interaction with you was once to request you complete your training which you had been asked to complete sometime ago but hadn't. Gain Healthcare view this behaviour as act of gross misconduct seeking to tarnish the image of the company, its workforce, and its management team hence the decision to end your employment.
3. Failure to take responsibility for your living home environment to the end that it caused you a health hazard is considered as another act of gross failure to maintain your living home environment to good enough standard is viewed as intent to tarnish Gain Healthcare and bring the company into disrepute. As live in staff of the property, it was your collective responsibility to organise yourselves with other occupants to clean and tidy your living home environment. Gain Healthcare only has a responsibility to provide you with accommodation only and are not required to provide any cleaning services. It is your responsibility to keep your surroundings clean.
4. In your response letter, you cite the cause of your illness was attributed to the poor home conditions, that the home was cold and that you could not cook. Again you fail to take responsibility for your own health needs and blame it on your employer. If you had taken the actions listed above that were at your disposal, this could have been prevented. This is cause for concern for a healthcare worker who cannot take responsibility for their own health needs, yet you are trusted to meet the health needs of vulnerable people in our society. It is reported you disclosed to a fellow worker that you had taken your prescribed medication without food and resulted in you feeling poorly. The same staff member suggested that you go to the shop which is a short walking distance to buy some food and you disregarded this.

Instead you made the decision to walk to the shop to charge your phone. You could have bought some food from the corner shop close to the address you shared with fellow employees to avert the side effects of taking medication on an empty stomach. You have completed medication training and you very much aware of your responsibilities to ensure you take your medication as prescribed by your doctor. You also disclosed to the Care Coordinator that you were unwell because you had stood in the cold for a while whilst waiting for your phone to charge at the shops. Again this was a decision you made and can not hold your employer responsible.

5. Failure to disclose a health need that affect your performance and attendance to your duty in the course of employment is a further cause for concern on the integrity of the person in you in the eyes of Gain Healthcare. On your application which you submitted you, under health declarations you didn't submit or inform us that you had any health needs that require any adjustments by us. Again this is a decision you made and you can not hold Gain Healthcare accountable. Instead all of the above looks very constructive to only put the company into disreput [sic]
6. You mention that you and your family didn't mention Gain Healthcare and it's Director. Which again is a false statement. We currently hold various videos and posts that have Olinda Chapel as part of the headline.

On this basis Gain Healthcare finds you not being open and honest hence another cause to terminate your employment.

Please be advised that we have notified the Home Office and withdrew our Certificate of Sponsorship and outlined the reasons why."

89 There was at pages 556-563 a "GCID - Case Record Sheet" which had been disclosed by the Home Office in response to a subject access request made by the claimant under the data protection legislation. At page 562 there was this record.

'Gain Healthcare Ltd has notified us via a SMS Message dated 01/06/2022 that this migrant is no longer employed by them.

Sponsor notification states: "Migrant worker has not been keen on undertaking her duties. It has been brought to our attention that migrant worker has be constructing false allegations against the Sponsor so they can leave their post. Migrant worker has intentions to work for a family"

VAF: 2118099 shows Migrant was granted Entry Clearance as a SKILLED WORKER MIGRANT HEALTH & CARE from 06/04/2022 to 15/10/2026. 3 linked Dependents'

90 Mrs Chapel-Nkomo's witness statement contained nothing about the manner in which the respondent informed the Home Office of the termination of the claimant's employment. The statement was only six pages long, and most of the second half of it (paragraphs 21-24 at pages 4-6 of the statement) consisted of a description (which was of course unnecessary) of the content of the documents at pages 261-263, 272-273 and 274-275 to which we refer (and in part set out) in the preceding paragraphs above. The witness statement contained, in paragraphs 14-20, the following passage concerning the manner in which the claimant's employment ended.

"Incidents occurring 30 – 31 May 2022

14. I received a call from Lesley Chinzunza [sic] on the morning of 31 May 2022. He explained to me that the Claimant had was [sic] feeling unwell. Given that Lesley had called me with concerns about her health in the manner he did, I asked for the Claimant to confirm it was not Covid that she had contracted. Thereafter, Lesley stated that according to what she had heard from another colleague, Snead Takaendesa (no longer employed by the Respondent), the Claimant was very unwell following not taking her medication with food the previous night. I therefore asked him to call an ambulance. I also told him that I would call the Claimant's next of kin (standard protocol) to update her.

15. I immediately called Jenipher Baber and updated her on the Claimant's condition. This is when Jenipher started falsely accusing me of all manner of things including modern slavery, unsanitary living conditions and not providing electricity for my staff. I tried to explain to her that this was the first I heard of any such allegations, but she would not let me speak. I therefore ended the phone call.

16. I called Lesley again to understand in more detail what was going on with the Claimant and highlighted to him the false allegations that Jenipher Baber had made. He then explained in full detail from his point of view what had transpired the previous night. He said that the Claimant had called him to tell him that the electricity in the accommodation had ran out. He said he told her to contact me but as she could not contact me (it was late at night so I would not have been contactable), she called him again regarding the issue. He said he told her to use the company card her or Snead had (as Snead was with her at the time), or she could use her own money to top up the

electricity and be reimbursed by the Respondent the following day. Lesley explained that on the morning of 31 May 2022, that Snead, who had gone to pick her up that morning had received a text from her saying she took her medicine on an empty stomach, which is why she was unwell. This is despite Snead driving her to the shops and advising her to get something from her to eat there too. It appears that she only went to the shops to charge her phone.

