EMPLOYMENT TRIBUNALS

Claimant: Mrs M Durojaiye

Respondent: St Mary's Care Ltd

HELD AT: London South, by CVP **ON:** 12-15 July 2021, 25, 26, 29 November 2021
8, 9 and 10 December 2021 (in chambers)

BEFORE: Employment Judge Barker
Mr J Hutchings
Ms N O'Hare

REPRESENTATION:

Claimant: In person with the assistance of her daughter, Ms Durojaiye
Respondent: Ms Hall, consultant

RESERVED JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. The claimant was constructively unfairly dismissed and wrongfully dismissed.

2. The respondent made unlawful deductions from the claimant's wages, including in relation to accrued but untaken annual leave and sick pay contrary to s13 Employment Rights Act 1996. The respondent also failed to enrol the claimant in a workplace pension scheme and failed in its requirements in relation to pay statements contrary to s8 Employment Rights Act 1996.

3. The claimant was not a disabled person on the grounds of anxiety and depression at the time to which these proceedings relate, but was disabled on the grounds of her back pain at the time to which these proceedings relate.

4. The respondent failed to make a reasonable adjustment for the claimant as per ss20-22 Equality Act 2010.

5. The claimant was not subjected to unlawful direct discrimination (s13), discrimination in consequence of something arising from her disability (s15) or unlawful indirect discrimination on the grounds of her disability (s19).

6. The claimant was not subjected to detriments on the grounds of having made one or more protected disclosures.

7. There will be a remedy hearing, with a time estimate of two days, on a date to be notified to the parties by the Tribunal in due course.

REASONS

Preliminary Matters and Issues for the Tribunal to Decide

1. The claimant brings claims of disability discrimination, detriment by reason of having made protected disclosures, constructive unfair dismissal, wrongful dismissal, unlawful deductions from wages, failure to provide itemised pay statements and unpaid holiday pay by a claim form presented on 6 March 2019, having commenced ACAS Early Conciliation on 28 December 2018 and ended conciliation on 11 February 2019. The Tribunal heard evidence from the claimant on her own account and from her daughter, who also acted as her mother's representative.

2. Although the events to which the claimant's claims relate cover several different jurisdictions and a period of time from 2016 to the end of 2018, the respondent only provided Ms Patel, the current managing director of the respondent's care home, to give evidence. Ms Patel only took over as managing director of the home in mid-2018 and was unable to speak to a number of the events in the claimant's complaints. This did not assist the Tribunal in making our findings of fact.

3. The disclosure exercise in these proceedings also requires comment from the Tribunal. The claimant requested a number of documents by way of disclosure which were either not provided or were provided after the final hearing had started and in advance of the resumed hearing. These included very basic personnel records of the claimant which we would have expected the respondent to be able to access and supply at an early stage in the disclosure process. The claimant's clocking-in and clocking-out records were disclosed between the end of the adjourned hearing and the start of the resumed hearing. This was despite the Tribunal making an order for their disclosure with the consent of the respondent at the case management hearing before Employment Judge Mason on 20 August 2020, to be complied with by 24 September 2020.

4. At a hearing before Employment Judge Truscott QC on 17 March 2021, the respondent accepted that the claimant was disabled by reason of her back condition. However, no determination was reached as to the period of time that the respondent considered this condition to have affected the claimant from, or whether they had

knowledge of her back pain at the time to which these proceedings relate. Furthermore, it is recorded in the "Notes and Orders" section of the record of the hearing:

> *"The claim based on disability because of anxiety and depression will not proceed as it is unlikely that depression and anxiety will qualify as a disability under the Equality Act"*

5. However, the claimant did not accept that this meant that no disability discrimination claim was being pursued on this basis. The Tribunal notes that the claimant is not recorded as having formally withdrawn this element of her claim, nor does the Tribunal file contain a judgment which dismisses this element of the claim on the claimant's withdrawal. It was the claimant's contention that she did wish this element of her claim to be determined. The Tribunal considered the information before it, including that the "Agreed Issues" section of the record of the hearing of 17 March 2021 contained the following issue:

> *"Does the claimant qualify for protection as a disabled individual? The claimant seeks to rely on depression, anxiety and back pain."*

6. On balance we conclude that the claimant did not withdraw her claim of disability discrimination on the basis of her depression and anxiety and so it was allowed to proceed. It has been determined at this hearing.

