



THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant

and

Respondent

Ms E Wilson

Salvation Army Housing Association
Limited

Held at London South (By video)

On 24-27 February
2025

BEFORE: Employment Judge Siddall

Representation

For the Claimant: In person

For the Respondent: Ms A Smith

RESERVED JUDGMENT

The decision of the tribunal is that:

- a. The claim for unlawful deductions from wages is dismissed upon withdrawal.
- b. The claim of Health and safety detriment, contrary to sections 44 and 48 of the Employment Rights Act 1996 is not well founded and it does not succeed.
- c. The claim for Automatic unfair dismissal (health and safety), contrary to sections 94, 98 and 100 of the Employment Rights Act 1996 is not well founded and it does not succeed.

- d. The claim for direct discrimination because of disability, contrary to sections 13 and 39 Equality Act 2010, is not well founded and it does not succeed.
- e. The claim for indirect discrimination (disability), contrary to sections 19 and 39 Equality Act 2010, is not well founded and it does not succeed.
- f. The claim for discrimination arising from disability, contrary to sections 15 and 39 Equality Act 2010, is not well founded and it does not succeed.
- g. The claim for failure to make reasonable adjustments, contrary to section 20 and 21 Equality Act 2010, is not well founded and it does not succeed.
- h. The claim for harassment related to disability, contrary to sections 26 and 40 Equality Act 2010, is not well founded and it does not succeed.
- i. The claim for victimisation, contrary to sections 27 and 39 Equality Act 2010 is not well founded and it does not succeed.

REASONS

1. This case was originally listed to be heard over five days. Due to the availability of judicial resources, evidence and closing submissions had to be completed in four days. As a result, a timetable was agreed with the parties at the outset of the hearing and limitations had to be applied to the time given for questioning each witness. This was not an ideal state of affairs but I am satisfied that both the Respondent and the Claimant had adequate time for cross-examination of each other's witnesses.
2. It was recognised that the Claimant is a vulnerable person by reason of her mental health. We took a number of breaks to give the Claimant the opportunity to gather her thoughts during questioning, especially if she was fatigued.
3. At the end of the hearing I indicated to the parties that I was considering making an anonymity order in relation to the Claimant's name. During the course of the proceedings she had disclosed a significant amount of personal information about traumatic incidents that had taken place in the past and her consequent mental illness. The Respondent asked for time to consider its

response to that suggestion. On 4 March 2025 they wrote to the tribunal objecting to an anonymity order being made. I had indicated to the Claimant that she could respond to any objections made by the Respondent within 7 days, but nothing has been received from her. In light of that and in accordance with the principles of open justice, I have made no such order. I shall refer to any personal information relating to the Claimant only in so far as is necessary to deal with any of the issues in the case.

4. The Claimant claims the following:
 - a. That she was subjected to detriments and was automatically unfairly dismissed because she left her workplace in circumstances of danger;
 - b. That she was subjected to unlawful discrimination related to the protected characteristic of disability (direct and indirect discrimination, disability-related discrimination, failure to make reasonable adjustments, harassment and victimisation).
5. A claim for unlawful deductions made by the Claimant in relation to sick pay, notice pay and holiday pay was withdrawn during the hearing.
6. The specific issues to be decided are set out in an agreed List of Issues which I have used as my guide in making my decision – see below.
7. I heard evidence from the Claimant and from Ms Lisa Carney (a former employee of the Respondent) on her behalf.
8. For the Respondent I heard evidence from: Ms Karola Hagenstede, the Claimant's line manager; Ms Vicky Hoskins who took the decision to dismiss her; Ms Binta Mass, a former colleague; Mr Philip Smith, who heard the Claimant's appeal; Ms Vicky Parris, senior project worker; and Ms Aniqua Kabiri and Grace Walder of People Services (the Respondent's HR department).
9. At the end of the hearing I reserved my decision.
10. The facts that I have found and the conclusions I have drawn from them are as follows.
11. The Respondent is a specialist provider of support and accommodation to people who have experienced homelessness. The clients are all vulnerable adults.

12. The Claimant has disclosed extracts from her GP and medical records. These show long term mental health problems. Her GP notes (at page 537) refer to her having episodes of anxiety with depression in 2014, 2015 and 2018. A letter from a consultant psychiatrist for Adult Mental Health dated 8 December 2014 describes her as having 'Emotionally Unstable Personality Traits' (page 633-634). In an assessment dated August 2023 (after her employment had ended) a diagnosis of bi-polar disorder is mentioned. A separate clinical note dated 7 August 2023 states that she has symptoms consistent with Bi-polar disorder and Obsessive Compulsive Disorder (page 682).
13. The Claimant had provided a comprehensive impact statement during the course of these proceedings which explains the history of her various diagnoses and highlights the effects that these have had upon her ability to carry out normal day to day activities. These effects include 'emotional dysregulation, unstable functioning and periods of emotional crisis'. She describes her fluctuating moods and feelings of panic and shame. The Claimant explains how she has suffered from anxiety-induced panic attacks from an early age.
14. The Claimant's employment started on 16 November 2022. She was employed as a project worker at the Respondent's Newhaven Foyer site, a residential centre for 37 vulnerable young people.
15. Prior to starting her employment the Claimant had an occupational health assessment following which the Respondent was advised that the 'Equality Act may apply'. The report stated that this did not affect her capability for work and that no adjustments were needed. No further information seems to have been provided at this point. However it is noted that the Respondent's HR-Escape system, under the heading 'disability' recorded that the answer was 'yes'. The Respondent's evidence was that People Services had access to this screen and that an employee could log in themselves to amend the page, but line managers did not have access to it.
16. The Respondent has a Sickness Absence policy which makes it clear that any absence from work must be reported to the employee's line manager. If that person is not available they must report to the next senior manager or in their

- absence, People Services. Text and other messages are not acceptable. Under the heading 'misconduct related to sickness absence' the policy states that disciplinary action will be taken where: 'the employee has failed to comply with SAHA's sickness absence notification and evidence requirements'. It adds that the Respondent reserves the right to withhold contractual sick pay under these circumstances.
17. Under the Claimant's contract, she was only entitled to SSP for the first three months of her employment.
 18. On 4 January 2023 Vicky Hoskins had a 1:1 meeting with the Claimant (284) who explained that she was having trouble coping when rostered for 7 days in a row especially as she was studying alongside her work. The Claimant had previously raised concerns about this shift pattern on 6 December 2022 (page 877). The Claimant also indicated that she was struggling financially. Ms Hoskins said she would send her details of the Employee Assistance Programme.
 19. The Respondent's evidence which I accept is that changing the shift pattern involved consultation with other members of staff before it could be implemented. I also accept that the Respondent commenced such discussions soon after that meeting.
 20. The Claimant says she gave Ms Hoskins details of her mental health issues at this meeting and referred to a diagnosis of EUPD in 2014. Ms Hoskins denies this. On balance I prefer the evidence of Ms Hoskins on this issue as her notes of the meeting make no reference to any significant health issues and her follow up email to the Claimant (page 299) focusses on her financial problems rather than any mental health issues.
 21. In that email Ms Hoskins sent the Claimant details of the Respondent's Employee Assistance Programme and emergency loan scheme.
 22. The Claimant's case is that on 20 January 2023 she telephoned her line manager to advise that she would not be in and had a GP appointment that day. She explained that she had been badly affected by a suicide attempt that a resident had made. She says that she gave details of a diagnosis of Emotionally Unstable Personality Disorder (EUPD) to her manager Karola Hagenstede. This is denied. I find that it is more likely than not that during