17. I thanked Lesley for the information and called the Claimant thereafter to explain that I had updated Jenipher regarding her health. I also asked her why she had knowingly taken her medication on an empty stomach in the knowledge that it was not supposed to have been taken that way. The Claimant holds herself as being trained to administer medication to patients. It was concerning to note that she had not only not disclosed this on her health declaration form (although I acknowledge that it is her prerogative to do so), but also not administered her own medication correctly. She did not respond directly to my questions and seemed to be trying to carefully construct her answers.

18. It eventually came to my attention from Lesley that the Staffordshire adult safeguarding team had called him to highlight that the Claimant was terming herself as a vulnerable adult and that the situation was a safeguarding issue. It seemed that this was as a direct result of false allegations the Claimant had made to the paramedics.
19. On the same day, I noted that Jenipher had taken to social media, including Facebook alleging all manner of false statements about the Respondent. The false allegation included that the Claimant was staying in inhabitable conditions, that she was forced to work, and that I had insulted her continuously. I contacted Jenipher and told her that I would not accept anyone putting the company into disrepute and asked her to collect the Claimant. It was clear to me that the allegations arose from the Claimant communicating the same to Jenipher.

20. Later, on 31 May 2022, I visited the property with Lesley. Aside from the new mattresses which had been delivered to the property that morning, the state of the interior was shocking. There were KFC chicken bones on the floor, expired food and take away contents in the fridge and around the three-bedroom house. McDonalds packaging and old food was in the bedrooms, and it was generally incredibly unkempt. This was the Claimant's responsibility to clean; not mine nor the Respondents."

91 When giving oral evidence, Mrs Chapel-Nkomo repeatedly asserted that early in the morning of 31 May 2022 she had caused an ambulance to be called and that she had, out of concern for the claimant, asked whether the claimant might have had Covid. We saw that she had first asserted that in the "livestream" to which the claimant referred in paragraphs 62 and 63 of her witness statement, which we have set out in paragraph 77 above. During that livestream, Mrs Chapel-Nkomo spoke in Shona, and there was a translation of what she said at pages 485-491. At the bottom of page 485 to the top of page 486, there was this passage.

> "The came here last night [sic], to find that there's no electricity right, and called the care co-ordinate, and the care coordinator told her to get the company card from the car and go top up electricity, but she didn't do it. They have company cards that stay in the car, to do with fuel, to top up fuel, because I don't want problems with fuel, uhm, she didn't do that. She went to say I had money in my bag and was told to take that money and go buy electricity, but she didn't do it. But she managed to walk from here and went all the way to what you call this, to the shops, and charge her phone at the shops, after charging her phone at the shops, she went and called her relatives to complain that she arrived at the house with no electricity. But she was given a card, the company car is there, by the way she lied that she could drive, she can't drive so she can't use the company car.
> Card you're being given, you were told, ok use your own money and you will get refunded, but you didn't do it. And she left it and went to stand outside a shop, then she caught a cold while standing outside the shop. In the morning another member of staff comes to pick her up and let's go to work. She then says of I'm ill, I'm ill, ohh your ill? How are you ill? she then said I drank B.P pills thinking I'm going to eat later, but it affected me, another story was I caught a cold, I was charging my phone. You go and charge your phone, but you can't top up electricity? The same place you went to charge your phone is the same place you can top up the electricity. but you couldn't do it. Your relative that you were calling and telling dilapidated house why they in that moment didn't top up your electricity for you then they could have called me tomorrow.
> I got a call in the morning saying the carers is not there. I ask what's happened. They start explaining to me while I'm topping up the electricity. When they said she's not feeling well, I was thinking maybe its covid, I've then called the relative to confirm if we call the ambulance, it was us who called the ambulance. Next thing you know she's gone and posted on the Ladies of UK group, posted pictures, and claiming Olinda is abusing staff, I've abused staff? How many times have I spoken to you ever since you started working for me? I've only spoken with you once, once, I've never spoken with you from the day you started working for my company. I've only spoken with you once."

92 In oral evidence, Mrs Chapel-Nkomo said that a car owned by the respondent was kept at 100 Commercial Street in the night of 30-31 May 2022 and that it had in its glovebox a debit card which was primarily to be used for fuel but which could have been taken by the claimant to the corner shop to which she in fact did go and at which she got her mobile telephone's battery recharged in the evening of 30 May 2022. Mrs Chapel-Nkomo said to us that the key to that car was at 100 Commercial Street and that the PIN for the card was "clear and open" and that the respondent (which in practice, we inferred, meant Mrs Chapel-Nkomo herself) would check bank statements every day to see if there was a discrepancy and that that had led to the finding of the misuse of one of the fuel cards which had led to the freezing of all of the fuel cards with the effects to which we refer in paragraphs 57-59 above.

93 In cross-examination, the claimant repeatedly said that she had not gone out of the house on 30 May 2022 after she had charged her mobile telephone's battery at the local corner shop because she had not felt safe to do so.

Our conclusions about what actually happened on 30 and 31 May 2022 and the real reasons why the claimant's employment with the respondent was terminated

94 We came to the clear view on the basis of the evidence before us and on a balance of probabilities that the claimant could in theory herself have topped up the electricity at 100 Commercial Street on 30 May 2022, if only because she had £10 in her suitcase there, as she said in paragraph 52 of her witness statement, which we have set out in paragraph 77 above.