7. The claimant will say that she was subjected to numerous investigations and disciplinary processes during the time to which these proceedings relate. The first disciplinary was between September 2016 and May 2017. There was a grievance raised by her in November 2016 which the claimant will say was not dealt with. The claimant raised another grievance on 9 August 2018 which was determined and the claimant appealed against the grievance outcome on 5 November 2018, which further outcome was not provided until February 2019, two months after her resignation.

8. The claimant began work on 2 August 2000 as a carer. The respondent operates a care home. The claimant transferred to the respondent's employment by way of a TUPE transfer and was employed under considerably more generous terms and conditions than newer members of staff.

9. The claimant was suspended on 2 November 2018 having been monitored by the respondent's CCTV footage in the staff office overnight on 27/28 October and again overnight from 30/31 October 2018, having been alleged to be asleep on duty. She resigned her employment in a letter dated 7 December 2018. No disciplinary investigation had taken place at the time of the claimant's resignation.

10. The claimant will say that she was not provided with itemised payslips between September 2018 and December 2018. She will say that occupational sick pay was not paid when it was due to her due to sickness absences in January 2018, February and March 2018. She was also not paid in April 2018. She will say that deductions from her wages started in July 2016 and because she received no

payslips from July 2016 onwards, she was not aware of these deductions until May 2017. The deductions were:

i. in 2016 for two months a deduction of 6p per hour was made to her hourly rate;
ii. in January, February and March 2017 she was not paid; and
iii. that she was not paid in January, February, March or April 2018

11. The claimant has been requesting records from the respondent for a very considerable period of time. The Tribunal notes that at no point during these proceedings has the respondent disclosed the claimant's attendance records concerning dates on which she was absent due to sickness for the relevant period to which these proceedings relate or absent due to annual leave for the period to which these proceedings relate.

12. The claimant resigned with immediate effect on 7 December 2018. The claimant will say that an offer made under the protected conversations legislation in section 111A of the Employment Rights Act 1996 persuaded her that the respondent had already reached a decision to terminate her employment on the grounds of gross misconduct and that she considered this to be the final straw in a series of breaches of trust and confidence. The respondent says that the offer ought not to be admitted in evidence in her unfair dismissal claim as it is covered by s111A.

13. The respondent accepts that the claimant is a disabled person by reason of her back pain. No concession was made by the respondent as to when they became aware that the claimant suffered with a back condition and the Tribunal will make findings of fact in that regard. The claimant alleges that she is also a disabled person by reason of anxiety, but the respondent does not accept this. The respondent notes that the claimant had no diagnosis of anxiety and stress as a mental health condition until after she had resigned.

14. At a case management discussion preliminary hearing before Employment Judge Truscott on 17 March 2021 the parties spent a considerable period of time agreeing a list of issues. Finalising the list of issues was not possible during that hearing so the parties were given the task of agreeing a list of the remaining issues after the hearing which list was endorsed by the Tribunal in an order dated 19 March 2021. The parties were told by Employment Judge Truscott that whatever was agreed in his presence at the second case management hearing was a complete list, however at the start of this hearing on 12 July 2021, the claimant indicated that although the claim of harassment was not being pursued she did still want to pursue an indirect disability discrimination claim and two further issues were added to the list of protected disclosures, as well as a claim of disability discrimination by reason of stress and anxiety.

15. At the outset of the second day of the hearing the parties discussed what outstanding disclosure there was and also the fact that the initial time allocated for the hearing was going to be inadequate. It was agreed with the parties that the listed hearing time would be used for the claimant's cross-examination after which a further 3 days would be listed for the hearing to be finished. Before the hearing was to be resumed there would be orders made for specific disclosure and additions made to

the list of issues. The respondent's witness Ms Patel would be permitted to submit a revised witness statement that dealt with all of the claimant's issues and the claimant could submit supplemental witness statements to deal with the new issues.

16. The orders to be complied with before the resumed hearing of 25, 26 and 29 November 2021 were set out in a case management order. The revised agreed and final list of issues is attached to this judgement and reasons as an Appendix.

17. It is the respondent's case that a significant number of the claimant's claims are out of time. We have considered the issue of limitation in this judgment and reasons.

18. The claimant has spent much of the final years of her employment in dispute with the respondent, all of which was documented in lengthy and often repetitive detail and all of which is before the Tribunal in evidence. The evidence put forward by the parties has been considered by the Tribunal. However, if the following findings of fact are silent in relation to some of that evidence, it is not that it has not been considered, but that it was insufficiently relevant to the issues that the Tribunal had to decide.

