EMPLOYMENT TRIBUNALS

Claimant: Lalla Sidibeh

Respondent: Midland Mencap (1)
Daniel Rogers (2)

Heard at: Birmingham **On:** 2 to 6 December 2024

Before: Employment Judge Wedderspoon
Members : Mr. I. Morrison
Mrs. L.S. Clark
Interpreter : Mr. Rene Turpin

Appearances
For the claimant: In Person
For the respondent: Ms. Z. Hussain, Consultant

JUDGMENT

1. All allegations of direct race discrimination fail and are dismissed.

2. All allegations of victimisation fail and are dismissed.

3. The claim of automatic unfair dismissal pursuant to section 103A of the Employment Rights Act 1996 fails and is dismissed.

REASONS

1. By claim form dated 17 May 2021 the claimant brought complaints of direct race discrimination, victimisation and automatic dismissal by reason of public interest disclosure. The claimant entered ACAS conciliation on 4 April 2021 in respect of the first respondent and 5 April 2021 in respect of the second respondent and obtained ACAS certificates on 19 April 2021.

2. The claimant describes herself as Black or Black African.

3. A draft list of issues was prepared by the claimant's representative, Dr. Roland Ibakakombo, for the Preliminary Hearing on 21 December 2021. Judge Gaskell identified in the hearing that both the victimisation complaints and public interest

disclosure complaints were problematic as presently pleaded because the grievances relied upon could not have been the motivation for matters which occurred earlier in time. The claimant's representative agreed to give the claims careful consideration. By e-mail dated the 6 of October 2023 the claimant's representative sent the Tribunal and the respondent's representative a final draft list of issues. The respondent did not comment on that list of issues but Miss. Hussain now acting for the respondent took no issue with that list. The Tribunal reviewed the list and amended it to add the element of public interest required under the public interest disclosure test.

List of Issues

Direct race discrimination

4. Was the claimant treated less favourably? The claimant relies on the following as the less favourable treatment :-

   4.1 Mr. Rogers and or Mr. David Bird failed in :

      4.1.1 Their duty of care to ensure the safety of the claimant and/or to take reasonable steps to ensure her safety following her being assaulted by C1 on 2 January 2021 and

      4.1.2 To carry out a proper risk assessment and take steps to reduce the risks of the claimant being verbally and physically attacked by C1 following the incident of two January 2021.

   4.2 Mr. Rogers failed to undertake an investigation into the events of 2 January 2021;

   4.3 Failure to complete a distressed behaviour record related to C1's conduct;

   4.4 Failure to carry out a safeguarding investigation

   4.5 Management staff failing to contact the claimant to check on her health after being assaulted by C1

   4.6 On 5 January 2021 the claimant being called by Ms. L Burrow the claimant being called by and being asked why she was not at work

   4.7 On 10 January 2021 the claimant being contacted by Lisa Burrow on a second occasion asking her if she could cover a shift;

   4.8 On 10 January 2021 the claimant contacted Mr. Rogers to query why nobody had called her to ask how she was. The claimant was told by Mr. Rogers that the lack of contact was due to COVID-19. However failed to explain why miss Burrow contacted her on two occasions in the same period

   4.9 Management staff failing to visit the claimant well she was on sick leave between 4 January 2021 and 23 January 2021

4.10 Failure to carry out a return to work interview following the claimant sickness absence coming to an end on 24 January 2021

4.11 Being asked to support C1 upon the claimants return to work;

4.12 On 22 January 2021 commencing disciplinary action against the claimant

4.13 On 9 February 2021 Mr. Rogers told the claimant that he felt by having the disciplinary investigation hanging over the claimant it could add to her stress

4.14 Mr. Rogers placing the claimant on shift for 9 February 2021 without her consent

4.15 The claimant's resignation on 22 February 2021

4.16 Miss. Gemma Weston failing to carry out a full investigation into the claimant's grievances

4.17 On 5 March 2021 Miss. Weston confirmed the claimant's grievances would not be upheld.

5. Was this treatment because of the claimant's race namely that she is black or black African ?

6. Was the claimant treated less favourably than a real or hypothetical comparator who did not share the claimant's protected characteristic of race?

Victimisation

7. Did the claimant do a protected act ? The claimant relies upon on the following as protected acts :- (the respondent agrees these matters were protected acts)

6,1 on 8 February 2021 the claimant notified the respondent that she was being mistreated due to the colour of her skin; and

6.2 on 22 February 2021 the claimant raised a grievance which comprised of complaints of discrimination on the grounds of race.

8. If so did the respondents subject the claimant to detriment because of the protected acts? The claimant relies on the following detriments :-

8.1 Miss Weston failing to carry out a full investigation into the claimants grievances;

8.2 On 5 March 2021 miss Weston confirm that the claimants grievances would not be upheld.

Automatic unfair dismissal s.103A of the Employment Rights Act 1996

9. Was the reason or principal reason for the dismissal that the claimant made protected disclosure? If so the claimant will be regarded as unfairly dismissed

10. Did the claimant make a qualifying disclosure under section 43B? The claimant relies upon the grievances :-

    10.1 on 8 February 2021 the claimant notified the respondent that she was being mistreated due to the colour of her skin; and

    10.2 on 22 February 2021 the claimant raised a grievance which comprised of complaints of discrimination on the grounds of race.

11. Did the claimant disclose information?

12. Did the claimant believe the disclosure of information was made in the public interest ?

13. Was that belief reasonable?

14. Did the claimant believe it tended to show that the following type of wrongdoing under section 43 B of the Employment Rights Act 1996 :-

    14.1 that a person has failed is failing or is likely to fail to comply with any legal obligation to which he is subject;

    14.2 but the health or safety of any individual has been is being or is likely to be endangered

15. Was that belief reasonable?

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

17. Whether the claimant was dismissed.

    Remedy

18. What remedy if any is the claimant entitled to ?

19. Should a declaration be made?

20. Should compensation be awarded in the form of injury to feelings?

21. Should compensation be awarded in the form of financial losses?

    The hearing

22. At the final hearing, the claimant was now a litigant a person. Her former representative had stood down in October 2024.

23. The Tribunal was provided with a bundle of 317 pages. The respondent added an additional letter dated on day 4 with no objections from the claimant (she had previously received this letter).

24. The Tribunal heard from the claimant and from Mr. Rogers, Operations Manager of the first respondent and named second respondent.

25. In the course of questioning in the afternoon of day one, the claimant was working on her iPad; it became clear that the claimant had not downloaded fully the updated bundle (which has been sent to her prior to her representative stepping down). In the circumstances the case was postponed to the following morning to give the claimant the opportunity to download all of the documents.

26. The procedure of the hearing and timetabling were discussed with the parties prior to commencement of the evidence. The claimant stated she understood the process. The Tribunal determined to deal with liability first.

27. The Tribunal expresses its thanks to Mr. Turpin, the interpreter who assisted the Tribunal during the hearing.

28. The claimant requested during the hearing that the Tribunal order that the CCTV evidence from the supermarket for the incident on 16 September 2019 be provided. The Tribunal informed the claimant that this application had been made very late in the course of the final hearing and could not assist the Tribunal in its findings; there was no dispute of fact that the claimant was subject to racial abuse by C1 on 16 September 2019. The Tribunal declined to make an order.

Findings of facts

29. The claimant was employed as a personal assistant by the first respondent a care provider and registered charity from 17 July 2019 until 22 February 2021. (see the claimant's contract of employment p.88-90).

30. The first respondent provides self-contained flats and safe housing for disabled people or people with learning disabilities. The claimant's role as a personal assistant was to go into housing units to assist where necessary on both council and private basis. The second respondent is the operations manager for housing, care and support of the first respondent.

31. Personal assistants enter private homes of citizens. The service user base consists of vulnerable individuals with special needs and mental health issues. There is a risk with this work that personal assistant employees can be subject to abuse or attack and the respondent has procedures to deal with that including conducting risk assessments to minimise risks; investigating incidents and if appropriate, allocating new staff to deal with the citizen.

Code of Conduct

32. There was no dispute between the parties that the Code of Conduct for Healthcare Support Workers and Adult Social Care Workers in England (page 70 to 79) applied to the claimant's employment and the claimant was aware of the principles. In respect of being accountable for actions, (page 73 paragraph 7) a personal assistant was *"never to accept any offers of loans, gifts, benefit or hospitality from anyone you are supporting or anyone close to them which may be seen to compromise your position."*

Policies

33. The respondent's disciplinary procedure (p.83 to 86) identified unsatisfactory conduct and misconduct as including : failure to abide by the general health and

safety rules and procedures; persistent absenteeism and lateness; fail to devote the whole of your time, attention and abilities to our organisation and its affairs during your normal working hours; failure to carry out all reasonable instructions or follow rules and procedures; unauthorised use or negligent damage or loss of our property and failure to abide by the code of conduct and practise issued by the general social care council a copy of which is available for inspection in the office.

