EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100548/2020

Final Hearing held in Inverness partly in person and partly remotely by Cloud Video Platform on 10 – 14 and 17 – 19 March 2025

Employment Judge A Kemp
Tribunal Member D McDougall
Tribunal Member R Martin

Mr D Tanase	**Claimant** **In person**
Barchester Healthcare Ltd	**Respondent** **Represented by:** **Mr M Briggs,** **Advocate** **Instructed by:** **Mr W Lane,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that

1. **the claimant was not dismissed by the respondent under section 95(1)(c) of the Employment Rights Act 1996**

2. **the respondent did not directly discriminate against the claimant because of his race under section 13 of the Equality Act 2010**

and the Claim is dismissed.

REASONS

E.T. Z4 (WR)

Introduction

1. This Final Hearing was arranged to address claims of what is normally referred to as constructive unfair dismissal, although that is not a term of law, and direct discrimination on the protected characteristic of race. It was heard largely in person, and with one witness appearing remotely.

2. The claimant was originally represented by a solicitor but for a substantial period has been a party litigant, as he was at the hearing. The respondent was represented at the hearing by Mr Briggs, Advocate.

3. The claim has had a lengthy history. The termination of employment occurred on 1 December 2019. Preliminary Hearings were held on 25 March 2020, 19 January 2021 and 9 July 2021. The claim was later struck out by the Tribunal, which led to a successful appeal by the claimant before the Employment Appeal Tribunal by Judgment issued on 1 June 2023 – ***Tanase v Barchester Healthcare Ltd [2023] EAT 84***.

4. There was then a Preliminary Hearing before EJ Kemp on 9 November 2023, which included case management orders, and a further Note issued after written submissions were made in relation to an application made by the claimant for documents or information on 28 November 2023. The parties were encouraged to agree a Statement of Agreed Facts and a timetable for witnesses. There was considerable correspondence on these issues thereafter. A Final Hearing arranged for dates in March 2024 was postponed, as was a later set of dates in July 2024. The present hearing dates were then fixed.

5. The parties did not reach agreement with regard to the matters referred to, and the Tribunal issued a Note and Orders on 11 April 2024 which included a timetable. It separately granted witness orders and corresponded with a witness Mr McKie in respect of whom a witness order had earlier been made but who now resided outwith Great Britain.

6. The claimant intimated an appeal against decision of the Judge in that last Note, which has not passed the sift conducted by the Employment Appeal Tribunal ("EAT") under its Rules. The claimant has sought a Rule 3(10)

hearing for that appeal which it is understood has been fixed for a date after the present hearing concludes.

7. The Judge issued a further Note on 6 June 2024 in regard to the present Final Hearing in those circumstances, and decided that it should proceed for the reasons there given. The claimant intimated an appeal against that decision, which has not passed the sift conducted by the EAT. The claimant has sought a Rule 3(10) hearing for that appeal, and will be heard on the same date.

8. The Judge issued a further Note for matters in relation to the Final Hearing, including a revised timetable sent to the parties on 19 November 2024, which it is understood the claimant has raised an appeal in relation to, and for which a Rule 3(10) hearing. The appeals remain of course entirely a matter for the EAT.

9. The claimant does not speak perfect English and a translator attended for this Hearing.

Preliminary Matters

10. Mr Briggs attended in person on the first day of the hearing, but as explained in an email from the respondent's solicitors sent early that morning had a health issue for a family member and sought to appear remotely for the remainder of the hearing. The claimant did not oppose that on the first day stating that he would leave it to the Judge, and that application was then granted. The solicitors had also sought to have their witnesses attend remotely but the Tribunal did not consider that that was appropriate given firstly the witness orders granted, secondly the position of the claimant as a party litigant and thirdly the circumstances overall. Mr Briggs did not seek to persuade the Tribunal that having witnesses attend remotely was required.

11. The claimant raised matters in relation to documents, which had been addressed in the Note dated 28 November 2023. The claimant stated that he had sought documents in 2021, and the respondent had sold the Care Home without keeping those documents. The claimant in effect protested

that his applications had not been addressed when made in 2021. That was a matter that had however been addressed in an earlier Note in which it was explained that it was not in accordance with the overriding objective to grant an order for documents the respondent did not possess, with the Judge also explaining that the claimant could give evidence on them, and raise questions in cross examination.

12. Before evidence was heard the Judge explained to the claimant again, having also done so in the Note after the hearing on 9 November 2023, the process of the giving of evidence, including rules as to asking questions in examination in chief that were not leading, cross examination to dispute any fact not accepted as accurate and to raise a matter that the witness had not covered which may assist the other party, that the Tribunal could ask questions at any time but normally did so after cross examination, and re-examination on matters arising from cross examination or from the Tribunal. The Judge also referred to giving oral evidence about documents so that they were before the Tribunal as evidence as otherwise they may not be considered, leading all the evidence as adding to it later, after the evidence is closed, is allowed only in exceptional circumstances, and finally about the making of submissions, being an opportunity not a requirement.

13. The Judge explained that the Tribunal could assist during the hearing to an extent in light of the terms of the overriding objective in Rule 3, including by asking questions to elicit facts in Rule 41, noting that the claimant was a party litigant for whom English is not his first language and that the respondent was represented by an experienced Advocate. The Judge stated that the Tribunal could not do so in a manner that led to their becoming an adviser of the claimant or acting as if his solicitor.

14. The Tribunal had also issued orders in relation to a timetable, which it had done given the lengthy history of the claim and to ensure that the Final Hearing concluded within the time allocated for it, as well as having regard to the fact that three of the witnesses were appearing on witness order. There had been expression of concern in some respects in relation to the postponements of the earlier hearings and the impact on the witness. The

Judge reminded parties at the commencement of the hearing of the timetable and that each should consider how best to conduct their respective cases, including what questions to ask when rather than leave the most significant points to the end, having regard to it. It did not understand however in practice that the timetable caused any difficulty for either party, and on occasion the evidence for a day finished early.

15. At the commencement of the second day of the hearing the claimant raised an objection to Mr Briggs appearing remotely, having sent an email to the Tribunal to that effect on the evening of the first day. For the reasons given orally to the claimant at the time his objection was repelled. Mr Briggs attended the remainder of the hearing remotely.

16. The claimant was given considerable latitude in his questioning of witnesses and the arrangements for evidence during the hearing itself. For example the Tribunal had suggested on the third day of evidence that Mrs Whitham's evidence might conclude in the morning of the fourth day and that if she was available Ms Russell might give her remaining evidence on the afternoon of that day (her circumstances are explained below). The claimant did not wish to do so and said in effect that his questions would take the allocated three hours of time. On that basis the arrangement was not advanced, but as matters transpired Mrs Whitham's evidence concluded before lunch that day, and the Tribunal did not sit until the following morning to hear the evidence of Ms Horne who appeared on witness order, which was a less than complete use of Tribunal time.

17. Similarly the evidence of Ms Horne concluded a little after 11am on the fifth day of the hearing, and after a discussion the claimant to his credit agreed that if it suited Ms Russell and was otherwise convenient her remaining evidence might be heard on the afternoon of the sixth day. Although it might have been possible to conclude both submissions on the afternoon of the seventh day the claimant stated that he was tired, and asked to do so on the following morning, which the Tribunal acceded to.

The evidence

18. The parties had prepared documentation in the form of a single Bundle, most but not all of which was spoken to in evidence. Three witnesses appeared by witness order. All but one witness gave evidence in person, with Mr McKie appearing remotely. The hearing was therefore in the form of a hybrid hearing to that limited extent.

19. The Bundle of Documents extended to 267 pages, but the first 94 were the Claim Form, Response, Tribunal Notes, and email correspondence that had been tendered. The claimant had tendered a Schedule of Loss in June 2021 on which he founded, seeking the sum of £61,759.81.

20. The claimant asked to give evidence from notes he had prepared, after attempting initially to do so without them, and helpfully Mr Briggs did not oppose that. In the circumstances the Tribunal considered that doing so was in accordance with the overriding objective, although that is not the normal practice in Final Hearings.

21. On the second day of evidence Ms Russell was sworn in. The claimant said that he had expected Mr McKie to give evidence that day from a timetable sent to him, and he was not prepared for her evidence. The timetable he referred to was a former one, with that for this hearing having been sent to the claimant and acknowledged by him on 19 November 2024. He then said that that timetable had been a draft, but it was not, as the Judge confirmed to him. There was a discussion over whether the witness was called by the claimant or respondent, and after that and consideration of how best to address matters it was agreed that the respondent ask questions in chief, although it had thought that the claimant was calling her, and that the claimant cross examine after a longer break for lunch than had been scheduled in the timetable to allow the claimant more time to prepare questions. Doing so was, the Tribunal concluded, in accordance with the overriding objective. After the lunch break the claimant sought further time before asking his questions. Mr Briggs undertook his examination in chief, and after a further break took instructions from the respondent. It was helpfully agreed by them that Ms Russell, who remains their employee, could return to complete her evidence on 19 March 2025, such that her evidence became part-heard.

That was then amended to the afternoon of 17 March 2025 after Mr McKie had completed his evidence, with parties' agreement.