Findings of Fact

19. The Tribunal's fact-finding was hindered in several regards in these proceedings. The first and most significant was the chaotic presentation of the evidence by the respondent, who prepared the bundle. The bundle was not in chronological order, but ran to over a thousand pages. The index was incomplete. While we accept that disclosure has happened in stages in these proceedings, and the respondent was attempting to respond to claims that were at times unclear, there was no attempt, so far as we could tell, to assist the Tribunal by ordering the bundle properly so that the documents were as a minimum in chronological order.

20. In addition, Ms Patel was the only witness for the respondent, and she did not work for the respondent for part of the time to which these proceedings relate. Her father, Mr Patel, is the designated responsible individual for the respondent when liaising with the CQC, but he did not attend, nor did Mr Kumara, the manager of the home, nor Mr Moomba, the consultant who carried out many of the meetings with the claimant and her daughter. That resulted in the respondent simply not being able to assist in answering a number of the Tribunal's questions as to what happened.

21. Furthermore, the Tribunal's conclusions are that the respondent's record-keeping for its staff is also chaotic. There appear, so far as we understand, to be no individual HR files for members of staff. None have been disclosed for the claimant. The respondent is, we understand, not able to say how much leave the claimant has taken in any particular year, due to the absence of such records, or how much sickness absence she had. There were relevant documents, such as the signing in sheets, which were not disclosed, even though the respondent confirmed that they had been in existence at the time to which the claims relate.

22. Ms Patel told the Tribunal that the signing in sheet was for the purposes of knowing who was in the building in the event of an evacuation. However, we also

heard that they would be used as substitute clocking in and clocking out records when the clocking in machine was not working, and the respondent accepted that its printouts of the machine records were incomplete due to it being out of service on occasion. It has therefore not been possible to say with any degree of certainty exactly when the claimant was in work.

23. Finally, the claimant herself was not always able to assist the Tribunal with her recollections of events. She frequently struggled to recall what had happened, particularly in relation to her wages and when she attended work and when she was absent. It is clear, and conceded by her and her daughter, that she relied (and still relies) very heavily on her daughter to assist her in making sense of working life, particularly pay and terms and conditions. However, her daughter also works and is the parent of a young child and so was not always able to be directly involved with her mother's issues with her employer, although she has certainly devoted an enormous amount of time and care in assisting her mother with her issues with the respondent.

24. Put simply, we find that the claimant and those like her who were not best placed to lobby with a disorganised and at times, entirely uninterested employer, ought not to have had to do so. There is, we find, no good reason why the respondent was not able to have a robust and well-organised system for ensuring that employees were paid accurately and on time, were able to say with certainty what absences had happened and when and were able to have disputes resolved promptly and reasonably, and received accurate and comprehensible pay slips. As our findings below will show, we have considered all the evidence before us and find that the respondent's poor management has been the root cause of several of the issues that we have had to determine. This should not have been the case.

25. However, we also accept that the claimant was, at times, not a particularly easy employee to manage. She suffered from frequent periods of ill health and was off sick for lengthy periods of time. She also took long periods of time off to spend abroad, without giving the respondent particularly much notice. She refused to attend work when asked to do so. She was unable, unlike many employees, to use a computer and, according to her daughter, has never sent an email. Her daughter told the Tribunal that her mother was only "semi-literate". However, we find that the respondent had employed the claimant for a very long period of time and that they had never been able to find a robust system for communicating with her, or managing her wages payments and keeping employee records for her accurately.

What were the wages properly payable to the claimant?

26. The claimant began work at St Mary's in 2000. At the time of her resignation, she had been employed there for 18 years. The claimant was one of the longest serving members of the respondent's staff. She was also employed under terms and conditions from when the home was run by an order of nuns, the Poor Sisters, which terms and conditions were far more favourable than those offered by the current owners of the home. Many of the more recent staff were also agency staff and so did not have the same job security as the claimant. The claimant was a member of the Unison trade union and frequently received assistance from them in relation to her

employment at the respondent. Very few, if any other staff were members of a trade union at the respondent.

27. It is the claimant's evidence that this meant that she was often the only one challenging what were often unfair practices or poor management by the respondent. She offered one example which is in the minutes of the claimant's grievance meeting of 8 August 2018, that night staff were required to attend training from 9am until 3pm the day after having worked a 12 hour night shift which finished at 8am. The claimant is recorded as having made the following comments at that grievance meeting in relation to complaining about having to attend this training:

> *"Margaret said there is this level of intimidation going on, whereby staff, really some certain staff do not have the grounds of challenging management. Margaret comes (sic) from has been transferred over with a very, very good contract and have been made aware of what her rights are. So she tells them, that's where the clash comes with her and management, she tells them it's not right for me to do this because I am required to rest for 11 hours."*

28. It is clear from the evidence before us that the claimant's relationship with the home's management was very good while the home was under the management of the Poor Sisters, but that since Mr Patel and his family took over, the claimant's relationship with the home's management has been a fractious one. The claimant's evidence and that of her daughter was that this has caused the claimant considerable stress and anxiety over the years but that she did not want to leave her job at the home because of her long-standing relationship with the residents and because it felt like her "*second home*".