95 We found at least one aspect of the evidence of Mrs Chapel-Nkomo to have been self-serving and unreliable. That was her evidence to us that she had herself caused an ambulance to be called for the claimant. While it was not critical as far as liability was concerned, it was relevant to credibility. We did not accept her evidence in that regard principally for the following reasons.

95.1 The email from Mr Takaendesa which we have set out in paragraph 78 above was sent just a day after the claimant had woken up unwell in the morning of 31 May 2022. In it, Mr Takaendesa made no mention of the involvement of Mrs Chapel-Nkomo, although it was possible that Mr Chizunza had spoken to her before telling Mr Takaendesa that he (Mr Chizunza) was calling an ambulance for the claimant. However, the text of the email was clearly to the effect that Mr Chizunza said that he was calling an ambulance when he first discussed the situation with Mr Takaendesa.

95.2 In Mrs Chapel-Nkomo's livestream of 31 May 2022, she did not say that she had asked Mr Chizunza to (as Mrs Chapel-Nkomo put it in paragraph 14 of her witness statement, which we have set out in paragraph 90 above)

"confirm it was not Covid that she had contracted". She merely said (as recorded by us in paragraph 91 above) "I was thinking maybe its covid".

95.3 In neither the email from Mr Takaendesa set out in paragraph 78 above, nor the one dated 18 August 2022 from Mr Chizunza which we have set out in paragraph 79 above, was reference made to the possibility that the claimant had Covid.

95.4 Mrs Chapel-Nkomo's WhatsApp message of 07:22 which we have set out in paragraph 81 above was about the fact that the electricity supply at 100 Commercial Street had run out. It was an angry message rather than one of concern for the claimant.

95.5 The text of the messages and posts set out in paragraphs 84-86 above from Mrs Chapel-Nkomo make no mention of Covid and they are consistent only with anger on the part of Mrs Chapel-Nkomo towards the claimant.

95.6 The same was true of the text of the letter of dismissal which we have set out in paragraph 87 above.

95.7 The same was true of the text of the letter dismissing the claimant's appeal against her dismissal, which we have set out in paragraph 88 above. In addition, in that letter the only reference to the claimant's health related to her "health condition" for which she needed the medication which she took on an empty stomach and which, in the view of the writer of the letter, which was Mrs Chapel-Nkomo, led to the situation which the writer saw as bringing the respondent into disrepute. That was consistent with the message on page 513 which we have set out in paragraph 84 above.

96 Less importantly, what Mrs Chapel-Nkomo said in paragraph 14 of her witness statement, which we have set out in paragraph 90 above, about asking the claimant to "confirm it was not Covid that she had contracted", made no sense. That was because the claimant could not confirm that she did not have Covid. She could only at best take a lateral flow test to see whether there was an indication that she had covid. So, if Mrs Chapel-Nkomo had in fact mentioned Covid then it was likely that she would have asked Mr Chizunza to ask the claimant to take a lateral flow test.

97 In addition, in neither the claimant's witness statement nor that of Ms Baber was it said that mention was made at any time on 31 May 2022 of the possibility that the claimant had covid. We found the evidence of Ms Baber which we have set out in paragraph 82 above to be completely accurate, not least because it was borne out in full by the messages which we have set out in paragraphs 84-86 above, the provenance of which, we add for the avoidance of doubt, was not challenged.

98 We concluded that the claimant could in theory have topped up the electricity meter's credit, either by using the bank debit card in the car which was kept at 100 Commercial Street (to which Mrs Chapel-Nkomo referred very swiftly in paragraph 5 of the text set out in paragraph 84 above), or by using her own £10 to do so at the local corner shop. While the reason why it was so was not directly relevant, we concluded that it was helpful to consider why the claimant did not herself cause the meter to be topped up. We concluded that it was in pat because she was, we found, not as enterprising and thrusting as someone else in the same circumstances might have been, and in part because she was not keen to use the only cash which she had with her, which, we found as a fact, had been given to her by Ms Baber to tide her over while waiting for her first salary payment.

99 That meant that some of Mrs Chapel-Nkomo's anger was justified. But Mrs Chapel-Nkomo expressed herself intemperately about that to Ms Baber and (we accepted the claimant's evidence on this) the claimant in the early part of 31 May 2022. That intemperance was in keeping with Mrs Chapel-Nkomo's general conduct, which was evidenced by the documents and factors to which we refer in paragraphs 57-59 above. So, we concluded, Mrs Chapel-Nkomo's conduct in her initial response to the circumstances which presented themselves to her at about 6.30am on 31 May 2022 was simply her normal way of reacting to adverse circumstances.

100 Having arrived at that conclusion, we asked ourselves whether, as claimed in paragraph 57 of the claimant's witness statement, which we have set out in paragraph 77 above, Mrs Chapel-Nkomo said "You are careless. I can't be baby-sitting you. I am going to terminate your employment". When it was put to the claimant that Mrs Chapel-Nkomo did not say that, as noted by EJ Hyams, the claimant said:

> "I remember that that statement is somewhere in the bundle."

101 If it had been said, then, we thought, it would have been seared into the memory of the claimant. However, we recognised that memories can be false, and that false memories can be created, as is recognised by Leggatt J (as he then was) in paragraphs 15-21 of his judgment in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm). EJ Hyams' notes of the cross-examination showed that it continued as follows (with the notes tidied up for present purposes; of course they are not as accurate as a transcript, but we believed them to be sufficiently accurate to be reliable).

> Q: She never said that to you?
> A: It may be on Jenipher's text messages with Ms Chapel.