34. Gross misconduct was identified in the disciplinary procedures as including maltreatment of service users and abandoning duty without notification or sleeping on duty or negligent or deliberate failure to comply with the requirements of the organisation policy and procedure concerning medicines.

35. A grievance procedure provided that an employee could raise a grievance with her line manager either verbally or in writing (page 87).

16 September 2019

36. On 16 September 2019 the claimant was subject to racial abuse by C1 in the supermarket. The claimant did not refuse to continue with the session but returned with C1 to his accommodation. Following this incident the claimant was set up as a "non-approved" member of staff for C1 (see page 210).

37. Although the claimant informed the Tribunal in her oral evidence that after 16 September 2019, she continued to assist with C1's care along with a co-worker this was in contradiction to the evidence she gave on 6 January 2021. During her interview on that date (page 178) the claimant stated she had "refused to work with C1 since because of that incident and had not worked with him since". The Tribunal concluded on the balance of probabilities that after the incident on 16 September 2019 the claimant did not work with C1 again supported by Mr. Rogers evidence; the claimant's interview at page 178 and the record of the system which showed the claimant was moved to a non-preferred carer. However, the claimant remained working in the same building as C1 and they were civil to one another (see page 181).

38. By reason of C1's complex disabilities, it was known to the claimant and other colleagues that C1 could be triggered by challenge.

2 January 2021

39. On 2 January 2021 the claimant was designated to provide care to D from 8 a.m. to 1.30p.m. Although it was suggested by the respondent to the claimant during cross examination the claimant was late for work as she logged onto the system at 8.44 a.m. the Tribunal accepted the claimant's evidence that she attended D at 8 a.m. but failed to log into the system in accordance with procedures until 8.44 a.m. Between 8 a.m. to 8.44 a.m. the claimant administered medication to D and sorted out his room and feet. By administering medication to D and tending to his care in the absence of logging on the system was a potential breach of the respondent's insurance.

40. D then told the claimant he did not need anything else. The claimant ended the 1:1 care of D at 12 p.m. but did not check out of the IQ : Timecard application which records all employees arrival and end times. The claimant did not inform

the on-call service either of the care assignment terminating ahead of schedule. In the circumstances there was no logged record of what the claimant was doing after 12 p.m.

41. The claimant was storing her food in the fridge at E's flat another citizen/service user. The Tribunal found on the balance of probabilities that the claimant, waited in the car park for E to return from shopping with Robert Lewis, a personal assistant in charge of E. Although the claimant disputed that she was waiting in the car park; the Tribunal preferred the written evidence of Robert Lewis; the claimant did not identify any reason that Mr. Lewis would have lied other than "he was white". The claimant also disputed that she went to E's flat in the morning to place her food there, but the Tribunal rejected her evidence about this, finding on the balance of probabilities; she must have left her food in the fridge earlier that day.

42. The claimant started cooking and then left and came back half an hour later (see the interview of Robert Lewis at page 206-208). The claimant disputed this statement under cross examination, but the Tribunal determined on the balance of probabilities that Mr. Lewis' statement was correct in the context that the claimant's evidence about events was not entirely credible; she had acted in breach of processes by failing to inform her employer she had terminated the care of D at 12 p.m. and furthermore she knew that by cooking at a service user's apartment she was acting in breach of the code of conduct.

43. The claimant accepted she knew that C1 was present in E's flat. The Tribunal does not need to resolve the exact matters which occurred in E's flat for the purposes of this case, but it found that something was said by C1 which upset E so that E was crying, and the claimant was comforting E. Both Mr. Lewis and the claimant reprimanded C1 and the claimant invited C1 to leave the flat by signalling to the door exit. There is no dispute that the claimant was then subject to a physical attack and was assaulted by C1 and he grabbed her by the neck. Maureen who was working in a nearby flat heard the screams and entered E's flat. The claimant asked Maureen to contact the police. Robert Lewis contacted the police (page 147); paramedics and the respondent's on call service. Mariatou called the online manager to report the incident. Maureen also contacted Aisha Farage who escalated this incident to the second respondent. Mr. Rogers who took the call insisted that the claimant attend hospital.

44. The claimant attended hospital (see the hospital report page 172-3). The claimant was finding it difficult to swallow (page 307) and had a painful left shoulder and left wrist.

45. The claimant was off sick from work; her fit note ran from 3 January 2024 to 23 January 2021.

46. Mr. Lewis completed an incident form on page 165-170 which was passed to Mr. Rogers and Lisa Barrow, Deputy Domiciliary Care Manager.

47. The claimant contacted Mr. Lewis to thank him for his help on 2 January 2021. The claimant also called Mr. Lewis on 10 January 2021. It was suggested to the claimant in cross examination that she said to Mr. Lewis that she had heard that he had said she had been cooking and she tried to deny she was cooking (page

207). The claimant disputed this in evidence. On the balance of probabilities and in the context of the Tribunal's concerns about the claimant's credibility, the Tribunal found that she acted in the manner alleged by Mr. Lewis in his statement.

48. The Tribunal also found that the claimant made her way to Ludford on 4 January 2021 to meet Lisa Barrow at the same time as Mr. Lewis, but Mr. Lewis had already spoken to Lisa (page 208). On 4 January 2021 Lisa Barrow and the claimant met at Ludford for a well-being meeting (page 197).

49. On 4 January 2021 Mr. Rogers called the claimant to check on the claimant's well-being and on 5 January 2021. The calls went to voicemail on both occasions, so Mr. Rogers sent an email to the claimant containing a blank incident report to complete.

50. On 6 January 2021 (page 177-179) the claimant met with Mr. Rogers and Lisa Barrow. The claimant had completed the incident form (see page157 to 161). In the incident form the claimant identified herself, C1 and E and Robert Lewis as being involved in the incident and that Robert Lewis as a witness. She also described Moreen, Mariatous and Robert Lewis as being on duty.

51. At the meeting on 6 January 2021, Mr. Rogers enquired about the claimant's health and offered the claimant support and reminded her that support was available via EAP. The claimant confirmed her hospital attendance, and she had a swollen neck. The claimant confirmed her version of events on 2 January 2021. The claimant confirmed that she kept her food in E's flat and warmed it up (see page 177). The claimant stated she was no longer going to work at Underwood close (page 178).

52. On 5 January 2021 and 10 January 2021 Ms. Barrow who had COVID was working from home and by mistake contacted the claimant to see if she was available for work. The claimant stated she thought this was race discrimination because she had provided the respondent with a fit note, she was unable to work. Mr. Rogers explained in his evidence (which the Tribunal accepted) that out of 200 employees about 20% were off sick at this time and it was a struggle to get all the assignments covered for the service users. Furthermore, he stated that until a fit note is uploaded to the system an employee is shown to be available for work. He sincerely apologised on the part of the respondent if the claimant was contacted by the respondent, but it was an exceptionally busy time for the respondent and with the added problem of sickness and COVID meant that the claimant could have been contacted by mistake. He disputed that the claimant was required to do a shift.

53. On 10 January 2021 the claimant complained she had no contact from management. At this time in accordance with Mr. Rogers evidence (which the Tribunal accepted) there was an unprecedented operational demand on the service.

54. On 11 January 2021 Mr. Rogers conducted an investigatory meeting with Mr. Lewis (see page 206 – 208) who provided his account of events on 2 January 2021 and informed Mr. Rogers that the claimant regularly used E's flat; his cooker; pots and pans and his food and the claimant along with others left food

in E's freezer and fridge and spent time in between shifts in either E's or D's flat downstairs. He described the claimant as phoning him on 10 December 2020 to say she heard that he had said she was cooking, and the claimant was trying to deny it. On the Sunday after the incident, he said he thought it was Ashia had tried to say that the claimant was supporting E at the time when she was not. Mr. Lewis said he had said to both sides *"I have nothing to gain from making up a story I can only say what I saw and what happened on the day from my perspective".* He also said that the claimant contacted him on the Sunday after the incident and on 10 December just before 11:10 to say that she'd heard he was having a meeting with Mr. Rogers and told Mr. Rogers that she was cooking in the flat. Further when the claimant knew he would be seeing Lisa at Ludford on Monday to hand in the incident report, the claimant made a point to go to Ludford to see Lisa at the same time so she could see me talking to Lisa. However, Mr. Lewis had already spoken to Lisa before she arrived so there was nothing more you could add when the claimant arrived.