- this conversation the Claimant provided details of her symptoms including a reference to emotional instability, but that she did not clearly state to Ms Hagenstede that this amounted to a specific disorder of EUPD. That is consistent with the notes that Ms Hagenstede made on the OH referral form (see below).
23. The Claimant was signed off sick with anxiety and depression from 20 January to 1 February 2023, returning on 2 February. During her absence she advised Ms Hoskins (on 23 January – see note page 302) that she had been triggered in relation to her own past trauma by a resident who had made a suicide attempt. She had been referred to community mental health services. Ms Hoskins requested an occupational health assessment and sent the Claimant a consent form on 24 January 2023.
24. Ms Hagenstede completed the OH referral form. The form records that ‘Emma was off work due to a decline in her mental health. Past trauma was triggered and was feeling mentally unstable’. The form also notes that the Claimant had been suffering from past trauma, was low in mood and that she had experienced a few triggers recently.
25. Based on the notes of conversations with the Claimant during this period of sickness, I find that the Respondent was fully aware from around 20 January 2023 that the Claimant had significant and long-term mental health issues, whatever the diagnosis. In addition to the fit note which recorded anxiety and depression, this would have been apparent from the fact that an urgent referral to mental health services had been made. The Claimant’s reference to past trauma made it clear that these issues were long-standing. It is of note that the OH form refers to symptoms of mental instability even if Ms Hagenstede had not understood from her discussion of with the Claimant on 20 January that this amounted to a specific diagnosis.
26. At a return to work interview on 2 February 2023 the Claimant told Ms Hagenstede that she had been referred for a psychiatric assessment on 7 March and that during her absence she had been supported by the mental health crisis team. The form notes that problems were likely to recur but that the Claimant did not have a disability, which Ms Hagenstede stated (and I accept) is what the Claimant had told her.

27. The Respondent pays all its staff on the 15 of each month. When the Claimant received her pay slip on 15 February she realised that she had not been paid in full for her sickness absence. On contacting People Services she learned that she was entitled to SSP only as she was in the first three months of her employment. The Claimant left work early that day without informing a manager.
28. The following day (16 February) one of the managers tried to contact the Claimant without success leaving her a voicemail message. Contact was eventually made on the afternoon of 17 February after a further message was left stating that the Respondent would call the Claimant's next of kin if she did not get back to them by a certain time. The Claimant called and advised the manager that she had become agitated during Wednesday's shift and had left in a state. The manager advised her that she could access the Employee Assistance Programme.
29. The Claimant returned to work on 18 February 2023.
30. On 23 February the Claimant contacted People Services and asked to rearrange the OH appointment that had been made for that afternoon as it conflicted with a work appointment. She was advised to contact the OH provider direct, which she did. Her evidence which I accept is that she did not receive a response.
31. Documentary evidence in the bundle shows that the OH provider contacted the Respondent seeking authority to re-schedule the appointment but they received no response and eventually closed the case. It was the evidence of Grace Walder that although email messages from the provider may have been sent to her inbox she was unable to access them due to issues around her login. The Respondent's case is that the Claimant 'cancelled' the appointment. This is plainly incorrect.
32. As a result of the absence from 15-17 February 2023, which the Respondent viewed as unauthorised under its policies, Ms Hoskins decided to call the Claimant to a three-month probationary review meeting which took place on 6 March 2023. In her preparation for the meeting Ms Hoskins identified the 'ability to manage emotions at work' as an area for improvement.

33. At the meeting there was a discussion about the progress the Claimant had made settling into the role and the training that had been completed up to that point.
34. The Claimant explained that she had been 'triggered' by the attempted suicide of a resident. She had a mental health crisis and had been signed off. She was now undergoing an assessment. She said that generally she was able to manage her emotions and cope with things. She was asked whether there was anything she needed from the Respondent and said she did not.
35. Ms Hoskins then explained that in leaving the site on 15 February the Claimant had not followed the proper procedure around reporting absence and so it had been treated as unauthorised. There had been an impact upon business planning and delegation. The Claimant said that she had become really upset and overwhelmed by the pay issue. The next day she did not trust herself to act normally.
36. Ms Hoskins made it clear that the onus was on the Claimant to let the Respondent know that she would not be in. She continued 'I would like you to work with us on this objective. This is something that isn't related to tasks but competency around managing emotions at work'. She asked the Claimant what would be helpful if a similar situation was to arise. The Claimant stated that it would have been helpful if someone had been available to talk to and she again referred to her aggravation about the deductions from her pay.
37. Ms Hoskins stated clearly in the notes that 'leaving work isn't acceptable' and that this type of behaviour could get in the way of a 'successful probationary period'.
38. Under 'agreed objectives' at the end of the document, Ms Hoskins wrote that the Claimant was 'not to leave shifts' and 'no unauthorised absences'.
39. Unfortunately the record of the meeting was not sent to the Claimant until 28 April 2023.
40. On 26 March 2023 the Claimant was verbally abused by a resident.
41. From 1 April 2023 the rotas were changed so that none of the staff would have to work for 7 days in a row.
42. On 11 April 2023 the Claimant had an altercation with a colleague, Binta Mass. The two had been friends and Ms Mass' evidence was that the

- Claimant had been 'there for her' during a difficult time of her life. On this occasion Ms Mass had asked the Claimant to roll a cigarette for her. She had gone out of the office. On her return, Ms Mass agrees that she asked the Claimant if she had taken some of her tobacco as the pouch 'felt light'. Ms Mass' evidence is that the Claimant became aggressive and defensive. The Claimant says that she felt she was being accused of stealing. After this incident the Claimant and Ms Mass no longer saw each other outside the office.
43. The conversation was witnessed by Lisa Carney who gave evidence on behalf of the Claimant. Ms Carney says that Ms Mass mistreated the Claimant and 'abruptly accused her of stealing her baccy and told her not to speak to her again'. Ms Carney also says that Ms Mass spoke to the Claimant as if she was dumb and insinuated that she had a learning disability. During her oral evidence Ms Carney stated that Ms Mass had also used this voice with other people although her witness statement suggests the treatment was addressed to the Claimant only.
44. The following day the Claimant reported the incident to Ms Hagenstede and asked her to speak to Ms Mass. The Claimant described the issues around the tobacco, but did not say that Ms Mass had spoken to her in a mocking way. Ms Hagenstede's evidence is that she did understand the Claimant to be raising this matter as a grievance, but told the Claimant she would address it. Her evidence was that she spoke to Ms Mass in a 1:1 meeting at a later date. We have seen a note of 3 April when Ms Mass and Hagenstede did discuss the incident although in their oral evidence both agreed that on this occasion Ms Mass had approached Ms Hagenstede rather than the other way around. I find therefore that Ms Hagenstede did not take steps to address the Claimant's concern following the discussion on 12 April 2023, although her reasons for this were understandable.
45. A further altercation occurred between the Claimant and Ms Mass on 26 April 2023. A former resident who was banned from the centre had entered the front door. Ms Mass was asking the person to leave. Her evidence is that the situation was not threatening and everyone was jovial. The Claimant came into reception and demanded that the person leave immediately. He moved

