Case No: 3310718/2022
3313610/2022

EMPLOYMENT TRIBUNALS

Claimant: Ms C Beverley
Respondent: Care Assist Ltd

Heard at: Watford
On: 23 to 26 September, 28 November, panel only on 29 November and 19 December 2024

Before: Employment Judge Dick
Mr K Chester
Ms L Jaffe

Representation
Claimant: Mr D Matovu (counsel)
Respondent: Miss L Hatch (counsel)

RESERVED JUDGMENT

The following is the unanimous judgment of the Tribunal:

1. The complaints of automatically unfair dismissal and ordinary unfair dismissal are dismissed as the claimant was not an employee of the respondent within the meaning of the Employments Rights Act 1996.

2. The complaint of being subjected to detriments for making a protected disclosure is not well-founded and is dismissed.

3. The complaint of direct race discrimination is not well-founded and is dismissed.

4. The complaint of harassment related to race is not well-founded and is dismissed.

5. The complaints relating to holiday pay and arrears of pay are dismissed upon withdrawal.

REASONS

Key to references:

[x] = page of agreed bundle.

{y} = paragraph number in the statement of the witness being referred to

INTRODUCTION; CLAIMS AND ISSUES

1. The claimant worked for the respondent from 22 July 2015 as a mental health support worker at the respondent's premises on Whitehall Road in Harrow. The claimant, who is black, says that she was subjected to harassment related to her race by the Registered Care Manager Nicola Faulkner in a number of ways from about November 2021. On 5 January 2022, finding herself on shift alone, the claimant provided medication to two service users without it being witnessed by another member of staff in breach of the respondent's procedures. When Mrs Faulkner arrived, there was a disagreement between them and, on the claimant's case, Mrs Faulkner told her to leave the premises. Two days afterwards, on 5 January 2022, the claimant's forthcoming shifts were cancelled by the respondent and the claimant was subjected to a disciplinary investigation. That investigation was completed with, to oversimplify somewhat, no formal sanction imposed. But the claimant never returned to work. It was not in dispute that she was not offered any more shifts at Whitehall Road, though the reasons for that were a point of contention. The claimant was sent a P45 months later – on 1 August 2022. The claimant says that in being prevented from working at Whitehall Road, she was treated less favourably than a white colleague, who had not been suspended after a similar incident in August 2021. The claimant further says that this was detrimental treatment because she had previously made two protected disclosures – one about the incident involving that other colleague and another about racism, bullying and harassment. The claimant also says that the respondent, in sending the P45, dismissed her, which was a further act of race discrimination and/or an unfair dismissal, either in the "ordinary" sense or because she had made the protected disclosures.

2. For the claimant to be able to bring complaints of unfair dismissal, she must have been an employee within the meaning of the Employment Rights Act 1996 ("ERA"). The respondent says that as a "casual (relief)" member of staff she did not have that status at any time or, in the alternative, only had that status when she was actually working (i.e. on the rota) which, by the time the P45 was sent, she had ceased to do. The respondent also denies that, even if the claimant had been employed, sending the P45 amounted to a dismissal. The respondent denies that the claimant was subjected to harassment and denies that, to the extent that she did disclose information, those disclosures were protected. It says that the decision to prevent the claimant working at Whitehall Road was

not discriminatory and had nothing to do with the disclosures; the other colleague was not in a comparable situation and to the extent that there were differences in treatment, they were not related to race.

3. The factual and legal issues for us to decide were, as the parties agreed, unchanged from the list of issues set out in the Case Management Summary prepared by Employment Judge ("EJ") Bedeau following a preliminary hearing on 22 March 2023, save that we were asked to consider an application to add a complaint of "ordinary" unfair dismissal. We granted that application and gave oral reasons for our decision. The list of issues was amended to reflect that decision and an edited version of that list is appended to this judgment.

4. In short, the complaints we had to consider were:
    a. Subjecting the claimant to the following detriments for making the two protected disclosures:
        i. Not allowing her to work at Whitehall Road;
        ii. Being told by Mrs Faulkner to leave the workplace on 5 January 2022.
    b. Unfairly dismissing the claimant, either "ordinarily" or because she made protected disclosures.
    c. Harassment by Mrs Faulkner relating to race in a number of specified ways.
    d. Direct race discrimination:
        i. Suspending the claimant and preventing her from working at Whitehall Road (whereas the comparator, the Team Leader, was not suspended and was allowed to continue administering medication).
        ii. Dismissing the claimant.
    e. [There were also complaints relating to holiday pay and arrears of pay, but see para 16 below.]

5. Although we were not asked to give written reasons for our decision on amendment, we do consider it appropriate to set out some of the procedural history and to briefly explain our reasons for our decision to allow the amendment, as they are relevant to the time limits point we deal with later. Before doing that, it may assist if we provide a little more context for the issues to be decided.

6. Regarding employment status, the claimant's case was straightforward – she regularly worked three shifts for the respondent, always at Whitehall Road, and the respondent's own documents described her as an employee and referred to a contract of employment. The respondent's case that the contract did not amount to an employment contract within the meaning of ERA was based primarily on the submission that the respondent was not obliged to offer the claimant work and the claimant was not obliged to accept it; only when she did (by agreeing to go on a rota) was there mutual obligation; this ended at the end of each rota cycle and where, therefore, the claimant was not working because she was not on the rota, she was not employed.

7. The first protected disclosure that the claimant said she made was about an incident involving the Team Leader at Whitehall Road. That employee was not a party to these proceedings and did not give evidence, so we do not consider it appropriate to name her – we refer to her simply as the Team Leader. On 6 August 2021 the Team Leader administered her own asthma medication to a service user who was having difficulty breathing. This alone was a breach of the respondent's policies, but the Team Leader was later also found to have falsified records relating to the medication. She was not suspended during the disciplinary process, which resulted in a final written warning. The claimant's case was that she had reported the incident to the respondent by email, which amounted to a protected disclosure. That email was not produced in evidence and the respondent's case was that the incident was in fact reported by the Team Leader herself and by another worker.

8. The second protected disclosure was said to be an email, which was produced in evidence, that the claimant sent on 28 December 2021, which she said amounted to a complaint about racism, bullying and harassment. The email was prompted by the following. The claimant had agreed to do a shift on New Year's Day. A decision to move that shift was made by Mrs Faulkner but communicated to the claimant by the Team Leader in a manner to which the claimant took exception. The following day Mrs Faulkner conducted a "situational supervision" with the claimant about what had happened. The claimant's emailed complaint was about how the whole situation had been handled. The respondent's case was simply that the email was not a protected disclosure as it made no mention of any alleged breaches of any legal obligation under the Equality Act 2010 ("EqA").

9. The complaint of harassment related to the conduct of Mrs Faulkner, who had started working at the Whitehall Road site, as the Registered Care Manager, in November 2021. One particular complaint was about her arranging the supervision meeting we refer to in the previous paragraph. Other particular complaints are dealt with individually below. One related to what was said (or was not said) during the course of an argument that started between the claimant and Mrs Faulkner after Mrs Faulkner had arrived at Whitehall Road on 5 January 2022, the day the claimant had started her shift alone, when the agency worker who should have been working with her did not attend for their shift. The claimant did not dispute that she had helped two service users with their medication without the assistance of a colleague. This is to be distinguished from physically administering the medication, but there was no dispute that the claimant's actions amounted to a breach of the respondent's policies; the claimant's case was that this was no more than a technical breach as she had little choice in the circumstances but to do what she did. When Mrs Faulkner arrived, there is no dispute that she and the claimant argued about the care of a particular service user. There was a dispute about whether Mrs Faulkner, as the respondent said, simply asked the claimant to move out of that service user's room or whether, as the claimant said, Mrs Faulkner told the claimant to leave the Whitehall Road site entirely.

10. Following the events of 5 January 2022, Mrs Faulkner was told by Gemma Dimano, the respondent's Operational Manager, to cancel the claimant's rostered shifts at Whitehall Road. The respondent conducted an investigation into the events of 5 January (the fairness of which was a matter of some contention), with the results being conveyed to the claimant on 8 February 2022. It was the respondent's case that by now, as a result of staff vacancies having been filled, there were no longer any shifts available at Whitehall Road but that the claimant could have worked that any of the respondent's other nearby sites. The claimant disputed the respondent's claim that there was no work available for her at Whitehall Road and said that in any case she should not had to have worked elsewhere as she had always worked at Whitehall Road. There was no dispute that the claimant did not in fact do any more work for the respondent.

11. The claimant says that the sending of the P45 months later amounted to a dismissal, whereas the respondent's case was that she cannot have been dismissed as she was not employed, but that in any case the P45 was sent simply by way of the respondent complying with its obligation to notify HMRC that the claimant was not receiving an income from the respondent.

PROCEDURE, EVIDENCE etc

12. Before the evidence was called we explained to the parties that we would read the witness statements but they should be sure to refer us to any documents of relevance in the agreed bundle during the course of the evidence or submissions. Both counsel helpfully suggested a number of pages which we might read in advance as they would be dealt with during the course of the evidence. We also discussed the issues with the parties (see paragraph 3 above).

13. After taking time to read the statements etc., we dealt with a number of preliminary issues:
    a. We made orders under what was then rule 50 to protect the identity of the service users who would be referred to during the course of the evidence. Those orders are dealt with in a separate document prepared at the time of the hearing. In accordance with the orders we do not name the service users.
    b. We granted the respondent's application for its witness Gemma Dinamo to give evidence by live link (over CVP).
    c. We granted the claimant's application to amend the list of issues, or in the alternative, the claim, to add a complaint of "ordinary" unfair dismissal; see below.

14. We heard evidence from the witnesses as follows. For the claimant: the claimant herself; Tanya Beverly, her daughter; Leah Mwaura, an agency worker who worked at Whitehall Road. For the respondent: Nicola Faulkner; Gemma Dimano; Sophia Phills, the respondent's Operations Director; and Dilip Gohil. In each case the usual procedure was adopted, i.e. their written

statements stood as their evidence-in-chief and they were then cross-examined.

15. Over the course of the case we agreed a number of times that further documents could be added to the agreed bundle. With one exception this was by agreement. Where the parties did not agree in one particular instance we gave oral reasons for our decision to allow the evidence in.

16. At the conclusion of the evidence we heard oral submissions from both counsel, supplemented by written submissions, for which we are grateful. We then reserved judgment. During the course of closing submissions counsel for the claimant indicated that the complaints relating to holiday pay and arrears of pay were not pursued. By agreement therefore we dismissed those claims upon withdrawal.

17. To put our decision on amendment in context, we first set out the procedural history of this case.

Procedural history

18. Two claim forms were presented in this case. In the following summary we omit any references to holiday pay and arrears of pay since those claims are no longer before the Tribunal. The first claim form [8] was presented on 14 June 2022 (i.e. after the claimant last worked for the respondent but before she was sent a P45 on 1 August 2022). It was accompanied by the required ACAS conciliation certificate. The claims were expressed as being for race discrimination, whistleblowing, bullying and harassment. In the free text part of the form the claimant complained that the investigatory process in January 2022 was unfair and complained that her shifts had been cancelled. She complained about the outcome of the investigation. On 8 November 2022 the claimant's daughter submitted an amendment application [37] on her behalf. Having been prompted to do so by the Tribunal she sent the application to the respondent on 8 December 2022. So far as is relevant the application said that the claimant was notified of her dismissal by P45 on 3 August 2022 but the date recorded on the P45 was 31 March 2022 so the claimant was "unclear" about when her employment was terminated. She applied to amend the claim to include "the updated events that occurred" and to add claims of "unfair dismissal due to making whistleblowing", "protected disclosure detriment" and "dismissed discrimination factor". Meanwhile, on 17 November 2022, the claimant had presented the second claim form [39]. This second claim form was accompanied by a second ACAS certificate, for a later (i.e. second) period of conciliation. The claimant ticked boxes on the claim form to indicate that her claims were for unfair dismissal, race discrimination and also indicated there were claims for "protected disclosure detriment, dismissed discrimination factor and injury to feelings". In the free text part of that form she said that she had been unfairly dismissed and repeated what had been said in the amendment application about her uncertainty about the date of termination. She said that she would like to apply to amend an existing claim to include the updated events that occurred and that the claims included "unfair dismissal due to

whistleblowing, protected disclosure detriment, dismissed discrimination factor…" In the later part of the form the claimant explained that when she asked why she been dismissed she had not received a response and said "they did not follow any formal disciplinary or dismissal procedures so I have essentially been left in the dark". The respondent responded promptly to both claim forms. The second response asserted that the Tribunal did not have the jurisdiction to consider the second claim on the basis that the second early conciliation certificate could not extend time limits and that the claim was therefore out of time. (If it could so operate, the second claim would undoubtedly have been in time – as the certificate shows [38], the claimant went [back] to ACAS on 31 October 2022 and the process finished on 4 November 2022.)