55. On 14 January 2021 the claimant contacted Mr. Rogers to say she was upset about the way the incident was being dealt with. Mr. Rogers invited the claimant to attend a zoom investigation on 15 January 2021 (see page 180-182) with Mr. Rogers, the claimant and Sarah Clapperton in attendance. This was a fact finding meeting.

56. During the meeting, the claimant stated she did not contact on call to report she had terminated D's care at 12 p.m. because she had contacted them frequently and it is for emergencies only. The claimant stated that she did not check out of the assignment on IQ Timecard because she had not finished and was still in the building. The claimant confirmed in this meeting she had stored food at E's flat and following E's arrival back from shopping she went to prepare food at E's flat. The claimant confirmed that she stored her food in E's fridge and freezer. She informed the Tribunal she had sought and obtained permission from E. The claimant confirmed she left D at 12 pm and visited her colleague Mariatou who was providing support at the bungalows and did not go home. The claimant was made aware of the EAP but the claimant stated she was having support from her GP and the police (page 182).

57. On 15 January 2021 (page 183) the claimant reported symptoms of depression and anxiety including low mood, difficulty concentrating, having negative thoughts, excessive worry and restlessness. Tests confirmed moderately severe to severe levels of symptoms of depression and anxiety.

58. The claimant's first fit note was due to expire 23 January. Mr. Rogers received a call from the claimant on 20 January 2021who confirmed she was fit to return to work on 24 January 2021.

59. On 22 January 2021 the claimant was invited to disciplinary hearing on 28 January 2021. This meeting did not take place on this day so that the letter was re-sent on 28 January 2021 to discuss the following(see p.187) :-

    (1) alleged failure to follow policy and procedure namely

(a) not notifying the on call your line manager alternative responsible person that your assignment with D ended at 12:00p.m. This assignment was scheduled to conclude at 13.30pm;

(b) not checking out of the assignment with D despite having checked in via IQ time card;

(c) arriving late for the allocated session with D checking in at 8:44 am rather than the scheduled start time of 8:00 am.

(2) unauthorised and inappropriate use of a citizen's private home, appliances and fuel to store and prepare meals for personal consumption

(3) alleged failure to take reasonable steps to limit/avoid contact with C1 namely

(a) being in the flat of a citizen without good reason, where C1 was present despite being set as non preferred staff by management to prevent such an occurrence

(b) changing the citizen despite being aware of the citizens temperament, risk assessments and the fact that you are not permitted to work 1:1 with C1

(4) Alleged to have make contact with colleague Robert Lewis with the intention of influencing, discussing and querying what they had reported in relation to a live investigatory process and the contents of their incident report

(5) it is alleged performance fell below the guidelines outlined in the code of conduct for healthcare support workers and adult social care workers in England namely s (1.1), s (1.3), S (1.6), S (1.7) S (1.8), S (3.5), S (4.3), S (4.5).

60. The claimant was informed that her employment may be terminated in accordance with the disciplinary procedure.

61. On 24 January 2021 the claimant had a return-to-work meeting with Charlotte Turner, senior personal assistant. The claimant confirmed she was well and happy to return back to work and happy to start the post and looking forward to it. The claimant returned to work at Hasbury Road (page 287) and was not required to work at Underwood close.

62. The disciplinary hearing was re-arranged for 2 February 2021 due to an unforeseen scheduling conflict arising from the allocation of a new rota at alternative setting. At the claimant’s request it was also re-arranged to 9 February.

63. On 7 February 2021 (page 198) the claimant sought to adjourn the meeting of the 9 of February because she said she had not received investigation notes from Moreen and Mariatou (page 198). Mr. Rogers confirmed in response there were no further additional documents, and the claimant was in full possession of the relevant material.

64. On 8 February 2021 (page 298) the claimant did not accept that the investigation meeting tomorrow was separate. She stated that the respondent was putting her under pressure and stress when forcing her to attend the meeting on 9 February 2021. The claimant further complained that she had been placed on shift on 9 February without her consent. The claimant stated that the manner the respondent was dealing with her case since 2 January 2021 was because of the colour of her skin, black. The claimant requested that the meeting be postponed.

65. On 9 February 2021 (page 299) Mr. Rogers responded to the claimant stating that the incident highlighted specific issues around the claimant's conduct that required investigation. He stated two members of staff, the claimant had mentioned did not witness the incident and therefore would be unable to give witness statements and would not be relevant to the investigation. He noted the claimant's allegation about the colour of her skin stating it was a serious allegation, and he asked the claimant to look at the organisation formal procedure in order to deal with this. He noted the claimant's mention of stress; he stated having this investigation hanging over you will be adding to this stress; he suggested dealing with the matter as soon as possible so that this can be alleviated. He reminded the claimant of the free and confidential EAP programme via health assured. The disciplinary hearing was rescheduled for 17 February 2021. On 17 February 2021 the meeting was rearranged to 23 February 2021.

66. On 22 February 2021 (page 191) the claimant resigned and raised a grievance. The claimant stated that the instigation of the disciplinary process against her was an act of race discrimination which aggravated her stress symptoms. She stated she was forced to inform the respondent of her resignation from the company with immediate effect. She described that she had been constructively dismissed by the business and racially discriminated because she is black/black African. The claimant set out her reasons behind her resignation which she deemed constituted acts of race discrimination as follows:-

(1) failing to take the incident of 2 January 2021 seriously;

(2) lack of compassionate care; lack of taking time and patience to wait my full recovery from this serious attack

(3) failing to have regards that my welfare and health and safety is important than any of my conduct on the day of the incident

(4) instigation of the grievance process against me;

(5) I have not been treated with dignity and respect

(6)lack of professional communication, flexibility, understanding and a good support from management staff;

(6.1) 5 January 2021 Lisa Borrow called me asking why I was not at work despite of knowing what happened to me on 2 January 2021 and of having my sick notes; I told her that I cannot because I was too ill to cover a shift;

(6.2) on 10 January Lisa Borrow called me for the second time she go to work and to cover a shift I told her that I cannot because I was too ill to cover a shift

(6.3) I called Daniel Rogers to complain that I was very upset and was not happy not to have call from management staff to check how I was doing following being attacked by the service user however Daniel Rogers replied this is because of COVID-19 so why did Lisa call me twice (asking why I was not at work and asking to go cover a shift) despite of COVID-19;

(6.4) no one from the management staff visited me whilst being off sick while after being attacked by a service user

(6.5) no one from the management staff called me to check my health after being attacked by a service user

(6.6) when I resume to work I was asked to work with the same service user who attacked me however I refused to do so which surely impacted on the decision to instigate the disciplinary meeting.

67. The claimant also stated that she was discriminated on grounds of her race colour of her skin black by the business which aggravated her stress illness symptoms therefore leaving the company with immediate effect from 22 February 2021 will help her to recover from her current stress illness symptoms. The claimant further requested a copy of the grievance policy along with copies of the data the company held about her.

68. On 23 February 2021 (page 193) the claimant submitted a further fit note for the period 23 February to 22 March 2021 for the reason of post-traumatic stress disorder.

69. By letter dated 23 February 2021 Mr. Rogers asked the claimant to reconsider her resignation. On 26 February 2021, in response, the claimant stated she did not wish to reconsider her resignation (page 300). The claimant stated *"I have made my decision to resign because I was racially discriminated which aggravated my stress illness symptoms so resigning will help me to recover from my current stress illness symptoms therefore I'm not going to reconsider my decision to resign. I'm willing to separately attend both processes grievance meeting and disciplinary meeting however this will depend on me finding or having a work colleague who will come or if you allow me to have a relative with me or to attend the meeting via video conference. Alternatively, you will provide me with written questions relating to the process is and I will answer to each of them in writing."* The claimant requested a full copy of the grievance procedure.

70. On 1 March 2021 Ms. Weston confirmed the disciplinary hearing would not continue as the claimant was no longer an employee but that the grievance would hearing would proceed. She invited the claimant to attend the grievance hearing on 3 March 2021.

71. On 3 March 2021 (page 203) the claimant stated she would not be attending the grievance hearing because her colleagues had refused to accompany her as they didn't want to put their work at risk. She stated she didn't have anyone else to come along with her. She stated that if the respondent had any difficulty understanding her grievance complaint or needed some additional clarification, she said the respondent may ask and she will provide written answers to the questions.

72. On 4 March 2021 Mr. Rogers confirmed the grievance hearing would be held in the claimant's absence and sent an outcome in due course.