- to the front door but was standing on the threshold. The Claimant went to find Ms Parris. Her evidence was that she was not upset, she was in a good mood but was speaking quickly and stumbled over her words a little. Ms Parris' evidence is that the Claimant was by this point angry and upset. On balance I prefer the evidence of Ms Parris on this point as it is consistent with the email that Ms Parris sent to Ms Hoskins very soon after the incident. The Claimant also outlines in her impact statement how she can start to speak very rapidly when agitated.
46. Ms Parris went into reception and asked the former resident to move out of reception and away from the entrance. She then asked Ms Mass why the Claimant was upset, but Ms Mass did not know.
47. Ms Mass and the Claimant then entered the kitchen. There is some dispute between them about what happened.
48. The Claimant's case is that Ms Mass queried why the Claimant had become involved in the situation with the resident. She says that Ms Mass was mocking and spoke to her in a very aggressive manner leaving her to fear for her own safety.
49. The Claimant then went back to see Ms Parris and told her that she was leaving due to stress. Ms Parris recorded what had been said in an email she sent to Ms Hoskins soon after the Claimant's departure. I have placed weight upon this document as a more or less contemporaneous account of what had occurred. She said that she had already been attacked at work by a resident and was not going to put up with it again. It was all too much. Ms Parris urged her to take a minute and calm down. She asked the Claimant to think about the consequences of leaving. The Claimant asked if she would get sacked. Ms Parris said she didn't know what would happen but she asked her to think about it again. The Claimant then walked out. This was around 4pm.
50. Having described the circumstances of the Claimant's departure from her shift, Ms Parris advised Ms Hoskins that she didn't think that additional cover would be needed as Ms Mass said she would stay and work later into the evening. (The Claimant had been due to work until 9pm and complete a handover to another member of staff at around 6.30pm).

51. After leaving the site on 26 April the Claimant immediately called People Services. Her evidence is that she believed that Ms Hoskins was off sick that day (Miss Hoskins stated that she was working from home).
52. The Claimant was signed off work from 26 April to 24 May 2023. An email in the bundle at page 505 confirms that the Claimant was paid full company sick pay over this period. During the hearing, the Claimant withdrew her claim that she had been paid incorrectly.
53. On the same day at 4.58 pm Ms Kabiri emailed the Claimant. She said she was sorry to hear that the Claimant was having a difficult time and reminded her about the EAP scheme. She also asked for details of what had happened with Ms Mass.
54. The Claimant replied on 4 May giving details of what had happened on both 26 April and on the 11 April (the tobacco incident). She expressed the wish that she would be paid for her current sickness absence.
55. On 3 May Ms Mass approached Ms Hagenstede and provide her account of what had happened on 26 April. She said that Ms Parris had informed her after the incident with the former resident that the Claimant was angry and upset. Ms Mass did not understand why. They then both entered the kitchen where they discussed the incident. Ms Mass asserted that both of them had raised their voices and that the Claimant had been mimicking her hand gestures. After the altercation the Claimant had left her shift. Ms Mass expressed her concern about what would happen if the Claimant returned to work and stated that she was scared to leave the office that day in case she met the Claimant on her way home.
56. I find that Ms Mass questioned the Claimant's decision to involve herself in the issue with the former resident and the Claimant reacted defensively. Ms Mass agrees that she raised her voice to the Claimant. I find that a difficult conversation took place in which both Ms Mass and the Claimant were upset with each other and had differing views of the incident that had occurred.
57. The Claimant was fit to return to work by 24 May 2023. Whilst absent the Respondent had decided to call her to what is described under their latest probationary procedure as a 'Probationary Review Meeting (with concerns)'. (This was not the procedure in place at the time when the Claimant

- commenced her employment but had been revised shortly before the meeting took place. As such, it was appropriate that the Respondent followed this procedure). The Claimant was advised that the termination of her employment was a possible consequence of this meeting.
58. The Respondent requested the Claimant to work at home on 25 May 2023 rather than come into the office following her sickness absence.
59. The notes of the meeting are on page 406. Ms Hoskins began the meeting by stating that the purpose of the meeting was to discuss the Claimant's performance 'including the concerns around the unauthorised absence and leaving shift on more than one occasion'. The Claimant had been advised that the termination of her employment was a possible consequence of this meeting.
60. Ms Hoskins pointed out that at the last probation review meeting they had discussed the Claimant's 'ability to manage emotions at work', and the requirement not to leave shift or to have unauthorised absences. The Claimant referred to her email of 4 May to Ms Kabiri which she says showed that she had raised concerns about bullying at work. She had not yet had a response to that email. Ms Kabiri explained the reasons why she had not had the chance to deal with the matters raised yet. She told the Claimant about her right to raise a grievance.
61. Ms Hoskins asked the Claimant why she had left her shift on 26 April. She said that she had been shouted at by a colleague. It had been 'confrontational and intimidating'. She was not able to discuss it with Ms Hagenstede who had left the office. She was in a really bad way, she had gone home and had a panic attack.
62. When asked if she wanted to add anything the Claimant said that she had been diagnosed with Emotional Unstable Personality Disorder back in 2014 which she had not realised until she had received a report from her GP quite recently. She believed she had mentioned this to Ms Hagenstede. I find on balance that this is the first time when the Claimant referred to EUPD as a specific diagnosis (although she had referred to the symptoms when she spoke to Ms Hagenstede on 20 January 2023). She said that when Ms Hoskins talked about her ability to manage or regulate her emotions, she

- found this 'a little bit offensive and dismissive of the difficulties I have. I can say it about myself, and I have said it about myself before, but I don't want others to say it'. Ms Hoskins acknowledged her unhappiness with that language.
63. Ms Hoskins and Ms Kabiri then adjourned the meeting to discuss the situation. When they reconvened, they advised the Claimant that her employment was being terminated due to issues around reliability and trust. She was told that she would receive a payment in lieu of notice. She was advised of her right of appeal.
64. The outcome letter is dated as 31 May 2023 and the reasons for the decision are as follows.
65. 'You left your shift at work on 2 occasions, on both occasions you did not follow the correct notification of sickness absence procedure as stated in the Sickness Policy. As a result, you had 2 occasions of unauthorised absences lasting longer than 1 day. Due to you leaving your shift without the required notification, you put our clients and colleagues' health and safety at risk, which could have had significant negative consequences. The trust in our relationship has therefore been broken, as I cannot be assured that you will not leave your shift again'.
66. The Claimant appealed to Philip Smith, regional manager on 31 May 2023. She stated that her dismissal was automatically unfair under section 100 of the Employment Rights Act 1996 and was also discriminatory and an act of victimisation. She stated that she had been bullied by Ms Mass and referred to the incidents on 11 and 26 April 2023. She said that the concerns raised in her email of 4 May had not been investigated. She repeated concerns about her sick pay and about how Ms Hoskins had handled the probationary reviews. She said that she had been treated unfavourably due to her mental health conditions.
67. After a short delay the Claimant was invited to an appeal meeting on 22 June 2023 which was attended by Mr Smith and Ms Walder.
68. It is clear that the Claimant and the Respondent had different expectations about how this meeting would proceed. Mr Smith saw his role as to consider only the reasons given for the Claimant's dismissal and her challenge to