The Issues

22. A proposed list of issues had been set out in the Note of the earlier Preliminary Hearing held before the same Judge on 9 November 2023, which included a summary of the claims being made by the claimant as there set out. The proposed list was not disputed by either party, and for ease of reference the issues proposed in that Note are repeated:

    (i) Was the claimant dismissed by the respondent under section 95(1)(c) of the Employment Rights Act 1996 ("the 1996 Act") or section 39(7) of the Equality Act 2010 ("the 2010 Act")?
    (ii) If so, what was the reason, or principal reason, for that dismissal?
    (iii) If potentially fair under section 98(2) of the 1996 Act was it fair or unfair under section 98(4) of that Act?
    (iv) If there was a dismissal, was that because of his race or ethnicity as a Romanian person in breach of section 13 of the 2010 Act?
    (v) Alternatively, if there was not a dismissal, did the claimant suffer a detriment when changes were made to his duties by the respondent because of his race or ethnicity as a Romanian person in breach of section 13 of the 2010 Act?
    (vi) If any claim succeeds, to what remedy is the claimant entitled, and in that regard
        (a) What losses did he suffer, or will he suffer?
        (b) What is the appropriate award for injury to feelings?
        (c) Has he mitigated his loss?
        (d) Should any award be reduced on account of any failure by the claimant to follow the ACAS Code of Practice on disciplinary and grievance procedures?

The facts

23. The Tribunal found the following facts, material to the issues before it, to have been established on the evidence.

Parties

24. The claimant is Mr Daniel Tanase. He is a Romanian national. His date of birth is 3 June 1964.

25. He formerly resided in Ullapool and now resides in Romania.

26. The respondent is Barchester Healthcare Limited. It is a provider of care in a large number of care homes throughout the United Kingdom. It has approximately 17,000 employees. It has a large number of care homes throughout the UK.

Employment

27. The claimant's employment with the respondent commenced on 11 November 2009. At that stage he was employed as a Registered Nurse.

28. On 1 November 2016 the claimant was promoted to a post as Unit Nurse Manager. His work location was Mo Dhachaidh Care Home, Ullapool ("the home"). The home has about 20 beds and is one of the smallest care homes in the respondent's portfolio.

29. The respondent issued a Statement of Main Terms and Conditions to the claimant on 1 November 2016. The respondent's practice was to provide a new such statement when an employee's job title changed. The Statement confirmed his job title as Unit Nurse Manager, but did not specify what his duties were. His work location was stated to be the home. He had 42.75 contracted hours per week, payable at an initial hourly rate of £12.65 per hour, which was later increased on a number of occasions. The Statement had the following clause:

> "**Additional and/or Alternative Duties**
>
> The company reserves the right to require you to perform additional and/or alternative duties from time to time and it is a condition of your employment that you are prepared to do this."

30. There was a Declaration with a section for signature by the claimant, but he had not signed it. It was signed for the respondent by Mrs Whitham.

31. In practice of the 42.75 hours per week there were 6 hours allocated for "supernumery" work, although that was not specified in the Statement. That supernumery work was of a managerial nature, when the claimant was not undertaking clinical duties, and included carrying out the rota. For the balance of 36.75 hours per week the claimant's work was clinical in nature, both as a Nurse on shift and carrying out a supervisory role in relation to the standard of care being provided.

32. There was a Job Description and Person Specification for the role as Unit Nurse Manager at the home issued to the claimant at about the same time as said Statement. It was a generic one, being one that was applied for all care homes across the respondent's group. It set out the duties that an employee could be required to undertake, but not all employees with the relevant job title would perform all the duties in the Job Description. Under the heading of "Leadership" were the following –

> "…..2 Prepare staff rotas so the correct skill mix are available at all times to meet the regulatory requirements in accordance with the DICE tool….
>
> 5. Lead the clinical team, supervising staff in all respects….
>
> 6. Lead the recruitment of clinical staff in the home……
>
> 7. Manage each member of the care team and ensure they receive the appropriate supervision, mentoring, appraisal, clinical training, and professional development……"

33. Under the heading of "General" was the following

> "3. Any other reasonable task requested by your line manager or the case home Clinical lead or home management team which is within your competence……"

34. The claimant was to report to a General Manager, and initially did so. For a period rotas for the nursing and care staff were prepared at the home by

Mrs Sharon Whitham, the Home Administrator at the home. Thereafter they were prepared by the General Manager until November 2016 when the claimant commenced to do so.

35. Rotas were prepared firstly from information provided from a tool called DICE and secondly from information about annual leave. Information on the care needs of each resident was inputted into it, and it generated details of the numbers of staff required. Mrs Whitham was responsible for issues related to annual leave. She prepared a template rota with information as to annual leave and that, together with the DICE details, formed the basis for the preparation of the rota.

36. For those care homes of the respondent which have up to about 50 beds rota arrangements are normally conducted by the General Manager for the home. Homes above that level have a deputy Manager, and a number of Unit Nurse Managers, and arrangements for conducting rotas vary according to the decisions made by the General Manager at each care home.

37. The General Manager of the home, Ms Ann Napier latterly having been in that role in an acting capacity, resigned with effect from in or around June 2019, and for a period of approximately three months there was no General Manager permanently in post for the home.

38. The claimant raised matters in relation to his Job Description and duties thereunder with Mrs Whitham, on a number of occasions. She explained to him on those occasions that Job Descriptions were used as a basic guide in all the homes of the respondents, which were of different sizes and with different arrangements in each, and that it was possible that each home may have a different member of staff carry out a particular duty in the job description as that suited that home best such that each duty referred to in the Job Description was not necessarily undertaken by the post holder.

June 2019

39. In or around June 2019 Mrs Wendy McGowan commenced assisting at the home on a temporary basis as there was no replacement General Manager at that time. Mrs McGowan was the Senior General Manager of the respondent's nursing home in Wick, and attended at the home [in Ullapool] on one or two days per week until a new General Manager was appointed. She conducted a review of documentation in relation to clinical matters, including care plans for residents and medication issues, and noted a number of matters that were not complete. She was also concerned at gaps in the claimant's knowledge she had noted by that time, and in particular the documentation for residents regarding care plans either not existing or not being updated. They were matters that required his attention as the Unit Nurse Manager as they were clinical matters, either by doing them himself or supervising nurses to do so. She considered that he required training on issues as to clinical governance. She spoke to him in June 2019 on a number of occasions on those matters.

40. She also spoke to staff during June 2019. Several of the staff complained to her about the rotas that the claimant prepared not being fair. She understood that the claimant had been taking all the supernumery time to complete the rotas, of 6 hours per week, whereas she took an hour to do so for her home which was about twice the size of the home at which the claimant worked. She considered that where a person both set rotas and was included in the rota that a perception of unfairness could result.

41. Mrs McGowan met the claimant on or around 17 June 2019 and informed him that he would no longer have responsibility for undertaking the rotas for his team and that she would do so. She did that primarily as she was concerned that there were areas of clinical practice that required attention, which she wished the claimant to focus on, but to an extent as several staff had complained to her that the rotas were not being arranged fairly by the claimant.

42. In a record of supervision for the claimant and Natasha Richardson, Kirsty Urquhart, Marie MacDougall and Allan Macfarlane held on a group basis that day she noted that daily meetings needed to occur daily, that an

assessment known as resident of the day also required to be conducted daily and that the General Manager's walkround was not happening. In the absence of the General Manager the walkround was to be undertaken by the claimant or Ms Whitham, and the assessment of resident of the day, requiring review of clinical plans and other clinical arrangements, was to be undertaken by the claimant.

43. The claimant raised some concerns over the rota being taken from him with Mr Kenny McKie, the Regional Director of the respondent, emailing him on 27 June 2019 asking to discuss matters without specifying the reason, then speaking to him about it when he met the claimant on 4 July 2019.

44. Mrs McGowan prepared a draft rota for a period of 8 weeks commencing in mid-August 2019 and sent that to the staff for comments. She did so seeking to follow how that was managed at her own care home in Wick. She asked that responses on it be sent to her.

Audit

45. On 3 and 4 July 2019 Ms Sue Horne of the respondent carried out an audit of the home, and prepared a report on it thereafter which noted a number of issues to address, several of which were in relation to clinical and nursing matters that fell under the responsibility of the Unit Nurse Manager. The claimant spoke to Ms Horne during her visit, and towards the end of it she spoke to Mr McKie the Regional Director who visited on 4 July 2019.

46. In early July 2019 Ms MGowan prepared a draft nurses rota for the 8 week period commencing on 19 August 2019. She wrote on a post-it note that any comments about it should be sent to her by 10 July 2019.

47. In August 2019 the claimant spent about three weeks on annual leave. Mrs McGowan emailed him on 16 August 20190 with regard to the audit required at the home for that month, attaching it, and asked to meet him later that month to show him how to complete the month end clinical governance work. She set out an action plan.

48. On the claimant's return from that holiday Mrs McGowan became aware that he was unhappy that the rotas had been removed from him. She returned the rota duty to him around that time. She ceased to have the role in effect standing in for the General Manager in early September 2019.

Mr Jackson new General Manager

49. Mr Andrew Jackson was appointed General Manager for the Care Home and commenced his duties on a date not given in evidence but likely to have been early September 2019. Mr Jackson received inductions from the respondents both at the home and at other homes in Wick and Arbroath. His inductions included a discussion with Ms McGowan who informed him amongst other matters of the issue with the claimant undertaking rotas and that that had been returned to the claimant. Mr Jackson had also held a discussion with Mr McKie and Mrs McGowan on the work required on clinical matters at the home, and the matter of the rotas prepared by the claimant that several staff felt unfair.