73. On 5 March 2021 (page 194) Gemma Weston, Deputy Director of Operations, rejected the claimant's grievance. She had obtained statements from Lisa Barrow (page 197) and Elaine Villiers and observation phone notes from Daniel Rogers and from Charlotte Turner. Gemma Weston found there was no evidence to substantiate the claim that by instigating a disciplinary process the respondent was racially discriminating against the claimant following Midland Mencap policies and procedures. She stated it was evident that conduct and performance are factors when undertaking the disciplinary process and the claimant had not provided any evidence to suggest otherwise. Further she found that there was no evidence to substantiate the claim that the respondent constructively dismissed her. The respondent noted it was unfortunate the claimant felt the disciplinary process aggravated the claimant's stress symptoms, but the respondent had a duty of care to follow policies and procedures relating to staff conduct. The suggestion that the respondent failed to take the incident seriously was dismissed; she took into account the number of meetings and phone calls between the respondent and the claimant about her well-being including 4, 6, 20 and 24 of January 2021. The claim that there was a lack of compassionate care was dismissed taking into account the number of phone calls and meetings to check on the claimant's welfare ensuring she was moved to a different project away from C1. She noted the claimant had reported she was happy with the adjustments and was looking forward to returning to work; she did not require any further support from the respondent. She did not find any evidence that there was a lack of professional communication, flexibility understanding and lack of support. The respondent's view was that there were a number of meetings and calls between the respondent and the claimant various management in relation to the claimant's well-being. The claimant was asked to work at Hasbury Court on her initial return to work until the vacant space opened up at Swarthmore Road in February. The claimant was noted to be happy with the adjustments and happy to return to work. In respect of being requested to cover shift by Lisa Barrow when off sick Miss. Weston found that Lisa had COVID and was working from home and was not in the office. Although Lisa couldn't recall calling the claimant, she acknowledged if she did she was unaware the claimant was actually off sick. Furthermore, management was not able to visit the claimant at that time due to COVID. The respondent would not want to contact the claimant until she felt fit for work. Further she dismissed the claimant's allegations she was asked to work with C1. She found that management had undertaken several changes to the claimant's schedule to ensure she was not working with C1. Furthermore, there was no evidence to substantiate the claim that by refusing to work with C1 led to initiation of the disciplinary grounds.

74. The claimant was offered a right of appeal which she did not exercise. The claimant entered ACAS early conciliation on 4 and 5 April 2021 and obtained certificates on 19 April 2021 and lodged her claim on 17 May 2021.

The Law

Direct race discrimination

75. Section 13 of the Equality Act 2010 provides that a person A discriminates against another B if because of a protected characteristic A treats B less favourably than A treats or would treat others.

76. It is necessary to establish if the respondent has treated the claimant less favourably than it treated or would treat others and the difference in treatment is because of the protected characteristic. The Tribunal is to make a comparison with an actual or hypothetical comparator in not materially different circumstances (see section 23 of the Act). It is possible to use the evidence of comparators in materially different circumstances to construct a hypothetical comparator and determine how such a hypothetical individual would be treated. However a statutory comparator as per section 23 of the Equality Act 2010 must be a comparator in the same position in all material respects of the victim save that he or she is not a member of the protected class see **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 IRLR 285.**

77. The Tribunal must decide why the claimant was treated as she was. The case of **Nagarajan v London Regional Transport 1999 IRLR 572** identifies this as the crucial question.

78. As to whether the alleged less favourable treatment was because of the protected characteristic, the key focus for the Tribunal is on the reason why the claimant was treated less favourably and whether it was the protected characteristic. This usually requires a consideration of the mental processes whether conscious or subconscious of the alleged discriminator see the case of **Islington London Borough Council v Ladell 2009 ICR 387**. In relation to discrimination claims the Tribunal has to determine the reason why the claimant was treated as he was and if the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment that is sufficient to establish discrimination. It need not be the only or even the main reason; it is sufficient that it is significant in the sense of being more than trivial. Direct evidence of discrimination is rare and Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two stage test set out in **Igen limited v Wong 2005 IRLR 285 CA.** In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination than it need not go through the exercise of considering whether the other evidence absent explanation would have been capable of amounting to a pre may face a case under stage one of the Igen test.

79. Section 136 of the Equality Act 2010 provides that where the Tribunal finds facts from which it could conclude that unlawful discrimination has taken place the burden of proof shifts to the respondent to prove that the action was non-discriminatory. This operates in two stages first the claimant must prove on the balance of probabilities facts from which the tribunal may infer the discrimination has taken place second and only if the treatment does so the respondent must prove on the balance of probabilities that the treatment was in no sense whatsoever because of the protected characteristic.

Victimisation

80. Pursuant to section 27 of the Equality Act 2010 "A person A victimises another person B if A subjects B to a detriment because (a)B does a protected act or (b)A believes that B has done or may do a protected act."

81. Protected act can include (pursuant to section 27 (2)(d) of the Equality Act 2010 "an allegation (whether or not express) that A or another person has contravened this Act".

82. The Equality Act 2010 asks the question in respect of causation as to whether B is subject to a detriment because of the protected act applying **Greater Manchester Police v Bailey (2017) EWCA Civ 425.** In the case of **Chief Constable of West Yorkshire Police v Khan (2001) UKHL 48** paragraph 16 The primary object of the victimisation provisions is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so. The correct question for the Tribunal is whether the treatment was to a material degree influenced by the fact that the claimant did a protected act (see **Carozzi v The University of Hertfordshire & another (2024) EAT 169**).

Automatic unfair dismissal/protected interest disclosure

83. Pursuant to section 103A of the ERA (1) an employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason or if more than one the principal reason for the dismissal is that the employee made a protected disclosure.

84. Pursuant to section 43B a qualifying disclosure is defined as :

(a) the worker makes a disclosure of information;

(b) the worker reasonably believes it is made in the public interest

(c) the worker reasonably believes it tends to show one of the matters listed which includes a breach of legal obligation.

85. HHJ Eady QC (as she was then) provided a detailed analysis of the statutory framework and case law of public interest disclosure claims in her judgement of **Parsons v Air Plus International Limited UKEAT/0111/17**. As to whether or not a disclosure is a protected disclosure the following points can be made : this is a matter to be determined objectively see paragraph 80 of **Beatt v Croydon Health Services NHS Trust 2017 IRLR 748.** More than one communication might need to be considered together to answer the question whether a protected disclosure has been made see **Norbrook Laboratories GB Limited v Shaw 2014 ICR 540.** The disclosure has to be of information not simply the making of an accusation or statement of opinion; see **Cavendish Munro Professional Risks Management Limited v Geduld 2010 IRLR 38 EAT.** That said an accusation or statement of opinion may include or be made alongside a disclosure of information; the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information? See **Kilraine v London Borough of Wandsworth (2016) IRLR 422 EAT.** As to the words, "in the public interest" inserted into section 43(B)(1) of the ERA by the 2013 Act this phrase was intended to reverse the effect of **Parkins v Sodexho limited 2002 IRLR 109 EAT** in which it was held that a breach of legal obligation owed by an

employer to an employee under their own contract could constitute a protected disclosure. The public interest requirement does not mean however that a disclosure ceases to qualify for protection simply because it may also be made in the worker's own self-interest; see **Chesterton Global Limited v Nurmohamed 2017 IRLR 837.**

86. Lord Justice Underhill in the case of **Chesterton** provided the following guidance see paragraph 27 to 30

"27. First and at the risk of stating the obvious the words added by the 2013 Act fit into the structure of section 43B as expounded in **Babula**. The Tribunal thus has to ask (a) whether the worker believed at the time that he was making it that the disclosure was in the public interest and (b) whether if so that belief was reasonable

28. Second and hardly moving much further from the obvious element B in that exercise requires the Tribunal to recognise as in the case of any other reasonableness review that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad textured. The parties in their oral submissions referred both to the range of reasonable responses approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to the Wednesbury approach employed in some public law cases. Of course, we are in essentially the same territory but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the Tribunal to form its own view on that question as part of its thinking -that is indeed often difficult to avoid- but only that that view is not as such determinative.

29. Third the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks as not uncommonly happens to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise in principle a Tribunal might find that the particular reasons why the worker believes the disclosure to be in the public interest did not reasonably justify his belief but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time; all that matters is that his subjective belief was objectively reasonable.

30. Fourth while the worker must have a genuine and reasonable belief that the disclosure is in the public interest that does not have to be his or her predominant motive in making it: otherwise, as pointed out at paragraph 17 above the new sections 49 (6A) and 103 (6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the workers motivation. The phrase "in the belief" is not the same as motivated by the belief but it is hard to see that the point will arise in practise since where worker

believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.