- these. The Claimant made it clear that she expected all the matters raised in her appeal letter to be dealt with.
69. Eventually it was agreed that the meeting would be adjourned so that the points raised by the Claimant could be investigated.
70. Mr Smith then carried out quite extensive investigations into the matters raised by the Claimant, making contact with Ms Hoskins, Ms Parris, Ms Mass, Ms Hagenstede and Ms Carney. He also reviewed both sets of probation review meeting notes, emails and the Claimant's employment application form. The Respondent agreed that no-one had checked the relevant part of the HR system which noted that the Claimant was recorded as having a disability.
71. Mr Smith then produced a detailed investigation report that starts at page 482 of the bundle.
72. Mr Smith and Ms Walder met with the Claimant on 25 August 2023 and the outcome of the appeal and her grievance were given to her. The decision to terminate her employment was upheld. In addition Mr Smith made the following findings:
73. The Claimant had raised a concern about her correct period of notice but this had been checked and she had been paid for one month in lieu.
74. Mr Smith referred to the Claimant's allegations of bullying by Ms Mass but noted that Ms Mass had said that she too had felt bullied. The complaint was not upheld.
75. Mr Smith noted that there had been a delay in responding to the Claimant's email of 4 May 2023 but pointed out that the Claimant had been advised of her right to raise a grievance and had not responded.
76. The complaint about the tobacco incident on 11 April 2023 was not upheld.
77. The Claimant alleged that her diagnosis of EUPD had not properly been taken into account when the decision to terminate employment had been made. Mr Smith's conclusion was that the Claimant had received support for her mental health problems. He stated that the Claimant had cancelled her OH appointment (although it is clear that he did not have the full picture into the circumstances of this).

78. With regard to the complaints about sick pay, Mr Smith pointed out that the Claimant had been paid in accordance with her contract.

79. Mr Smith rejected the claim that the Claimant had been reasonable to leave her shift early on 26 April to protect herself from danger.

80. A fit note in the bundle shows that the Claimant was signed off as sick from 5 October 2023 to 29 February 2024.

Decision

81. I now turn to each of the Claimant's claims which are set out in the List of Issues.

Health and safety detriment (s. 44 Employment Rights Act)

1. On 26 April 2023:

- a. Did the Claimant reasonably believe that she would be in serious and imminent danger which she could not reasonably be expected to avert by remaining at her place of work? If so, did the Claimant leave, or refuse to return to her place of work, because of such circumstances?**
 - b. In the alternative, did the Claimant in circumstances which she reasonably believed to be serious and imminent, take appropriate steps to protect herself from such circumstances?**
2. In relation to this claim, I find that on the 26 April 2023 the Claimant became upset and distressed as a result of the issue around the former resident who had entered the hostel. For the reasons stated above, I find that it is apparent that the Claimant was in a distressed state before entering into the kitchen to speak to Ms Mass. What followed was an altercation between them during which Ms Mass agreed that she raised her voice to the Claimant. The Claimant left work shortly afterwards.
3. I also place some weight on the conversation that Ms Mass had with Ms Hagenstede on the 3 May 2023 in which she stated that she was worried about what would happen if the Claimant came back to work and that she had been

scared of leaving the office on 26 April 2023 in case she encountered the Claimant on her way home.

4. The Claimant's evidence about becoming overwhelmed following this incident on 26 April is consistent with what she has said about other situations at work and how she has responded to them. I refer in particular to the sickness absence she had in January 2023 after becoming distressed about a resident's suicide attempt. On that occasion she describes a mental health crisis and it is noted that this resulted in a referral to mental health services. On 15 February she left the workplace after becoming very distressed about deductions from her pay. She has also provided evidence in her impact statement about how she can become panicked and overwhelmed by situations.
5. It is therefore not surprising that the Claimant, who I find was already distressed by the time she spoke to Ms Parris, became very upset after she had an altercation with Ms Mass in the kitchen, during which Ms Mass admits that she raised her voice to her. Her expressed need to leave the workplace is consistent with what had happened previously. I note and accept her evidence that she had a panic attack when she got home. I am satisfied that from her subjective point of view, the Claimant felt herself to be at risk if she remained.
6. I am not however satisfied that the Claimant left her place of work or took steps to protect herself 'in circumstances of danger which the worker reasonably believed to be serious or imminent'. This is not a test that is wholly subjective. Case law including *Miles v Driver and Vehicle Standards Agency* 2023 EAT 62 suggests that the tribunal's role here is to carefully weigh up the available evidence as to any risk involved and whether this has been appropriately mitigated. In this case I take into account the evidence of the Claimant in her witness statement, Ms Mass' conversation with Ms Hagenstede on 3 May 2023 the email sent by Ms Parris to Ms Hoskins on the day (which provides the overall context for the discussion even if Ms Hoskins did not witness the discussion in the kitchen).
7. In this case, I am not satisfied that the conduct of Ms Mass, though distressing to the Claimant, presented her with serious or imminent danger. I find that this was a workplace disagreement about how a particular issue had been handled. Both

parties were agitated. Ms Mass is likely to have raised her voice and used a mocking voice but on balance I conclude that her conduct was not threatening, and that any aggression came nowhere near to creating a situation of danger for the Claimant.

Automatic unfair dismissal

- a. was the sole or principle reason for the Claimant's dismissal that she had taken the steps identified in 1a or 1b?**

8. I find that this claim does not succeed. First, for reasons stated above, I find that the Claimant had not left her shift on either 15 or 26 April that the Claimant had left her shift in circumstances of danger. If I am wrong on that, I accept that there is a link between the two occasions when the Claimant left her shift and the decision to terminate her employment. This is very clear from the notes of the final probationary review meeting and the letter confirming dismissal. I find however that the principal reason for the dismissal of the Claimant is that the Respondent had formed the view during her probationary period that she was not a reliable employee and that if she were to leave her shift again, staff and residents could be put at risk due to insufficient staff levels. In any event, for the reasons stated above, the Claimant had not left her shift on 26 April in circumstances of danger.

Disability

9. **Did the Claimant, at the relevant time, have a physical or mental impairment that had a substantial and long-term adverse effect on the Claimant's ability to carry out normal day-to-day activities? The Claimant relies on unstable personality disorder, mixed anxiety and depressive order and bi-polar disorder.**
10. The Respondent concedes that the Claimant is disabled by reason of anxiety and depression but not by reason of Emotionally Unstable Personality Disorder or bi-polar disorder.
11. Much was made of this distinction and the Claimant was questioned at length about her diagnoses and when these occurred. I find that the medical evidence was very clear that the Claimant has a long term serious mental health illness going back to at least 2014 when she was given a diagnosis of EUPD. Different specialists seem to have debated this over time and different conditions have been suggested, with the suggestion of bi-polar disorder being made after her

employment had ended. I find that the exact label to be placed on the Claimant's mental health conditions matters not. At all relevant times she met the definition of a person with a disability due to significant and long-term mental illness which is more serious than a generalised anxiety and depressive disorder.