29. The claimant began work with the respondent on the basis of two shifts per week, overnight Tuesdays/Wednesdays and Thursdays/Fridays, and around 2009 added a third weekly shift which was overnight Saturdays/Sundays. Although each shift was originally 12 hours long, until May 2017 the claimant was only paid for 11 hours as her one hour break was unpaid.

30. On 19 May 2017, at a return to work meeting with the respondent's consultant Mr Moomba and the claimant's manager Ms Pomona, the claimant was told that she would be paid for 11.5 hours per shift from then on as 30 minutes of her break would be paid, and 30 minutes would remain unpaid. Mr Moomba told the claimant that the reason for this change was in case she or another member of staff were required to give emergency assistance during their breaks, at least they would be paid for some of it. Ms Patel also told the Tribunal that the change in the way the respondent dealt with their breaks was because other care homes were doing so, and they needed to remain attractive to new staff. We find that this took effect from 1 April 2017.

31. Therefore the wages properly payable to the claimant were, we find, 34.5 hours per week as of April 2017 at the claimant's hourly rate, and 33 hours per week at the claimant's hourly rate for the period prior to April 2017.

32. The claimant had a contractual sick pay entitlement as a result of her TUPE transfer to the respondent which was generous; she was entitled to ten weeks full pay and six weeks at half pay. She was also entitled to four weeks' leave according to her original contract of employment, which is less than the statutory minimum entitlement. She is therefore entitled to the statutory minimum of 4 weeks plus bank and public holidays of 8 days, therefore 5 weeks and 3 days pro rata to her status as a part-time employee.

33. The claimant was offered the opportunity to join a workplace pension but the evidence before the Tribunal leads us to conclude that this was never processed by the respondent and the claimant has not received the benefit of membership of the scheme.

34. The claimant's payslips, which ought to have been provided to her on or before her pay date, were frequently late. The respondent required her to collect her payslips from the home, but if the claimant was absent from work, the respondent appeared to have no system for sending them to her. The claimant's daughter and her union representative Mr Woolgar frequently had to email several times to request payslips before they were sent to her. For example in January, February and March 2017, her payslips were late, and again when she was absent due to sickness in January and February 2018 this was still not provided to her by 1 March when her daughter emailed to ask for it.

The period to May 2017

35. The claimant has had a number of grievances and complaints with the respondent's management over the years. The period of time to which these proceedings relate began in 2016. The claimant had worked until 30 June 2016 and took annual leave to travel to the USA until approximately 28 August 2016.

36. On her return to work, she worked for one week before being suspended. A letter dated 9 October 2016 from Mona Matthew, the home manager at the time, stated that a resident had been found to have been assaulted and an investigation began as to who might have been responsible. The resident had said that the assailant was "*that bloody black bitch*" and so the respondent investigated a number of the black members of staff, including the claimant.

37. The claimant was called to an investigation meeting on 7 October 2016 with Nadine Sayir, an independent HR consultant. The claimant requested that the respondent consult the CCTV footage in the resident's room, which was found to exonerate the claimant of the charges entirely because it was apparent from the CCTV that the claimant did not enter the resident's room on the night in question. At the investigation meeting, the claimant alleges that she made disclosures to the respondent of breaches of health and safety obligations that amounted to protected disclosures. She reported "*extreme staff shortages*", residents woken too early, staff forced to use their own money to buy hygiene supplies, that carers were unskilled, that residents were isolated, and that documents to the Care Quality Commission were falsified.

38. However, following the investigatory meeting the claimant received a letter dated 28 October 2016 (which the claimant alleges was not drafted until mid-November, and which she did not receive until 14 November) which stated that the CCTV had cleared the claimant of the charges of assault, but that she was being charged with a previously un-notified count of misconduct for failing to provide personal care for the resident in question, as the claimant and another carer were the only two female members of staff on shift and the resident required care from two female members of staff. As the CCTV showed that the claimant did not enter the resident's room all night, the claimant was charged with gross misconduct during the investigation and without a disciplinary hearing. She was offered no right of appeal.