87. Lord Justice Underhill stated at paragraph 37 where the disclosure relates to a breach of the workers own contract of employment (or some other matter under section 43(B)(1) where the interest in question is personal in character there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reid's example of doctors hours is particularly obvious, but there may be many other kinds of case where it may reasonably thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case.

88. In a case of automatic constructive unfair dismissal by reason of making a public interest disclosure, the claimant must establish there was a fundamental breach of contract on the part of the employer; that the employers breach caused the employee to resign and that the employee did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal (see the case of **Western Excavating ECC Limited v Sharp 1978 ICR 221).** The question for consideration by the Tribunal is whether the protected disclosure was the principal reason that the employer committed the fundamental breach of the employee's contract of employment that precipitated the resignation. If it was, then the dismissal will be automatically unfair.

Submissions

89. The respondent provided a written submission. The respondent submitted that the claimant failed to give credible evidence during cross examination; there were clear discrepancies between the claimant's oral evidence and witness evidence and the claimant blamed her former legal representative for this. Further the respondent submitted that the claimant displayed concerning discriminatory beliefs including stating the reason her colleagues and line managers were lying was because they were white, and she was black. No further reasons were put forward by the claimant. The respondent submitted that there was no direct race discrimination.

90. The respondent did not wish to add anything orally to the written submissions.

91. In the respondent's written submission, it submitted that the claimant's grievances were fully investigated in the context that the claimant confirmed she had not met Miss Weston (the grievance investigator) and declined to attend the grievance hearing and failed to submit any further evidence or information. The claimant stated her grievances were not upheld because she was black but the claimant took no opportunity to appeal the grievance outcome.

92. The respondent accepted the claimant had made disclosures pursuant to section 43 B of the Employment Rights Act 1996 but it was disputed that the claimant's disclosures were made in the public interest; the disclosures were made in fact in respect of the claimant herself and the treatment she perceived to be discriminatory against herself. Further it was submitted that the claimant could not reasonably believed that she was disclosing a failure to comply with a legal obligation or a health and safety concern; any such allegation of discrimination

was unfounded; the claimant' subjective belief was not objectively reasonable. here was no causative link between any disclosure and the claimant's decision to terminate her employment.

93. The claimant provided a written submission by one page email stating that the attack on 2 January 2021 had a significant impact on her physical and psychological health. The claimant submitted the respondent failed to maintain a safe working environment and this attack is a direct consequence of their disregard for the safety and well-being of employees. She stated that the respondent's actions were grossly negligent and should not be tolerated in any professional setting. The claimant stated she should win her case because the facts are supported by clear and convincing evidence including witness testimony, medical documentation and the respondent's conduct. She submitted the situation falls squarely within the legal protections against workplace violence and assault. The claimant further submitted that a ruling in her favour would send a strong message about the importance of maintaining a safe and respectful work environment and aim to set a precedent (example) for the integrity and safety of all workers in the workplace.

Credibility

94. In assessing evidence, the Tribunal took into account the claimant is a litigant in person, English is not her first language, and she had been giving evidence via an interpreter. The Tribunal noted that the claimant understood English and in the course of the hearing started to answer questions before the interpreter had interpreted the question. The Tribunal determined that the claimant had been inconsistent in her oral evidence and some elements of her oral evidence contradicted her written statement and evidence she gave in the course of the investigatory process. For example, the claimant informed the Tribunal in evidence that she continued to assist with C1's care after the incident in September 2019. This was in contradiction to her evidence dated 6 January 2021 (page 178) when the claimant stated she had not worked with C1 since the incident and the respondent's records that the claimant was removed as C1's preferred carer. The claimant accepted that she was removed as C1's preferred carer following the incident in September 2019 but remained civil to him; the claimant then contradicted this by saying he bad mouthed her behind her back. At paragraph 21.2 of her witness statement the claimant stated that she handed a copy of the sick note to the respondent but in cross examination the claimant stated that this was not correct she actually emailed it.

95. When asked why the claimant believed she was racially discriminated against, she said it was because the investigator and Mr. Lewis were both white and she was black. She said that Moreen and Mariatou should have been interviewed but accepted that they did not witness the events arising before the attack. The claimant accepted in cross examination that the use of a vulnerable service users facilities/fuel was a breach of the code of conduct but she felt she asked the service users permission so this was fine.

96. Although the claimant had stated in her witness evidence that she believed she was discriminated against by reason of race along with other former members of staff, this was not put to Mr. Rogers. The Employment Judge asked Mr. Rogers about other black employees. Mr. Rogers explained that the respondent had a

very diverse workforce and that other employees had been dealt with in accordance with the respondent's policies and procedures.

97. The Tribunal found Mr. Rogers was an honest and reliable witness and consistent. He was very thorough in his evidence wishing to provide detailed answers.

Conclusions

Mr. Rogers and/or Mr. David Bird failed in :

97.1.1 Their duty of care to ensure the safety of the claimant and/or to take reasonable steps to ensure her safety following her being assaulted by C1 on 2 January 2021 and

97.1.2 To carry out a proper risk assessment and take steps to reduce the risks of the claimant being verbally and physically attacked by C1 following the incident of 2 January 2021.

98. The claimant did not identify an actual comparator. The Tribunal constructed a hypothetical comparator as a white employee who had sustained an assault from a service user.

99. The Tribunal having heard all of the evidence determined that the incident on 2 January 2021 was taken very seriously by the respondent and escalated by Elaine Villiers to Mr. Rogers on emergency call duty/ the person co-ordinating matters. He was in constant communication with Elaine Villiers and another manager Aisha. His priorities were the claimant's welfare and that she be seen by medical professionals. Further the respondent took steps to ensure there was no further escalation or repeat from the perpetrator. On the same day C1 was reassessed and ultimately he was removed from the service. Mr. Rogers requested that if the claimant had not seen the paramedics she should go to the hospital. He instructed two managers to get onsite straight away. Mr. Rogers provided instructions that the police should be called if not already done so. He commenced an initial investigation by collecting the relevant information and then he sought to investigate the facts. His response, the Tribunal finds would have been the same for a hypothetical comparator. He tried to call the claimant on a couple of occasions to complete the statutory reporting requirements and check her well- being. He asked the claimant and Mr. Lewis to complete an incident report. He tried to call the claimant on a couple of occasions and did leave voicemails. He interviewed the claimant and Mr. Lewis following the incident. Since September 2019, the claimant was already the non-preferred carer for C1. At the meeting on 6 January 2021 the claimant was informed she did not need to work at the same premises and when the claimant actually returned to work from 24 January to 8 February she was placed at different premises to Underwood.

100. Mr. Rogers gave evidence to the Tribunal (which it accepted) that it was a fundamental and routine part of his job to ensure the service was safe.

101. The Tribunal determined that the respondent did exercise a reasonable duty of care towards the claimant to ensure the safety of the claimant and took

reasonable steps to ensure the claimant's safety following the assault on 2 January.

102. The Tribunal determined there was no less favourable treatment here. Further that the claimant's treatment had nothing whatsoever to do with the claimant's race. The allegation fails and is dismissed.

103. <u>To carry out a proper risk assessment and take steps to reduce the risks of the claimant being verbally and physically attacked by C1 following the incident of 2 January 2021.</u>

Mr. Rogers did not consider it necessary to undertake a formal written risk assessment following the incident on 2 January 2021. However, a risk assessment was completed by Mr. Rogers in that he determined C1 should be immediately re-assessed by reason of the violence shown and was ultimately removed from the service. Furthermore, the claimant was removed from the site on her return to work on 24 January 2021. The Tribunal determined that Mr. Rogers would have carried out the same process for any hypothetical comparator.

The Tribunal determined there was no less favourable treatment. Further that the claimant's treatment had nothing whatsoever to do with the claimant's race. This allegation fails and is dismissed.

<u>Mr. Rogers failing to undertake an investigation into the events of 2 January 2021</u>

104. The claimant's evidence on this point was that the respondent just interviewed "a white man" and that she alleged therefore it was direct race discrimination. Mr. Rogers interviewed the claimant (the victim of the assault) on 6 January 2021 (see page 177 -179) and on 15 January 2021 (page 180 – 182) and Mr. Lewis (the eye-witness of the events leading up to the assault and the actual assault) on 11 January 2021 (wrongly dated December) (see page 206-208).

105. The claimant argued that this was an inadequate investigation, and he should have interviewed Moreen and Mariatou. Mr. Roger's opinion was that they were not involved in the incident (see the claimant's own incident report page 157; the claimant did not identify them as witnesses to the incident). Moreen attended when she heard the claimant screaming from the attack of which there was no dispute that it occurred. Mariatou was not involved in the incident at all but was on shift.