50. Mr Jackson had during the inductions reviewed records at the home, including the audit by Ms Horne. He had noticed that there were some gaps in the documentation kept by the home on clinical matters, which included matters for which the claimant had responsibility. He spoke to members of staff at supervision meetings and became aware of concerns they expressed to him about the claimant, including an issue of the language he used, and how he had managed both them and the rotas, which they did not wish to raise formally from a fear of retaliation.

51. He conferred with Ms McGowan and Mr McKie, who suggested that to free the claimant up in order to concentrate on the various clinical matters that were outstanding and which required action by a registered nurse, Mr Jackson undertake the rotas himself. He considered that that was part of the General Manager's Job Description which included "manage staff in all respects including….performance management."

26 September 2019

52. A staff meeting was held on 26 September 2019. It was conducted by Mr Jackson. The claimant and some of the nursing staff attended the meeting. The Minute for that meeting was prepared by Mrs Whitham, and was accurate as a record of it. It included the following:

> "…….
>
> **9 Staff Rotas**
>
> Andrew discussed with nursing staff that he had been asked to take control of staff rotas. He explained that he would do this from the next set of rotas to be displayed. He explained that following supervisions with staff it had become apparent that not all staff are happy with their current rota patterns. He advised that he was currently looking at changing the shift times and hours worked etc and this was going to be discussed further with care staff at their meeting which is due soon. Once any decisions have been made we will be discussing further with staff….."

53. That comment was made in the context of the shift then being of 13.5 hours duration and consideration being given to reducing it to 12 hours.

October 2019

54. The claimant met Mr Jackson for a supervision meeting on 10 October 2019. It was recorded in a written record. Mr Jackson confirmed that the claimant was managing his team "reasonably well". He suggested that the claimant use handovers and a shift planner tool to get the best out of his team. He said that he [Mr Jackson] would be undertaking the staff rotas "to allow Daniel time to concentrate on clinical needs". That was a reference to gaps he had noticed in the documentation at the home, including for care plans and others. He considered that that was a clinical need that required the claimant's attention as the claimant was a qualified nurse and Mr Jackson was not. By taking over the rotas that freed up time for the claimant to attend to clinical work. Another reason for that decision was that about ten members of staff had complained to Mr Jackson in supervision meetings with about how the claimant had managed rotas, or how he had managed them. The claimant informed him that attending to

rotas was in his contract or words to that effect. Mr Jackson said that he was planning to do so himself. The claimant regarded the change to doing rotas as a breach of his contract of employment.

55. The claimant had a period of annual leave commencing on 23 October 2019.

56. On 24 October 2019 a staff meeting was held. It was chaired by Mr Jackson. A minute of that meeting was taken by Mrs Whitham, and was an accurate record of it. It referred to rotas as follows:

> "Andrew left this to last as he explained that following his recent supervision sessions it was clear that most staff were unhappy with the current rota situation for various reasons. Andrew explained that obviously we are willing to look at changing the rota issue and from now on care and nursing staff rotas will be done by himself….." Staff were asked for their thoughts, it was stated that Mr Jackson and Mrs Whitham would look at the next set of rotas "to see if they can produce a rota that better suits all concerned and will discuss further with staff in the near future. However any questions in the meantime please ask."

57. On 30 October 2019 the claimant returned from annual leave. He saw the Minutes of the staff meeting on 24 October 2019. The claimant noticed that responsibility for the staff rotas had been taken by Mr Jackson himself.

Resignation

58. On 31 October 2019 the claimant emailed Mr McKie at 8.03am stating "Thank you very much for attending the meeting on 4th July 2019, but unfortunately the issue brought to your attention at that time it happened again. Therefore I had informed the General Manager of my resignation with the notice period according to my contract."

59. The claimant spoke to Mr McKie by telephone shortly afterwards, and the claimant set out his reasons for wishing to resign. Mr McKie said that he would come to the Care Home on 8 November 2019 and that they would discuss matters then.

60. The claimant wrote to Mr Jackson on 31 October 2019 intimating his resignation on notice, which was to expire on 1 December 2019. The letter was handed to Ms Sharon Whitham, Administrator, at around 10 – 11am that day, and stated the following:

> "Please receive this letter as formal notice of my resignation from Unit Nurse Manager position with Mo Dhachaidh Care Home starting from 31/10/2019. It has come to my attention that Barchester Healthcare Limited is in breach of contract with me as an employee by your on going changes in my employment duties and I consider myself to be constructively dismissed. This notification includes one month notice as stated in my employment contract and my last working day will be 01/12/2019."

61. Mr McKie had an urgent business matter which made him unable to attend the meeting with the claimant that had been arranged for 8 November 2019. He asked Ms McGowan to attend in his place. By the time she arrived the claimant had left. The claimant did so as he did not wish to discuss matters with Ms McGowan who had earlier also removed his rota duties.

62. On 11 November 2019 Ms Mairi Barton, HR Specialist of the respondent, wrote to the claimant inviting him to attend a meeting with Ms McGowan or to contact her.

63. The claimant replied to Ms Barton by email on 12 November 2019 referring to Mrs McGowan undermining his position, and on the same date she responded including by stating that she was unaware of any concerns he had with Mrs McGowan and offering a meeting with Ms Elspeth Russell of the respondent to investigate his concerns.

64. On 14 November 2019 Mr Jackson wrote to the claimant referring to the meeting they had held that day when the claimant confirmed his intention to leave. Mr Jackson wrote confirming the arrangements for the claimant's resignation to take effect. He offered to speak to him again if he felt that he had made a hasty decision. The claimant did not do so.

65. On 20 November 2019 the respondent posted an advertisement online for position with them as Unit Nurse Manager at an hourly rate of £15.99. It was a standard form advertisement issued because of the claimant's resignation.

Grievance Hearing

66. The claimant was due to meet Ms Russell on 2 December 2019. He attended at the Inverness office of the respondent to do so, but Ms Russell did not attend at the due time, and he left about ten minutes after the time for their meeting. She arrived shortly thereafter, having been detained on a call to the family of a resident, and the meeting was re-arranged.

67. On 17 December 2019 the claimant attended a Grievance Hearing with Ms Russell. The claimant attended with his wife, and Ms Laura Griffiths attended as a note-taker. The note of that meeting is a reasonably accurate record of it. It was sent to the claimant on 9 January 2020.

68. On 3 January 2020 Ms Russell met Mr Jackson. A note of the meeting is a reasonably accurate record of it. On 9 January Ms Russell met Ms McGowan. A note of the meeting is a reasonably accurate record of it. On a date in January 2020 [no more specific date was given] Ms Russell met Mr McKie. A note of the meeting is a reasonably accurate record of it.

69. On 24 January 2020 Ms Russell wrote to the claimant rejecting his grievance. She explained that her meeting with the claimant had been delayed due to her own annual leave and ideally she would have liked to have met him before his last day of employment. She set out the position of the meeting on 2 December 2019. She also explained about Mr McKie being due to meet the claimant on 8 November 2019.

70. She set out her reasons for her decision, which were that the respondent was not in breach of contract and that the respondent was trying to support the claimant in his role by taking away an administrative task to allow him to concentrate on other areas of his role to best meet resident's needs. She also explained that the claimant had a right of appeal. The claimant did not appeal.

Effect of termination of employment

71. The claimant was upset by the changes to the role he performed. He returned to Romania shortly after his resignation took effect as his mother was gravely ill, and then passed away on 15 January 2020. He then returned to the UK and sought employment.

72. Prior to the termination of employment the claimant earned £746.21 gross per week. The net pay he received was £554.85 per week. The claimant was enrolled in an auto-enrolment pension scheme called NEST. The respondent's contribution to that scheme was 3%.

73. The claimant sought alternative employment, both with the NHS and Newcross Healthcare as a Registered Nurse and as a Unit Nurse Manager.

74. The claimant did not receive State benefits after the termination of employment.

75. The claimant commenced employment with Newcross Health Care Ltd as a Bank Nurse on 11 April 2020. His net income was £354.15 per week. That continued until 13 May 2021 when the claimant was suspended.

76. The claimant commenced other employment with NHS Highland in or around March 2020. His net pay was £277.76 in the period to 5 April 2021.

77. The claimant's role as Unit Nurse Manager was advertised after the termination of his employment at £19 per hour. Had he not resigned his pay is likely to have risen to approximately £600 net per week in or around April 2020.

78. The claimant now resides in Romania. He has applied for retirement income.

Other matters

79. The Care Inspectorate inspected the home periodically. It found on 26 March 2018, 22 January 2019 and 21 November 2019 that, against the issue of "How well did we support people's wellbeing" that the home had

been “very good”. On the issue of “How well is care and support planned” on each of the latter two dates the rating was “good”. No rating was given for the earliest said date.

80. The claimant commenced early conciliation on 5 December 2019 and received the Certificate for the same on 5 January 2020. The Claim Form in this claim was presented to the Tribunal on 28 January 2020.