12. Did the Respondent know, or could the Respondent reasonably have been expected to know that:

- a. the Claimant was disabled?**
- b. for the purpose of a claim in respect of reasonable adjustments, that the Claimant was or would be subject to the substantial disadvantage relied on?**

13. I find that the answer to both questions is 'yes'. The Claimant provided information to the Respondent's OH provider that she had conditions which led them to conclude that 'the Equality Act may apply'. She is recorded in the Respondent's computerised records as having a disability. Even if they had not seen this record, Ms Hoskins and Ms Hagenstede were clearly aware from at least 23 January 2023 that the Claimant was suffering from a serious mental illness which was long-term. The illness had necessitated the involvement of specialist mental health services and involved anxiety, depression and symptoms of emotional instability.

Direct Disability Discrimination

The Law and the Burden of Proof

- 1. Section 13 of the Equality Act 2010 states 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'.
- 2. I take note of the provisions on the burden of proof set out in section 136 of the Equality Act 2010 and how this has been interpreted by **Igen v Wong** [2005] EWCA Civ 142 and later cases. In relation to allegations of discrimination I must first consider whether there are facts from which the tribunal could decide, in the absence of any other explanation that unlawful discrimination has occurred. In that case, we must decide that a contravention has occurred

unless the Respondent provides an explanation that is wholly non-discriminatory.

3. In Madarassy v Nomura International plc 2007 ICR 867, a case of direct discrimination, the Court of Appeal followed its earlier decision in Igen and held:

- (a) that a mere difference in treatment was not enough to shift the burden – ‘something more’ was required;
- (b) the tribunal had to have regard to all the evidence before it;
- (c) there was no error of law in moving to the second stage in cases involving a hypothetical comparator, as in Shamoon.

14. Did Binta Mass perceive that the Claimant had a mental or learning disability that would qualify as a disability under the Equality Act?

15. The document on page 504 of the bundle indicates that Ms Mass was fully aware that the Claimant had mental health problems which were described to her as ‘bipolar’. This conflicts with her witness statement where she says that she was not aware of any condition. I find that Ms Mass was aware that the Claimant had a disability due to her mental health. However on balance I do not find that she had a perception that the Claimant had a learning disability. I was struck by Ms Mass’ evidence about the respect she had for the Claimant, her description of her as ‘smart’ and the friendship she had formed with her prior to the incident on 11 April. I find that Ms Mass was reasonably sympathetic to the Claimant’s mental health problems, certainly prior to 26 April, but had not formed a view that these amounted to a learning disability. This assertion is not supported by any evidence.

16. Did the Respondent subject the Claimant to the following treatment and if so, did it amount to less favourable treatment?

- a. **On 1 March 2023, 6 March 2023, 15 May 2023 did Victoria Hoskins make reference to the Claimant's ability to manage her emotions?**
Reference to this is clearly found in the notes of 6 March 2023 and of 25 May 2023. The Claimant does not dispute that she used this description

about herself. I find that Ms Hoskins was in fact being careful to reflect back to the Claimant language that she herself had used, and to talk about the problems she was having in a neutral manner. This did not amount to adverse treatment and there is no evidence to support an assertion that Ms Hoskins would have treated any other member of staff in any other way. The allegation of less favourable treatment is not made out.

- b. **On 11 and 26 April 2023, Ms Binta Mass using a derogatory and mocking slow voice when speaking to the Claimant.** The evidence relating to this is unclear. The Claimant did not mention this when she spoke to Ms Hagenstede on 11 April 2023. However Ms Carney stated that she had heard Ms Mass using this voice during or after the 'tobacco incident'. She said in her oral evidence that Ms Mass used this voice not only to the Claimant but to others in the office. I therefore find that it is more likely than not that Ms Mass spoke in this manner on 11 April and 26 April. However I am not able to find that this amounted to less favourable treatment. Ms Carney's oral evidence was that Ms Mass acted in this way not only to the Claimant but also to others. Being spoken to in this way may have been unpleasant but it did not therefore amount to less favourable treatment of the Claimant. Even if I am wrong on that I find that speaking in this manner was not because of the Claimant's mental health problems or the fact that Ms Mass perceived that she had a learning disability. Evidence of a perceived disability has not been made out. I find it more likely than not that Ms Mass spoke to the Claimant in this way on two occasions during altercations between them, first in relation to the 'tobacco incident' and second in relation to the former resident who had entered the site. Her manner had nothing to do with the Claimant's mental health problems.
- c. **Failing to investigate complaints of bullying made by the Claimant to Karola Hagenstede on 12 April 2023 (verbally), Kash Hussain (by telephone) on 26 April 2023 and Anika Kabiri (by email) on 4 May 2023.** I note that the Claimant raised her concerns about Ms Mass' conduct during the 'tobacco incident' on 12 April 2023 with Ms

Hagenstede. She was asked what she wanted to happen and she said that she wanted Ms Mass to be spoken to. There is no suggestion in the notes that the Claimant wished to raise this as a grievance. It is true that Ms Hagenstede said she would address the matter and did not do so. She did not discuss it until Ms Mass approached her on 3 May to talk about the incident on 26 April, and on that occasion it was Ms Mass herself who referred to the incident. To that extent therefore the tobacco incident was not addressed at the time. It was raised again by the Claimant in her email dated 4 May 2023 to Ms Kabiri. This email was in response to Ms Kabiri's email asking the Claimant about the events that had led to her leaving the office on 26 April 2023. It was not clear that the Claimant was raising this as a grievance. When asked if she wanted to use the grievance procedure she did not reply at that time. The Claimant went on to raise her concerns at the probationary review meeting on 25 May and to set them out clearly in her letter of appeal to Mr Smith on 31 May 2023. Although the Respondent's response to these matters was initially somewhat confused, Mr Smith then decided to carry out a full investigation into all the matters raised. I conclude that the allegation that the complaints were not investigated has not been made out. The Claimant has not proved facts from which I could conclude that discrimination has occurred. In any event I find that there is no evidence to suggest that another person who had raised similar concerns would have been treated any differently. Any delay or omission in dealing with the concerns arose because the Claimant's intentions in raising them were not clear and it was not until 25 May that she indicated that she wanted them formally investigated.

- d. **From 5-19 May 2023, not paying the Claimant company sick pay.** It is the Respondent's case that the Claimant was paid her full pay during this period of sickness absence in May 2023. After some consideration, the Claimant accepted this during the hearing. This allegation therefore does not proceed any further.