Q: Are you taking your answer from Ms Baber's text messages?
A: Because they were texting.

Q: [The claimant was then referred to paragraph 57 of her witness statement.]
A: She [i.e. Mrs Chapel-Nkomo] called me in the morning; she said that. She said you are an adult; you have to look after yourself.

Q: She never said to you why have you not gone to work?
A: She did and I said I am sick.

Q: Ms Chapel-Nkomo never said I am going to terminate your employment?
A: She did when she was shouting at me when I was sick."

102 That was unconvincing evidence in support of the claim that Mrs Chapel-Nkomo told the claimant in the telephone conversation which occurred on 31 May 2022 that she was going to dismiss the claimant. We accepted that the claimant put the conversation on the loudspeaker of her mobile telephone in the manner, and for the reason stated, in paragraph 57 of her witness statement (which is set out in paragraph 77 above). We found it more likely than not that Mrs Chapel-Nkomo said that she could not baby-sit the claimant as she was an adult, because that was in keeping with Mrs Chapel-Nkomo's general approach of intemperance and berating staff when she was unhappy with them. We did not, however, conclude that she said that she was going to terminate the claimant's employment. That was in part because of what we say in the next paragraph below. It was also because if the claimant had been told during the telephone conversation early in the morning of 31 May 2022 that she was going to be dismissed then, we concluded, that would have been said in the carefully-written details of the claim, which we have set out in paragraph 2 above. We also thought that the members of the ambulance crew who heard the conversation via the loudspeaker were less likely to say that the claimant might have been a victim of modern slavery if the claimant had been told that she was going to be dismissed than if there had been no suggestion in the conversation of the termination of the claimant's employment. That is because slavery connotes bondage, and termination of the employment would have been inconsistent with bondage. Rather, the ambulance crew were more likely to be concerned about the possibility of modern slavery if there was no suggestion of the termination of the employment.

103 What really riled Mrs Chapel-Nkomo was the fact that Ms Baber put on Facebook the documents at pages 269 and 496-511. That conduct of Ms Baber was, we found, the real reason why the claimant was dismissed.

104 However, Mrs Chapel-Nkomo asserted that Ms Baber had been caused in part to put what we saw at pages 269 and 496-511 on Facebook by the claimant.

That was clear from the content of the message which we have set out in paragraph 86.2 above and from these words in the letter of dismissal which we have set out in paragraph 87 above:

> "You have engaged your family to post slanderous, malicious, and false information about Gain Healthcare Ltd and about myself as an Employer."

105 In fact, we concluded, the claimant had not in any way engaged her sister to put on Facebook the documents at pages 269 and 496-511. Rather, that was done by Ms Baber purely on her own initiative. We concluded too that Mrs Chapel-Nkomo did not truly believe that the claimant had caused her sister to put those documents on Facebook.

106 We concluded also that Mrs Chapel-Nkomo's decision that the claimant should be dismissed was in no way influenced by the fact that the claimant had sent the text set out in paragraph 63 above to Mr Chizunza. We arrived at that conclusion on the basis of our following factual conclusions.

106.1 Mrs Chapel-Nkomo topped up the electricity supply at 100 Commercial Street only minimally in order to ensure that the staff there switched off any electrical items which they were using as soon as they had finished using them.

106.2 Mrs Chapel-Nkomo knew very well that the respondent's employees who slept at 100 Commercial Street frequently complained about the fact that the electricity supply to those premises was cut off because the meter had run out of credit, but she never took any action against any of them for their complaints.

106.3 Mrs Chapel-Nkomo was aware of the complaints of the staff of the respondent about the cooker at the property. That was clear from the fact that she had herself organised the replacement of that cooker with a single hob plate hob, which arrived as described in paragraph 29 of the witness statement of the claimant, which we have set out in paragraph 62 above. Nothing negative was done to the claimant by the respondent because she had made her complaints to Mr Chizunza about the state of the property. Mrs Chapel-Nkomo, we concluded, just was not bothered by the fact that the claimant had complained about the state of the property.

107 What changed the situation as far as Mrs Chapel-Nkomo was concerned was the fact that Ms Baber had put the documents at pages 269 and 496-511 on Facebook.

108 We could see no documentary evidence that Mrs Chapel-Nkomo saw the messages at page 495 (whose translated text was at page 494, which we have set out in paragraph 55 above) before she made (and then confirmed) the decision that the claimant should be dismissed. Mrs Chapel-Nkomo was asked in cross-examination when she first became aware of the text messages of 3 May 2022 of which there were copies at page 495, and she said that she was aware of them only in the hearing bundle. That statement was not challenged by Mr Ohringer, whose ability was perspicuous and who, it appeared to us, left no stone unturned in what he did on behalf of the claimant.

109 The latter factor was not conclusive, of course. Nevertheless while, for the reasons stated in several places above, we treated the oral evidence of Mrs Chapel-Nkomo with considerable caution, given that Ms Baber's own evidence was that she had put only pages 269 and 496-511 on the Facebook page to which Mrs Chapel-Nkomo had access on 31 May 2022, we concluded that Mrs Chapel-Nkomo was unaware of the messages at page 495 of which there were translations at page 494 before she dismissed the claimant and then dismissed her appeal against her dismissal.

The respondent's employee handbook

110 Before turning to the relevant law, we record that on pages 81-99 there was a copy of the respondent's Staff Handbook, with, at page 100, a copy of a letter which would have enclosed it if it had been sent to the claimant. The claimant did not assert that the handbook was not applicable to her, albeit that it was available to her only via the "QCS Mobile App". On page 91, this was said.