The claimant’s submission

81. The following is a very basic summary of the submission that was provided orally. The claimant argued that his claims of constructive dismissal and race discrimination should succeed. The removal of his duties to undertake the rota happened twice in a relative short period of time of 3 – 4 months. It was in breach of his Job Description which was a formal document issued to him by the respondent. The decision and the manner in which it had been done left him without any trust in the respondent. He had been excluded from the team dealing with staff recruitment, he was not allowed to have staff meetings and he was not allowed to investigate grievances. The respondent argued that the Job Description was different in a small care home which was discriminatory. From the claimant’s point of view there had been a plan to harass and intimidate him in the workplace. The reason given for removing rotas did not exist. There was no document to support it. Mr Jackson accepted in re-examination that the claimant had mentioned the contract, and said that he had shrugged his shoulders.

82. The claimant addressed the evidence given by each witness and commented on the same. He denied that the rota had been managed for his own personal interest and said that the respondent had not provided any evidence of that. Ms McGowan had prepared a rota for 8 weeks from August 2019. He had been removed from the duty from June, and it was returned in August, then removed again. The importance of it was set out in the job description under the heading of “Leadership”. He invited the Tribunal to accept his claim in full.

Respondent's submission

83. The following is again a very basic summary of the submission that was provided. Helpfully Mr Briggs agreed to give his first, although in accordance with normal practice he would have gone second as the claimant had at least initially the onus, and he had provided a detailed skeleton argument which he supplemented orally. He argued that there was no express term of contract, under reference to the case of ***McBride*** addressed below, and there had not been breach of the implied term as the test was an objective one, and separately that there was reasonable and proper cause for what was done such that there was no dismissal. He referred to the absence of a counter-narrative by the claimant, and that there had been no evidence to support the claim as to race discrimination, with the claimant not putting that case positively to the witnesses called. The reasons for removing the duties had been as he had argued.

The law

(i) Unfair dismissal

84. There is a right not to be unfairly dismissed provided for in section 94 of the 1996 Act.

85. Section 95 of the 1996 Act defines what a dismissal is and provides, so far as material for this case, as follows:

> "**95 Circumstances in which an employee is dismissed**
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
> ……..
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

86. Section 98 of the 1996 Act addresses the issue of fairness and provides, so far as material for this case, as follows:

"98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."……..

87. The onus of proving such a dismissal where that is denied by the respondent falls on the claimant. From the case of ***Western Excavating Ltd v Sharp [1978] IRLR 27*** followed in subsequent authorities, in order

for an employee to be able to claim constructive dismissal, four conditions must be met:

(1) There must be a breach of contract by the employer, actual or anticipatory.

(2) That breach must be significant, going to the root of the contract, such that it is repudiatory.

(3) The employee must leave in response to the breach and not for some other, unconnected reason.

(4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may have acquiesced in the breach.

88. The Inner House considered the issue of a constructive dismissal in ***Aberdeen City Council v McNeil [2014] IRLR 113.***

89. Terms of contract may either be express or implied. There is no requirement for a contract of employment to be in writing. The statutory statement of terms issued under section 1 of the Employment Rights Act 1996 is not the contract of employment but does amount to evidence of the contract, which may be strong evidence. The statutory statement is not necessarily conclusive evidence of its terms, discussed by the Court of Appeal in very different factual circumstances to the present in ***Robertson and Jackson v British Gas Corporation [1983] ICR 351.***

90. An issue in the present case is whether the terms of the Job Description were contractual in effect, or not. That issue was considered in general terms, and in very different circumstances, by the Supreme Court in ***McBride v Scottish Police Authority [2016] IRLR 633***. The claimant in that case was a police fingerprint technician who had had an involvement in a case which led to the appeal against conviction followed by the trial of a police officer for perjury. After that the claimant was not required to give evidence in court in light of concerns that she would be attacked by defence counsel in future cases because of her involvement in the earlier proceedings. Giving evidence in court was included in the 12 points set

out in her job description. Several years later she was dismissed, held by a Tribunal to have been unfair and an order for reinstatement was made on the understanding that that would be into the post of a non-court-attending fingerprint technician. The employer appealed. This was allowed in the EAT and Court of Session, but for different reasons. The Court of Session held that the Tribunal had attempted to reinstate her on altered contractual terms, which it considered impermissible. The claimant appealed.

91. The Supreme Court allowed her appeal and upheld the tribunal's order. The court held that there was no alteration to her contractual terms by restricting her to non-court duties. In so far as the job description was concerned Lord Hodge giving the decision of the court said that "Whether an employee had a reasonable expectation of being allowed to do certain work which he or she enjoyed or which maintained or developed work-related skills are questions to which the answers are fact-sensitive."

92. There is therefore no single answer to that issue, and each case will depend on its facts. Earlier in his speech Lord Hodge had said the following:

> "There are cases in which it has been held that an employer, who by unilateral action has fundamentally altered the nature of an employee's job, has repudiated the contract of employment. See, for example, *Coleman v S and W Baldwin (t/a Baldwins) [1977] IRLR 342, Pedersen v Camden London Borough Council [1981] IRLR 173."*

93. In ***Pedersen*** the Court of Appeal had held that the Industrial Tribunal were entitled to conclude that the appellant's contract of employment as a "bar steward/catering assistant" correctly construed was one under which he was primarily employed as a bar steward with catering assistant duties as a subsidiary matter on such occasions as there was no work as a bar steward. The Tribunal had been entitled to find that in substantially reducing the appellant's function as a bar steward the respondents had committed a fundamental breach of the appellant's contract of employment entitling the appellant to treat himself as having been constructively dismissed.

94. Lord Hodge's speech read as a whole suggests in our view that usually an employee will have no contractual right to perform every function included in a job description, but that if the employee can prove facts to support it a contractual right to do so in whole or part will be capable of being found.

95. An express term of contract can arise by the incorporation of terms of another document into the contract itself, a matter addressed in McBride - McBride – The Law of Contract in Scotland, chapter 7.

96. Implied terms in the context of the present case are those which are necessary to give a contract business efficacy, as a very broad summary of the law in that area which is addressed in McBride chapter 9.

97. In every contract of employment there is an implied term derived from ***Malik v BCCI SA (in liquidation) [1998] AC 20***, heard in the House of Lords, which was slightly amended subsequently in ***Baldwin v Brighton and Hove City Council [2007] IRLR 232***. In ***Leeds Dental Team Ltd v Rose [2014] IRLR 8*** it was held that the test was objective***:***

> "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

98. The law relating to constructive dismissals was reviewed in ***Wright v North Lanarkshire Council [2014] ICR 77***. The reasonableness or otherwise of the employer's actions may be evidence as to whether there has been a constructive dismissal, although the test is contractual: ***Courtaulds Northern Spinning Ltd v Sibson and Transport and General Workers' Union [1988] IRLR 305***, ***Prestwick Circuits Ltd v McAndrew [1990] IRLR 191***. Where the alleged breach of trust and confidence consists solely of an exercise of a discretion granted to the employer an employee who is disadvantaged by it can only challenge it by showing that no reasonable employer would have done so: ***IBM UK***

Holdings Ltd [2018] IRLR 4 (applying the Supreme Court decision in ***Braganza v BP Shipping Ltd [2015] IRLR 487***).

99. Where it is argued that there was a final straw, being a last act in a series of acts that cumulatively lead to repudiation, that last straw must not be entirely trivial – ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833.*** The questions that a Tribunal should ask were summarised as follows:

> "(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
> (2) Has he or she affirmed the contract since that act?
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
> (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term?.....
> (5) Did the employee resign in response (or partly in response) to that breach?"

100. ***Omilaju*** is a reference to the Court of Appeal decision in ***Omilaju v Waltham Forest LBC [2005] IRLR 35.*** Breach of the implied term as to trust and confidence set out above, where that is held to have occurred, is inevitably a fundamental breach amounting to repudiation - ***Morrow v Safeway Stores Ltd [2002] IRLR 9***.

The reason

101. If there is held to be a dismissal, there must then be consideration of what the reason, or principal reason, for that dismissal was, and if it was a potentially fair reason under section 98(2), it is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996.

102. In ***Abernethy v Mott Hay and Anderson [1974] ICR 323***, the following guidance was given by Lord Justice Cairns:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

103. These words were approved by the House of Lords in ***W Devis & Sons Ltd v Atkins [1977] AC 931***. In ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748,*** Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision.

104. If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law.

Fairness

105. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the 1996 Act which states that it

> "(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and
>
> (b)shall be determined in accordance with equity and the substantial merits of the case."

106. The issue of whether or not it was fair under section 98(4) also applies to a constructive dismissal: ***Savoia v Chiltern Herb Farms Ltd [1982] IRLR 166.*** It is possible, if somewhat unusual, for a dismissal under section 95(1)(c) to be held not to be unfair. ***Wells v Countrywide Estate Agents t/a Hetheringtons UKEAT/0201/15*** is an example of such a case, where

it was held that if the employee's demotion for an act of gross misconduct did constitute a constructive dismissal that dismissal was for a potentially fair reason (conduct) and was reasonable in all the circumstances, such that it was not unfair.

107. In regard to questions of fairness the Tribunal should take account of the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures, so far as relevant.