- e. **Treating the Claimant's absence as unauthorised in the payslips dated 15 May 2023 and 15 June 2023.** Although there is some suggestion in the dismissal letter that this absence was unauthorised, the evidence shows that the Claimant reported her absence to People Services on 26 April 2023 as she left the office. In terms of her pay, it is now clear (see above) that the absence was not treated as unauthorised and the Claimant received her full pay for her absence from 26 April to 24 May. This allegation is therefore not made out.
- f. **Classifying the Claimant's absences on 15-17 February 2023, 26-27 April 2023 and 15-19 May 2023 as unauthorised on 25 May 2023.** I accept that the Claimant's absence on 15-17 February 2023 was treated as unauthorised as she did not report it to her manager or to people services as she left her shift. (For the reasons stated above, the absence in April and May 2023 was treated as authorised as it was reported). However the Claimant has not demonstrated that anyone else would have been treated differently. The Respondent's sickness absence policy sets out the reporting requirements clearly and I find that the Respondent took a strict approach to enforcement of these. It is important to emphasise here that there is a distinction between the classification of an unauthorised absence and the Respondent's sick pay rules. As at February 2023, the Claimant did not qualify for company sick pay in any event: that is why she was not paid for the absence, and not because her absence was not authorised. Having said that, the fact that she had not reported her absence in accordance with the relevant policy did have implications for her probation, as Ms Hoskins made clear. It is therefore necessary to consider whether such classification amounted to 'less favourable treatment'. The comparator she relies upon here is Ms Mass. Although the Claimant asserted that deductions had been made from the salary of Ms Mass which were later reinstated, it was Ms Mass' evidence that although this had happened, the deductions had not been made for an unauthorised absence. She had challenged her entitlement to sick pay with People Services, and pay had been reinstated once it was realised that she (unlike the Claimant) had sufficient service at the point of her

absence to qualify for company sick pay. I accept Ms Mass evidence. I also note Ms Hoskin's evidence that on another occasion pay had been withheld from a 'Person C' because she had failed to report her absence in the correct manner, suggesting that the Respondent took a similarly strict approach to all staff. There is no other evidence of differential treatment contained in the Claimant's appeal letter or witness statement. I find that the Respondent's categorisation of the Claimant's absence on 15-17 February as 'unauthorised' was in accordance with its procedures and did not amount to less favourable treatment. On balance I find that the evidence shows that any other member of staff would have been dealt with in the same way.

- g. **Dismissing the Claimant on 25 May 2023.** In the letter confirming dismissal of 31 May 2023 (page 413) the Respondent states that the Claimant's employment was being terminated because she had two occasions of unauthorised absence where she had not followed the proper reporting procedures, putting client's and colleague's health and safety at risk. I am not quite clear why the second absence (which started on 26 April) has been classified as unauthorised. The Respondent has established that the Claimant was paid full company sick pay for this absence, suggesting that it was accepted that she had become unwell. Their case appears to be that the Claimant should have reported to Ms Hoskins (who was working from home) that she was leaving her shift. The Claimant's case is that she had understood that Ms Hoskins was unwell and that as a result she made sure to contact People Services as soon as she left the office. There is therefore some doubt as to whether the absence was really 'unauthorised'. However this is not enough to establish a complaint of direct disability discrimination. There is no evidence to support an assertion that this amounted to less favourable treatment. The possible comparator here is Ms Mass. It was Ms Hoskin's evidence that the probationary period of Ms Mass was extended (rather than terminated) because of her poor sickness record in the early months of her employment. The circumstances are not exactly the same however as Ms Hoskin's points out that Ms Mass had not left her shift at any stage.

I am satisfied that it is more likely than not that the Respondent would have treated anyone else who had left their shift twice in exactly the same way and brought the probationary period to an end. I find that the allegation is not made out.

Indirect Disability Discrimination (s.19 Equality Act)

17. Did the Respondent apply the following provision, criterion or practice(s) (PCP)?

- a. **Classifying leaving a shift early without following standard reporting procedure as an unauthorised absence.** The Respondent's sickness absence policy clearly states that 'Disciplinary action will be taken where...the employee has failed to comply with SAHA's sickness absence notification and evidence requirements'. I have taken note of the evidence of Ms Hoskins at paragraphs 16-19 and accept that the Respondent places considerable importance upon the requirement to comply with the reporting procedures in order to ensure that they are properly staffed, in particular in relation to project workers such as the Claimant. At paragraph 91, Ms Hoskins states that pay was withheld from another staff member referred to as 'Person C' when she did not call in to report her absence. It is clear that when the Claimant left her shift on 15 February 2023 and failed to call in the following morning to notify the Respondent that she was unwell, this was treated as unauthorised absence. There is also reference to the Claimant taking an unauthorised absence when she left shift on 26 April 2023 although the basis for this treatment is unclear – on that occasion the Claimant did report her absence to People Services (but not to her line managers). In light of the strict enforcement of the sickness absence procedure, I find that the PCP is made out.

18. If so, did that PCP put persons sharing the Claimant's protected characteristic at a particular disadvantage when compared with persons who do not share that protected characteristic? I accept that there may be some mental illnesses where a person experiences a sudden crisis that necessitates them leaving the workplace without reporting to a manager. I am

not satisfied that in this case the evidence provided supports such an assertion. However in case I am wrong on that I go on to consider the remaining parts of the test set out in section 19.

19. If so, what was the nature of that disadvantage? The Claimant relies on the following:

- a. **The Respondent treated leaving a shift early as unauthorised absence and grounds for dismissal.** I note the Respondent's evidence about the withholding of pay from Person C and the extension of the probationary period of Ms Mass. The Claimant's absences on 15 April and 26 April were clearly a significant factor both at the first probationary review meeting and at the meeting when the Claimant was dismissed.

20. Did the PCP put the Claimant at that disadvantage? I am not satisfied on the evidence that this case has been made out. I accept that both on the 15 February and 26 April 2023 the Claimant was distressed as she left work. The Claimant has not however demonstrated that it is more likely than not that she was unable to report that she was going home sick on each occasion. First the evidence for the events of 15 February show that the Claimant was endeavouring to speak to People Services throughout the day to sort out her pay issue. Second at paragraph 18 of her witness statement she explained how she told Ms Mass and another project worker that she was leaving and asked them to report to management. Third the Claimant refers to an exchange of messages with Ms Parris on the morning of 16 February in which she refers coherently to the sick pay issue. It is notable that Ms Parris passed on a message for the Claimant to call a deputy manager and she replied 'that's nice of her' but did not make a call until the following day. Turning to the 26 April the evidence does not demonstrate that the Claimant was unable to follow the reporting procedures. Her evidence is that even though she was very distressed she was able to call People Services (believing that her line managers were unavailable) to inform them that she was going home and the reasons for this. For all these reasons I find that the claim for indirect discrimination is not made out. Even if that is not correct I would have found that enforcing the reporting requirements was a

proportionate means of achieving a legitimate aim, for the reasons set out in relation to the claim for disability-related discrimination below.

Discrimination arising from disability (s.15 Equality Act)

21. Did that Claimant's absences on 15 February and 26 April 2023 arise in consequence of the Claimant's disability? Ms Smith asserts that the Claimant has not established this but I must disagree. I turn first to her disability impact statement which describes the Claimant's difficulties in managing normal day to day activities due to periods of 'emotional dysregulation, unstable functioning and periods of emotional crisis'. She describes her fluctuating moods and feelings of panic and shame. The Claimant explains how she has suffered from anxiety-induced panic attacks from an early age. I have noted Ms Parris' evidence that on the 26 April when the Claimant came to see her, before the altercation with Ms Mass, she was already angry and distressed. She herself agrees that she was falling over her words (and she refers to 'rapid speaking' as one of her symptoms in her impact statement at page 760). At paragraph 35 of her witness statement, the Claimant herself says that she had a panic attack as she left the kitchen after speaking with Ms Mass on that day. All the evidence points to someone in a strong degree of agitation. The medical evidence demonstrates that the Claimant is a person with a significant history of serious mental health problems which have been variously diagnosed as anxiety and depression, EUPD, bi-polar disorder, PTSD due to childhood trauma and OCD. I find that on the 15 April and 26 April 2023 the Claimant had become overwhelmed by events in the workplace and had to leave. This arose as a consequence of her mental health problems.