> "**Escalating Concerns**
> All employees have a responsibility to report to their manager with regard to any changes in the physical, behavioural or social condition of the Service User, to any perceived lack of resources, help or advice, or any action by persons or organisations which may be harmful to the Service User. You should also report any refusal of care or any time you are unable to deliver Care as planned. You must ensure you read CR74 - Safeguarding Policy and Procedure, AR48 - Child Protection Policy and Procedure and the Whistleblowing Policy and Procedure for Gain Healthcare Ltd on the QCS online management system or via the QCS App."

<u>Relevant case law</u>

111 We were grateful to both representatives for the courteous way in which they conducted their clients' cases and their thorough submissions. We do not refer here to all of the case law to which they referred simply because we took it all into account and we saw no need to lengthen an already long judgment by referring to all of it in the following section.

Case law concerning the applicable statutory provisions

(1) Proving an unlawful motivation (using that term in the sense in which it is described by Underhill LJ in for example paragraph 72 of his judgment in *Unite the Union v Nailard* [2019] ICR 28)

112 The statutory tests relating to liability other than in the law of contract were largely helpfully incorporated into the list of issues which EJ Bansal recorded and which we have set out in paragraph 17 above. (We say "largely" because the list did not recognise explicitly that section 44(1)(c) of the ERA 1996 is so far as material in the same terms as section 100(1)(c) of that Act. In addition, sections 43F and 43G of that Act were referred to only by way of summary. We return to those provisions below.)

113 We found passages in two (surprisingly) unreported cases to be of assistance in assessing the factual assertions of both parties here. The first one was that in *Gestmin* to which we refer in paragraph 101 above. The second, which was of less importance here, but which was helpful in the circumstances, was the following passage from the judgment of Underhill LJ (a former President of the EAT) in *Chief of Greater Manchester Police v Bailey* [2017] EWCA Civ 425, with which both other members of the court (one of whom was another former President of the EAT: Sir Patrick Elias) agreed, so it was in effect the judgment of the court.

> '54. In the light of my conclusion on ground 1 it is unnecessary to consider this ground. To spell it out, the ET's finding that DCS Shenton and/or ACC Heywood were motivated in making their decision to terminate the Claimant's secondment by the fact that he had previously brought proceedings against the GMP was based squarely on the statutory burden of proof provisions: the Tribunal held that in the absence of any evidence from them there was no explanation of why they had taken their decision. But the burden of proof has no role in a case "where the tribunal is in a position to make positive findings on the evidence one way or the other": see the judgment of Lord Hope in *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054, at para. 32 (p. 1065H); and the Tribunal has made such findings in this case.
>
> 55. If the Tribunal had not in fact made a positive finding, there would have been an issue about the effect of the Tribunal's self-misdirection at para. 24 of the Reasons – see para. 29 above. Elisabeth Laing J held that the error was immaterial because if the Tribunal had asked itself whether there was material from which an inference of victimisation could be drawn "it must have said 'yes'" (see para. 61 of her

judgment); and Mr Gilroy adopted that reasoning. I am bound to say that I have seen nothing in the ET's primary findings which I would regard as establishing a prima facie case that the secondment came to an end when, and in the way, that it did because (or even partly because) the Claimant had previously brought proceedings against the GMP. But I need not explore the point further.'

114 We noted that in referring to what Lord Hope said in *Hewage*, Underhill LJ failed to refer to the fact that the passage in *Hewage* to which he referred involved an endorsement of something said by Underhill LJ himself when he was President of the EAT. That passage was as follows.

> "32 The points made by the Court of Appeal about the effect of the statute in these two cases could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J (President) pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other. That was the position that the tribunal found itself in in this case. It is regrettable that a final resolution of this case has been so long delayed by arguments about onus of proof which, on a fair reading of the judgment of the employment tribunal, were in the end of no real importance."

<u>(2) The impact (or otherwise) of the word "principal" in sections 100 and 103A of the ERA 1996</u>

115 We were referred to, and considered with care, the decision of the Court of Appeal in *Timis v Osipov* [2019] ICR 655 and the decisions of the EAT in *Wicked Vision Ltd v Rice* [2024] ICR 675 (Bourne J) and *Treadwell v Barton Turns Development Ltd* [2024] EAT 137 (HHJ Barklem). We concluded that the acute difficulties arising in that series of cases arose from the apparent inconsistency between a discriminatory dismissal within the meaning of sections 39(2)(c) and (4)(c) of the Equality Act 2010 ("EqA 2010") and an unfair dismissal within the meaning of section 100 or section 103A of the ERA 1996. That inconsistency arises from the fact that a dismissal will be in breach of section 39(2)(c) or section 39(4)(c) of the EqA 2010 even if the discriminatory conduct or victimisation in question is not the principal reason for the dismissal, whereas in order for a claim of unfair dismissal within the meaning of section 100 or section 103A of the ERA 1996 to succeed, the prohibited motivation must be the principal reason (which one might usefully call the principal motivation) for the dismissal.

(3) What kind of circumstances can be the subject of a statement satisfying the requirements of section 100(1)(c) of the ERA 1996?