19. On 12 February 2023 the parties were sent a letter [72] setting out the decision of EJ Maxwell. EJ Maxwell referred to the claimant's email of 8 November 2022 and observed that no objection had been received by the respondent. EJ Maxwell allowed the claim to be amended to add claims of unfair dismissal by reason of having made a protected disclosure and direct race discrimination in dismissing the claimant. EJ Maxwell noted that the effective date of termination appeared to be 3 August 2022 and said that the claimant would have been in time to present a claim of unfair dismissal or dismissal as an act of race discrimination on 8 November 2022. He said that the application had been made in good time at a very early stage in the proceedings and that it was reasonable for the claimant who was without legal representation to have been unaware of rule 92 (i.e. the rule then requiring the application to have been sent to the respondent). EJ Maxwell went on to say that there was a factual and legal overlap between the existing claims and those the claimant sought to add and there would be no prejudice to the respondent in allowing the application, whereas there would be prejudice to the claimant if the application was refused as a freestanding claim would now be too late. EJ Maxwell therefore concluded it was in the interests of justice to allow the amendment. It is not clear on the face of the letter whether EJ Maxwell had had sight of the second claim form or took account of the second ACAS certificate, though at least the latter seems implicit from what he said about the applicable time limit. What is clear is that EJ Maxwell took into account the issue of time limits in making his decision and he did not say that the amendment was granted subject to the issue of time limits being decided at a later hearing.

20. The first hearing in this case took place on 22 March 2023 before EJ Bedeau. EJ Bedeau ordered that the two claims should be consolidated. His orders do not make explicit mention of EJ Maxwell's letter. EJ Bedeau did say (at para 36) that the respondent asserted that the second claim was presented out of time and that the claimant could not avail herself of the ACAS extension provisions. It was at this hearing the list of issues was prepared – essentially as set out in the Appendix to this judgment, save for the absence of point 3A (ordinary unfair dismissal). In paragraph 9 of the list EJ Bedeau included the question whether the claimant had presented any claim under ERA which was out of time.

21. There was a dispute between the parties, which we deal with below, about whether the issue of time limits on the automatically unfair dismissal complaint was, as a result of EJ Bedeau's orders, still "live", or whether it had already been decided by EJ Maxwell. All agreed however that there was such a complaint.

Our decision on amendment

22. The application before us was to amend the claim and/or the list of issues to add a claim for "ordinary" unfair dismissal. The claimant's primary submission was that only an application to amend the list of issues was required. We decided that adding ordinary unfair dismissal did in fact necessitate an application to amend the claim rather than simply to amend the list. We were referred to *Mervyn* v *BW Controls Ltd* [2020] EWCA Civ 393, [2020] ICR 1364. In that case, the claim was for unfair dismissal. The claim form had set out facts which could support a claim for constructive dismissal (indeed the form "shouted [it] out"), but the list of issues prepared at the preliminary hearing concentrated on whether the claimant had been "actually" (as opposed to constructively) dismissed by the respondent, excluding the question of constructive dismissal. In deciding whether the Tribunal at the final hearing should have considered whether there was a constructive dismissal, the Court of Appeal held that the Tribunal should have amended the list of issues and considered constructive dismissal. The Court did not give explicit consideration to whether an amendment to the claim would also have been required, no doubt because, regardless of whether or not there was a constructive dismissal, the claim would only have been for "ordinary" unfair dismissal and in any case the constructive dismissal had been raised on the claim form. That case did not therefore assist us on whether an application to amend the claim was necessary in this case. We took the view that pleading ordinary unfair dismissal, where that had not been explicitly raised as part of the claim (and here we mean the claim as already amended by order of EJ Maxwell) was different and would require an application to amend the claim.

23. On considering whether to allow the amendment sought, we considered that it was a case of relabelling. The claims as amended already explicitly referred to a dismissal, both as a complaint under ERA but also as an act of discrimination. Although the second form (and the application considered by EJ Maxwell) said that the complaint was for unfair dismissal because of whistleblowing, so that it might not be said that a claim for ordinary unfair dismissal was "shouted out", there was information contained in both the application and the second claim form to suggest a procedurally (i.e. ordinarily) unfair dismissal. In particular, the second claim form asserted a lack of formal disciplinary or dismissal procedures (Box 15, [50]); the first claim form made similar complaints though not, then, in the context of there having been a dismissal. We considered the nature and timing of the application. Taking account of the overarching balance of prejudice we allowed the amendment. The claimant would be caused

prejudice by a refusal in that she would not be permitted to argue what could be a significant part of her case. In contrast, the respondent would be caused little if any real prejudice. The parties had come prepared to litigate the issues of employment status and whether there was a dismissal, as well as the fundamental question why the claimant was dismissed and, in reality, whether that was fair. It was hard to see how the respondent might have approached the case differently had it known any earlier, though there would be some changes relating to, for example, the burden of proof. Any residual prejudice could be cured by an applications to, for example, prepare supplementary witness statements or amend the response. (No such applications were in the event made.) We would add that, had the claimant only been required to make an application to amend the list of issues, we would have allowed the application for essentially the same reasons.

FACT FINDINGS

24. We find the following facts on the balance of probabilities. Where facts were not in dispute, we simply record them. Where we have needed to resolve disputed facts we make that clear. We have not made findings on every dispute of fact presented to us, but merely on those which assist us to come to a decision bearing in mind the list of issues.

The respondent's business

25. The respondent provides supported living and care homes in West London for young adults, specialising in mental health, young onset dementia and learning disabilities and treating people with bipolar disorder, drug dependency, eating disorders or substance abuse disorders. It operates at seven sites, four of which are in Harrow, and it employs 66 people.

Facts relating to employment status

26. The claimant's job title was "casual (relief) mental health support worker". At [111] was a "statement of the main terms of employment" ("the terms document") signed on behalf of the respondent by Mr Dilip Gohil on 19 July 2015 and by the claimant, described as "the employee", on 22 July 2015. The document refers throughout to the claimant being employed and says that her period of continuous employment would commence on 22 July 2015. It says her duties are set out in a role description, with which we were not provided. The terms document says that the claimant's place of work would be Whitehall Road but she may be required to work at such locations as may be directed by the company from time to time with reasonable notice. Under the heading hours of work it said:

> Your normal hours of work will be as required, and by arrangement on shifts fixed by a Rota on a monthly pattern. The days worked will usually

include evenings, weekends and Public Holidays, and some sleeping-in duties for which an additional payment of £25.00 is made per night.

The Company reserves the right to determine the pattern, vary the hours and require you, with reasonable notice, to change your working pattern or work additional hours to ensure service provision.

27. The claimant was to be paid monthly in arrears at an hourly rate. The Staff Handbook is specifically referred to as one of the documents which form the "contract of employment". The claimant would be subject to the disciplinary rules and grievance procedures set out in the Handbook, which was at [241]. Indeed, the respondent purported to apply those rules to the claimant following the incident of 5 January 2022. The respondent had a Supervision Policy [423] which referred to situational supervisions (which Mrs Faulkner subjected the claimant to in December 2021). The Supervision Policy is not referred to in the terms document, though supervision is referenced a number of times in the Handbook.

28. The terms document makes no provision for sick pay, though the Handbook [262] says the company "reserves the right to make sickness payments" and says that all "employees" have a right to statutory sick pay.

29. There was no requirement in the terms document that the claimant not work for others, though there was a requirement that the claimant must not carry on any business similar to or in competition with the respondent, or attempt to solicit the respondent's customers. We do accept the claimant's uncontested evidence that in practice she did not work for others (at least before the events of January 2022).

30. The respondent continued to issue materially identical "terms documents" to those working in a similar way to the claimant at least as late as 2022 – see para 90 below. It almost goes without saying that if the respondent considered that such a person was a worker rather than an employee within the meaning of ERA, there was nothing to stop it saying so in this document.

31. There was no dispute about the following aspects of the claimant's evidence. She set out her duties in some detail in her statement, which we would broadly describe as caring for the respondent's residents. She also helped to train new staff and supported them with inductions. She was required to complete monthly "resident reports" and chaired monthly "residents meetings". She was a designated first aider at certain periods and had also been the designated fire officer. She led shifts, i.e. was the most senior person on shifts where the others were agency workers. She also completed over 70 courses during her time working for the respondent by way of mandatory training. The claimant wore a name badge and there was no suggestion that she provided her own equipment. There was no dispute that (whatever might have been her obligations under the contract or the terms document) the claimant in fact only ever worked at the Whitehall Road site.

32. The claimant paid tax at source under the PAYE system and was part of the respondent's pension scheme. She was entitled to paid holiday (though of course that is a right accorded to workers as well as employees), accrued pro-rata on the basis of the days actually worked. We note that in the bundle, though they were not referred to in the course of the evidence, that there were two "annual leave request" forms [411, 410] filled in by the claimant requesting four days' leave in March 2019 and six days' leave in December of that year. Mr Gohil's written evidence dealt with the point: "Casual workers' annual leave is pro rata to the hours they worked. Every now and then they check how many days leave they have accrued . Once notified, they book the leave with their line managers. This system applied to Mrs Beverley." The claimant agreed – she said that she would inform the Team Leader when she wanted holiday, asking whenever the need arose.

33. The respondent kept documents which named the "relief staff" at its three sites. On the document for August 2021 headed "current relief/weekends staff list" the claimant's name appeared under the Whitehall Road heading. In a column headed "job type/availability depending on shift" the entry for the claimant recorded "weekdays/weekends" [417]. A similar document [114] with the same heading for 2020 recorded the claimant's "job type" as "relief".

34. The claimant said in her statement that although the contract described her as a relief worker she was "fully part and parcel of the respondent's business". We agree that is fair in the sense that the respondent considered her to be an important member of staff and she was one of a number of people doing work which was essential to the respondent's business (though some of those people included agency staff, who all agreed were not employees of the respondent).

35. It is right to say that in their oral evidence all of the respondent's witnesses described the claimant as an employee. Equally, for perhaps obvious reasons, neither counsel asked those witnesses for their views on the distinction between an employee and a worker for the purpose of employment law. Mr Gohil in cross-examination described the claimant as an "employee on a casual contract" – this is indicative of the lack of legal precision with which the respondent's witnesses approached the issue of employment status, so we do not consider their mere use of the word employee to be conclusive. For the same reason we were not assisted by a letter written by the late Sandy Gohil (Dilip's brother) in October 2020 in his capacity as the respondent's Chief Executive Officer at the height of the Covid-19 pandemic. The letter, addressed to whom it may concern, says that the claimant is an "essential employee" of the respondent providing essential care for six people in Harrow and is classified as a "key worker".

36. Although all were agreed that work was allocated to the claimant by a rota system, there was some dispute about whether that operated weekly or monthly. As we have observed, the terms document said monthly. We also note a message admitted into evidence (see para 39 below) where the claimant refers to that month's rota. However, we accept Mrs Faulkner's oral evidence

that by the time we are concerned with and in particular by the time of the argument about the shift for New Year's Day 2021/22, for reasons connected with the pandemic, the rotas were in fact being done on a weekly basis. The claimant's message appears to us to have been based on her experience of the previous system.

37. The claimant's statement said that she was "requested to do three shifts per week" and that she was rostered on a regular basis for seven years; she agreed in her oral evidence that she did not necessarily do those shifts on the same days at the same time each week. We note that in her written evidence Mrs Faulkner referred to the claimant doing "her usual 3 shifts" in December 2020. So when the claimant did work, she usually did three shifts per week. We accept that when the claimant was to be working, her hours were published by the respondent on the rota, she did the hours and in return she was paid.

38. The most contentious part of the evidence on employment status was whether the respondent was obliged to offer work and whether the claimant was obliged to accept it. The claimant's case was that she had "guaranteed hours". The respondent's case was the opposite – that the claimant was on a "zero hours" contract. The respondent relied principally on three things to show this. First, the terms document to which we have already referred did not set out any guaranteed hours.

39. Second, a table [235] was prepared by Mr Dilip Gohil from the respondent's pay records. We accept that this document is an accurate record. The document appeared in the agreed bundle prepared well in advance of the trial and we were not presented with any evidence that contradicted it. There are significant gaps (i.e. periods in which the claimant did not work). Those periods are not periods when the claimant took paid holiday, as paid holidays are recorded separately. In other words there were significant gaps where the claimant did not work and was not paid. The document covers the period from 20 November 2020 to 31 December 2021 (i.e. when the claimant last worked for the respondent). The document records the number of hours for which the claimant was paid each month. This figure varies from 30 hours in February 2021 to 113 in September 2021. We of course note that many employees do not work set hours; we also note that in some cases the payment for a particular month actually seems to cover the first half of that month and the second half of the previous month; the document does however make clear which days the work was done. There are a number of instances where the claimant did not work (and was not taking paid holiday) for more than a full week (meaning Monday to Sunday in this context): 13 to 22 December 2020, 27 December 2020 to 6 February 2021 (i.e. the claimant did not work at all in January 2021) 19 March 2021 to 10 April 2021, 15 May to 26 May 2021. There are no such gaps from then until December 2021; from then the claimant worked a minimum of 94.5 hours. The claimant was asked about these gaps in her oral evidence. While she thought she had sciatica at one point, she did not have a clear recollection. Some messages in evidence [419], exchanged between the claimant and the Team Leader shed some light on this: On 12 January 2021 the Team Leader asked how the claimant was feeling and whether her back

was any better and offered three shifts that week. The claimant replied that she had had a bit of a relapse; she hoped she would be "fine for the February rota". As we have just observed, Mr Gohil's record shows that the claimant did not work, and was not paid, at all in January 2021.