39. The letter stated:

"…considering the gravity of the nature of this investigation, I have decided only to give you a verbal warning even though your failure to care for this user is considered gross misconduct."

40. We accept that this sanction was imposed following a breach of the respondent's own procedures. Both the claimant and her union representative Mr Woolgar challenged the validity of imposing this sanction in this manner on her. Various emails were sent to the respondent by the claimant's daughter and Mr Woolgar following the receipt of this letter. These included:

a. Emails between Mr Woolgar and Ms Sayir from 17-21 November 2016, in which Mr Woolgar questioned why Ms Sayir had imposed a disciplinary sanction on the claimant during an investigatory meeting. Ms Sayir's response did not address the question, but stated *"I am more than happy to meet with Margaret to go through details of my findings. I suggest however that we leave her to first fully enjoy the wedding of her daughter and… I meet with her in December.*";

b. A letter of grievance from the claimant dated 21 November 2016, drafted on her behalf by her daughter;

c. Emails to Ms Sayir from Mr Woolgar on 9 December 2016, and to Ms Sayir and Mona (the home manager at the time) on 13 December 2016, asking why the claimant remains suspended and without pay, which were not responded to;

d. An email of 19 December 2016 from the claimant to Mona and Ms Sayir asking when her suspension would come to an end and why she had not been paid, which was not responded to; and

e. An email to Mona and Ms Sayir from Mr Woolgar on 3 January 2017 asking when the claimant should return to work, and when her salary would be rectified and payslips given to her, which was not responded to.

41. The claimant had requested a period of unpaid leave to attend her daughter's wedding in Nigeria. It is unclear from the respondent's evidence and the lack of any

HR or personnel records for the claimant whether or not the claimant's absence was formally authorised by the respondent, but it is clear that the claimant accepted that she had exhausted her annual leave for that year and so was absent as unpaid leave for her trip to Nigeria from 1 December 2016 until 6 January 2017.

42. However, the claimant became ill and was absent from 7 January 2017, being unable to fly back to the UK. She returned to the UK on 7 February 2017 and spoke to the respondent's consultant HR advisor Mueti Moomba on 9 February 2017, the contents of the conversation being confirmed in an email of the same date, in an attempt to clarify when she could return to work. The claimant also asked for Mr Moomba to confirm *"that my name has been cleared and an assurance that [if] I require any reference from work I will be provided with a good reference"*

43. On 14 February and 10 March 2017 the claimant wrote to the owner of the respondent's business, Mr Subir Patel, in an attempt to move the issues forward, as she had not heard from the respondent since speaking to Mr Moomba. She received no response to either of these letters. She was still not being paid and had not returned to work.

44. Mr Moomba spoke to the claimant on 16 March 2017. The claimant's daughter records in an email written on her mother's behalf on 6 April 2017 that Mr Moomba promised a letter would be sent immediately after the meeting on 16 March 2017 but this was not done and instead the claimant was contacted on 21st March to attend an induction.

45. The email from the claimant's daughter of 6 April informs the respondent that the claimant was being badly affected by the respondent's refusal to resolve the "*long-standing allegation*" and that this was causing her distress and anxiety which was affecting her health and that she had been signed off work by her doctor for a month. The notes were before the Tribunal and record that the claimant from 3 April 2017 to 2 May 2017 was suffering with "*low mood*".

46. On 26 April the claimant's union representative contacted Mr Moomba again in an attempt to resolve the issue of the claimant's pay. On 2 May 2017 the claimant contacted her union representative again to say that she still did not know what had been paid and had not been paid and she still did not have her payslips. She told her representative "*I need full payments of my wages so I can return back to work*".

The claimant's return to work in May 2017

47. On 19 May 2017, the claimant, her daughter, Mr Moomba and Ms Pomona had a meeting about the claimant's return to work.

48. The meeting was very long and covered a considerable period of the claimant's recent history with the respondent. The respondent's agent, Mr Moomba, revealed that the months since October 2016 had been difficult for the respondent. Events included the previous manager, Mona, having left on 16 December 2016 but the claimant had not been aware of this. Therefore, emails sent to the respondent in December 2016 had gone largely unread. More significantly, the local council had imposed what was described as an "embargo" following which the respondent "*had*

not been trading for the past how many months" according to Mr Moomba, due to concerns over the quality and safety of the care.

49. Both Mr Moomba and Ms Sayir were external HR consultants. Mr Moomba told the claimant that he had been brought in by Mr Patel to "*fix my home*".