116 Section 100(1)(c) of the ERA 1996 applies where an employee brings to the employer's attention by reasonable means "circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety". Mr Ohringer referred us to the decision of the EAT in *Von Goetz v St George's Healthcare NHS Trust (No.1)* (UKEAT/1395/97) for the proposition that "the risk to health or safety need not arise in the workplace for this provision to apply". The claimant in that case was neither present nor represented at the hearing of that appeal. The appeal was about a ruling, invited by leading counsel who appeared for the respondent in the first instance hearing, that section 100(1)(c) applies only if there is a risk to the health and safety of an employee. The EAT, in our view entirely understandably, allowed the appeal. Lindsay J's judgment on behalf of the EAT, at paragraphs 25-28 stated, vividly, the reasons why the appeal was allowed.

> '25. ... There is no reference there [i.e. in section 100(1)(e) of the ERA 1996; the EAT also referred earlier on in paragraph 25 of its judgment to section 100(1)(c) of that Act] to the other persons being required to be workers or fellow-workers, or to be workers at the same establishment, or of the same undertaking or part of an undertaking. It is just a reference to "other persons" which, on the face of things, means exactly what it says.
>
> 26 Can we take two examples? I hope they are not too lurid. Suppose a man works as a machinist in a parachute factory. There is no safety committee; no one has been appointed as a safety representative. He notices that, by some mistake, the yarn used to sew up the different sections of the parachutes is not the usual yarn and not up to the strength of the usual yarn, nor having its usual durability. He says that the parachutes will, in consequence, burst open if they are used. If he tells the employer about that, could he not fairly think himself protected by section 100 were he then to be dismissed? Would he not be within the last lines of section 100(1)(c)? Plainly, his mention would be arising as a circumstance connected with his work, and yet the pilots or other persons likely to be affected if the parachutes were to burst might not well be employees. They are likely to include service personnel, or private fliers, or daredevils parachuting for fun, and they certainly would not be likely to be fellow-employees.
>
> 27 Take a different example that possibly might fall within 1(1)(e) [sic; that was probably a reference to section 100(1)(e)]. On a wet and icy day, a bus inspector sees a bus about to leave the depot, on a passenger route, with bald tyres. The inspector tells the driver not to

take it out, fearing for the safety of the driver, the conductor, the passengers on the bus when they get on, pedestrians and other road users. He is fired. Would it really be an answer that the other persons he sought to protect from danger were not, or were not necessarily employees, or were not fellow employees, and were not at the inspector's place of work?

28 We see no reason, simply in point of construction of a domestic provision, to limit the ambit of, for example, 1(c) and 1(e), so that they should be concerned only with harm or possibilities of harm at the dismissed employee's place of work or to his fellow employees, or to any employees. Indeed, nowadays, it is not all uncommon for one worker to stand alongside his fellow, not even knowing whether the fellow worker is, truly speaking, an employee at all, rather than someone on a contract for services, engaged by way of an employment agency."

(4) What is the reach of section 43B of the ERA 1996?

117 In paragraph 29 of his written closing submissions, Mr Ohringer said this.

> "The 'failings' which the disclosure seeks to address need not be acts or omissions of the employer. (*Hibbins v Hesters Way Neighbourhood Project* [2009] ICR 319)".

118 The headnote to that case was very helpful in showing how that case was decided and its impact. It was as follows.

> 'The claimant was employed by a local authority neighbourhood project network as a language teacher but spent one day a week teaching at an associated project run by the respondent. On reading a report in a local newspaper, she identified a suspect in a rape case as one of the students she had interviewed for a course run by the respondent, and she passed information about him to the police. The claimant subsequently brought a complaint against the respondent pursuant to section 47B of the Employment Rights Act 1996, claiming that she had suffered a detriment, in that she had been branded a trouble maker by the respondent because her disclosures to the police had involved them in a criminal matter, and that the disclosures were protected disclosures made in accordance with section 43H. An employment tribunal dismissed her complaint, holding that a disclosure of information which did not reveal any wrongdoing on the part of the employer was not a "qualifying disclosure" within the meaning of section 43B.
>
> On appeal by the claimant –

Held, allowing the appeal, that the identification of the wrongdoer as "a person" in section 43B(1)(b) of the Employment Rights Act 1996 included all legal persons, without being limited to the employer; and that, as there was no limitation whatsoever on the people or entities whose wrongdoings could be the subject of qualified disclosures, the case would be remitted to a different tribunal to consider the claim and other defences put forward by the respondent"'.

Case law concerning the claim for damages for breach of contract

119 We saw that Mr Ohringer made these submissions about the case law concerning the contractual claim.

"Breach of contract

47. A contract of employment exists once there is an employment agreement, even before work is due to commence. (*Sarker v South Tees Acute Hospitals NHS Trust* [1997] ICR 673.)

48. Although there is no general duty on an employer to take care of its employees' economic wellbeing (*Crossley v Faithful and Gould Holdings Ltd* [2003] ICR 1615, the implied duty of trust and confidence must mean that an employer is prohibited from over-charging for costs which the employer has incurred.

49. *Rawlinson v Brightside Group Ltd* [2018 ICR 621 demonstrates how this will be the case in an analogous situation. In that case, the claimant was given a false reason for dismissal to encourage him to work-out his notice period. As the EAT stated 'that the implied term imports an obligation upon an employer to act in good faith and not to mislead, that seems to me uncontroversial in so far as it relates to a continuing employment relationship'. (para.33)"

Our conclusions on the claims

The claim under sections 44(1)(c) and 100(1)(c) of the ERA 1996

120 We concluded that an assertion that living conditions in accommodation provided for employees (or workers) who work for the employer who dismisses an employee who complains about them is not an assertion about "circumstances connected with [the employee's] work" within the meaning of sections 44(1)(c) and 100(1)(c) of the ERA 1996. We say that despite the passage from *Von Goertz* which we have set out in paragraph 116 above. That passage referred to consequences to persons other than employees or workers of the employer of

unsafe practices at work, and was consistent with the proposition that the focus of the two statutory provisions is what goes on at work, and not what goes on in premises provided for the accommodation of the persons who do that work.