108. The Tribunal must not substitute its own views for those of the employer. The test is the band of reasonable responses both for the decision being made and what is to be done about it – ***British Leyland (UK) Ltd v Swift [1981] IRLR 91*** and ***Iceland Frozen Foods Ltd v Jones 1982 IRLR 439*** albeit that those authorities are in the context of a dismissal by the employer directly, nor constructively. Nevertheless the same principle of the band of reasonable responses applies.

Discrimination

109. The law relating to discrimination is found in statute and case law, and account may be taken of guidance in the statutory Code of Practice issued by the Equality and Human Rights Commission: Employment.

(i) Statute

110. Section 4 of the Equality Act 2010 ("the 2010 Act") provides that race is a protected characteristic. Section 9(1)(a) defines race, which includes nationality.

111. Section 13 of the 2010 Act provides as follows:

> "**13 Direct discrimination**
> 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."

112. Section 23 of the 2010 Act provides

> "**Comparison by reference to circumstances**

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

113. Section 39 of the 2010 Act provides:

"**39 Employees and applicants**

……

(2) An employer (A) must not discriminate against a person (B) –

……..

(c) by dismissing B

(d) by subjecting B to any other detriment …….

(7) In subsections (2)(c) and (4)(c) the reference to dismissing B includes a reference to the termination of B's employment……

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the contract without notice……"

114. Section 136 of the 2010 Act provides:

"**136 Burden of proof**

If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

(ii) Case law

(a) Direct discrimination

115. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572***. In some cases, such as ***James***, the grounds

or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15***.

116. Further guidance was given in ***Amnesty***, in which the then President of the EAT explained the test.

117. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions referred to further below) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377.***

Less Favourable Treatment

118. In ***Glasgow City Council v Zafar [1998] IRLR 36***, a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour and having a protected characteristic. He must show less favourable treatment, one of whose effective causes was the protected characteristic relied on. Although something more than unreasonable behaviour and the protected characteristic is required that need not be a great deal: ***Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279***.

Comparator

119. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***, also a House of Lords authority, Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the

prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

120. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences between that person and the claimant. Guidance was given in ***Balamoody v Nursing and Midwifery Council [2002] ICR 646***, in the Court of Appeal.

121. The EHRC Code of Practice: Employment provides, at paragraph 3.28:

> "Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'"

Substantial, not the only or main, reason

122. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a "substantial reason" for the decision. In ***O'Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause. In ***Igen v Wong [2005] IRLR 258*** the test was refined further such that it part of the reasoning that was more than a trivial part of it could suffice in this context: in that context it referred to ***Nagarajan:***

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are

> better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

123. The law was summarised in ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673***, heard in the Court of Appeal. Lord Justice Elias said the following (in a case which concerned the protected characteristic of disability):

> "In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason".

Detriment

124. The key question is - "Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" ***Shamoon.*** It is to be interpreted widely in this context – ***Warburton v Chief Constable of Northamptonshire Police EA-2020-000376*** and ***EA-2020-001077***

Burden of proof

125. There is a normally two-stage process in applying the burden of proof provisions in discrimination cases, whether for direct discrimination or victimisation, as explained in the authorities of ***Igen v Wong [2005] IRLR 258***, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If he does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is held to be

inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached. It may not always be necessary to follow that two stage process as explained in ***Laing v Manchester City Council [2006] IRLR 748*.**

126. Discrimination may be inferred if there is no explanation for unreasonable behaviour (***The Law Society v Bahl [2003] IRLR 640*** (EAT), upheld by the Court of Appeal at ***[2004] IRLR 799.***)

127. In ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and held that the onus did remain with the claimant at the first stage. That it was for the claimant to establish primary facts from which the inference of discrimination could properly be drawn, at the first stage, was then confirmed in ***Royal Mail Group Ltd v Efobi [2019] IRLR 352*** at the Court of Appeal, and upheld at the Supreme Court, reported at ***[2021] IRLR 811***. The Supreme Court said the following in relation to the first stage, at which there is an assessment of whether there are facts established in the evidence from which a finding of discrimination might be made:

> "At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account."

128. In ***Igen Ltd v Wong [2005] ICR 931*** the Court of Appeal said the following in relation to the requirement on the respondent to discharge the burden of proof if a prima facie case was established, the second stage of the process if the burden of proof passes from the claimant to the respondent:

> " To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive."

129. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court approved the guidance from the authorities of ***Igen*** and ***Madarassay***.

130. The Tribunal must also consider the possibility of unconscious bias, as addressed in ***Geller v Yeshurun Hebrew Congregation [2016] ICR 1028***. It was an issue addressed in ***Nagarajan.***

Unlawful constructive dismissal

131. The test of whether or not there was a dismissal under section 39(7) of the 2010 Act, often also called a constructive dismissal (used in the sense focussing on the dismissal, not the issue of its fairness) is essentially the same as in section 95(1)(c) of the 1996 Act, and the issue of such a dismissal was examined by the EAT in ***De Lacey v Wechseln Ltd (t/a The Andrew Hill Salon) [2021] IRLR 547.***

Observations on the evidence

132. The witnesses are addressed in the order in which they gave evidence. **The claimant** was we considered seeking to give honest evidence. There was limited direct dispute on fact but there was some. He disputed in particular allegations of his not managing the team well, or issues over the fairness of how he prepared the rota, and argued that there was no documentation to support those allegations. We did not consider however that that absence of documentation was conclusive, as we accepted the evidence of the other witnesses to whom we refer below.

133. The real and central dispute was over whether the job description document was contractual or not (which is essentially a question of law not fact), whether there was any good reason for the rotas to be removed from him or not, and whether doing so amounted in the circumstances to a dismissal. In cross examination he did not always directly answer the question, but we concluded that that was because he did not understand it, with the additional difficulty of the language barrier only partly overcome by the translation of question and answer. Some of the matters raised with him were about points he was not aware of at the time of the events, and understandably he was somewhat cautious in answering them. For

example he appeared to be unaware of staff concerns over his handling of rotas, or his use of language, and therefore denied that they existed. Another example is the question of gaps in his knowledge and clinical matters that required attention, which in essence he denied, relying on the Care Inspectorate reports. For reasons we address below however we accepted Mrs McGowan's and Mr Jackson's evidence that there were issues particularly on clinical matters which led to the rotas being removed, and to the extent that the claimant disputed the basis to do so we did not accept the claimant's evidence in that regard.

134. The evidence of those witnesses was supported by Ms Horne and Ms Russell. For example when the claimant put to Ms Russell in cross examination that the ratings achieved from the Care Inspectorate she said that she would not have been happy with them as they were not the highest rating of Excellent, which is what she aspired to.

135. **Ms Russell** was we considered an obviously credible and reliable witness. She gave her evidence in a measured and straightforward manner and we accepted it. She explained that the investigation she had undertaken had been recorded in writing and the notes of meetings were accurate, on which we accepted her evidence. On the issue of the terms of the job description, her evidence was that carrying out a duty such as the rotas was not exclusively the preserve of the Unit Nurse Manager, and she explained how the issue was managed in her own home in Inverness. We considered that evidence to be compelling, and accorded both with common sense and the Tribunal members' experience of how matters within a job description would ordinarily be expected to be managed. She was a registered Nurse herself.

136. **Mr Jackson** was we considered a credible and reliable witness. He no longer worked for the respondent. attended on witness order, and it was relatively obvious to us that he had no wish to be present. He did however give evidence clearly and convincingly. We accepted both the evidence he gave and the reasons he put forward for removing the rotas from the claimant. We accepted that that had been discussed on 26 September 2019 and again on 10 October 2019, both of which meetings the claimant

had attended, and further that he spoke to the claimant on 14 November 2019 as referred to in the letter of that date, giving the claimant a further opportunity to speak to him which the claimant did not take up. There was support from the documents before us at least to a reasonable extent and we did not accept the claimant's argument that his evidence was in effect a fabrication.

137. **Ms Whitham** was we considered an obviously credible and reliable witness. Despite her having left the respondent's employment in 2022 she had a generally excellent recollection of the matters on which she gave evidence, and where she could not recall a detail she said so. She had been called by the claimant on witness order, however she gave evidence that contradicted many elements of his case. One aspect of that was that she had explained to him that duties in a job description were not prescriptive, in the sense that they had to be performed by the job holder, rather they were the duties that could be required of an employee and whether they were or not in a particular home depended on the arrangements in that home.

138. She confirmed that there had been complaints with regard to the language the claimant had used to staff, and how he had managed the rotas. They had been informal ones, and made to her. She had personal experience of his use of bad language by the claimant. She confirmed that clinical duties were the main aspect of his role as Unit Nurse Manager and that the claimant knew that. She explained that in smaller homes with up to 40 - 50 residents General Managers managed rotas. She was clear in her evidence that Mr Jackson was proposing changes to rota duties so that the claimant could concentrate on the clinical issues that were outstanding. She said that that was intended to be temporary, until the rota had been determined, after which it would be returned to the claimant. Whilst we considered it more likely that that evidence was correct it had not been suggested to the claimant in cross examination that that was the case, ie that it was temporary only, and on that basis only we did not make a finding in fact to that effect.