50. The claimant's daughter went back over the claimant's history of difficulties at work. They also discussed how changes were going to be made moving forward. It was agreed that the claimant would return to work and would work in a different wing – Jasmine - of the home so that there was no danger of a repeat of the claimant being falsely accused by the abusive resident as she was in 2016.

51. The impact of the allegations, investigation, suspension, sanction and delay on the claimant and her mental health were discussed. The claimant reported the extent of her anxiety. This had already been raised in emails to the respondent during her absence from work including on 27 March 2017. The respondent also knew that the claimant's absence from work in April 2017 was due to her blood pressure being very high and issues with her mental health.

52. The staffing levels and responsibilities on the new wing were discussed. An arrangement was put in place that the nurse in charge would go over the claimant's work at the end of every nightshift to verify that there were no problems with it. The claimant was told about the increase in pay that was introduced in April 2017 so that half an hour of her break would now be paid, meaning that in a normal working week she would receive an hour and a half's extra pay.

53. The claimant did then return to work on 23 May 2017 and signed a supervision contract in June 2017. At her supervision meeting in June 2017 she reported that things were better and she was happy to be back at work.

54. The period from the summer of 2017 to January 2018 was relatively unremarkable. The claimant, so far as the Tribunal understands (although the evidence was at times unclear on this issue) did not report the need for any sleeping tablets between May 2017 and March 2018. The claimant however told the Tribunal during these proceedings that after her supervision in June 2017 the respondent's staffing on Jasmine wing deteriorated to the extent that it caused her stress and anxiety, in that she believed there were not enough staff for the number of residents and too much work for each carer.

The Claimant's Sickness Absence in Early 2018

55. The claimant was absent due to sickness in January and February 2018. She was ill with a cough and sinus issues but subsequently contracted a clostridium difficile (C-Diff) infection in mid-February 2018. She initially self-certified and was subsequently signed off by her GP with a series of sick notes. The self-certification and sick notes covered the period 6 January 2018 to 7 March 2018.

56. The claimant's daughter contacted Mr Moomba by email on 23 February confirming that the claimant was still off sick and was not expected to return to work imminently. However, the claimant's daughter told Mr Moomba that the claimant had

11 days annual leave outstanding that she wished to take before the annual leave year expired on 31 March, as soon as she was well enough to do so. She also requested that she be sent the claimant's payslips by email as she was not able to collect them from the premises.

57. On 1 March 2018 the claimant's daughter wrote to Mr Moomba and Mr Kamara and informed them that the claimant's sick note had been extended to 7 March, but that she was formally requesting that she be allowed to take her annual leave from 8-22 March 2018. She also reminded them in that email and in an email sent the next day to the same recipients, that the claimant had still not been sent her payslips for the period of her absence.

58. On 7 March the claimant's daughter emailed Mr Moomba to inform him that the claimant would be returning to work the following day as her period of sickness had ended and her GP had said she was clear to return to work. Mr Moomba did not respond until 6.08pm the following day, which should have been the claimant's working day, to ask if the claimant could attend a return to work meeting the following day (Friday 9 March) "*owing to the length of time she has been off*." No indication was given as to whether the claimant was to be paid for the shift she would have missed overnight on 7 March.

59. On 9 March after her meeting, the claimant (via her daughter) emailed Mr Moomba to ask for further information on her mother's behalf. The email notes that Mr Moomba had requested that the claimant have a stool test to show she was clear of C-Diff before she returned to work. However, it is clear from the email and the respondent's subsequent response that although the respondent required that the claimant have the test, they did not provide her with any assistance in doing so (for example, via an occupational health provider or a private clinic). Instead, she was obliged to ask her GP for a test to be done via the NHS. The email also noted that the claimant had secured an appointment with her GP on 12 March but that the claimant needed a letter from the respondent for the GP, which set out why the respondent needed to access the claimant's medical records and what test they needed to be carried out and the reasons for it.

60. The claimant's daughter also asked that the respondent confirm that the claimant would be paid for the "waiting period" from 8 March, as in her opinion the GP had declared the claimant fit to return to work and it was the respondent's additional requirements that were preventing this.

61. The response from Mr Moomba, which was sent also on 9 March, was inadequate in this regard. He simply states:

> *"Please find the letter attached as per your request. I hope it has been clear enough in what we are seeking as I have a lot of experience in this area and know what C Diff can do to the vulnerable elderly clients we have. I also just want to make sure that Margaret is fit and healthy to return to work as she has had over 16 weeks of sickness in the past 12 months."*

62. No mention is made of the claimant's wages. In an email in response, the claimant's daughter notes that the results of the test will take 5 days to come, and

given this, could the claimant have confirmation on how she would be paid "*since you authorised her absence to retake another stool test*".