40. Third, the respondent's witnesses drew distinctions between three classes of people who worked for the respondent. At one end of the spectrum were the "permanent" staff. They had guaranteed hours each week, which they were not entitled to refuse to do. At the other end were agency workers, which the respondent was keen to use less of due to their costs; they were not employees of the respondent (and there was no dispute about that). In the middle were the casual/relief workers, including the claimant, who had no set or minimum hours; on its case, the respondent had no obligation to offer them work and they had no obligation to accept any shifts they were offered. As Mrs Phills (the respondent's operations director, the most senior employee of the respondent who gave evidence) put it, they were effectively the respondent's bank workers who were called on to fill gaps in the rotas where there were no permanent staff available. Mr Dilip Gohil also asserted that there was no obligation to provide work on the part of the respondent and no obligation to accept it on the part of the casual/relief workers. Gemma Dimano similarly asserted that the claimant was on a zero hours contract and was entitled to refuse any offer of work. In particular, Mrs Phills {22} told us that the respondent's full-time employees were always required to work shifts over Christmas and New Year. In contrast there was no such requirement for the relief workers to do this and indeed the claimant generally chose not to. The claimant accepted that she did generally not work over that period, and that when she had it had been her choice. The claimant also agreed that if she had been what the respondent termed a permanent employee she would have been required to work the period. As an example, at [382] there was a record of a 2019 supervision with the claimant where the supervisor had recorded that the claimant had "very kindly volunteered to work on Christmas Day to allow permanent staff, who always work on Christmas day, to have a day off this year." Mrs Phills also told us that the bank workers were regularly encouraged to sign on as permanent staff, because the respondent wanted as many permanent staff as possible. We accept that, though we also accept the claimant's evidence that (for whatever reason) that particular message never was conveyed to her.

41. In her evidence the claimant pointed to "getting into trouble", as she described it, for declining an additional shift due to having family plans. This is a reference to the shift on New Years Day Shift 2021/22. We return to this in more detail below, but in short, as we have said, Mrs Faulkner decided to change the claimant's shift from an early shift to a late shift; it was more a case of the claimant being told about the change rather than being consulted about it before the decision was made. It was clear to us that Mrs Faulkner was of the firm view that she had no obligation to consult the claimant, believing that once someone such as the claimant had accepted work on a particular week, she, Mrs Faulkner, was entitled to change the rotas at short notice if necessary without consulting the staff, though she did not suggest that in the event of the change someone such as the claimant would be obliged to do the work. In this

particular instance, when the claimant said that she could not work the late shift as she had made plans with her family, we accept Mrs Faulkner's evidence that on the respondent's behalf she accepted that and had an agency worker cover the late shift instead. As she put it in her statement: "this is one of the benefits of being a relief worker, you can pick and choose when you want to work." The claimant made no suggestion that she was ever subjected to a detriment for refusing the change of shift. On the basis of the evidence we heard, we find that the respondent's attitude would have been different had the claimant been what the respondent would describe as permanent staff. While this incident alone does not determine the issue whether the claimant was entitled to refuse work, we do consider that it is part of the picture in that regard – it is indicative of the parties' general approach to the issue of whether the claimant was obliged to accept work.

42. Taking all of the above into consideration we find that the reality of the relationship was that the respondent was not under any obligation to offer the claimant work and that when the respondent did offer the claimant work she was under no obligation to accept it. For the avoidance of doubt, we are referring here to the months and years up to January 2022 (which was when the claimant last worked for the respondent).

43. Regarding the work the claimant did and the degree of control over her work which the respondent exercised when she was working, the evidence we heard suggested that there would have been no material difference had the claimant been what the respondent termed permanent staff, i.e. had the claimant ever become permanent staff, we find her day-to-day work would not have changed materially. (We do not consider that we heard sufficient evidence to enable us to come to a similar conclusion one way or the other about how the claimant's role compared to agency staff.)

The incident of 6 August 2021

44. On 6 August 2021 the Team Leader used her own asthma inhaler on a service user who was having breathing difficulties. In other words she administered medication which had not been prescribed to that service user. The claimant and another of her colleagues ("the Other Worker") witnessed this. Two days later, on 8 August, the Team Leader submitted an incident report form. In it she said that she had administered an inhaler but did not say that it was not the service user's inhaler. The following day, 9 August, the Team Leader wrote to Sophia Phills, saying that she had made a bad mistake on the shift. She had not called sooner as it had taken her time to build up the courage. She explained that the service user was on the floor struggling to breathe and when she tried to use their inhaler it did not work. In panic or as a gut reaction she had used her own. She accepted that she had made a serious error of judgment. In her oral evidence Mrs Phills told us that she had asked the Team Leader to do a statement. The statement, dated 15 August 2021 was in the bundle [129]. It essentially reiterated the contents of her earlier email.

45. Mrs Phills also told us, and we accept, that the incident was to be investigated by Esther Shomoye, who was the respondent's Registered Manager at the time, upon the latter's return from holiday. It was not clear to us exactly when Ms Shomoye returned from holiday, but it was not suggested to us that any adverse conclusion should be drawn from the fact that Ms Shomoye seems not to have taken any action until 12 September 2021, when the Other Worker emailed her and Mrs Phills about the incident [122]. The Other Worker took issue with some of the details of the account the Team Leader had given in her statement but also raised a separate (though clearly linked) concern that the same day the Team Leader had signed her (i.e. the Other Worker's) name on the "MAR chart", the formal record of medication administered to each service user, creating a false record which implied that the Other Worker had administered the medication. Ms Shomoye emailed the Other Worker on 13 September to suggest that they meet on 16 September. An email of 17 September records that Ms Shomoye decided that a formal investigation would be conducted by Gemma Dimano.

46. Ms Dimano recalled meeting the Team Leader and the Other Worker and having a short conversation with the claimant. She emailed Ms Shomoye on 27 September 2021. Her findings were that the Team Leader had administered her own medication to a vulnerable adult and had falsified documents to indicate that the Other Worker had administered the medication. She said that she believed it was an act of misconduct and would advise that the Team Leader's case should go to a disciplinary.

47. On 12 October 2021 Ms Shomoye wrote to the Team Leader. The letter was headed "Final Warning letter". Ms Shomoye referred to her own investigation, which she said had "identified that you failed to record a true description of the events which occurred". She described an investigatory meeting on 29 September 2021 (i.e. after Ms Dimano's involvement ended). Ms Shomoye said that she had spoken to the Team Leader about her expectations and those of the respondent. She said that the Team Leader understood how dangerous and inappropriate it was to share medication. In line with the disciplinary policy she issued a final written warning of six months' duration. We note that there appears here to have been something of a blurring of the lines here between, on the one hand, an mere investigatory meeting and, on the other, a disciplinary meeting; we do not know whether the Team Leader was ever formally informed that there was a disciplinary procedure and whether, for example she had the right to be accompanied. We also note that Ms Shomoye's letter makes no mention of Ms Dimano's finding that the Team Leader had falsified the MAR record. The phrase "failed to record a true description of the events" does not seem to us to cover that falsification (as Ms Dimano had found it to be) which, to put it mildly, was potentially rather more serious than a mere breach of the respondent's procedures. We simply do not know whether Ms Shomoye took account of the point without recording it or instead overlooked the point – we did not of course hear evidence from her, nor were we provided with records (if there were any) of the investigatory/disciplinary meetings.

48. We can properly go so far as to agree with Mrs Phills' evidence to us that what the Team Leader was found to have done could properly be described as gross misconduct. However, given the paucity of evidence we do not consider it appropriate to make a formal finding about whether the decision to award a final warning was an inappropriate sanction, though there can be little doubt it was lenient. Nor do we consider it necessary to make such a finding. The claimant's complaint is that she was prevented from working while the investigation against her went on, whereas the Team Leader was not suspended. It is certainly right to say that the Team Leader was not suspended.

The claimant's report of the 6 August 2021 incident

49. The claimant's case was that she made a protected disclosure about the incident, in early August 2021. (The list of issues has this as April 2021 but that error is not material as the documents clearly establish when the incident happened.) The claimant says that she reported the incident by email to Esther Shomoye. In its amended response the respondent accepted that the claimant had made a protected disclosure [88]. However by the time of submissions, the respondent's position had developed somewhat – it said that it had been unable to find any such email and the claimant had failed to prove on the balance of probabilities that she sent the email.

50. The claimant's evidence about when she sent the email and more importantly what she said in it was vague. She said that she reported it and the Other Worker reported it and as far as she knew it was only after that that the Team Leader reported the incident; we know that that cannot be right. The claimant did not produce the email in evidence, yet she had, we find, access to her work email account for some time after she last worked for the respondent. An email sent by the claimant's daughter on 15 March 2022 [216] refers to a recent email, which must be the email at [215], which was sent to the claimant's work email address. So the claimant clearly had access to her work email address at that time. Indeed, we accept what Mr Gohil told us, which was that he took over as the administrator of email accounts and noted in August 2023 that the claimant's account was still open. When asked by Ms Jaffe whether she had checked lately to see whether she still had access, the claimant said she had not. The other evidence we had on the point was from Mrs Phills, to the effect that she vaguely recalled the claimant putting something in writing, either a statement or a complaint, about the incident, after, she thought, the Other Worker's complaint. On the basis of all of this, we consider it more likely than not that the claimant sent some information by email to someone employed by the respondent about the 6 August incident; we can be no more specific than that. For reasons which we do not think it is necessary to state at length given what was the subject matter of the disclosure, even if we are unable to say what was said in detail, we accept that the claimant believed that the information tended to show that a person had failed to comply with a legal obligation and that the health of an individual had been endangered. We also accept the claimant's evidence that she believed that the disclosure was made in the

public interest. Likewise, we accept that in the circumstances both of these beliefs were reasonable.

"No jab no job" (November 2021)

51. On 15 September 2021 the Department of Health and Social Care wrote to the respondent (amongst many others) explaining that regulations which were to come into force on 11 November 2021 would require staff working at CQC-regulated homes (such as Whitehall Road) to have had a Covid-19 vaccine unless they had a medical exemption. This was popularly referred to as the "no jab no job" rule. On a temporary basis, from the date of the letter and until the imminent launch of the NHS Covid pass system, staff who had a medical reason would be able to self-certify. An email from Mrs Phills to the claimant dated 2021 October thanked her for her email providing a medical exemption certificate from her GP [142] and explained that the self certification system was expected to end on 24 December of that year. Having provided the required information, Mrs Phills continued, the claimant should disregard an earlier letter she had been sent headed "Confirmation of Dismissal for Statutory Restriction"; the claimant could continue to work in post as Mental Health Support Worker (Relief). A further letter from the claimant's GP dated 10 November 2021 explained the claimant's reasons for not having had a Covid-19 vaccine. The claimant provided further evidence to the respondent about that on 27 November 2021. The relevance of all this will become clearer later when we deal with Mr Gohil's evidence.

Mrs Faulkner (November 2021 onwards)

52. As we have said, Mrs Faulkner started work for the respondent in November 2021, as the Registered Manager (i.e. registered with the CQC) at Whitehall Road and one of the respondent's other sites. She usually spent about three days a week at Whitehall Road. Before that, Mrs Faulkner had been a nurse. When Mrs Faulkner was appointed, Ms Dimano had just taken over from Ms Shomoye as the operations manager for Whitehall Road and the same other site.

53. It was suggested on behalf of the claimant that due to certain action taken by the nursing regulator against Mrs Faulkner she was not authorised to act as Registered Manager. That issue was explored with Mrs Faulkner in her oral evidence and we are satisfied there is no merit to the claimant's suggestion. The issue was not in our judgment relevant to our decision (and in particular to Mrs Faulkner's credibility).

54. Following the break between the fourth and fifth days of this case, Mrs Faulkner was also asked about what Mrs Faulkner described as a misunderstanding between herself and another colleague who is not connected to this case. No evidence was called to contradict Mrs Faulkner's evidence about the incident and of course questions from counsel are not evidence. The evidence about the misunderstanding was not relevant to this case and it did not assist us in coming to our decision.

55. Mrs Faulkner has a hearing impairment and wears bilateral hearing aids. We accept her evidence that she often relies on lip reading. At the time we are dealing with, i.e. in the middle of the Covid-19 pandemic, people were habitually wearing face masks and this clearly caused Mrs Faulkner some difficulty. We accept that this was not a difficulty which was apparent to the claimant. We accept that she had not noticed Mrs Faulkner's hearing aids and it was clear to us on the basis of Mrs Faulkner's own oral evidence that she had not told the claimant about her hearing impairment – she clearly felt that she did not have to tell each of the people she worked with about it. As Mrs Faulkner told us, people would misconstrue her actions as intense staring, particularly when she was concentrating hard to hear someone when she could not lipread because they were wearing a mask. We consider that the claimant could have misinterpreted this as hostility on Mrs Faulkner's part as the claimant was not aware of Mrs Faulkner's hearing impediment. It was plainly Mrs Faulkner's right not to tell people about her hearing impairment, but it left scope for misunderstanding. This was a reflective of a somewhat dogmatic approach on Mrs Faulkner's part – she did not have to tell people, so she did not – which was also evident in her approach to the change of shift on New Years's Day which we deal with in more detail below – she felt she did not need to consult the claimant, so she did not. We accept that the claimant reasonably perceived Mrs Faulkner's manner to be abrupt on occasion, but we find that this was her approach in general rather to the claimant in particular.