139. **Ms Horne** we also considered an entirely credible and reliable witness. The claimant had called her and she appeared on witness order. She explained that when she had conducted her audit there were 45 separate issues identified, and that a reasonable proportion of them, to paraphrase her evidence, was of clinical matters that fell under the claimant's responsibility. She considered that it was part of his duty to prepare or update care plans himself, contrary to the question he put to her. The number of concerns was fairly high for a home of that size, and although they were not serious they were there. She did not support the claimant's evidence in relation to matters on a job description and said that as it was a small home everyone had to help. That indicated to us that there was a degree of flexibility expected of all staff in the home, and that rigidly restricting duties to those in a job description, either not straying beyond it or requiring all mentioned in it to be carried out, was not how the home operated. She was not able to recall some details from the passage of time, but did remember passing some information to Mr McKie.

140. **Mr McKie** was called by the claimant on witness order, which had initially been granted when he was resident in Great Britain, although he is now resident in Ireland, and no longer works for the respondent. We considered him to be a credible witness. He explained that he could not now recall matters such as a conversation with the claimant on 4 July 2019, or the detail of those held with Ms McGowan and Mr Jackson about the claimant later, or those with the claimant on or around 31 October 2019, but he was clear that the statement he gave to Ms Russell had been his best recollection at that time and was more reliable than his recall now. We were entirely satisfied that that was his honest evidence, in that with the passage of time much of the detail was no longer recalled by him. In that statement he had not recalled why Ms McGowan wanted to remove the rota duty from the claimant in June 2019, but on other matters the written record from January 2019 (no more specific date was given) was we considered likely to have been reliable. In general terms however he supported the evidence of other witnesses (save the claimant) that the rota duty was not significant from his perspective, that changing it was not flagged as an issue of concern, and that the main duty of the Unit Nurse

Manager was clinical. He said that he was not aware of issues the claimant had with Ms McGowan at the time otherwise would not have suggested that he meet him when he was not able to. He recalled that the reason for not being able to meet the claimant was an unannounced inspection by the Care Inspectorate at a care home in Aberdeen that had required his attention.

141. **Mrs McGowan** was also we considered an obviously credible witness. There were some aspects which she could not recall given the passage of time, and we accepted that that failure of memory was genuine. One example was when she had started in the home, which initially she said was July 2019 but was then shown the minute of 17 June 2019, and accepted that it must have been earlier. The claimant in his submission sought to rely on that, but we did not consider that slight change to her evidence to be at all material. She explained that after she had assumed a role at the home on one or two days per week after Ms Napier left she reviewed documentation and found some gaps in what had been done clinically particularly involving the claimant that required attention. Some staff spoke to her about the rotas not being fair. She took the rotas from the claimant to free up time for him to attend to the clinical matters. When she became aware in late August 2019 that he was unhappy with that, she returned them to him at that stage. She had not been aware of there being any difficulty between them.

142. She did not agree with the claimant as to the job description, and explained that in the home she ran in Wick she did the rotas. Her evidence was that the job description set out tasks that the Unit Nurse Manager could be asked to do, not those that person required to do. She explained that that was also the position in relation to interviewing new staff members. She rejected the suggestion that race or nationality played any part in her decisions. We were satisfied that for the areas where Mrs McGowan had a recollection of events, her evidence was reliable.

General

143. What we considered of significance was that there was no evidence of any personal animosity towards the claimant by any of the witnesses who had

been or remain employees of the respondent. Mrs McGowan and Mr Jackson had discovered gaps in his knowledge and how the documentation for residents had been completed which he had either done personally or had responsibility for in his role. They did not suggest that that was any form of performance issue or similar, but a matter that required to be rectified, and that in that context removing what they thought of as a minor duty of doing rotas would help him. It was not clear to those witnesses why the claimant protested the issue as he did. As Mr Briggs pointed out in his submission the only evidence as to the reason for that reaction was the suggestion that the claimant chose shifts which suited himself and which some staff thought unfair. There was no evidence from the claimant on that matter beyond the fact that it was a duty in his job description. There was almost no oral evidence from the claimant perceiving a loss of authority from the change, although it was mentioned in his email to Ms Barton. It is not a matter that we require to determine, but the evidence from those witnesses was consistent that generally staff did not like doing rotas, which was generally viewed as a mundane and thankless administrative task.

144. Some of the witnesses recalled some details but not others, and there was not always correlation between witnesses as to what each remembered. That arose for example in relation to discussions between Mrs McGowan, Mr Jackson and Mr McKie, as well as other meetings. We considered that that arose from the passage of time. We have assessed our findings in fact from the evidence we heard, seeking to do so having regard to all of the evidence both oral and documentary. It is also appropriate to note that some of the matters that the claimant raised in submission had not been addressed in evidence, or were not before us. In the latter category for example he argued that what happened was harassment and intimidation of him, but no claim under section 26 of the Equality Act 2010 had been made, nor had that point been put to the witnesses.

Discussion

145. The Tribunal considered all of the evidence it heard, and the full terms of the submissions of the parties. It answers each of the issues which had

been identified as above in the following paragraphs. It reached an unanimous decision.

Did the respondent dismiss the claimant in terms of section 95(1)(c) of the Employment Rights Act 1996 ("the 1996 Act")?

146. This is often colloquially referred to as a constructive dismissal, although that is not a term in the 1996 Act itself. It is, the Tribunal considers, helpful to re-state that the test is an objective one. Neither the subjective intention of the respondent, nor the subjective perception of the claimant, are determinative. The test has different elements within it, addressed further below.

147. There is a distinction between a breach of contract, and a dismissal under section 95. They are different concepts, such that if something is a breach of contract that is not necessarily a dismissal, and *vice versa*.

148. A term of contract may either be express, or implied. Breach of an express term of contract may be a dismissal provided firstly that the breach is material as it is known in Scots Law, or fundamental and repudiatory as referred to in ***Sharp***, but also secondly that the other conditions for dismissal set out in ***Sharp*** are met.

149. Breach of an implied term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely seriously to damage or to destroy the relationship of trust and confidence between the respondent and claimant, may be a dismissal. For there to be a dismissal requires firstly conduct likely (the relevant term in this context as the Tribunal did not consider that there was any calculation by the respondent) seriously to damage or destroy the relationship of trust and confidence, to paraphrase. If so, there is secondly consideration of whether the employer did or did not have reasonable and proper cause for its acts – if it did, there is no dismissal even if there is a fundamental breach of contract. The other conditions in ***Sharp*** then are engaged. Breach of the implied term if it occurs is however itself material or repudiatory.

150. The onus falls on the claimant to establish that there was a dismissal. If that is done, the onus falls on the respondent to prove the reason for that, and if that is done and it is a potentially fair reason there is no onus on either party in relation to the issue of fairness. The onus in that regard is neutral. The issues identify elements within the overall statutory test to which we now turn.

The claimant's view that doing the rota was a contractual term

151. The claimant considered that the Job Description was a contractual document, and we took his argument to be that it was an express terms of his contract. As a party litigant, it is understandable why he may think that, and there was no doubt that it was his genuine belief. It appeared to be the principal reason why he resigned, but we have concluded that his view that the job description was contractual in effect is not correct.

152. A Job Description is not itself a contract of employment, nor is it so inflexible a document that it should be read as if a conveyancing document, which appeared to be how the claimant viewed it. The position was addressed in ***McBride*** to an extent, as addressed above. The duties in the Job Description may not normally be contractual, but nevertheless can become contractual depending on the relevant facts. Simply including one or more specific elements as a duty in a Job Description is not in our view sufficient. There requires to be other evidence from which that duty becoming a contractual term can be inferred.

153. There was no written contract of employment, and the Statement of Terms did not purport to be so. That Statement was however evidence of the contract of employment, and we took that Statement into account on that basis (there was no suggestion of any evidence that would be contrary to the terms there being in effect the terms of contract). There was no specific term as to the duties to be performed, nor was there any specific reference to the Job Description or other reference which might lead to it being incorporated into the contract.

154. Within the Statement was a term that allowed in effect a variation of duties. That provision of itself contradicts the suggestion that the carrying out of

each duty in the Job Description was a contractual requirement, and could not be removed from the claimant. It is not in our view conclusive on that issue, but suggests very strongly that the Job Description was not contractual.

155. The Job Description did not state in terms that it was intended to be contractual in effect, nor that it was not contractual in effect. It was reasonably comprehensive and detailed, and written in terms suggesting requirements such as the use of words including maintain, support, comply, ensure and prepare. In addition, the claimant had in effect protested about the removal of the rota duty by Ms McGowan to Mr McKie, and it had been restored to him by her once she became aware that he was unhappy about it. Mr McKie had no recollection of whether he was involved in discussions with Mrs McGowan about that issue. Mrs McGowan's evidence was that it was her own decision taken after the unhappiness had become known to her, as that had not been her impression initially, and we considered her evidence reliable on that point. What we did consider of some relevance was that the claimant had not raised any formal grievance at the time being June 2019. He did raise the matter informally with Mr McKie, and spoke to him about it in July 2019, but it appeared that the arrangement persisted until late August 2019 when Ms McGowan became aware of the claimant's unhappiness and reversed her decision. The fact that the claimant worked to that revised arrangement for a not insignificant period is not in our view supportive of his arguments.

156. The claimant also referred to the decision letter by Ms Russell which he argued was an acknowledgement that the job description was, in effect, contractual. The letter does however firstly require to be read as a whole, and considered within the context of Ms Russell's evidence to us. Her view was that the duties in the Job Description were not those which the claimant exclusively did, were not contractual and was simply those the respondent was entitled to require the claimant to undertake, but not all duties were always undertaken. As explained above we accepted her evidence.