63. In his response on 12 March, Mr Moomba stated

> *"I am struggling to understand your insinuation that I authorised her absence. No, I merely requested that the GP to confirm Margaret could return to work safely without putting anyone in the service at risk. It is well within my duty to do so, I have never said nor written anything to say it was authorised or paid absence, I even made this very clear in my last email."*

64. We note that this response was typical of many of the dozens of communications we have been referred to from the respondent to the claimant and her daughter regarding pay. We find that the respondent did not take sufficient notice of their obligation to pay the claimant's wages. The email exchanges set out above are illustrative of this attitude. The claimant's GP had cleared her as fit to return to work. The respondent wished her to take an additional test. The respondent made no provision for this test to be performed quickly and placed that responsibility on the claimant and her GP. Having done so, and noting the inevitable delay that this would cause to the claimant's return to work, the respondent's agent bridled at the suggestion that the claimant should be paid during this waiting period. This is, we find, a clear example of the respondent's cavalier attitude to their obligation to pay wages to their staff.

65. Subsequently, two representatives of the claimant's union attempted to liaise with the respondent, in order to ensure that the claimant was paid and that she was given an indication of when she could return to work. Contact was made by the union on 13 March, 28 March and three times on 4 April. Contact was also made by the claimant's daughter on 26 March (when the claimant's test result was sent by email and which result was negative), 3 April and twice on 6 April. During this time there was also protracted email correspondence between the claimant's daughter, the union and the respondent which attempted to address the issue of the shortfall in the claimant's wages from the previous year.

66. Eventually an agreement was reached that the claimant would be put on the rota to work on 7 April. Prior to this, the respondent's consultant Mr Moomba had said on 9 March that the claimant could not return to work until she had done a stool test and been confirmed to be free of C-Diff by her GP. By 13 March, when it was being argued that the claimant should be paid for her continued absence, Mr Moomba's emails changed the instructions to the claimant from requiring her to obtain a stool test, to stating "*Her GP did not sign her to return to work otherwise I would have had no problem for her to come straight back into work. The GP had an option to see her before returning to work but choose not (sic)*."

67. On 23 March, while the test results were still awaited, he wrote "*The whole thing is being prolonged by the GP. She could easily write a letter to indicate Margaret can come back to work just like she was able to sign her off sick*." This suggests, we find, that Mr Moomba misunderstood the process of sick notes and recovery from illness and also that he was being disingenuous about what had been

required from the claimant. Even after the negative stool test result was sent in on 26 March, he failed to communicate with the claimant.

68. On 4 April he wrote to the claimant's union representative Mr Woolgar: *"We called Margaret yesterday in the presence of 2 staff and she never picked up the call nor called back*." Given that the primary method of his communication had been via email, the claimant's daughter responded on 6 April to question why a follow up email had not been sent on 4 April if her mother had not picked up the phone. No response was made by Mr Moomba to this question, but he responded to the claimant's daughter to say that "*I will get Sindhu to call you tomorrow to discuss the rota*." The claimant's daughter asked whether communication could be with her by email instead.

69. Finally, on 6 April, Mr Moomba wrote to the claimant's daughter and said, "*Margaret can commence work from tomorrow Saturday 7th*" and the claimant did resume work that day.

70. We find that the claimant ought to have been paid in full for the period from 8 March to 7 April, as she was available to work and was following the respondent's instructions as to the conditions for her return. The respondent could have speeded up her return by accepting the GP's initial indication of her fitness for work or by arranging a private stool test, which would have been quicker in all likelihood, but they did not, and they have no entitlement to deduct from the claimant's wages for that period of absence. The claimant also ought to have been given payslips by some method that would have allowed her to access them while absent, such as by post or to her email account that was operated by her daughter. The respondent failed to provide the claimant with itemised pay slips in good time.

71. The claimant was not granted her annual leave. She was eventually told that she had not provided the respondent with the required 4 weeks' notice to take leave, and the leave year ended without her having been able to take her full entitlement.

72. During this period in March, April and May 2018, the claimant's daughter was engaged in ongoing discussions with the respondent's staff at this point about underpayment of the claimant's wages. The claimant's daughter and the claimant's union representatives, notably Mr Woolgar, told the respondent that the claimant was entitled to enhanced contractual sick pay as she had legacy terms and conditions from before the respondent took over. The respondent refused to pay the claimant occupational sick pay without seeing a copy of the original staff handbook that contained these terms.