56. The claimant alleged that Mrs Faulkner would ignore staff of colour and would only speak to white members of staff. The claimant said that Mrs Faulkner had specifically ignored the claimant when she greeted Mrs Faulkner a number of times; she initially put this down to Mrs Faulkner not taking to her but formed a different view when she saw that Mrs Faulkner did not speak to other black members of staff. We considered this evidence to be vague. We heard evidence from Leah Mwaura, an agency worker at Whitehall Road, who is black and who accused Mrs Faulkner of being a racist. Under cross examination it became apparent that she had only worked at the same time as Mrs Faulkner on two shifts; Mrs Faulkner would not have been with her for all of the time on those two shifts. Her belief that Mrs Faulkner was a racist was based predominantly, she said, on the fact that Mrs Faulkner did not come over and introduce herself, then went on a smoking break with two other (presumably white) employees and talked to the service users but not to her and another black member of staff. We cannot see how this could reasonably lead to the conclusion that Mrs Faulkner was a racist and we reject Ms Mwaura's assertion. We were presented with some other pieces of evidence about what one member of staff had said about Mrs Faulkner, or about what one member of staff had said another member of staff said about her. In the absence of evidence from those witnesses, we gave those pieces of evidence no weight. Mrs Faulkner's evidence was clear and we accept it – she did not ignore the claimant (or other black workers).

57. The list of issues contained the following further allegations about Mrs Faulkner: that she "would arrange supervision meetings with the claimant without prior notice; would raise her voice when speaking to the claimant; when

asked by the claimant whether she was a racist, she did not answer but stared intently at the claimant." The way that is phrased suggests multiple instances of each sort of behaviour but it seemed to us that the evidence we heard about these issues related to one situational supervision on 23 December (where there was no allegation of a raised voice) and the argument on 5 January 2022; we deal with these dates individually below. If there was an allegation that Mrs Faulkner raised her voice on other occasions, it may of course be that that was attributable to Mrs Faulkner's hearing impairment.

22 December 2021 – Change to the New Year's Day Shift

58. On 20 December 2021 Mrs Faulkner reviewed the Christmas and New Year rota that the Team Leader had prepared. The claimant had been due to work the early shift on New Year's Day. Each shift was staffed by two people and Mrs Faulkner wished to avoid a situation where both of those were agency staff, as the agency had recently proven unreliable by cancelling shifts. She therefore asked the Team Leader to speak to the claimant about moving to the late shift, so that there was what she described as a Care Assist member of staff (by which she meant either a "permanent" or "casual/relief" worker) on each shift.

59. The claimant was informed of this by the Team Leader on 22 December 2021. We accept that the claimant was told there had been a change, rather than being consulted. This was clear from the claimant's evidence, but also Mrs Faulkner's evidence – as we have said, she clearly believed that she had no obligation to consult people before making such changes as she believed it was a matter of ensuring that the service users were kept safe by maintaining proper staffing levels. We accept the claimant's evidence that she was told about it in an abrupt manner by the Team Leader.

60. The Team Leader later told Mrs Faulkner that the claimant had said that she felt she had been treated disrespectfully by being told she must change her shift at short notice. We accept Mrs Faulkner's evidence that the Team Leader complained informally to her, Mrs Faulkner, about the manner in which the claimant had complained to her, the Team Leader, about the change of shift. Mrs Faulkner, being new to her role, was speaking regularly to her line manager Ms Dimano at this time, and this was one of the things Mrs Faulkner mentioned when they spoke. We accept Mrs Faulkner and Ms Dimano's evidence that Ms Dimano suggested to Mrs Faulkner that Mrs Faulkner hold a "situational supervision" with the claimant.

61. One question might be why a situational supervision was held with the claimant but not with the Team Leader. Although Mrs Faulkner knew, through what the Team Leader had told her, that the claimant was dissatisfied, the claimant had not actually complained to Mrs Faulkner. Further, Mrs Faulkner had already discussed the situation with the Team Leader, so there would have been little point in holding a situational supervision with her. We also accept the respondent's case, through Mrs Faulkner's evidence, about the nature of a situational supervision. It was a process used to discuss a particular issue – which might be positive or negative. It was not, for example, a precursor to a

disciplinary procedure and should not be seen in such light – having a situational supervision should be viewed as a neutral act. Indeed, other examples of situational supervisions, including one concerning the Team Leader, conducted by Mrs Faulkner were included in the bundle, which bore that out (i.e. some positive, some negative). While we accept that nobody had ever before ever asked the claimant to take part in a situational supervision, Mrs Faulkner and Ms Dimano were new to their roles and may simply have had different management styles to the claimant's previous managers.

23 December 2021 – Situational Supervision

62. On 23 December 2021 Mrs Faulkner approached the claimant and asked to speak to her. She said words to the effect of: "This is about how you spoke to the Team Leader about the shift." The claimant (on her own evidence, which we accept) replied with words to the effect: "You shouldn't be here because of the way I spoke to the Team Leader, you should have said the Team leader said I spoke to her in a certain manner and is it true rather than accusing me." Mrs Faulkner then apologised. We consider this to have been unnecessary in the circumstances – the claimant's reply in our view was an overreaction to an innocuous statement.

63. Later the same day, Mrs Faulkner asked to see the claimant for the situational supervision meeting, which took place in Mrs Faulkner's office. Mrs Faulkner asked the claimant what had happened and the claimant told her, explaining that she wasn't complaining about the message but the way it had been conveyed by the Team Leader. (As Mrs Faulkner noted, the only difference between the accounts of the claimant and of the Team Leader was in who had been unprofessional, i.e. who had used an inappropriate tone.) Mrs Faulkner told the claimant that it was her idea to move the shift and explained her view that she did not need to consult staff about shift changes. The claimant asked why a situational supervision meeting was taking place as she had never had one before and Mrs Faulkner told her it was Gemma Dimano's idea. Mrs Faulkner told the claimant that she would write up meeting notes for the claimant to sign and the claimant told her that she would sign them if she was satisfied with them. There was no material difference between the recollections of the claimant and Mrs Faulkner on any of these points.

64. Mrs Faulkner wrote a written note of the supervision and printed a copy off for the Team Leader to give to the claimant when she was next on shift. Although the claimant had shifts on 29 December and 31 December 2021 and 5 January 2022, the note was never given to the claimant. Since we did not hear from the Team Leader, we do not know why that was. We were provided a copy of the note [150]. Mrs Faulkner recorded that she had reminded the claimant about the "code of conduct and remaining professional in all communication" and set out actions for the claimant to complete by 31 December 2021: reading the code of conduct and completing any outstanding training. The note is dated 29 December 2021.

65. It is important to distinguish (i) the decision to hold the meeting and what happened at the meeting, both of which the claimant was clearly subject to, and (ii) what Mrs Faulkner recorded as actions from the meeting, which as we have said never in fact reached the claimant. As to (i), we have already explained why we consider the decision to hold the meeting to have been unobjectionable, and we would say the same about the conduct of the meeting, though as we say above, we do accept that the claimant reasonably found Mrs Faulkner's manner to be abrupt. As to (ii), while on the face of it, requirements to read the code of conduct and complete outstanding training are unobjectionable, even if the note had been given to the claimant on the date it was prepared (and it was not) it would have been impossible for the claimant to have completed the requirements by 31 December in work hours since she was not due to work again until after that date. Having heard Mrs Faulkner's evidence we attribute this to a lack of thought rather than to malice. It is also important to note that even if these requirements had ever reached the claimant, they did not have the status of disciplinary actions either formal or informal.

Claimant's email of 28 Dec 2021

66. On 28 December 2021 the claimant sent an email to Sofia Phills. (Note that this is the second of the documents at page [388]. There was no suggestion that the first undated document – which carries a specific complaint of "potential racism" – was sent to the respondent.) The email recites the claimant's account of the events of 22 and 23 December. It describes the Team Leader's manner as "derogatory, authoritative and abrupt" and says that the claimant is not happy with how the situation has been handled and that she had been treated unfairly. The claimant concludes by saying that she feels "aggrieved to some degree bullied". It was the claimant's case that this email was a complaint about "racism bullying and harassment which was a breach of the respondent's legal obligations under the Equality Act 2010". In our judgement it was no such thing. The complaint is about unfair or unpleasant treatment, but it contains no allegation, express or implied, that the treatment had anything to do with any protected characteristic of the claimant (nor that the treatment could in any other way have amounted to any other sort of breach of the Equality Act). We do not accept that the claimant believed that what she wrote in the email tended to show that the respondent was failing to comply with its obligations under the Act. Nor do we accept that the claimant believed that sending the email to the respondent (i.e. disclosing the information within it) was in the public interest. The email clearly was a complaint relating mostly to the tone used by the Team Leader towards the claimant, though also about Mrs Faulkner's decision to call the claimant in for supervision; it related to the claimant's own private interests, though there is a passing mention of how one other member of staff told the claimant she had been treated by the Team leader.

67. The claimant worked shifts on 29 and 31 December 2021.

5 January 2022

68. The claimant arrived for her first shift of the new year around 7 a.m. on 5 January 2022. Her co-worker was to have been an agency worker, but the agency worker did not attend. The claimant found herself responsible for looking after six service users, on two floors, on her own. The claimant phoned the Team Leader a number of times and was eventually told that Mrs Faulkner would be coming in. During the course of cross-examination it was suggested to the claimant that she could or should have phoned somebody else; we consider that the claimant acted perfectly reasonably in phoning the Team Leader.

69. As she arrived around 8 a.m., while still outside the building, Mrs Faulkner received a call from the Team Leader alerting her to the agency worker's absence; she then called the agency and the worker. There was a dispute between the parties about precisely what time Mrs Faulkner arrived. We did not consider this dispute to be material. On any view, the claimant was alone for a not insignificant time. In any case we note that if Mrs Faulkner, as we accept, received the call from the Team Leader on her way in, she and the claimant might have had slightly differing perceptions of precisely when she started work.

70. It was not in dispute that by the time Mrs Faulkner arrived on the first floor, where the "medication round" began, the claimant had "undertaken" medication for two service users on her own. This is to be distinguished from physically administering the medication – in this case, the claimant fetched the service users' medication from locked cabinets and handed it to them to administer themselves then made a record on the MAR chart. We accept the claimant's characterisation of this – that she "oversaw" the service users taking their medication. However, there was no dispute that it was a breach of the respondent's guidelines/policies for the claimant to have done this on her own, i.e. without another member of staff present to "witness". We accept that the claimant genuinely believed this to have been a minor breach – as she put it in evidence, it was "in theory" a breach but she used her discretion. But the policy afforded her no such discretion and we also note that there was no suggestion that there was an urgent need for either of the service users to have had their medication at that precise time, and that the claimant knew that help was on the way.

71. As we have already indicated, shortly after Mrs Faulkner's arrival there was an argument between her and the claimant. Although Mrs Faulkner had noticed that the claimant had "undertaken" medication alone as we have described, that it not what the argument was about. It was about the care of a particular service user. Mrs Faulkner noticed that one service user's bed was wet and asked the claimant whether she had showered him. The claimant said that she had been unable to move him on her own because her back hurt. We accept that Mrs Faulkner had until now been unaware of any problem with the claimant's back. The respondent more generally would only have been aware of the difficulty the claimant had had in the past which we refer to above – there was no evidence before us that the claimant had made the respondent aware of an ongoing problem. The claimant had thought that Mrs Faulkner was going

to shower him, but when Mrs Faulkner said that instead she, Mrs Faulkner, would help the claimant take him to the bathroom so that the claimant could shower him, the claimant instead suggested that she, the claimant, should wash him in bed. Mrs Faulkner said that he needed a shower and then there was then a disagreement about whether the claimant had refused to shower him or whether Mrs Faulkner had said that the claimant had refused when she had not. We find that both women raised their voices (there was little if any real dispute about this) during what was a short exchange of words.

72. At some point during the conversation Mrs Faulkner used the word out; the claimant's case was that Mrs Faulkner was telling her to get out of Whitehalll Road, whereas Mrs Faulkner's evidence was that she was merely asking the claimant to move out of the service user's room to avoid upsetting him. We accept Mrs Faulkner's evidence on this point.

73. It was common ground that the claimant then told Mrs Faulkner that she was a racist, and that Mrs Faulkner did not react. Mrs Faulkner's evidence, which we accept, was that she did not react as she was stunned by what the claimant had just said.