106. The Tribunal determined that Mr. Rogers did undertake an investigation of the events on 2 January 2021 and the same was adequate in the circumstances. He identified the witnesses relevant to the event, the claimant and Mr. Lewis; the claimant herself had identified Mr. Lewis as a witness, and Mr. Rogers interviewed them. He did not interview Moreen and Mariatou concluding that they were not witnesses to the event (Moreen heard the screams and saw C1 assaulting the claimant; the assault was not in dispute). Mariatou was on shift but not involved with the incident. The Tribunal determined that Mr. Rogers would have treated a hypothetical comparator in exactly the same way as the

claimant; identifying who was a relevant witness to the events and interviewing solely them.

107. The Tribunal rejected the claimant's contention that because Mr. Rogers interviewed a white man it amounted to direct race discrimination; the Tribunal determined that conclusion could not be drawn from a selection of Mr. Rogers of an eye-witness to the events to be interviewed who was white.

108. There was no less favourable treatment. The treatment of the claimant had nothing whatsoever to do with her race. This allegation fails and is dismissed.

Failure to complete a distressed behaviour record related to C1's conduct

109. Mr. Rogers gave evidence (which the Tribunal) accepted that he completed a distressed behaviour record related to C1's conduct. In his role of health and safety, Mr. Rogers is required to log onto the IQ system which captures the incident so to record the behaviour on that day. This captures the relevant information and notes for managers information about the service user including behaviours. The claimant who has the burden of establishing primary facts did not establish this allegation. The allegation fails on its facts and it is dismissed.

Failure to carry out a safeguarding investigation

110. The Tribunal rejected this allegation based on its findings of facts above. The Tribunal has already noted that C1 was subject to further re-assessment immediately by reason of the violence shown and ultimately he was removed from the service on the basis that Mr. Rogers did not consider he should remain in the service of the first respondent. Prior to his removal the claimant remained a non-preferred carer for C1. On the claimant's return to work she was not required to work at Underwood close but moved to another premises. Following the assault, the respondent took all reasonable steps in terms of safeguarding the claimant and other carers as set out above and undertook an investigation. The Tribunal determined that the respondent would have treated a hypothetical comparator in exactly the same way. There is no less favourable treatment. The claimant's treatment had nothing whatsoever to do with her race.

111. This allegation fails on the facts and is dismissed.

Management staff failing to contact the claimant to check on her health after being assaulted by C1

112. The respondent held a well-being meeting with the claimant conducted by Lisa Barrow on 4 January 2021 at Ludford (see page 197). Mr. Rogers sought to make contact with the claimant on both 4 January and 5 January 2021 and left voice messages and requested a call back. Following his call to the claimant on 5 January 2021 he sent her a follow up email and asked the claimant about her welfare and to complete a blank incident form. The claimant attended the meeting at Pinewood on 6 January having completed the incident form.

113. The Tribunal determined that the respondent management did not fail to contact the claimant to check on her health after being assaulted by C1. The respondent would have treated a hypothetical comparator in exactly the same way. This allegation fails on the facts and is dismissed.

On 5 January 2021 the claimant being called by Ms. L Barrow and being asked why she was not at work

114. The claimant met Ms. Barrow on 4 January 2021 for a well-being meeting and the claimant stated she did not need anything more from the respondent (see page 197). Ms. Barrow's recollection was that the claimant seemed ok and upbeat. Following this meeting Ms. Barrow was working from home with COVID and not in the office. In her statement Ms. Barrow stated she could not recall contacting the claimant to cover shifts and would not have called her if she knew she was off sick (see page 197). Mr. Rogers explained that in the context of COVID about 15% were off sick and it was a challenge to get all shifts covered and there was a ring around of staff. Furthermore, if not in the office an employee is unlikely to see the sick note from the claimant or would not see it until it was loaded onto the system if working remotely. There was no suggestion that the claimant was forced to work a shift.

The Tribunal determined in the context of COVID and the challenges that placed on this respondent including staff shortages to cover shifts there was a ring around staff to cover shifts in accordance with Mr. Rogers evidence. The contact of Ms. Barrow on the balance of probabilities was likely to have been a mistake and if not in the office, she would not have seen the claimant's sick note or not seen it on the system. The Tribunal determined that in this context a white hypothetical comparator would have been subject to the same treatment. The Tribunal was not satisfied, as the claimant contended, she was contacted by the respondent because she was a black woman. This allegation fails and is dismissed.

On 10 January 2021 the claimant being contacted by Lisa Burrow on a second occasion asking her if she could cover a shift

115. The claimant's case is that Ms. Barrow contacted her on a second occasion asking if she could cover a shift because she was a black woman. Ms. Barrow, as set out at page 197, said she had no recollection of contacting the claimant or being aware she was actually off sick.

116. The context is that the claimant met Ms. Barrow on 4 January 2021 for a well-being meeting and the claimant stated she did not need anything more from the respondent (see page 197). Ms. Barrow's recollection was that the claimant seemed ok and upbeat. The claimant did not challenge she gave this impression. There is no dispute that Ms. Burrows was working from home by reason of having COVID and therefore on the balance of probabilities did not have access to any sick notes of employees. Furthermore, the Tribunal accepted the evidence of Mr. Rogers that a number of employees were off sick and it was a challenge to get all shifts covered and there was a ring around of all staff to cover shifts. The Tribunal was satisfied that this was an operational mistake/oversight and the claimant's treatment had nothing whatsoever to do with her race. This allegation fails and is dismissed.

On 10 January 2021 the claimant contacted Mr. Rogers to query why nobody had called her to ask how she was. The claimant was told by Mr. Rogers that the lack of contact was due to COVID-19. However failed to explain why Miss Barrow contacted her on two occasions in the same period

117. The Tribunal has already found based on the evidence of Mr. Rogers that he tried to contact the claimant on both 4 January and 5 January 2021; got no response and left voicemails. Further Mr. Rogers also had a zoom meeting with the claimant on 15 January 2021. The allegation of Mr. Rogers stating there was a lack of contact due to COVID and he did not explain why Ms. Barrow contacted her, was not directly put to Mr. Rogers in evidence. The Tribunal accepts that the claimant did complain that nobody had called her to ask how she was. However, the claimant had been contacted by the respondent on two occasions; left voicemails but the claimant did not respond. In the context that the respondent had attempted to contact the claimant by telephone, had a well-being meeting on 4 January and was checking on her well-being the Tribunal do not find there was a lack of contact by the respondent. The respondent as set out above during COVID was struggling to cover shifts and it was an extremely difficult time for the respondent. Further during COVID management of the respondent was unable to visit the claimant whilst the claimant was off sick (see the grievance response at page 195). The Tribunal found that a hypothetical comparator would have been treated in the same way as the claimant in the context of COVID the respondent could not have visited the claimant. Her treatment had nothing whatsoever to do with race. This allegation fails and is dismissed.

Management staff failing to visit the claimant whilst she was on sick leave between 4 January 2021 and 23 January 2021

118. There is no dispute that the respondent's management did not visit the claimant whilst she was on sick leave between 4 January 2021 and 23 January 2021. The Tribunal accepted the evidence of Mr Rogers that it was not the practice of the respondent to visit sick employees with short term sick leave but in any event a national lockdown was in force from 6 January 2021 which would have made such a visit unlawful. A hypothetical comparator would have been treated in the same way. The Tribunal rejected the claimant was subject to less favourable treatment because of her race. This allegation fails and is dismissed.

Failure to carry out a return to work interview following the claimant's sickness absence coming to an end on 24 January 2021

119. The Tribunal did not find that this allegation was made on the facts. The Tribunal found on the basis of Mr. Rogers evidence along with the grievance investigation that that (page 196) that senior PA Charlotte Turner did the return-to-work interview as it was documented on the IQ system (page 196). On the claimant's account the return-to-work interview was completed by Mr. Rogers. The fact is even on the claimant's case a return-to-work interview did take place. This allegation fails and is dismissed.

Being asked to support C1 upon the claimant's return to work

120. The Tribunal did not find this allegation was made out on the facts. The claimant's evidence is that on 6 January 2021 she stated she did not want to work with C1. The claimant had been his non-preferred carer since September 2019 (following suffering abuse from C1 in the supermarket). On the claimant's return to work from 24 January to 8 February 2021 the claimant did not have to work with C1 and he was removed from the site. The Tribunal found that the

claimant's allegation she was asked to support C1 on her return to work as not credible in the context she had not had to work with C1 since September 2019 (as set out in her interview see page 178); was his non-preferred carer and the steps which the respondent had taken to ensure that the claimant and other employees remained safe including obtaining a re-assessment of C1 and his removal from the service. The Tribunal rejected this allegation. The allegation fails and is dismissed.