157. We also accepted Mrs Whitham's evidence that she had explained to the claimant on a number of occasions that a duty in the Job Description might not be undertaken in a particular home, depending on the arrangements in the home. She had been called by him, but her evidence also contradicted his suggestion that the duties in the Job Description were each contractual requirements for him to do. We considered it entirely clear from her evidence that they were not viewed as such at the time by the respondent, and that had been communicated to him.

158. Her evidence was supported to an extent by that of Ms Horne. She also did not agree with the claimant on how the job description was viewed in practice. That position was further supported by Mr McKie who explained that the job description may apply to a large care home with a Deputy Manager, and where specific duties may be organised differently to the small care home that the claimant worked in, as well as by the evidence of Mrs McGowan to similar effect. We accepted that evidence.

159. That issue was considered in the context that from the experience of the two lay members of the Tribunal a Job Description is generally regarded not as contractual in effect, but more as an outline of what the employee can be required to do. It is not therefore a document setting out the duties that that employee must be given exclusively. It is also not immutable, as both duties and circumstances change over time. It operates in practice as a guideline. It appeared to the Tribunal almost unworkable, if not entirely unworkable, that each element of a job description must be undertaken exclusively by the employee at all times or there would be a breach of contract. That appeared to the Tribunal to be contrary to common sense and its industrial experience. That experience supported the conclusion that the Tribunal had separately reached that the Job Description was not an express term of contract whether by incorporation or otherwise.

160. Taking account of all of the evidence we heard we were therefore satisfied that there was no contractual term that each duty within the Job Description was a contractual requirement exclusive to the claimant, and had become an express term of the contract of employment.

The claimant's view that he was being undermined by removal of rota duties

161. From the subjective standpoint of the claimant the removal of the rota did undermine his authority as a manager. He held that belief genuinely at the time, and he made reference to that in an email to Ms Barton, although as stated there was very little oral evidence on that matter. In essence he argued that removing the rota was likely seriously to damage his trust and confidence in the respondent because of that, and had in fact done so.

162. Looking at the matter objectively that was not the case, in our view. He remained in his role of Unit Nurse Manager. The rotas had been undertaken by Ms McGowan for a period between June and August 2019. There had been issues over the rotas, and Mr Jackson undertaking that task so that the claimant could spend time on clinical matters, which the claimant could do but Mr Jackson, who was not a Registered Nurse, could not, was entirely appropriate in our view. These were matters that any employee of the respondent would be able to understand, such that the claimant's role as manager was in our view not undermined in any objective sense at all so as to breach the implied term.

163. That was all in the context of Ms Horne's audit finding a reasonably large number of clinical issues that required to be addressed, Mrs McGowan's view formed earlier and Mr Jackson's view formed later to similar effect (his view partly being based on that audit report). Mr McKie did not recall such level of detail. There was a clear need to address those clinical issues, and focussing on them not the rotas was an obvious and common sense response to the issue. From all the evidence we heard we did not consider that the claimant was undermined in an objective sense by the removal of rotas, even although he perceived that to have been the case, and that what the respondent did had not therefore breached the implied term on that basis.

164. The claimant argued that Mrs McGowan had taken her decision in June 2019, therefore before the report by Ms Horne such that it could not have influenced the decision. Mrs McGowan's evidence however, as we understood it, was that she had taken the decision to assist the claimant on the basis of what she had herself found, and that when she saw the

report from Mr Horne later that supported the view she had held. It appeared to us that there was a consistency of view between Mrs McGowan, Ms Horne and Mr Jackson as to clinical governance issues, gaps in the claimant's knowledge of that, and the need to address those matters. We accepted that chapter of the evidence, and did not accept the claimant's contrary evidence.

165. We also accepted their evidence as to informal complaints intimated to Mrs McGowan and then Mr Jackson from staff. That there was no document to confirm it was not a surprise given that these were informal complaints and it was said that the staff were concerned of any recriminations from the claimant. They were not addressed in a disciplinary sense, and it is therefore no surprise that there was nothing in the claimant's personnel file. But there is no requirement for such a matter to be in writing, and we accepted the evidence that these were genuine issues raised. Whether the staff doing so were right to say that that was partly so that the claimant could manage rotas for his own benefit for using bad language is not quite the point for us. We accepted that that had been raised, and was part of the background to the decision taken such that we did not accept the claimant's arguments in that regard.

The nature of the changes to the claimant's role

166. We accepted that the intention of Ms McGowan in June 2019 had been to remove what she considered to be an administrative role from the claimant so that he could perform the required clinical and other duties, so as to improve the service given to residents, as well to a lesser extent to address concerns from several staff about the fairness of the rotas. Her view was that there were clinical issues to be addressed, and that view was later supported by the audit by Ms Horne carried out in early July 2019 as we have noted above. Mr Jackson's intention when he became the General Manager was to seek to resolve an issue raised by at least some other staff as to the fairness of the rotas, but also and as the primary reason to free up time for the claimant who he considered was taking too long a time to do so where there were a number of other clinical matters that required the claimant's attention as set out above.

167. We did not consider that the removal of the rota amounted to a fundamental change to his job, although we accepted that the claimant was genuine in his own belief that it was. His belief was that it was in the Job Description under “Leadership” and that that meant that it was important. But we consider that we must read that document as a whole, and consider it in the context of all the evidence. This is an objective test, and looked at on such a basis we did not consider that there had been a material breach even assuming that it was a breach, or that the change was fundamental. Matters require further to be considered also in the context of the term of the Statement allowing for variation in duties.

168. We also considered that the extent of the supernumery duties of which preparing the rota was a part was of significance. Unlike in the ***Pedersen*** case the undertaking of the rota was not the main aspect of his role. The main aspect, exemplified by the fact that 36.75 of the 42.75 hours per week of his work (that being his own evidence that it was 6 hours of supernumery time), was in clinical work. The rota was also not solely the work of the claimant, as it had been done earlier by the General Manager, then Mrs Whitham, and when the claimant was doing it Mrs Whitham did the initial work of adding in annual leave and other details to the template rota, which also involved use of the DICE tool.

169. The claimant in his submission referred to the hours he said he had been paid for supernumery work, but that was not based on evidence that had been given before us. What was paid for supernumery hours was a point addressed in part with Mrs McGowan when the claimant cross-examined her, but as she did not have any recollection of that as she did not deal with payroll matters there was no positive evidence from her. We did not therefore find that to be a matter before us in evidence, although we do not consider that it could assist the claimant’s argument as it would reduce the hours worked for the rota not increase them, at least in relation to the payments he says were made.

170. The view we formed was also fortified by the terms of the Job Description read as a whole, which had initial sections headed “Quality and Regulation” and “Clinical”, and in relation to “Leadership” included some

clinical aspects such as that staff comply with the NMC Code, and by the reference to “best clinical practice” for example. That the role of the Unit Nurse Manager was primarily clinical was also the evidence of Mrs McGowan, Mr Jackson, and Mr McKie. The administrative side was less than 15% measured by time, and of that the claimant said that he spent about 1.5 hours per week on the rota, but where the evidence of others particularly Mrs McGowan was that they had understood that all of that time was taken on the rota.

171. We also considered the claimant’s evidence that finalising the rota was important, both as part of the means of providing a service to residents and more generally as part of his managerial role. In simple terms that included his sense that he was in a more senior position and not having that duty he felt undermined him. But we did not consider that looking at matters objectively that was sufficient to raise the issue to one that was material or fundamental, essentially for the reasons given above.

172. Taking all of the evidence we heard, we considered that the rota aspect of the role was not fundamental or material.

Was that potentially a repudiatory breach of contract and breach of the implied term?

173. The claimant argues in effect that how the respondent handled the matter breached the implied term. Whilst Mr McKie did know of the reverse by Mrs McGowan of her decision, that did not we consider establish a right to do such work. Mrs McGowan did so as she became aware of the claimant being unhappy about it, and that a new General Manager was shortly to be at the home and could deal with the matter, but that did not suggest that it was permanently to be the position in our view. Mr Jackson then discussed the issue of rotas with the claimant on two occasions, firstly on 26 September 2019 at a meeting of more senior staff at which the claimant was present and secondly on 10 October 2019 at a supervision meeting with the claimant alone. That was in our view a reasonable manner in which to deal with the issue, and not indicative of repudiation.

174. Separately Mrs Whitham had discussed job description duties with the claimant on a number of occasions, although no dates were given, and explained that they may not all require to be undertaken. Her evidence on that we accepted, and it contradicts the argument for the claimant.

175. Having regard to all the circumstances, including the reasons given by Mr Jackson and the meetings he held with the claimant (which we also address further below) we concluded that looking at it objectively the claimant had not proved a breach of the implied term.

If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term?

176. In our view the answer is no. For essentially the same reasons the cumulative impact of matters did not have that effect. That is as although the same point had arisen in June 2019 with Ms McGowan that was managed informally such that it was not suggested as being a permanent matter, and it was not documented at the time. She did not raise it with HR as she had not considered it a significant matter or one that was in any sense contentious at the time. We also considered the other matters that the claimant referred to in evidence, which included that he was not doing all of the role the Job Description required such as in relation to hiring of staff, conducting grievances and the like but for the reasons given above we did not consider that there was any contractual entitlement to require to do all of such duties. As stated we accepted Mrs Whitham's evidence that something in the Job Description was not always a duty that the person required to perform was not only not the position, but that she had explained that to the claimant on a number of occasions. Her evidence was as noted above supported to an extent by Ms Horne. Both of those witnesses had been called by the claimant, and we accepted their evidence on this point.