Cancellation of claimant's shifts

74. Shortly afterwards, Mrs Faulkner called Ms Dimano and told her about the claimant being involved in the use of medication alone and said that the claimant had shouted at her in front of a service user. Ms Dimano told Mrs Faulkner that the claimant should complete her shift but that she should not be booked for any further shifts. At that point the claimant was already booked to do shifts on 8 and 9 January, which were not cancelled at that point.

75. On 7 January, at Ms Dimano's request, Mrs Faulkner emailed the claimant to say that following the commencement of an investigation into her conduct on 5 January the decision had been made to cancel all her current booked shifts until the investigation was completed. The shifts she had been due to work on 8 and 9 January had been cancelled and no future shifts would be booked until the respondent had the outcome of the investigation [164]. The decision outlined in that letter was, we find, taken by Ms Dimano. We accept Ms Dimano's evidence about the reason for her decision, which had to do with the claimant's clash with Mrs Faulkner rather then the medication issue – as Ms Dimano put it, it was "unfair for the service users to be supported by staff who were having conflicts on shifts". In effect if not in name, the claimant was suspended from work (at least at Whitehall Road – see below). At least at this time, i.e. early January, that was because of the events the respondent was investigating, rather than because work was not available for the claimant.

76. Although the clash as we have just described it involved two people, we do consider that at this point it was reasonable for the actions have been taken against the claimant rather than against Mrs Faulkner. Mrs Faulkner was the more senior and, as we go on to find, had a different employment status to that of the claimant. More significantly, at this stage the complaint was about the

claimant and not about Mrs Faulkner. (Although the claimant's allegation that Mrs Faulkner was racist later formed a part of the investigation, at this point the claimant had made no such formal complaint.) We consider that taking the claimant off shifts pending the outcome of the investigation was a reasonable exercise of Ms Dimano's management discretion.

77. We accept that Ms Dimano, as she said, may have had it in mind that the claimant could continue to work at other of the respondent's sites, but that was not made clear to the claimant. Mrs Faulkner's email said "no future shifts will be booked until we have the outcome of the investigation", albeit in the same sentence which referred to the shifts at Whitehall Road being cancelled. We accept that the claimant quite reasonably concluded that she was suspended from all work, not just work at Whitehall Road, though the distinction is something of a fine line given that as far as the claimant was concerned she only worked at Whitehall Road, as indeed had been the case in practice over the preceding years.

The investigation

78. The claimant agreed in evidence that it was reasonable for the respondent to have conducted an investigation. We agree. Ms Dimano asked Tracy Hull, a Team Manager for the respondent at a different site, to conduct a fact finding investigation in to the events of 5 January. We did not hear evidence from Ms Hull, but we were provided with a copy of the report she prepared.

79. The report is headed "Investigation – Fact Finding" and records the investigation taking place between 6 and 13 January 2022. It lists three allegations concerning the claimant: "solely administering medication"; "refusing to provide personal care to a service user", and; "conduct/communication". A further allegation, against Mrs Faulkner, is "racist towards [the claimant]".

80. Both the claimant and Mrs Faulkner provided written statements for the purposes of the investigation. Ms Hull records a detailed phone call with Mrs Faulkner where they discussed Mrs Faulkner's account of events. No such conversation took place with the claimant. Ms Hull records that at 10:30 a.m. on 13 January she emailed the claimant to ask for her mobile number so that she could "discuss and conclude" the investigation. It is unclear to us why Ms Hull was unable to find a number for the claimant in the respondent's records or systems, or why she could not have found it another way, for example by asking someone else. It is also unclear to us why Ms Hull saw fit to conclude her investigation the same day without waiting for a response from the claimant – we know in fact that the claimant replied the following day [395].

81. From the way the report is phrased it is sometimes hard to distinguish between Ms Hull's summary of what she was told and her own findings of fact. It does appear that she concluded that the claimant had given medication without another member of staff present, knowing that this was a breach of procedure. She did not make any clear finding about whether the claimant had refused to

provide care to a service user. She did find, having spoken to an administrator at the respondent's head office, that the claimant had not disclosed any "health issues relating to her back which may impact on her… providing personal care and safe moving and handling techniques". She also said: "[the claimant] is said to of conducted herself in manor [*sic*] within the service users' home (Whitehall) which is unacceptable, by raising her tone of voice to staff and in proximity of service users." Although this is phrased as an allegation it appears under the heading "conclusion". Likewise, she also says: [Mrs Faulkner] is said to of potentially used communications that was interpreted in a different manor than intended towards [the claimant]." A number of points appear under the next heading, "Recommendations". A written warning for the claimant "would be advisable regarding conduct within service users' home, towards staff and medication management". The other recommendations concerning the claimant relate to training or refreshers on the code of conduct, medication policy and moving and handling as well as monthly supervision and monitoring of her conduct. Mrs Faulkner too was to receive monthly supervision and was to be aware that all communications towards the claimant might be interpreted in a different manner than was intended.

82. Ms Hull's report was emailed to Ms Dimano on 13 January 2022. It was never sent to the claimant. On 18 January, after the claimant contacted her enquiring about the situation, Ms Hull emailed the claimant to say that all the documentation had been passed on to Ms Dimano, who would be in touch directly. On 23 January 2022 the claimant emailed Ms Dimano expressing concern about the way she had recently been treated. She expressed the concern that she had not heard anything about the investigation nor about when her shifts would be reinstated. Ms Dimano responded the same day and said:

> I will be writing to you in due course with the findings of the investigation. May I take this opportunity to remind you that you are on a relief zero hour contract and now that the investigation is complete you are able to pick up shifts in other services.

83. The only reasonable interpretation of this is that previously the claimant had been suspended from working anywhere for the respondent (not just at Whitehall Road). That was until the point that the investigation finished, i.e. technically 13 January, but the claimant was not told it had finished until 18 January and it was not actually made clear to her that she could work elsewhere until this email of 23 January. The claimant was now being told that she was able to work for the respondent at other sites; the clear implication, of course, was that she still could not work at Whitehall Road (presumably, though not expressly, pending Ms Dimano's decision/actions in light of the report).

84. On 7 February 2022 the claimant emailed Ms Dimano asking for clarity about why her shifts had been cancelled, how long the cancellation was to last, the circumstances surrounding the investigation, whether she would be paid and what policy the process was being managed under. Ms Dimano repeated the contents of her previous email and said that the claimant would only be paid for shifts that she had completed. We accept Ms Dimano's evidence that she was

not well at the time, which may explain why she did not deal with the claimant's case immediately, though we should say that no particular complaint was made to us about delay. It is clear however that the claimant was left in a state of uncertainty for some weeks, being told that the investigation had been completed but not being told what the outcome was.

Result of the investigation

85. Having considered the report, Ms Dimano decided to write to the claimant in the terms we set out below. She asked the respondent's HR department to send her a template letter but the template they sent was the wrong sort, so she wrote her own letter. The claimant was emailed the letter, along with the respondent's code of conduct and code of practice, on 8 February 2022. Ms Dimano's letter started by saying that the findings of Tracey Hull's investigation were that the claimant: "gave medication" without a witness present knowingly failing to follow correct procedures; conducted herself in a manner which was unacceptable by raising her "tone of voice to staff in the proximity of service users", and; had not disclosed any health issues relating to her back which may have had an impact upon her "providing personal care and safe moving and handling techniques". We reproduce the rest of the letter in full:

> The conclusion is that your conduct on the 5th of January 2022 was unprofessional and not in line with Care assist policy and procedures.
>
> It is expected that this behaviour does not repeat itself and that going forward you will always remain professional and courteous whilst on shift in Care Assist. This includes communicating with service users, speaking to professionals, and speaking to colleagues professionally.
> This letter will remain on your file for 12 months and if any more incidents of poor conduct take place, then you may be subjected to disciplinary action.
>
> We expect you to pay attention to these issues and avoiding them in the future.
>
> Please refer to the Code of Conduct Policy attached

86. This decision was on one view effectively the imposition of a suspended sanction, without the safeguard of a formal disciplinary meeting, though that may be overstating it a little. We think it might best be characterised as an informal formal warning, which reflects the somewhat confused status of the ultimate result of the investigation. The respondent itself, through Mrs Phills, appears to have been somewhat confused too – Mrs Phills' evidence to us was that she believed that there had not been a disciplinary hearing as there had been a finding of no case to answer; that is clearly not consistent with Ms Dimano's approach – she accepted the findings, so there was a case to answer in her view, it was simply that she decided nevertheless not to progress the case to a disciplinary hearing. In fairness to Mrs Phills she was not involved in the process.

No further work at Whitehall Road

87. The practical result of the conclusion of the investigation was that nothing changed – the claimant was still not offered any more shifts at Whitehall Road. Ms Dimano's evidence was that by now there were no shifts available at Whitehall Road and so she asked a colleague to arrange work for the claimant at two nearby sites; it appears that the claimant was not informed of those efforts. On 13 February 2022 [209] the respondent's head office administrator wrote to the claimant and said "as I understand Gemma has mentioned you can work at the other services apart from Park Drive and Whitehall"… "Whitehall has recruited so we don't have hours". (Park Drive was the other site where Mrs Faulkner worked.). On 15 February the claimant replied to say that she had worked at Whitehall Road for almost 7 years and did not understand why she was currently not included on the rota there.

88. On 21 February 2022 the claimant's daughter wrote to the administrator expressing various concerns about the investigation. On 6 March the administrator emailed the claimant and said: "I know I have mentioned this before. You can work at Kings Road or Lynton, which is close to Harrow. Please let me know so I can arrange it." The claimant did not make any attempts to find work at these other sites (there was no dispute about this). Though the other sites were not particularly far from where the claimant lived, she only wanted to work at Whitehall Road.

89. It is clear that the claimant was never told that the reason for her not being offered work at Whitehall Road had changed, aside from in the roundabout way of the 13 February email. Was the reason the claimant was not put on the rota at Whitehall Road from February genuinely, as the respondent said, because there was now no work available or were there, as the claimant asserted, other reasons – linked to the events of 5 January 2022 or to what the claimant says were her protected disclosures before then, or to her race?

90. As we have said, the initial reason for the claimant being prevented from working at Whitehall Road was the investigation. That reason was no longer in effect by 7 February at the latest. In her evidence Gemma Dimano set out the respondent's position. The respondent had for some time before this been trying to recruit full-time permanent (i.e. not casual/relief) staff for Whitehall Road. It had successfully recruited one member of staff on nights around December but was also looking to recruit a full-time day staff member. A candidate – referred to as CSJ – was interviewed for a permanent role in late December. At the interview CSJ said that she could not commit to a permanent contract and she was due to start a course in a few months time. She was therefore offered a casual/relief contract instead. We were shown a copy of her terms document and it was in materially the same terms as the claimant's (indeed it was all-but identical). It was issued on 31 December and CSJ began work on 3 January 2022. CSJ was, as Ms Dimano put it, "of black British ethnicity". Despite her studies, CSJ was doing full time hours – in contrast to

what had been the claimant's usual three days per week – which was of more use to the respondent. We accept this evidence, which in fact means that Ms Dimano's decision to prevent the claimant from working at Whitehall Road during the course of the investigation was rather beside the point – there was not the work for the claimant, even taking account of the evident difficulty the respondent was having with recruitment at around that time. We also accept Ms Dimano's evidence that she had been unaware that the claimant had only ever worked at Whitehall Road. Sophia Phills conceded in her evidence that the respondent could and should have communicated better with the claimant. We agree.

91. What were the reasons for Ms Dimano's actions? Specifically, referring to the list of issues, in refusing to allow the claimant to work at Whitehall Road and/or suspending her. Note the distinction – the claimant was suspended in reality if not in name, i.e. prevented from doing any work, for a relatively short time. She was prevented from working at Whitehall Road, i.e. not offered any more work there, for considerably longer. Clearly Ms Dimano was aware of the claimant's involvement in the 6 August incident, though the reality of it was that on the basis of her recollection of events she viewed the claimant as, in everyday language, a witness rather than a whistleblower – her statement refers to the Other Worker as "the real whisteblower". Although she was cc'd in to Sophia Phills' response to the claimant's 28 December email, Ms Dimano's evidence was that she had not received the email itself. We accept that. More widely, we accept Ms Dimano's evidence that that the events of 6 August and the 28 December email played no part in her decision making (and, on the basis of her knowledge and recollection of those events, accept that they played no subconscious part). We also find that, notwithstanding the issues we have identified above, the decisions made by Ms Dimano had nothing whatsoever to do with the claimant's race. We did consider whether the unsatisfactory communication with the claimant should lead us to conclude that there were other unstated reasons for the treatment, but we concluded that it did not.