121. <u>On 22 January 2021 commencing disciplinary action against the claimant</u>

There is no dispute that the respondent invited the claimant to attend a disciplinary meeting. The original invitation was not included in the trial bundle but the letter re-arranging the meeting dated 28 January 2021 (page 187) sets out the allegations. The claimant accepted in cross examination that the code of conduct for healthcare support workers (see page 70-82) and the disciplinary policy (page 83-86) applied to her employment with the respondent. It was mandatory that the claimant should not accept benefits or hospitality from anyone she was supporting pursuant to the code (see page 73) and/or this could amount to maltreatment of service users under the disciplinary procedure or was a breach of the disciplinary procedure itself (see page 85(g) and 84(p)).

On the basis of the claimant's interview on 15 January 2021 she confirmed she had stored food and prepared a meal at a vulnerable service users flat (see page 181). The claimant had also confirmed in her interview that following terminating the care of D she did not inform the respondent (page 180); this could amount to abandoning duty without notification under the disciplinary process; a gross misconduct offence (see page 85 (i) or failing to devote the whole of her time to the respondent see page 84 (h)). The claimant stated she attended D on time but failed to log onto the system; in the absence of logging onto the system the claimant provided care and medication. This was a breach of the requirements of the organisation's procedures and a potential gross dismissal disciplinary offence (see page 85(o)). If late to attend work this is a potential breach of the disciplinary procedure (page 84(d)). The Tribunal determined that the respondent invited the claimant to a disciplinary hearing because it had justified concerns about the claimant's conduct following its investigation. The Tribunal concluded that where similar concerns had been raised against a white hypothetical comparator following an investigation the white comparator would also have been invited to a disciplinary investigation and treated in exactly the same way as the claimant. The claimant's treatment had nothing whatsoever to do with race. This allegation fails and is dismissed.

<u>On 9 February 2021 Mr. Rogers told the claimant that he felt by having the disciplinary investigation hanging over the claimant it could add to her stress</u>

122. This allegation was not put by the claimant to Mr. Rogers but the Tribunal finds if made the comment appears to be a fairly innocuous observation and factually accurate; having a disciplinary hanging over any employee is a stressful experience and the observation is factually accurate. The Tribunal determined that this could be said to a hypothetical comparator facing disciplinary investigation. There was no less favourable treatment and the claimant's treatment had nothing to do with her race. The allegation fails and is dismissed.

Mr. Rogers placing the claimant on shift for 9 February 2021 without her consent

Mr. Rogers gave unchallenged evidence about how shifts are allocated in the respondent's system. The Tribunal accepted his evidence. Shifts are allocated based on data present in the system on the day before namely in this instance on 8 February 2021. The claimant had not submitted a sick note until 9 February 2021. At the time of the allocation of the shift for 9 February 2021, on 8 February, the claimant was still showing as available for work on the system. The claimant contended that it was done deliberately by management; specifically by Mr. Rogers. Mr. Rogers refuted this. The Tribunal preferred the evidence of Mr. Rogers; the claimant was allocated a shift to work on 9 February 2021 at a time when her sick note was not logged onto the system and the system stated she was available to work. A hypothetical comparator would have been treated in exactly the same way. There was no evidence that the claimant was forced to work this shift. This allegation fails and is dismissed.

The claimant's resignation on 22 February 2021

The claimant's case is that by reason of the discriminatory treatment she resigned on 22 February 2021. The Tribunal notes that the claimant's resignation took place one day before the disciplinary hearing fixed for 23 February 2021 to deal with allegations of the claimant's misconduct. The Tribunal rejected that the claimant was subject to the alleged discriminatory treatment for the reasons set out above. On the balance of probabilities, the Tribunal found that the claimant resigned on 22 February 2021 one day prior to the disciplinary hearing when she was due to face serious allegations of misconduct and potential disciplinary action. This allegation fails and is dismissed.

Miss. Gemma Weston failing to carry out a full investigation into the claimant's grievances

The claimant's oral evidence is that the investigation was inadequate because Ms. Weston failed to interview Mariatou and Moreen (see paragraph 76 of claimant's witness statement). The claimant's grievance (see page 191-2) dated 22 February 2021 contained 6 main allegations and six sub heading allegations. The allegations made by the claimant were focused on the management's response to the incident on 2 January 2021 and instigation of a disciplinary process. The claimant did not identify how interviewing Mariatou or Moreen would have assisted the respondent in investigating her grievance; the claimant had not identified these individuals as being involved in the incident on 2 January 2021 (see the incident form the claimant completed). The claimant declined to attend the grievance hearing post her resignation stating that the respondent could make some enquiries with her if they needed more information and the claimant failed to appeal the grievance outcome.

The Tribunal must consider the adequacy of the grievance investigation in the context that the claimant chose not to attend. The claimant made the stark allegation that by instigating a disciplinary process the first respondent racially discriminated against her. Save to assert before this Tribunal this was because she was black, the claimant did not provide any other evidence to the Tribunal or Ms. Weston. Her evidence about another black employee was not put to Mr.

Rogers. The claimant had accepted during her interview on 15 January 2021 she stored her food and prepared her meal (therefore using fuel) at a vulnerable service users flat (see page 181). The claimant had also confirmed in her interview that following terminating the care of D she did not inform the respondent (page 180); this could amount to abandoning duty without notification under the disciplinary process; a gross misconduct offence (see page 85 (i) or failing to devote the whole of her time to the respondent see page 84 (h)). The claimant stated she attended D on time but failed to log onto the system; in the absence of logging onto the system the claimant provided care and medication. This was a breach of the requirements of the organisation's procedures and a potential gross dismissal disciplinary offence (see page 85(o)). If late to attend work this is a potential breach of the disciplinary procedure (page 84(d)). The Tribunal determined as set out above that the respondent invited the claimant to a disciplinary hearing because it had justified concerns about the claimant's conduct following its investigation. The Tribunal concluded that where a white hypothetical comparator was subject to investigation and similar concerns were raised, the white comparator would also have been invited to a disciplinary investigation. The claimant's treatment had nothing whatsoever to do with race. In the absence of providing any evidence (accept making the allegation), Ms. Weston completed an investigation into this allegation.

In respect of the failure to investigate the claimant's contention that she was constructively dismissed by the respondent, this was rejected by the respondent on the basis that the claimant did not substantiate the allegation. The claimant did not attend the grievance hearing and did not provide any evidence. The Tribunal determines that this allegation fails on its facts.

In respect of the allegation that the respondent failed to investigate the allegation that the disciplinary hearing aggravated stress symptoms, Ms. Weston noted that it was unfortunate that you felt the process aggravated her symptoms but that policies and procedures had to be followed. The Tribunal does not see that the respondent could have made any other findings than this in the absence of the claimant providing any further information; as a matter of fact a disciplinary process is likely to be stressful but an employer is duty bound to follow its policies. This allegation fails.

In respect of the failure to investigate allegations that the incident was not taken seriously; there was a lack of compassionate care; lack of time and patience waiting for her recovery and lack of dignity and respect and lack of professional communication, flexibility and good support from management; this amounted to race discrimination, Miss. Weston did note that meetings or phone calls were held on 4 January 6 January (wrongly dated April); 20 January and 24 January 2021. Further Miss Weston noted that the claimant was moved to two different projects to ensure she was not in close proximity with C1. Further the claimant reported she was happy with the adjustments and was looking forward to returning to work and indicated there was no further support she required. She further noted the client was lost work at Hasbury court until a vacant space opened up at Swarthmore Road; the claimant was noted as being more than happy to return to work. The Tribunal does not see that the respondent could have made any other findings than this in the absence of the claimant providing any further information. In any event factually the Tribunal rejected these allegations. As set out above the respondent did take the incident seriously; was

compassionate; showed dignity and respect towards the claimant and there was professional communication, flexibility, understanding and good support from management. These allegations of race discrimination fail.

In respect of the allegation of a photo to investigate whilst off sick she was called to cover shifts, miss western did investigate this matter by discussing the issue with Lisa who could not recall cooling the claimant she had COVID and was working from home and not in the office and it learns it if she did she was unaware the claimant was actually off sick. The tribunal found that discussing the matter with Lisa who was alleged by the claimant to have been contacted bye was an adequate investigation. The allegation fails.

In respect to failing to investigate the allegation that management did not visit the claimant while she was off sick, Miss. Weston did consider this allegation finding that the respondent management were unable to visit the claimant whilst off sick due to COVID. This was an adequate investigation. The allegation fails.