177. That the issue of rotas had arisen on two separate occasions did not in our view elevate it to one that met the statutory test as explained in authority set out above. Matters had moved on from June 2019, in particular from Mr Jackson's appointment, the discussions he had held

with staff, and his own consideration of documentation which noted issues that required to be addressed. There was, given all the circumstances, nothing objectionable looked at objectively in any way in his decision in our view. We concluded that there was not a dismissal on the "last straw" principle considering all of the evidence we heard in the round.

178. In conclusion therefore for all of these reasons we did not consider that the claimant had discharged the onus on him of proving that there had been a dismissal, and on that basis the claim under the 1996 Act is dismissed.

If so, did the respondent have reasonable and proper cause for acting as it did?

179. We answer this question out of completeness and given the position put forward by the claimant before us. If a breach of the implied term had been established we would have held that the respondent had reasonable and proper cause for changing duties to the extent that it did, such that that negates there having been a dismissal in law. The extent of the change to his duties overall was in our view reasonably limited. Whilst the perception of the claimant was genuine that is not the test in law. In our view applying an objective test firstly there was reason given which was seeking to improve the service to residents being a clinical task the claimant could perform not Mr Jackson, where each of Ms McGowan, Ms Horne and Mr Jackson had found there to be clinical matters requiring attention, but also secondly that took place in circumstances where some staff had reported to Mr Jackson concerns over the rotas that the claimant had prepared. We accepted Mr Jackson's evidence on that.

180. The claimant's position appeared to be that in light of the Care Inspectorate report all was well, and there were not any clinical matters requiring attention. He also alleged that the criticisms of him were, in summary, unfounded. But the evidence of their being genuine was in our view clear. It came primarily from Mrs McGowan and Mr Jackson, but also supported from other sources including contemporaneous records of meetings and to an extent by Mrs Whitham. There was no formal

complaint by staff, no formal performance management, and the report from the Care Inspectorate stated as it did, but none of that evidence means that the issues spoken to by those witnesses did not happen. It was said that some staff did not wish the complaint to be formal as they were concerned as to recrimination from the claimant if they did. The claimant argued that the lack of documentation was not explained by the respondent, but in our view that is not correct. It was explained that the issues were raised informally by several of the staff.

181. Ms Horne's evidence was clear that there were clinical matters that required to be addressed, in quite a sizeable number, with some of the repeat issues from previous audits. She was also clear that the claimant was the lead nurse responsible for those areas. That evidence is to be assessed in the context of a care home caring for very vulnerable residents, where the standard of care requires continually to be maintained. Her role was to carry out an audit for operational purposes, different to those by the Care Inspectorate although partly covering the same issues. She was not involved in the disputes over rotas or otherwise, and we accepted her evidence, which did not support the position that the claimant maintained.

182. Putting these two matters together making that change was both reasonable, and for a proper cause. The change was not so significant, in our view, as itself to amount to a repudiatory breach. Further, it was the kind of change that the Statement provided for in relation to a change of duties, in effect. It was proportionate having regard to the claimant's clinical role being the primary aspect of his duties, and that Mr Jackson could not undertake clinical matters as he was not a registered nurse. That there had been issues raised about the rotas gave further support to the decision and its proportionality. Taking all the evidence we heard into consideration, we did not consider that there had been a dismissal as that term is understood in section 95.

If there was a dismissal what was the reason or principal reason for the dismissal?

183. This issue does not now arise, but again we address it for completeness given the circumstances. If the Tribunal had required to determine this point we would have found that, on the hypothesis that there had been a dismissal in law contrary to our finding above, the reason for that was "some other substantial reason" being the intention to improve the service to the residents as a clinical matter, in the context firstly of concerns identified over documentation and service found in particular by Mrs McGowan and then Mr Jackson and secondly of some staff raising issues with each of them in relation to the fairness of the rotas the claimant had prepared and his interactions with them. Changes to how the home was managed internally were required to address such issues. That is in our view something that is substantial for the purposes of the section. That is a potentially fair reason.

If that reason was potentially a fair one under section 98 of the 1996 Act was it fair or unfair under section 98(4) of that Act?

184. Had we held that there had been a dismissal contrary to our actual finding we would have held the dismissal, had there been one, not unfair. Mr Jackson had raised the matter with the claimant and others at a meeting which the claimant was present at, with others, on 26 September 2019, and then again at a supervision meeting held with the claimant alone on 10 October 2019. Whilst the claimant clearly disagreed with him and made reference to the contract in the later meeting that did not cause Mr Jackson to reconsider the position. He had his reasons, as discussed above, and we consider that he was acting within the band of reasonable responses when he did so, both as to the decision he made and how he took it. The band of reasonable responses is relatively wide, albeit not without limits, and our unanimous view is that the respondent remained within it.

185. The later meeting on 23 October 2019 to address rotas amongst other matters was held when the claimant was on annual leave, but by then there had already been the two meetings referred to such that this was not a new point that had been raised. In any event he was aware of matters

on his return, and could have raised them with Mr Jackson either informally, or by raising a grievance about that had he wished to do so.

186. In our view the consultation about this point with the claimant was within the band of reasonable responses. That view was fortified by the terms of the letter of 14 November 2019 Mr Jackson sent, which offered the claimant a discussion, having held one with him that day when the claimant had been adamant that he was resigning. That meeting, and the letter offering a further discussion, gave the claimant an opportunity to reconsider his decision to resign, or to discuss it further, at a time when his resignation had not yet taken effect. The claimant did not do so, but he clearly had that opportunity as the letter confirms. That is all in our view further evidence of a level of discussion and consultation with the claimant that fell well within the band of reasonableness.

Was there a dismissal under section 39(7) of the 2010 Act?

187. For the reasons given above, we did not consider that there had been such a dismissal. The test under this section is essentially the same as that for dismissal under section 95(1)(c) of the 1996 Act, and our decision in this context is made for the same reasons as above.

If there was a dismissal, was that because of his race or ethnicity as a Romanian person in breach of section 13 of the 2010 Act?

188. Again we answer this question for completeness, and do so in the negative. There was no evidence we found that could raise a *prima facie* case that race or nationality played any substantial, in the sense of more than minor or trivial, part in the decisions the respondents took. The fact of the claimant having a particular race, being a Romanian national, and what he perceived to be detrimental conduct, is not sufficient in law. We noted that the issue of race was not raised in the claimant's resignation letter, and he did not raise it in his cross examination of Mr Jackson. It was raised in cross examination by Mr Briggs, both with Mr Jackson and Mrs McGowan, and the suggestion that race was any part of the decision was clearly and convincingly rejected.

189. The matters that he raised in his evidence, which included his view that his performance had been good, with Care Inspectorate reports supporting that, and no performance management formally had taken place, indicated to him that the removal of rotas might be related to his race. But that we considered was not sufficient to raise a *prima facie* case, as there was nothing in the evidence suggesting, or that could properly suggest, that race was a significant or indeed any factor in the decisions taken. Race does not have to be the only reason, or the principal reason, for the decision, but there was nothing we found to suggest that it was any part of the reasoning for the respondent's decisions whether consciously or unconsciously.

190. Separately we found that there was a reason given by the respondent for removing the claimant's rota role, contrary to his arguments, which was the view formed by Ms McGowan initially that there were clinical areas requiring attention by the claimant in the context of issues over the rota, and Mr Jackson's view that, in light of essentially the same concerns expressed to him, and other areas of concern he had noted on clinical matters, it would be appropriate for him to do the rotas as an administrative task rather than the claimant so that the claimant had more time for clinical issues, as addressed above. We accepted that evidence, and that distinguished this case from that of ***Bahl.***

191. The claimant relied on an hypothetical comparator, and we were satisfied that someone in the same circumstances as the claimant but not sharing his protected characteristic would have been treated in exactly the same way by the respondent. The claimant's race played no part whatsoever in the decisions of the respondent.

Alternatively, if there was not a dismissal, did the claimant suffer a detriment when changes were made to his duties by the respondent because of his race or ethnicity as a Romanian person in breach of section 13 of the 2010 Act?

192. No, for the same reasons as given above. Whilst the claimant argued that changing duties could be a detriment there was no evidence we found that that change was made because of his race or ethnicity. A comparator as described above would have been treated in exactly the same way by the

respondent. The claimant's race played no part whatsoever in the decisions of the respondent.

If any claim succeeds, to what remedy is the claimant entitled, and in that regard

(a) What losses did he suffer, or will he suffer?

(b) What is the appropriate award for injury to feelings?

(c) Has he mitigated his loss?

(d) Should any award be reduced on account of any failure by the claimant to follow the ACAS Code of Practice on disciplinary and grievance procedures?

193. This issue does not now arise.

Conclusion

194. The Tribunal therefore dismisses the Claim.

Employment Judge: A Kemp

Date of Judgment: 2 April 2025

Date Sent to Parties: 3 April 2025