121 The fact that the purpose of the protection afforded by sections 44(1)(c) and 100(1)(c) of the ERA 1996 is what happens at work is shown by the words of both provisions. For convenience, we now set out section 44(1)(c) in full.

> "(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—
>
> ...
>
> (c) being an employee at a place where—
>
> (i) there was no [representative of workers on matters of health and safety at work or member of a safety committee], or
>
> (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
>
> he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety".

122 We found the whole of section 44 to be of assistance in arriving at our interpretation of the effect of the latter words, but perhaps of most importance was the reference in section 44(1)(a) to "risks to health and safety at work".

123 In addition, and in any event, we found that the claimed detrimental treatment of the claimant, as set out in paragraph 48.1 of the case management summary of EJ Bansal which we have set out in paragraph 17 above, was not done to any extent because the claimant had made any kind of assertion about health and safety. That is for the following reasons.

124 The first claimed detrimental treatment was that "On 12 May 2022, at a meeting called by Ms Chapel Nkomo, [Ms Chapel-Nkomo] threatened the claimant with dismissal and having her visa revoked if she failed to comply with the company rules." Given what we say in paragraphs 72 and 73 above, that claim was in our judgment not well-founded on the facts.

125 The second claimed detrimental treatment was that "'On 31 May 2022, Ms Chapel Nkomo was angry with the claimant being unable to attend work and

shouted at her, "you are careless, I can't be babysitting you. I'm going to terminate your employment"'. Given what we say in paragraphs 99-102 above, we found that that claim was not well-founded on the facts.

126 The third claimed detrimental treatment was that Mrs Chapel-Nkomo "On 31 May 2022 dismissed the claimant." Whether or not the dismissal was on 31 May or 1 June 2022 was not material (and in fact Mr Ohringer in paragraph 55(c) of his written closing submissions referred to the dismissal as having occurred on 1 June 2022). What was material was what was the real reason why Mrs Chapel-Nkomo dismissed the claimant.

What was the principal reason for the claimant's dismissal?

127 We found that what the claimant herself put in her ET1 claim form, as set out in paragraph 2 above, was correct. There, she said:

> "The main reason why I was dismissed by Gain Healthcare Ltd was that my sister shared the photos of the poor living conditions that I was living in on social media at the accommodation provided by them as part of my employment agreement and the poor working conditions which resulted in my illness."

128 We came to that conclusion having heard Mrs Chapel-Nkomo give evidence and for the reasons stated in paragraphs 103 and 106-109 above.

129 However, given what we say in paragraph 104 above, if we had concluded (contrary to what we say in paragraph 120 above) that the Facebook posts of Ms Baber had been about circumstances at work for the purposes of sections 44(1)(c) and 100(1)(c) of the ERA 1996, then we would have concluded that the claimant was dismissed principally because her sister had put in the public domain photographs and statements which were highly damaging to the respondent, not, as asserted in paragraph 57 of the closing submissions of Mr Ohringer, "because of her disclosures to her sister on 03.05.22 and 30.05.22".

130 That conclusion would also have been fatal to a claim relying on sections 44(1)(c) and 100(1) of the ERA 1996, because they require the circumstances in question to be brought to the attention of the employer. Even if we had concluded that the real reason for the claimant's dismissal was that Mrs Chapel-Nkomo thought that the claimant had caused her sister to put in the public domain photographs and statements which were highly damaging to the respondent, that would not have led to a finding in the claimant's favour here.

131 For the avoidance of doubt, if it had been necessary to do so, we would have concluded that the failure to keep the electricity supply flowing continuously at

100 Commercial Street involved a risk to the health and safety of the persons occupying those premises.

The claim under sections 47B and 103A of the ERA 1996

A discussion about the law

132 The claims under sections 47B and 103A of the ERA 1996 were to an extent alternative ways here of putting the claims under sections 44 and 100 of that Act with one exception. The differences were that (1) a disclosure within the meaning of section 43B of the ERA 1996 can be protected if it is made in accordance with section 43G of that Act, and not merely to the employer, and (2) the disclosure need not concern the workplace (*Hibbins*).

133 Section 43F of the ERA 1996 refers to disclosure to a prescribed person. We were not referred by either party to the Public Interest Disclosure (Prescribed Persons) Order 2014, SI 2014/2418, but we saw that at the material time, the Care Quality Commission ("CQC") was listed as such a person for the purposes of section 43F in regard to

> "Matters relating to—
>
> (a) the registration and provision of a regulated activity as defined in section 8 of the Health and Social Care Act 2008 and the carrying out of any reviews and investigations under Part 1 of that Act; or
>
> (b) the functions exercised by the Healthwatch England committee, including any functions of the Care Quality Commission exercised by that committee on its behalf; or
>
> (c) any activities not covered by (a) or (b) in relation to which the Care Quality Commission exercises its functions."

134 We were strongly inclined to conclude that the accommodation provided by a care provider for its employees (rather than its residents), including sleeping-in accommodation, is within the scope of those matters. That was because if a worker's accommodation were not conducive to the worker being clean and well-rested, then the worker might well be less effective at giving care to recipients of the employer's services.