In respect of failing to investigate whether the claimant was asked to work with the same citizen who attacked her. Miss Weston in the context of the limited information given by this claimant found that management had undertaken several changes to the claimant's schedule to ensure she was not working with C1 finding no evidence that refusing to work with the citizen led to the initiation of the disciplinary process. This was an adequate investigation and the allegation fails.

The Tribunal was taken to Miss Weston's investigation which consisted of a statement from Elaine Villers the care coordinator dated 5 March 2021 concerning the claimant's return to work; telephone interview with Lisa Barrow on 5 March 2021 page 197. Miss. Weston also took into account Charlotte Turner's file notes and notes of Mr. Rogers.

The Tribunal found the claimant's dissatisfaction with the investigation and outcome of the grievance was that her grievance was not upheld in her favour; that in itself does not amount to direct race discrimination.

<u>On 5 March 2021 Miss Weston confirmed the claimant's grievances would not be upheld</u>

Ms. Weston dealt with each of the allegations made by the claimant and determined they were not related to race. The Tribunal repeats its findings above. Following the investigation by Miss. Weston the grievance was rejected. The Tribunal finds in the context of limited evidence provided by the claimant save for mere assertions/allegations, Miss. Weston was entitled on her investigation to reject the claimant's grievance. There was no direct race discrimination. This allegation fails and is dismissed.

<u>Victimisation</u>

123. Did the claimant do a protected act ? The claimant relies upon on the following as protected acts :- (the respondent agrees these matters were protected acts)

6.1 On 8 February 2021 the claimant notified the respondent that she was being mistreated due to the colour of her skin; and

6.2 On 22 February 2021 the claimant raised a grievance which comprised of complaints of discrimination on the grounds of race.

124. If so, did the respondents subject the claimant to detriment because of the protected acts? The claimant relies on the following detriments :-

124.1 Miss Weston failing to carry out a full investigation into the claimant's grievances;

The Tribunal has concluded in the context that the claimant made assertions/allegations and did not attend the grievance hearing, Miss. Weston carried out a reasonable investigation in the circumstances. The allegation fails and is dismissed.

124.2 On 5 March 2021 Miss. Weston confirm that the claimant's grievances would not be upheld.

On 5 March 2021 (page 194-5) Miss. Weston confirmed that the claimant's grievances would not be upheld. The mere assertion by the claimant that Ms. Weston failed to uphold her grievances because she did a protected act is not sufficient to establish a claim of victimisation. The claimant did not wish to attend the grievance hearing. Ms. Weston conducted an investigation in this context and Ms. Weston considered each of the claimant's points in turn and set out her reasons fully in her outcome letter. There was no evidence adduced by the claimant to establish her case that Ms. Weston rejected her grievance because she did a protected act. This allegation fails and is dismissed.

<u>Automatic unfair dismissal s.103A of the Employment Rights Act 1996</u>

125. Was the reason or principal reason for the dismissal that the claimant made protected disclosure? If so the claimant will be regarded as unfairly dismissed

126. Did the claimant make a qualifying disclosure under section 43B? The claim it relies upon the grievances :-

126.1 On 8 February 2021 the claimant notified the respondent that she was being mistreated due to the colour of her skin; and

126.2 On 22 February 2021 the claimant raised a grievance which comprised of complaints of discrimination on the grounds of race.

127. The respondent did not dispute that the claimant made qualifying disclosures by way of alleging mistreatment due to the colour of her skin on 8 February 2021 and raising a grievance on 22 February 2021.

127.1 The respondent contested that the claimant's complaints on both dates were made in the public interest. The Tribunal was satisfied that when the claimant raised her concerns on both 8 February 2021 and on 22 February 2021 that the claimant believed that she was disclosing information in the public interest. The fact that the claimant's concern on 8 February 2021 was that she personally was being mistreated due to the colour of her skin and on 22 February 2021 the claimant's grievance concerned her alleged treatment based on the grounds of her race does not mean that the claimant did not make disclosures in the public interest. There is a significant public interest that individuals in the workplace should not be discriminated against by reason of their protected characteristic nor should they be exposed to harm or danger. Lord Justice Underhill in his judgment of Chesterton (at paragraph 35) stated *"whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the numbers of people sharing that interest that is in my view the ordinary sense of the phrase in the public interest. Such an interest does not change its character simply because it is shared by another person."* In this case the numbers in the group whose interests the disclosure served were the number of employees employed by the respondent; which was not insignificant; the disclosure directly affected a very important interest namely that individuals should be treated and protected in accordance with the provisions of the Equality Act and should not be subject to harm of their health; the disclosure was of deliberate wrongdoing namely that she was directly discriminated against by reason of her race/ was being harmed and the respondent was providing work in the public service relevant to the wider community. The Tribunal concluded that the disclosure was made by the claimant in the public interest and that she had a reasonable belief that the disclosure was made in the public interest and such belief was reasonable; namely that the disclosure showed the respondent was failing to comply with its legal obligations under the Equality Act 2010 and her health or safety has been, is being or is likely to be endangered. The disclosure was made to the employer and was protected.

128. The Tribunal has set out above that the claimant must establish there was a fundamental breach of contract on the part of the employer; that the employers breach caused the employee to resign and that the employee did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal (see the case of **Western Excavating ECC Limited v Sharp 1978 ICR 221).** The question for consideration by the Tribunal is whether the protected disclosure was the principal reason that the employer committed the fundamental breach of the employee's contract of employment that precipitated the resignation. If it was, then the dismissal will be automatically unfair.

129. The Tribunal has found that the claimant made protected interest disclosures on 8 February 2021 and on 22 February 2021 (as contained in her written letter of resignation). Between 8 February 2021 and 22 February 2021, the Tribunal has found that on 9 February 2021 (page 299) Mr. Rogers responded to the claimant stating that the incident highlighted specific issues around the claimant's conduct that required investigation. He stated two members of staff, the claimant had mentioned did not witness the incident and therefore would be unable to give

witness statements and would not be relevant to the investigation. He noted the claimant's allegation about the colour of her skin stating it was a serious allegation, and he asked the claimant to look at the organisation formal procedure in order to deal with this. He noted the claimant's mention of stress; he stated having this investigation hanging over you will be adding to this stress; he suggested dealing with the matter as soon as possible so that this can be alleviated. He reminded the claimant of the free and confidential EAP programme via health assured. The disciplinary hearing was rescheduled for 17 February 2021. On 17 February 2021 the meeting was rearranged to 23 February 2021.

130. The respondent had already determined to hold a disciplinary hearing on 9 February prior to the claimant making a protected interest disclosure dated 8 February 2021. There can be no causative link between the holding of a disciplinary hearing and the claimant's protected interest disclosure.

131. On 9 February 2021 when Mr. Rogers stated that two members of staff the claimant had mentioned did not witness the incident and therefore would be unable to give witness statements and would not be relevant to the investigation, the Tribunal finds that Mr. Rogers was stating the facts and was justified in doing so. His conduct here could not be considered as acting in a way that is likely to destroy or seriously damage the relationship of trust and confidence between the parties.

132. On 9 February 2021 when Mr. Rogers noted the claimant's allegation about the colour of her skin stating it was a serious allegation, and he asked the claimant to look at the organisation formal procedure in order to deal with this, he was directing the claimant to the relevant processes of the respondent's organisation in respect of such concerns. The Tribunal finds that Mr. Rogers was stating the correct process to follow and was justified in doing so. His conduct here could not be considered as acting in a way that is likely to destroy or seriously damage the relationship of trust and confidence between the parties.

133. On 9 February 2021 when Mr. Rogers noted the claimant's mention of stress; he stated having this investigation hanging over you will be adding to this stress; he suggested dealing with the matter as soon as possible so that this can be alleviated. The Tribunal has found that this comment was innocuous and a correct factual observation. He also reminded the claimant of the free and confidential EAP programme via health assured. The Tribunal finds that Mr. Rogers was stating the facts and was justified in doing so. His conduct here could not be considered as acting in a way that is likely to destroy or seriously damage the relationship of trust and confidence between the parties.

134. On 9 February 2021 by reason of the claimant's complaints the disciplinary hearing was rescheduled for 17 February 2021 and later on, 17 February 2021 the meeting was rearranged to 23 February 2021. The conduct here could not be considered as acting in a way that is likely to destroy or seriously damage the relationship of trust and confidence between the parties. The claimant had wanted the meeting to be moved so that the respondent was justified in re-arranging it.

135. The Tribunal finds that none of these matters establish the respondent committed a fundamental breach of the employee's contract of employment so precipitating the claimant's resignation. The claim for automatic unfair dismissal fails and is dismissed.

EJ Wedderspoon

Dated 19 February 2025