The Other Worker

92. On 11 November 2021 Gemma Dimano had written to the Other Worker to say that her employment would end on 10 November 2021 as she had confirmed in a meeting that she did not wish to have the vaccination. On 23 March 2022, the Other Worker emailed Mrs Phills [218] to ask whether, now the mandatory vaccine rule had been revoked, she might be able to return to work at Whitehall Road . The same day Mrs Phills emailed Gemma Dimano to ask whether she would be happy to have the Other Worker back at Whitehall Road. Presumably Mrs Phills then spoke to Ms Dimano (we were not shown an email), as four hours later Mrs Phills emailed the Other Worker and said: "We currently have vacancies at Lynton Road, we have filled Whitehall Road with new relief." Further emails show that the Other Worker was set to begin work at Lynton Road, but then did not take up the post for personal reasons. The relevance of this evidence was, the respondent said, that the Other Worker was plainly the original whistleblower regarding the 6 August 2021 incident and yet the

respondent, although it had been obliged by the "no jab no job" rules to dismiss her, assuming for the moment that dismiss is the appropriate word, had been perfectly happy to have her back when those rules no longer applied. This showed, the respondent said, that it would not have dismissed the claimant for whistleblowing, particularly where she had not been the original whistleblower. We consider that there is some weight in this argument.

93. We do note that, before all of this, before the rules had actually changed, on 1 February 2022 the Other worker had requested to come back to Whitehall Road, having heard that the rules were to change. An email from Mrs Faulkner to Mr Surendranath says that the rules had not changed but that if the Other Worker got vaccinated "she can return to WH". We do note the inconsistency with the respondent's position that there was no work available at Whitehall Road around then, but the email is only dealing with whether there was a legal barrier to her coming back, rather than whether there was work available.

Mr Gohil and the P45

94. Mr Dilip Gohil was a director of the respondent company and worked as an accounts assistant and "general support". Of particular relevance to this case, he had responsibility for the respondent's payroll. He did not work in what he described as the operational or front line side of the business. His brother Sandy was the respondent's CEO until his unexpected death in October 2021, which led to a period of change in the respondent during which time Ms Dimano took up her role with responsibility for Whitehall Road. From hereon where we say Mr Gohil we are referring to Dilip rather than Sandy.

95. It was Mr Gohil who took the decision to have the claimant issued with a P45. Mr Gohil told us that relief workers (i.e. such as the claimant) would usually notify the respondent when they no longer wished to work, but that was not always the case – some would simply "go quiet". Once a relief worker had not been "active" for a period of time, Mr Gohil believed, on the basis of advice he had received from the respondent's accountants, the respondent was under an obligation to notify HMRC of that fact. That was done, he said, by generating a P45 – this, he thought, caused HMRC's records to be updated, ensuring that the worker was taxed correctly if, for example, they had taken up other work. He did not see the issuing of a P45 as a dismissal. We found Mr Gohil to be an honest witness and we accept all of this.

96. The claimant's P45 was issued on 1 August 2022 but gave the claimant's leaving date as 31 March 2022, which was picked, Mr Gohil said, as it was the last date of the financial year. He said that he had had the document issued because he believed the claimant had not worked for the respondent for some time. He did not consider himself to be dismissing the claimant. He pointed out that her company email account had not been deactivated when the P45 was issued – as we record above, it remained active for quite some time afterwards. His reasons for believing the claimant had not worked for some time were as follows. He told us that did not know the claimant well, but they would exchange pleasantries. He recalled that the claimant had told him in November 2021 that

she would not be working beyond the end of the year, because she did not want to have the Covid vaccine, which, he said, was mandatory at the time (see para 51 above). In his oral evidence he said that he thought there had been two conversations, one around 19 November and the other about two weeks before. He had understood that the claimant believed she had a "reprieve" for a month and made a note to check if the claimant had left, but he did not in fact check; he did however notice that she stopped appearing on the timesheets. The claimant did not recall having said any such thing to Mr Gohil, but her recollection appeared unclear; we preferred Mr Gohil's evidence on the point. Mr Gohil's evidence was that his decision to have the P45 issued was solely for the reasons we have set out – he specifically denied that it had anything to do with the claimant's race, or her email complaint of 28 December, of which he only became aware as part of the Tribunal process. We accept all of this. No suggestion was made to him that the events of events of August 2021 or January 2022 played any part, but for the avoidance of doubt we find clearly that they did not. We accept that Mr Gohil's intent in having the P45 sent was not to prevent the claimant from working for the respondent, although we do understand why the claimant interpreted it as a dismissal.

97. On 23 October 2022 the claimant emailed Mr Gohil. He did not reply, he said, because he had by then been advised that the matter was "under litigation". It might be said that this is another example of how the respondent could and should have communicated better with the claimant.

Other points

98. We heard evidence from the claimant's daughter Tanya. Much of it related to the reasons for the delay (if there was a delay) in bringing the claim to the Tribunal. Given our other findings on the issue of time limits (below) we did not need to make any findings about that. During the course of that evidence, Tanya Beverley did tell us that she had observed that her mother had some problems with memory loss. Though Tanya Beverley was not an expert witness, we did consider it was permissible for us to take account of those observations where they were relevant. We therefore did not draw any adverse inferences against the claimant, where otherwise we might have done, when the claimant said she did not remember things which we might have expected her to. Of course, where there were things which the claimant did not remember or did not remember clearly, we inevitably relied on other witnesses who did remember, or on documentary evidence. We should say that we do not doubt Tanya Beverley's assessment that her mother was substantially affected by the genuine (and in some aspects understandable) sense of grievance she felt about the way she was treated; it is just that that did not assist us in deciding the issues we had to decide.

LAW

99. Where we set out the law below we do include some authorities which were not formally cited in argument before us. Where we do so, we are confident that no unfairness is caused to the parties since the authorities merely establish points

of law which are uncontroversial and/or which counsel did address us on in substance even if each case was not specifically referred to

Employment status

100. The starting point is s 230 ERA, which so far as is relevant provides:

> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

101. "Employee" is to be distinguished from "worker"; the latter is defined by s 230(3) ERA, and the respondent accepted that the claimant met that definition.

102. In *Ready Mixed Concrete Ltd* v *Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515 Mackenna J set out the three conditions necessary for a contract of service to exist.

i. The employee agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for the employer ("mutuality of obligation" and a requirement of "personal service").
ii. The employee agrees, expressly or impliedly, that in the performance of that service he will be subject to the employer's control in a sufficient degree consistent with an employment relationship ("control").
iii. The other provisions of the contract are consistent with its being a contract of service.

103. Regarding mutuality of obligation, there must be an obligation on the employee to do some work and for the employer to pay for that (described as the "wage-work bargain" in *Commissioners for His Majesty's Revenue Customs* v *Professional Game Officials Ltd* [2024] UKSC 29). As long as there is an obligation to do *some* work, the fact that an employee is entitled to turn down (some) work is not necessarily inconsistent with mutuality of obligation and the obligation of personal service (*Ryanair DAC* v *Lutz* [2023] EAT 146 para 180). It is also seems clear that mutuality of obligation involves more than payment in return for personal work but requires also an obligation on the part of the engager to provide work (or pay in lieu of work).

104. Regarding personal service, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. We say no more about this aspect since it was clear that in this case the claimant did not have a right of substitution, fettered or otherwise.

105. Regarding control, in *Ready Mixed Concrete*, at 515, the court said:

> Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make [an employment contract]. The right need not be unrestricted.

106. The question is whether there is to a sufficient degree a contractual right of control over the employee, rather than whether in practice the employee had day to day control over their own work. The *extent* of control will remain relevant to the overall assessment where the employee/worker establishes *sufficient* control to satisfy the *Ready Mixed Concrete* control requirement (*Revenue and Customs Commissioners* v *Atholl House Productions Ltd* [2022] I.C.R. 1059 at para 75).

107. Once mutuality of obligation and control are established, a multi-factorial approach must be applied to determine whether, judged objectively by reference to the contract and the circumstances in which it was made, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made and on the basis of facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to the parties (*Atholl House* (above)).

108. In *Uber BV and others* v *Aslam and others* [2021] UKSC 5 the Supreme Court held that when deciding whether someone was a worker it was wrong in principle to treat the written agreements as a starting point. Rather, it was necessary to determine, as a matter of statutory interpretation, whether the claimants fell within the definition of a "worker". The Tribunal's findings should be based on the language of the agreement but also the way in which the relationship in fact operated and the parties' evidence about their understanding of it. As the same court put it in *Autoclenz Ltd* v *Belcher* [2011] UKSC 41, the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. The *Autoclenz*/*Uber* principle applies to determination of employee status just as it does to the determination of worker status – *Ter-Berg* v *Simply Smile Manor House Ltd* [2023] EAT 2 para 47. In the latter case, the EAT clarified that in a case where what was the true intention of the parties in reality is a live issue, it is necessary to consider all the circumstances of the case which may cast light on whether the written terms do truly reflect the agreement, applying the broad *Autoclenz* approach rather then stricter contractual principles. At paras 65 onwards, the EAT said that a written term stating that a person is not an employee or worker could not stand if as a matter of fact the person was, nor if the object of the term was to defeat statutory rights. Absent those circumstances, it is however legitimate to have regard to the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain, it can be decisive.

109. During closing submissions, Mr Motovu for the claimant agreed that it was not his case that there were a series of individual contracts as in the *Professional Game Officials Ltd* case (above). Even if that had been the claimant's case, she would have faced the difficulty that continuity of employment would be broken each time she took more than one full week off after the end of each contract (see 210(3) ERA and *Carrington* v *Harwich Dock Co Ltd* [1998] I.C.R. 1112]) and in this case as we have said she did not work at all in January 2021, for example, so she would not have the two years' service to bring a claim for "ordinary" unfair dismissal. There would also be the issue of the respondent's alternative case. For the respondent, Miss Hatch's primary position was that there was no employment contract. But, she submitted in the alternative, if there was an employment contract then it appeared that the claimant was employed on a week-to-week basis from June 2021 to January 2022, i.e. each time she went on the week's rota, but that there was no contract after that as she had not worked since January 2022, so she could not still have been employed in August 2022 when she says she was dismissed. The issue for us was therefore whether there a contract of employment in the conventional sense, which had subsisted for some years.

Unfair dismissal

110. S 94 of the Employment Rights Act 1996 "ERA" confers on employees (not workers) the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.

111. The employee must show that they were dismissed by the employer (see s 95 ERA).

Time limits in unfair dismissal cases

112. Under s 1111 ERA, unfair dismissal claims must be presented within three months of the effective date of termination "EDT" or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. The EDT is defined by s 97 ERA – where the employment is terminated without notice it will be the actual date of the termination; where employment is terminated with notice it will be the date of expiry of the notice. The three month time limit is subject to extension by the mandatory conciliation provisions. Provided a claim is presented one month (or less) after the end of the conciliation period, the claim will be in time if it was presented within three months of the start of early conciliation.

"Ordinary" unfair dismissal

113. S 98 ERA deals with the fairness of dismissals in two stages. First, the employer must show that it had a potentially fair reason for the dismissal within section 98 (1) and (2). Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

114. So far as the first stage of fairness is concerned, S 98 ERA provides, so far as is relevant:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> …

115. The second stage of fairness is governed by s 98 (4) ERA:

> (4) … the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

116. In deciding fairness, we would therefore have regard to the reason shown by the respondent and to the resources etc. of the respondent. In general, the assessment of fairness must be governed by the band of reasonable responses test set out by the EAT in *Iceland Frozen Foods Ltd* v *Jones* 1983 ICR 17. In applying s 98(4), it is not for us to substitute our judgement for that of the employer and to say what we would have done. Rather, we must determine whether in the particular circumstances of this case the decision to dismiss the claimant fell within the band of reasonable responses open to a reasonable employer.

117. In the event that the dismissal was unfair, we would go on to consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, in accordance with the principles in *Polkey* v *AE Dayton Services Ltd* [1987] UKHL 8.

Protected disclosures

118. The law provides certain protections for people, commonly described as whistleblowers, who make "protected disclosures". By s 43A ERA, a protected disclosure means a qualifying disclosure made by a worker (which includes an employee) in accordance with any of sections 43C to 43H. A qualifying disclosure is made in accordance with sections 43C if it is made to an employer.

There was no dispute here that if disclosures were made then they were made to the respondent.

119. By s 43B, a qualifying disclosure means any disclosure of information which, in the reasonable belief of the person making the disclosure, is made in the public interest and tends to show one or more of a number of things ("the wrongdoing"). One of those things (s43B(d)) is that that the health or safety of any individual has been, is being or is likely to be endangered. Another (s 43B(b)) is that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

120. In the case of a disclosure directly to an employer, the Tribunal will consider the following. First, was there a disclosure of information? The disclosure need not be in writing. Depending on the content and context, an allegation may amount to information *Kilraine* v *London Borough of Wandsworth* [2018] ICR 1850. It is immaterial that the recipient is already aware of the information (s 43L(2)). Second, did the claimant believe two things: (i) that the information tended to show the relevant wrongdoing and (ii) that the disclosure was in the public interest. So far as both beliefs (i) and (ii) are concerned, it is the claimant's belief at the time of making the disclosure (not any later) that is relevant, and the belief must be a genuine, subjective belief.

121. So far as (i) is concerned, the reasonableness of the belief may depend on the claimant's status (i.e. layperson or expert – *Korashi* v *Abertawe Bro Morgannwg Local Health Board* 2012 IRLR 3). There must be a belief not just that there was wrongdoing, but that the information tends to show it (*Soh* v *Imperial College of Science, Technology and Medicine* EAT 0350/14).