22. If so, did the Respondent subject the Claimant to unfavourable treatment, namely dismissal, because of something arising in consequence of the Claimant's disability? On both occasions the Respondent categorised the Claimant's decision to leave her shift as unauthorised absence. As stated, this was a significant factor at the Claimant's first probationary review meeting where she was warned that a repetition might mean that she did not pass her probationary period. As the letter of dismissal makes clear, these two absences were the key reason for the decision to terminate her employment.

23. **If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the following legitimate aim: maintaining safe staff levels, safeguarding residents and ensuring best practice.** In her witness statement beginning at paragraph 10, Ms Hoskins describes how the residential centres operated by the Respondent is staffed on a 24 hour, 7 days a week basis. She sets out the duties of staff while working at the centre including reception, assessment of residents, dealing with emergencies and providing training and activities. She describes the on-call service operated by the Respondent in parallel to the staffing roster, and the availability of relief workers to cover staff shortages. As already stated, Ms Hoskins also refers to the importance that the Respondent places upon staff reporting their absences in line with their procedures, as otherwise the service might be understaffed. This could create a risk both to residents and to staff who may remain on shift without sufficient support. I am satisfied that in enforcing the absence reporting procedures strictly and in applying sanctions to staff who did not comply with them, the Respondent had the legitimate aim of maintaining safe staffing levels, safeguarding residents and ensuring best practice. I turn to the question of whether the means that the Respondent adopted in order to achieve that aim were proportionate.
24. Much of the case law on the question of proportionality deals with the concept of justification in cases of indirect discrimination, but the principles set out are in assistance in cases brought under section 15 as well. In *Allonby v Accrington and Rossendale College* [2001] EWCA Civ 529 the Court of Appeal stated that that what is required is an 'objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition'. In *Hardys & Hansons plc v Lax* [2005] EWCA Civ 846 the court stated that a tribunal must demonstrate a 'thorough and critical analysis showing a proper understanding of the employer's business and the financial and other impacts of the approach being contended by the employee'. In the case of *Homer*, there is reference to the condition applied (in an indirect discrimination case) being 'appropriate and necessary'. In the case of *NSL Ltd v Zaluski* [2024] EAT 86 the EAT stressed that this means what is reasonably necessary.

25. In this case the Respondent had the legitimate aim of ensuring that its residential service, involving as it did a group of vulnerable adults, was properly staffed. It is clear that a member of staff leaving shift early presented problems in terms of potential understaffing, the need to keep residents and staff safe, and the ability to carry out planned activities for the residents.
26. Having said that I have noted that when the Claimant left her shift on 26 April the Respondent decided against calling in relief staff as they decided it was not necessary and Ms Mass agreed to work late.
27. The decision to terminate the employment of the Claimant clearly had significant implications for her. She experienced a lengthy period of ill-health after her dismissal and, as far as I understand, is not yet back in the workforce.
28. There are other aspects of the Respondent's decision to dismiss the Claimant which give some cause for concern.
29. First, although the Respondent's HR system recorded that the Claimant was a person with a disability, and the Claimant had told them about her significant mental health issues at various points from 20 January onwards (including telling Ms Hoskins that she had a diagnosis of EUPD at the meeting on 25 May) the Respondent appears not to have appreciated that they were potentially dealing with a member of staff who had a disability. Reading the dismissal letter and the appeal letter there is little evidence that this was taken into account before the respective decisions were made.
30. Second the Respondent took the decision to dismiss without investigating the Claimant's mental health conditions to understand what they were dealing with and whether this would have an effect on the Claimant's performance in the future. The Respondent was acting on the basis that the Claimant had 'cancelled' her occupational health appointment. This was plainly not correct. Neither Ms Hoskins nor Mr Smith considered asking the Claimant to book a further appointment prior to the dismissal or conclusion of the appeal.
31. Third, it is clear that one option that was open to the Respondent was the extension of the probationary period. Ms Hoskin describes in her witness

statement how this option was adopted in the case of Ms Mass who had a poor absence record during her initial probationary period. Although neither Ms Hoskins nor Mr Smith dealt with this possibility in their witness statements, when questioned during the hearing about the option of extension both made it clear that they did not consider this to be feasible.

32. My analysis of the situation is as follows. The Respondent placed considerable importance upon the requirement to report sickness absences in line with its procedures. On 15 February the Claimant became distressed and overwhelmed at work and left without following the proper procedure. Her failure to comply with the requirements was brought to her attention at the first probationary review meeting and she was specifically told that if there was a recurrence, this might mean that she would not successfully complete her probationary period. It is very unfortunate that the written record of this meeting was not sent to the Claimant for some time, but I am satisfied that the consequences of non-compliance were made clear to her. The Claimant demonstrated that she was aware of the requirement as when she left her shift on 26 April, although very distressed, she made considerable efforts to notify People Services that she was going home and why.

33. In the letter dated 31 May 2023 the Respondent states that the Claimant was being dismissed for two incidents of 'unauthorised absence'. This is a little misleading. It is hard to understand why the absence beginning on 26 April was classified as 'unauthorised' as the Claimant had reported it. However as the letter also makes clear, it was not simply the failure to report that led to the dismissal. It was the fact that on both occasions the Claimant had left her shift before it was due to end: 'you left your shift at work on two occasions' and 'due to you leaving your shift without the required notification, you put your clients and colleagues' health and safety at risk, which could have significant negative consequences. The trust in our relationship has therefore been broken as I cannot be assured that you will not leave your shift again'. Ms Hoskins deals with this at paragraph 84 of her witness statement where she says that she needed to be able to trust that a staff member would not leave their shift without reporting it properly, and that the Claimant telling her that she had EUPD did not sufficiently

mitigate against her abandoning her shift and the problems and risks that this created.

34. It is also important to bear in mind that throughout this period the Claimant was still in a probationary period. It is very common practice for an employer to employ a person 'on probation' with the aim of assessing whether they are suitable for a role. If a person is not able to fulfil the role to the required standard, and provided these standards are made clear to them and it is explained what the employee needs to do to achieve them, an employer will often be justified in bringing employment to an end within the trial period.
35. I conclude that it was very important that the Respondent was in a position to staff the service appropriately and ensure the safety and wellbeing of their staff and the vulnerable adults in their care. On two occasions during her probationary period the Claimant, through no fault of her own, left her shift abruptly due to experiencing high levels of distress. This caused practical and safeguarding issues for the Respondent.
36. The dismissal of the Claimant amounted to unfavourable treatment because of something arising from her disability, namely the fact that she would easily become distressed and overwhelmed and be at risk of a panic attack. I have carefully considered that there was a less discriminatory option available to the Respondent namely the extension of the Claimant's probationary period. It is clear that this option was given scant consideration by the Respondent.
37. I place weight however upon the fact that the Claimant was still in her probationary period, and upon Ms Hoskins evidence that even with knowledge of the EUPD diagnosis this did not make a difference to her decision that she could not be certain that the Claimant would not leave her shift again. Having taken all the circumstances into account I accept that an extension was not likely to resolve this uncertainty. The Claimant had been warned that leaving her shift again might lead to the end of her probationary period. Given her complex mental health issues, there is no evidence to suggest that even with support she would be unlikely to leave her shift again if she felt overwhelmed. The evidence presented to the tribunal suggests that the Claimant would continue to struggle

with the difficult situations that were likely to reoccur in this workplace such as: an incident of self-harm by a resident; verbal abuse by a resident; and confrontations with other members of staff. I conclude that the Respondent's actions were a proportionate means of achieving their aims of maintaining staff levels, safeguarding staff and residents and implementing best practice.