135 Section 43G provides:

> "(1) A qualifying disclosure is made in accordance with this section if—
>
> (b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—

...

(c) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

<u>Our conclusions on the claims made under sections 47B and 103A of the ERA 1996</u>

136 Given our conclusions stated in paragraphs 103-104 and 106-109 above, we concluded that the real, or only, reason for the claimant's dismissal was that Ms Baber, her sister, had put the posts at pages 269 and 496-511 on Facebook. As we say in paragraphs 104 and 105 above, Mrs Chapel-Nkomo asserted that Mrs Baber had done that at the instance of the claimant, but, we concluded, Mrs Chapel-Nkomo did not truly believe that Mrs Baber had acted at the instance of the claimant.

137 We concluded that dismissing someone for doing something which was a protected disclosure within the meaning of section 43B of the ERA 1996 was capable of being in breach of either or both of sections 47B and 103A of the ERA 1996. Here, we concluded that the respondent was under a contractual obligation to ensure that the premises at 100 Commercial Street were reasonably safe to use and that the electricity supply to the premises would not be unreasonably interrupted. We also concluded that not ensuring that there was a more or less constant supply of electricity to the premises (so that it was interrupted only as a result of an occasional interruption through an inadvertent failure to ensure that the meter was topped up) meant that there was an endangering of the health and safety of those using the premises.

138 Accordingly, pointing out the fact that the electricity supply was frequently disconnected by the meter running out of credit was in our judgment a statement within the meaning of section 43B(1)(b) and/or (d) of the ERA 1996.

139 However, posting on Facebook the documents at pages 269 and 496-511 was in our view not within the protection of section 43G of the ERA 1996. That was because in our view if it had been done by the claimant then it would not have been reasonable for her to do it given that in our judgment the claimant should have approached at least the CQC and probably then the Home Office before, as a last resort, publishing the facts to those who had access to the Facebook pages in question. In coming to that conclusion, we took into account the fact that the failures to which pages 269 and 496-511 referred were at the lower end of seriousness and the fact that the claimant had not utilised the respondent's whistleblowing procedure before her sister put those pages in effect in the public domain.

140 Further, in our view, if Mrs Chapel-Nkomo had taken action against the claimant because she genuinely thought that the claimant had caused her sister to put the documents at pages 269 and 496-511 on Facebook, then she would have taken that action because of the manner in which those documents were "disclosed" for the purposes of section 43B of the ERA 1996. So, we would have concluded that what Mrs Chapel-Nkomo did was done not because of the fact that those documents were disclosed, but because of the manner in which they were disclosed, applying the principles in *Kong v Gulf International Bank (UK) Ltd* [2022] ICR 1513.

141 For those reasons, the claims of breaches of section 47B and 103A of the ERA 1996 failed.

The claims in the law of contract: (1) for damages in regard to the sums required by the respondent to be paid before the claimant became an employee and (2) for wrongful dismissal

142 We turn, then, to the law of contract.

The claim for damages in the form of the sum of £2,691

143 The claim for damages in regard to the sums which were paid by Ms Baber (which we will regard as having been paid on behalf of the claimant) was about a sum paid in order to enable the contract of employment to come into existence, because without the payment of that sum, the contract would not have come into existence.

144 The claim was put in the following way in the written closing submissions of Mr Ohringer.

> "61. The Respondent's case was that the Claimant was told that the fee she was required to pay upon signing her contract was for expenses which the Respondent incurred on her behalf. In the course of Ms Chapel-Nkomo's it became clear that was not true. No part of the fee was supported by any invoice or calculation. It was simply a sum which Ms Chapel-Nkomo thought she could charge. Knowingly overcharging an employee is a breach of the implied term of trust and confidence.
>
> 62. As a result of this breach by the Respondent, the Claimant was persuaded to pay £2,619 and that is the loss she has suffered. The Respondent has failed to demonstrate that it had a legitimate basis for charging any of this sum."

145 The problem with that argument was that it failed to take into account the fact that the sum was a pre-requisite to the contract. There was certainly no authority put before us, or of which we were aware ourselves, which supported the claim for an order for the payment of £2,619 as damages for breach of contract.

146 We then reflected and reasoned that (1) damages are payable as compensation for a breach of contract and (2) the sum of £2,619 was not obviously classifiable as a loss flowing from a breach of contract.

147 In the circumstances, we were unable to see how the claim for damages for breach of contract in the form of the £2,619 which was paid in order to enable the contract to come into existence could succeed, and we therefore dismissed it.

The claim of wrongful dismissal

148 However, we concluded that the claimant had been guilty of no fundamental breach or repudiation of her contract of employment. That was because, (1) as we say in paragraph 105 above, the claimant did not cause her sister to put pages 269 and 496-511 on Facebook, (2) as we say in paragraph 76 above, the respondent had no concerns about the claimant's performance, and (3) in part because of our factual conclusion in paragraph 75 above but in any event, we saw no cogent evidence (despite the suggestion by the respondent to the contrary) that the claimant was to any extent in breach of contract or repudiating it by failing to be trained to do her job.

149 Accordingly, the claimant's claim of wrongful dismissal succeeded. She was entitled to notice pay which was agreed to be of one week's pay which, given what we say in paragraph 19 above, was £479.45.

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Employment Judge Hyams

Date: 4 November 2024

SENT TO THE PARTIES ON

8 November 2024

FOR THE TRIBUNAL OFFICE