122. So far as (ii) is concerned, there is no requirement that the information is provided in good faith. There is a distinction between belief (which is relevant) and motive (which is not) (*Virgin Active Ltd* v *Hughes* 2023 EAT 130). In deciding whether it was reasonable for the claimant to believe that disclosure was in the public interest, relevant factors to be weighed include: the size of the group affected by the wrongdoing, the nature of their interests and the extent to which those interests were affected, the nature of the wrongdoing and the identity of the wrongdoer *Chesterton Global Limited* v *Nurmohamed* [2018] ICR 731.

Automatically unfair dismissal for making a protected disclosure

123. S 103A ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure. In such circumstances the employee it said to be subject to an automatically unfair dismissal, i.e. there is no need for the Tribunal to consider generally whether the dismissal was fair – it is deemed not to be. Where there are multiple protected disclosures, the Tribunal is required to ask itself whether, taken as a whole, the disclosures were the principal reason for the dismissal: *El-Megrisi* v *Azad University* EAT 0448/08.

Detriment for making a protected disclosure

124. By s 47B ERA, a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer (used in its wider sense here) done on the ground that the worker has made a protected disclosure. Enforcement of the right is by way of complaint to the Tribunal under s 48 ERA. An employee may not complain that a dismissal amounts to a detriment by his employer (see s 47B(2); instead the remedy there lies under s 103A (see above)). Otherwise, the word detriment is not defined in ERA. In *Ministry of Defence* v *Jeremiah* 1980 ICR 130 Brandon LJ said that it meant simply "putting under a disadvantage", while Brightman LJ said that there is detriment "if a reasonable worker would or might take the view that [what the employer did] was in all the circumstances to his detriment". There is no requirement for the detriment to be of any particular severity, though it must be a detriment to which the employee was subject "in the employment field" (*Tiplady* v *City of Bradford Metropolitan District Council* 2020 ICR 965).

125. By operation of s 48(2) ERA, while it is for the claimant to prove that they made a protected disclosure and that they were subjected to a detriment by the employer, if they prove those things, it will be for the employer to prove the ground on which any act (or failure to act) was done – the respondent will be required to prove that the protected disclosure was not a material influence, i.e. that it played no part whatsoever in the act – *Fecitt* v *NHS Manchester* [2012] ICR 372. (In contrast with a dismissal for whistleblowing, in which case the issue is whether the whistleblowing was the *principal* reason for the dismissal.)

Discrimination generally

126. The Equality Act 2010 ("EqA") prohibits discrimination on the grounds of various "protected characteristics", set out at sections 5 to 18. An employer must not discriminate against (or harass or victimise) an employee by (amongst other things) dismissing them or by subjecting them to any other detriment (sections 39 and 40). There was no dispute here that the claimant was the respondent's employee for the purposes of EqA, which uses a wider definition than ERA so as to include workers. Nor was there any dispute that the respondent would be liable under s 109 for any contraventions of the Act done by other employees (e.g. the claimant's managers). The Tribunal's jurisdiction to hear complaints about contraventions of the provisions prohibiting discrimination in employment is established by s 120.

127. The Equality and Human Rights Commission Employment Code ("the EHRC Code" provides a detailed explanation of the EqA. The Tribunal must take into account any part of it that appears relevant to any questions arising in proceedings (s 15 Equality Act 2006).

128. A person's motive is irrelevant, as even a well meaning employer may directly discriminate. We remind ourselves that discrimination may be sub-conscious. The case law recognises that very little discrimination today is overt or even deliberate. As Lord Nicholls said, in the context of a case about race discrimination, in *Nagarajan* v *London Regional Transport* [1999] IRLR 572:

> All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always

recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn.

129. S 136 of the EqA makes provisions about the burden of proof. If there are facts from which the Tribunal could decide, in the absence of any other explanation, that there was a contravention of the Act, the Tribunal must hold that there was a contravention, unless the respondent proves that that there was not a contravention. S 136 requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another (*Hewage* above). The burden of proof does not shift where there is no evidence to suggest the possibility of discrimination (*Field* v *Steve Pye and Co (KL) Ltd* [2022] EAT 68). Guidelines on the application of s 136 were set out by the Court of Appeal in *Igen Ltd* v *Wong* [2005] EWCA Civ 142 and the importance of these was recently restated by the Employment Appeal Tribunal in *Field* v *Steve Pye and Co (KL) Ltd* [2022] EAT 68. We do not reproduce the thirteen steps of the guidance here, but we took account of all steps. One important point to note is that the question is whether there are facts from which a Tribunal *could* decide… It is not sufficient for the employee merely to prove a difference in protected characteristic and a difference in treatment. Something more is required (*Madarassy* v *Nomura International Plc* [2007] EWCA Civ 33). Unfair or unreasonable treatment on its own is not enough (*Glasgow City Council* v *Zafar* [1998] IRLR 36). If the burden of proof does shift, under the *Igen* guidance the employer must prove that the less favourable treatment was “in no sense whatsoever” because of the protected characteristic. Because the evidence in support of the explanation will usually be in the possession of the employer, tribunals should expect “cogent evidence” for the employer’s burden to be discharged.

Direct discrimination because of race

130. Under s 13(1) EqA read with s 9, direct discrimination takes place where because of race a person treats the claimant less favourably than that person treats or would treat others.

131. By s 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. The circumstances need not be precisely the same, provided they are close enough to enable an effective comparison: *Hewage* v *Grampian Health Board* [2012] UKSC 37. In many direct discrimination cases, it is appropriate for a Tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable

treatment was because of a protected characteristic (in this case, race). However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the "reason why" the claimant was treated as they were (*Shamoon* v *Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] IRLR 285).

132. The protected characteristic need not be the only reason for the treatment, provided it had a significant influence on the outcome (*Nagarajan* v *London Regional Transport* [1999] IRLR 572, HL).

Harassment related to race

133. Under 26(1) EqA read with s 9, harassment related to race takes place where there is unwanted conduct related to race which has the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether the conduct has that effect the Tribunal must take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

134. In *Richmond Pharmacology Ltd* v *Dhaliwal* [2009] IRLR 336, the EAT said (at para 22):

> Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct… it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.

135. A similar point was made by the EAT in *Betsi Cadwaladr University Health Board* v *Hughes and others* [2014] EAT 0179/13 (at para 12):

> The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

136. By operation of s 212(2), something which amounts to a detriment for the purposes of EqA does not include conduct which amounts to harassment. In cases where both direct discrimination and harassment are alleged, it will therefore usually be appropriate to consider first whether the conduct amounts to harassment and, if not, then to consider whether it amounts to direct discrimination.

Time Limits in discrimination cases

137. In discrimination claims, under s 123 EqA a complaint must be brought after the end of (a) the period of 3 months starting with the date of the act complained

of or (b) such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. Failure to so something is to be treated as occurring when the person in question decided on it. In the absence of evidence to the contrary a person is to be taken to decide on failure to do something (a) when they do an act inconsistent with doing it or (b) if they do no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it.

CONCLUSIONS

Time limits and jurisdiction for the unfair dismissal complaints (Issues 3A.1 and 9)

138. Amendments having been permitted to add complaints first of automatically unfair dismissal and then also ordinary unfair dismissal, we have now to decide whether the automatically unfair dismissal complaint (and therefore also the ordinary unfair dismissal complaint) still had a "live" point on time limits.

139. The respondent says that EJ Bedeau clearly believed time limits still to be an issue for the unfair dismissal claim and that his actions in listing time limits as an issue must supersede any act of EJ Maxwell. The respondent relied on *HM Revenue and Customers* v *Serra Garau* 2017 ICR 1121 and two other cases (see below) for the proposition that, with time limits in issue, a second period of early conciliation did not engage the extension of time provisions in s 207B ERA. Further, the respondent argues that EJ Maxwell was in error to say that the claim would have been in time and to say that the claimant was without legal representation (as we heard during the course of the evidence, there had at least an issue about that).

140. The claimant says in contrast that EJ Maxwell's order was clear – the claim was amended, time limits having been considered, to include a claim for automatically unfair dismissal because of whistleblowing; EJ Bedeau's later orders and list of issues could not change that. Whether or not EJ Maxwell had got that decision wrong is beside the point since the respondent took no action to appeal it or to ask EJ Maxwell to revisit his decision.

141. We agreed with the claimant's submissions on this point. EJ Maxwell's decision was clear – he allowed the amendment, having taken account of time limits. If EJ Maxwell had erroneously relied upon the absence of legal advice, he could have been invited to revisit that decision. Likewise, If, if *Serra Garua* meant that the second ACAS period could not be taken into account, that was a matter that should have been taken up as part of EJ Maxwell's decision to permit the amendment. It was not for us to overturn EJ Maxwell's decision. Further, we note that *Serra Garau* does not necessarily apply directly to the circumstances of this case. *Serra Garau* concerned a second certificate in a claim for unfair dismissal where the first had been obtained before the claimant's notice period – i.e. both certificates related to the same complaint, unfair dismissal. The other two cases relied upon by the respondent also concern two certificates for one claim (*Treska* v *Master and Fellows of*

University College Oxford UKEAT/0298/16 and *Romero* v *Nottingham City Council* EAT 03/02/17). The situation is different here of course – the first certificate could not have covered the claimant's complaint of unfair dismissal as her complaint is that she was dismissed after the first certificate was issued.

142. We therefore did not need to make any further findings on time limits for the purposes of the unfair dismissal claims, since there was no dispute that the first claim (or at least most of it) was in time. We accordingly find that we had jurisdiction to consider the unfair dismissal complaints.

Employment status (Issues 3.1 and 3A.2)

143. Ultimately we took the view that here there was not the mutuality of obligation required for there to be a contract of service. This is based almost entirely on our finding, explained above, that the respondent was not obliged to offer the claimant work and the claimant was not obliged to accept whatever work might be offered. In coming to this decision, we are conscious of two points.

144. First, almost all the other features of the contract were features consistent with a contract of employment. Two possible exceptions to this were: the degree of control exercised over the claimant's day-to-day work might not have been any different to the degree of control the respondent exercised over agency workers, who everyone agreed were not employees; and although the claimant received holiday pro rata in proportion to the hours she worked (as would a worker) she was not otherwise paid when she was not working. But otherwise: the claimant had no right of substitution; she was an important part of the respondent's operation in the sense we have set out above and had at times duties (e.g. fire marshall) beyond merely the day-to-day work of caring for the service users; she did not supply her own equipment; the respondent clearly considered that she was subject to its disciplinary procedures. But standing back and considering the relationship as a whole, though the parties clearly might have (and indeed did) called it employment, we consider that the lack of obligation – which both parties in our judgement considered to be a feature of the relationship – is sufficient to outweigh the other factors. We also consider that the respondent's (if perhaps not the claimant's) conduct after January 2021 gives a clear indication of its view of the nature of the contract, which had not changed – although the claimant was still "on the books" the respondent clearly considered that she was not obliged to work. The respondent had told the claimant she could work at other sites, she did not, yet the respondent took no action (save for issuing the P45 much later, which below we conclude was not a dismissal).

145. Second, it will be evident that in coming to this conclusion we have applied the principles in *Uber*/*Autoclenz*/*Ter-Berg* and looked beyond simply the wording of the written contract and considered the way in which the relationship operated in reality. We acknowledge that (at least in the reported cases) this principle appears not to have operated against the interests of an employee. It might be said that that an operation with the resources of the respondent might have little real cause for complaint if it was found to be an employer having

provided a written terms document that said exactly that, repeatedly. But ultimately someone who has the protection of employment status by operation of statue can only have the protection where they satisfy the statutory definition (as refined in the authorities). One other point here is that although almost all of the features of the written contract point to employment status – not least the repeated use of the word employment and employee – not all of them do. As Ms Hatch pointed out, the contract itself did not specify any guaranteed hours.

Protected disclosures (Issue 1)

146. For the reasons we have set out above, we find that the claimant did make a protected disclosure, in early Augst 2021, about the incident of 6 August 2021. We find that the claimant did not make a protected disclosure on 28 December 2021.

Detriments (Issue 2)

147. The claimant was not allowed to work at the Whitehall Road site, from 7 January and in the weeks that followed, up to and beyond 6 March. Whatever the respondent's reasons for that, that was plainly a detriment to the claimant – she was prevented from working at the place she had worked for many years. The decision was, as we have said, made by Gemma Dimano, although communicated by others. Was this done on the ground that the claimant had made a protected disclosure in August 2021? We conclude that the disclosure played absolutely no part in Ms Dimano's decision. We accept the respondent's evidence that the claimant was initially prevented from working at Whitehall Road because of the investigation (which itself had nothing to do with the disclosure) and was later not offered work there because there was none available. None of that had anything to do with the disclosure, for the reasons set out at paragraph 91 above.

148. The claimant was not told by Mrs Faulkner to leave the premises on 5 January; the claimant misinterpreted what Mrs Faulkner said to her, so that was not a separate detriment. For the avoidance of doubt we would not consider being asked/invited to leave the service user's room in the circumstances as we have found them to be to amount to a detriment. Nor would we have found, had we needed to consider it, that Mrs Faulkner's actions had anything to do with the August disclosure.