Failure to make reasonable adjustments (S.20 Equality Act)

38. Did the Respondent apply the following provision, criterion or practice(s) (PCP)?

- a. **Throughout the Claimant's employment of 16 November 2023 until 10 April 2024 requiring employees to work seven consecutive days;** I accept that when the Claimant started her employment the Respondent's practice was that staff could be rostered to work seven consecutive days. The Claimant raised concerns about this as early as December 2022. She discussed it with Ms Hoskins in January 2023. After consultation with other staff, the rotas were adjusted with effect from April 2023 so that this was not a requirement. However the Claimant does not dispute the Respondent's evidence that in practice she was only ever asked to work seven days in a row on one occasion. I find that although this practice was in place it did not place the Claimant at a substantial disadvantage as it was not regularly applied in practice. Even if it did place her at a disadvantage the Respondent adjusted the practice after consultation with affected staff. This did not amount to a breach of section 20.
- b. **Not investigating allegations of bullying in the workplace;** I find that the Respondent did not have a practice or policy of not investigating allegations of bullying. I accept that the Claimant did raise concerns about the conduct of Ms Mass on the 12 February 2023 and in her email of 4 May 2023. It was not clear initially on either occasion that she wishes her concerns to be investigated. Once these were reiterated at the final probationary meeting, the response was somewhat confused prior to the first appeal meeting with Mr Smith. After that Mr Smith carried out a full

investigation into all the Claimant's concerns. I find that in this case the PCP is not made out.

- c. **Treating staff leaving shift without following reporting procedures as unauthorised absences;** I have found already that the Respondent did classify the Claimant leaving shift as unauthorised absence, in accordance with its sickness absence procedures. However for the reasons set out above, I find that this did not place the Claimant at a substantial disadvantage. Whilst she felt that she was compelled to leave her shift on two occasions, I find that the Claimant has not established that she was unable to comply with the Respondent's reporting procedures (as indeed she did so on the 26 April 2023). This claim therefore fails.
- d. **Not arranging Occupational Health Assessments before making disciplinary and probationary decisions.** As I have said above the Respondent's case is that an occupational health assessment was arranged but that the Claimant cancelled her appointment. The documentary evidence shows that this was not correct. The Claimant asked to reschedule her appointment but the OH provider did not do so because they were waiting for authority from the Respondent which was not given, due to technical issues. It seems that the situation relating to the OH Referral was not realised until, at the earliest, the final probationary review meeting. That said, given that the Claimant disclosed her diagnosis of EUPD at that meeting, the Respondent might have been expected to re-refer her to occupational health in order to understand more about the Claimant's health before making a decision. If the Claimant had sufficient service to bring a claim of 'ordinary' unfair dismissal, this might have been a crucial element. In relation to this claim however the case of *Spence v Intype Libra Limited* [UKEAT/0617/06] states that a failure by an employer to carry out an assessment or obtain a medical report before dismissing someone was not a breach of the duty to make reasonable adjustments.

Harassment (s.26 Equality Act)

39. Did the Respondent engage in the following conduct?

- a. **On 11 and 26 April 2023, Ms Binta Mass using a slow stammering mocking voice towards the Claimant.** On the basis of Ms Carney's evidence I find that it is more likely than not that Ms Mass did use such a voice on 11 February and 26 April. I find however that Ms Mass had also used this voice to other members of staff. I conclude that although this conduct was offensive and unwanted, it was not related to the Claimant's actual mental disabilities nor (for the reasons set out above) to any perceived disability.
- b. **Ms Hoskins wrote a letter to the Claimant on 15 May 2023 that expressed concern that she had left work on 2 occasions when she felt unable to manage her emotional responses.** Ms Hoskins referred to this in the first probationary meeting, in the letter of invitation to the final probationary meeting and during that meeting itself.

40. If so, was that conduct unwanted? At the meeting on 25 May the Claimant made it clear that this language was unwanted as she found it offensive.

41. If so, did that unwanted conduct relate to disability for the purposes of the Equality Act? I find that Ms Hoskins was taking care to reflect the Claimant's own language back to her and to talk about her workplace issues in a neutral way. I am satisfied that Ms Hoskins had no intention to upset the Claimant and was choosing her words with care. Nevertheless I find that the conduct did relate to disability. Ms Hoskins was talking about the feelings of distress and being overwhelmed that the Claimant had shown in the workplace and which had left to her leaving her shift on two occasions. These symptoms are plainly related to her mental health conditions.

42. If so, did the unwarranted conduct have the purpose or effect of:

- a. **Violating the Claimant's dignity; or**

- b. **Creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? And if so, having regard to all the circumstances of the case and the perception of the Claimant, was it reasonable for the conduct to have that effect?** I find that there was nothing inherently offensive or derogatory in the words themselves and that Ms Hoskins was seeking to talk about what had happened to the Claimant in a sensitive manner. At the meeting on 25 May the Claimant made it clear that she found Ms Hoskin's language about her mental health problems offensive. She admitted however that she had used similar language about herself. I conclude that although I accept that the language may have made the effect of making the Claimant feel uncomfortable, it is not reasonable to view Ms Hoskins conduct as having the effect of violating the Claimant's dignity or of creating a humiliating or offensive environment. It is correct that she was talking about the Claimant's symptoms and so the language is related to her disability, but in all the circumstances I find that it does not meet the definition of harassment set out in section 26 of the Equality Act.

Victimisation (s.27 Equality Act)

43. Did the Claimant do a protected act? The Claimant relies on the following:

- a. **Her email to Ms Anika Kabiri on 4 May 2023 where she states: 'Due to the victimising nature of Binta's behaviour towards me, and the fact there has been general hostility from her towards me on numerous occasions in the workplace, as well as the impact on me and my ability to work, I regard this as bullying and am in a position where I am now considering alternative employment options as the experiences mentioned above have affected my mental health very negatively and given me a lot of anxiety when considering my future at the Foyer.'** I have read the Claimant's email of 4 May 2023 very carefully. I note that she refers to bullying and states that her mental health has been impacted negatively. However the email does not contain any allegation that there has been a breach of the Equality Act 2010. I find that considering the email as a whole and the specific extract referred to, the

email cannot amount to a protected act under section 27 of the Equality Act 2010. The claim for victimisation therefore fails on this ground.

Employment Judge Siddall
Date: 20 March 2025