Automatically unfair dismissal (Issue 3.2)

149. Since the claimant was not an employee within the meaning of ERA the complaint of automatically unfair dismissal must be dismissed on that basis alone. We do however consider it appropriate to make the following further findings.

150. In these particular circumstances we find that, even if the claimant had been employed, she was not dismissed when the P45 was sent. Putting aside Mr Gohil's subjective intent, the mere sending of the slip, with nothing more, in

these particular circumstances did not amount to a termination of the claimant's engagement viewed objectively, though we do accept that the claimant might genuinely have perceived it that way, particularly given the popular understanding of a "P45" being sent when someone's employment ends. But we have accepted Mr Gohil's evidence about what the function of the P45 truly was.

151. On the basis of our factual findings, we would also conclude that even if there was a dismissal, the reason (or principal reason) was not the disclosure in August 2021. It was evident to us that Mr Gohil, who made the decision to send the P45, had no knowledge of the disclosure. His decision simply had nothing to do with it.

Ordinary unfair dismissal (Issues 3A.3 to 3A.9)

152. Since the claimant was not an employee within the meaning of ERA the complaint of unfair dismissal must be dismissed on that basis alone. Given our findings also that, even if the claimant was an employee she was not dismissed, there is no need for us to make any further findings about ordinary unfair dismissal, whatever concerns we may have expressed above about the process.

Direct race discrimination (Issue 5)

153. We made clear factual findings above to the effect that Ms Dimano and Mr Gohil's actions were in no sense whatsoever to do with the claimant's race. Strictly, then, we need not have considered s 136 EqA, but we do think it appropriate to say here that the burden of proof did not in our judgment shift under s 136.

154. Dealing first with issues 5.1.1 and 5.1.2, it is right to say that the Team Leader was not suspended, was allowed to carry on work at Whitehall Road and was allowed to continue administering medication; the claimant was prevented from doing those things (except perhaps she could have continued administering medication in February had she taken up the respondent's offer of work at other sites). But we do not consider the Team Leader to be a comparator. Although the Team Leader was a member of staff, who was not black, who administered medication in breach of the respondent's policy, there were material differences between the circumstances relating to each case. She was a permanent member of staff, whereas the claimant was not. We do think that the point that the respondent had no obligation to offer the claimant work is material here. But more significantly, although the medication issue was more serious than the claimant's in that it was compounded by the inaccurate (or worse) records, the claimant's case also had other features, namely the clash with Mrs Faulkner which, as we have already found, was a significant reason, if the not the reason, why the claimant was taken off shifts at Whitehall Road. The Team Leader's later lenient treatment is not strictly relevant to the issue why she was not suspended, but might have had some bearing but for the fact that there was a different decision maker (Ms Shomoye). Though even then we stress that lenient is not the same as unduly lenient and we did not

hear evidence from that decision maker, who may have taken into account mitigation such as the Team Leader's partial confession. Also, in some senses at least the final written warning was more serious than the sanction (if that is the right word) applied to the claimant – the informal formal warning, with the claimant not being prevented from working elsewhere. We should also make clear that we are not suggesting that a different decision maker alone means the circumstances are not comparable.

155. Regarding Issue 5.1.3, the reasons that led us to the conclusion that the Team Leader was not a comparator are if anything stronger here, even if there was any suggestion that Mr Gohil had decided not to dismiss the Team Leader by sending her a P45. We also found in any case that Mr Gohil did not consider that he was dismissing the claimant, and did not do so. It was not suggested that Mr Gohil did not send P45s to others. Indeed his evidence, which we accepted, was that that was exactly how he treated other workers who had not worked for some time.

156. Ultimately we find that there are not facts from which the Tribunal could decide that there was discrimination, even were the Team Leader used as an evidential comparator. In the absence of the respondent's explanation, but taking account of the context: (i) the claimant was prevented from working at Whitehall Road when allegations (including different sorts of allegations than were made against the Team Leader) which merited investigation were investigated, and thereafter when no work was available there and (ii) the claimant was sent a P45 when she had not worked for months. There is no evidence on which a Tribunal could conclude that a hypothetical comparator who was not black would have been treated differently in those circumstances. Nor was there evidence that an actual comparator was treated differently. So in this case we conclude that there was not less favourable treatment and the question whether there was "something" more did not arise.

157. Even had the burden been on the respondent to prove that there was not discrimination, we would have considered that burden discharged here – we made findings, having heard the evidence, that the decision makers' actions had nothing to do with the claimant's race, whatever else we might have thought of them.

158. To answer the points in the list of issues more directly, the respondent did not treat the claimant less favourably than it treated or would treat someone not of her race. What treatment there was had nothing to do with the claimant's race.

Harassment related to race (Issue 4)

159. So far as the things said to be harassment which were proved or partially proved are concerned, we found that Mrs Faulkner did the following things: (i) arranged a supervision meeting (at short notice if not with no notice); (ii) raised her voice once during an argument in which the claimant also raised her voice;

and (iii) did not answer but stared intently at the claimant when the claimant accused her of being a racist.

160. Each of (i) to (iii) were unwanted conduct, though it might be stretching it a little to say that about a person raising their voice in an argument when the other person is doing the same. None of (i) to (iii), however, on the basis of our findings, related to the claimant's race. We accepted that Mrs Faulkner had good reasons to arrange the supervision meeting. She raised her voice during a heated argument when any annoyance she felt had nothing to do with the claimant's race. The fact that she said nothing when called a racist was not related to the claimant's race, but to the fact that she was stunned at the accusation; if she stared intently it was related to her hearing rather than to anything else. If we had needed to decide the point, we would have found that clearly none of the three things had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Nor could they, on the facts as we found them, have had that effect, taking into account particularly whether it was reasonable to have that effect. The claimant might have been annoyed that the situational supervision took place, but it did not have the effect we have just set out. Nor did Mrs Faulkner raising her voice. Nor did Mrs Faulkner remaining silent and staring when accused of being racist, even taking into account the claimant's lack of knowledge of her hearing impairment.

Time limits on other complaints (Issues 8 and 9)

161. In light of our findings above, we did not need to consider time limits for the discrimination, harassment and whistleblowing detriment complaints.

Concluding remarks

162. EJ Dick wishes to apologise to the parties for the time it has taken him to prepare this reserved judgment and to make clear that the lay members of the Tribunal were in no way responsible for the delay.

APPENDIX:
Edited Version of Final List of Issues

Whistleblowing (detriment and dismissal)

1. Protected Disclosures

1.1 Did the claimant make one or more qualifying disclosures as defined in section 43B ERA?

1.2 The Tribunal will decide:

1.2.1 It is the claimant's case that she made two qualifying disclosures. The first in time was in April 2021, when she reported to the Registered Care Manager at the time, that another worker, [the Team Leader], had administered her own asthmatic medication to another service user which was not prescribed for that person and constituted a breach of a legal obligation as well as the health and safety of the user was endangered.

1.2.2 The second, followed an incident between the claimant and [the Team Leader] after which the claimant wrote to the Operations Director on 28 December 2021, complaining about racism, bullying and harassment which was a breach of the respondent's legal obligations under the Equality Act 2010.

1.2.3 Did she disclose information?

1.2.4 Did she believe the disclosure of information was made in the public interest?

1.2.5 Was that belief reasonable?

1.2.6 Did she believe it tended to show that:

1.2.6.1 a person had failed, was failing or was likely to fail to comply with any legal obligation; and/or

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

1.3 Was that belief reasonable?

1.4 If so, was that disclosure made to the employer?

2. Detriments (s.47B Employment Rights Act 1996)

2.1 Did the respondent do the following things that the claimant says are detriments?

2.1.1 She was not allowed to work at the Whitehall Road site.

2.1.2 It is the claimant's case that shortly after the disclosure on 28 December 2021, she was told by the Registered Care Manager to leave the workplace; and

2.2 By doing so, did the respondent subject the claimant to detriment?

2.3 If so, was it done on the ground that she had made the protected disclosure set out above?

3. Automatic unfair dismissal (s103A Employment Rights Act 1996)

3.1 Was the claimant an 'employee' within the meaning of s.230(1) ERA 1996?

3.2 If so, was the reason or principal reason for dismissal that the claimant made the protected disclosures alleged above? It is the claimant's case that she was dismissed because she made the two protected disclosures above.

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

3A. Ordinary unfair dismissal (s111 Employment Rights Act 1996)

3A.1 Does the ET have jurisdiction to hear the claim for ordinary unfair dismissal?

a. Was the claim for ordinary unfair dismissal presented before the end of 3 months beginning with the effective date of termination?

(i) The claimant's case is that the effective date of termination was 03/08/2022.

(ii) The claimant's second ET1 was presented on 17/11/2022.

b. Did the claimant's second ACAS early conciliation certificate dated 04/11/2022 have any impact on the limitation period? Does *HM Revenue and Customers* v. *Garau* 2017 ICR 1121 & *Romero* v. *Nottingham City Council* EAT 03/02/17 apply?

c. If the claim was not presented in time, was it reasonably practicable for the claimant to present the claim before the end of the period of 3 months? If not, was the claim presented within a reasonable period - s.111(2)(b) ERA 1996?

3A.2 Was the claimant an 'employee' within the meaning of s230(1) ERA 1996 at the time of the alleged dismissal?

3A.3 If so, was the claimant dismissed within the meaning of s95 ERA 1996? The claimant's case is that she was notified of dismissal by a P45 received on 3 August 2022. The respondent denies that the issuing of a P45 amounted to dismissal. The respondent's case is that it was simply a notification that the claimant was not receiving an income from the company.

3A.4 If so, what was the reason or the principal reason for the claimant's dismissal?

3A.5 Was the reason or principal reason shown for the dismissal a potentially fair reason falling within s98(2) ERA 1996 or some other substantial reason within s98(1)(b) ERA 1996?

3A.6 If so, did the sanction of dismissal fall within the range of reasonable responses of a reasonable employer?

3A.7 Was the dismissal otherwise procedurally fair?

3A.8 Did the employer act reasonably or unreasonably in the circumstances

(including having regard to the size and administrative resources of the respondent's undertaking) in treating the reason for the dismissal as a sufficient reason for dismissing the claimant, in accordance with equity and the substantial merits of the case?

3A.9 If the Tribunal finds that the dismissal was procedurally unfair, would the claimant have been dismissed in any event? (Polkey)

Race discrimination claims

4. Harassment related to race (Equality Act 2010 section 26)

4.1 Did the respondent do the following things that are said to be harassment?

4.1.1 The claimant's case is that the Registered Care Manager ignored staff of colour; would arrange supervision meetings with the claimant without prior notice; would raise her voice when speaking the claimant; when asked by the claimant whether she was a racist, she did not answer but stared intently at the claimant; and would speak only to the white members of staff.

4.2 If so, were those things unwanted conduct?

4.3 Did they relate to the claimant's race?

4.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

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

5. Direct Race Discrimination (Equality Act 2010 section 13)

5.1 The claimant, a black woman, relies on the above acts under harassment, as well as the following:-

5.1.1 the difference in treatment between the claimant and [the Team Leader], a white person, who was not suspended and was allowed to carry on with her work whereas the claimant was no longer able to work at Whitehall Road and was suspended;

5.1.2 [The Team Leader] continued to administer medication; and

5.1.3 Dismissing the claimant by sending her P45 on 1 August 2022.

5.2 Did the respondent treat the claimant less favourably than it treats or would treat someone not of her race or because of race?

5.3 Who is the comparator? The Tribunal will have to decide whether the claimant was treated worse than someone else was treated. There must be no material difference between the circumstances and those of the claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The claimant says she was treated less favourably than [the Team Leader], or a hypothetical comparator who is not black.

5.4 If so, are there primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

5.5 If so, can the respondent prove a non-discriminatory reason for the treatment complained of?

Unauthorised deductions from wages

6. Holiday Pay
[…]

7. Unpaid wages
[…]

8. Jurisdiction (Equality Act 2010 claims)

8.1 Did any of the respondent's acts/omissions which the claimant alleges were unlawful harassment under s.26 Equality Act 2010 or direct discrimination under s.13 Equality Act 2010 occur before 5 January 2022?

8.2 If before 5 January 2022, did those acts/omissions form part of a continuing act which ended on/after 5 January 2022?

8.3 If not part of a continuing act, were the claimant's ss.13 and 26 Equality Act 2010 complaints about those acts/omissions presented within 3 months of those acts/omissions?

8.4 If not, is it just and equitable for the Tribunal to extend time to allow those complaints to be presented out of time and determined on their merits?

9. Jurisdiction (Employment Rights Act 1996 claims)

9.1 Has the claimant presented any claim which falls under the Employment Rights Act 1996 out of time?

9.2 If so, did those acts/omissions form part of a continuing act or series with the last of which taking place in time?

9.3 If not, was it reasonably practicable to have lodged those claims within the prescribed time limit (having regard to any extension for ACAS Early Conciliation)?

9.4 If not, has the claimant presented the claims within a reasonable period thereafter?

REMEDY

[…]

Approved by:

Employment Judge Dick

26 February 2025

JUDGMENT SENT TO THE PARTIES ON 27 February 2025

FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/