73. Mr Woolgar took issue with this and told the respondent that the entitlement of long-serving staff members to enhanced sick pay had already been established a considerable time ago. It is the claimant's case that the respondent was seeking to avoid or delay paying her contractual sick pay because of the amount of sickness absence she had taken. We accept the claimant's evidence in this regard. The respondent had been in charge of the home for many years at that point and the claimant had been in receipt of enhanced sick pay on previous occasions. Requests for a copy of the original handbook in April 2018 were, we find, evidence of an attempt to avoid or delay payment to the claimant.

The Claimant's Complaints About PPE and Staffing levels in 2018

74. The claimant raised complaints about the suitability of the respondent's personal protective equipment (PPE) on several occasions, four of which she asserts amounted to protected disclosures:

a. to the home manager Mr Kamara and Mr Moomba on 7 April 2018 that the PPE was not fit for purpose;

b. 23 April 2018 to manager Anca Pomona that the PPE was not fit for purpose;

c. to Mr Kamara on 27 April 2018 that the PPE was not fit for purpose; and

d. on 8 June 2018 that she sent Mr Moomba and Mr Kamara photographs of the unsuitable PPE and the purchased PPE to show the difference.

75. We find that on 14 May 2018 she disclosed that she and other staff were having to buy their own PPE and supplied photographs of herself to Mr Moomba, Ms Chibanda and Mr Woolgar in her own PPE and in the respondent's PPE. The claimant told the Tribunal that because the aprons she was given to wear tore at the slightest pressure, this increased her anxiety and would cause her to twist her back in an awkward and uncomfortable way when assisting residents. These photographs were sent by the claimant again on 16th May to Mr Kamara, when she requested a meeting with him about it.

76. The claimant complains to this tribunal that she was "disciplined" for making this complaint which she says amounts to a protected disclosure. However, we note that Mr Moomba's response was not to discipline her but to question why the claimant was taking photographs on duty, which was prohibited.

77. We note that subsequently the claimant was provided with PPE of a higher standard, but we do not find that the claimant has established on the balance of probabilities that the initial supply of PPE was inadequate.

78. On 4 and 14 May and 25 June the claimant bought and submitted receipts for the purchase of her own PPE equipment, which came to £47.37 in total. The Tribunal was at times told by the claimant and her daughter that this was never repaid. At other times the claimant's evidence was less clear. The respondent's case is that this was repaid. No receipts or confirmation of payment in any documentary form is before the tribunal. The respondent's case was that the claimant would have been given cash. The respondent's only witness Ms Patel was not party to the repayment. We find on the balance of probabilities that the claimant was told to purchase her own PPE, did so, requested repayment by submitting receipts as directed but was not reimbursed.

79. We accept that the claimant made complaints about the PPE provided to her to the respondent on 7, 23, 27 April and 14 and 16 May 2018. We accept that she believed that this was a disclosure of information which was in the public interest, as we find that she was motivated to ensure that the residents received the best care and that she and others were not subjected to unnecessary risk of infection. We also accept, although we do not agree, that the claimant's belief was that this was a breach of health and safety requirements, and that the claimant's belief was reasonable in this regard due to the difference in size and quality of the PPE.

80. We do not find that the claimant made any protected disclosures on 8 June 2018, despite this assertion in her list of issues. The evidence before us was that this was not a notable date in these proceedings and that allegation may have been dated in error.

The Claimant's grievance in June 2018, disclosure about staffing levels in August 2018 and the grievance gearing in August 2018

81. The claimant's daughter wrote and submitted a letter of grievance on her behalf to Mr Subir Patel on 26 June 2018. In it, she complained about all of the issues raised in these proceedings up to that date, including the imposition of the disciplinary sanction at the investigatory meeting in 2016, the excessive delay in her return to work in 2017, the issues with her sickness absence in 2018, her complaints about staffing levels and resident care, her complaints about the adequacy of PPE and about the ongoing underpayment of wages, holiday pay and sick pay, and the respondent's failure to set up her workplace pension.

82. The claimant approached ACAS for the first time to begin pre-claim early conciliation on 24 July 2018.

83. A grievance hearing was convened on 9 August 2018 and an external consultant, Joy Vasoodaven, was commissioned to conduct the investigation and produce a report. Ms Nirva Patel at this stage was present in a note-taking capacity and introduced herself as "*working in admin*". The claimant attended with her daughter and Sam Ferman, an officer from her trade union. The meeting lasted for almost 90 minutes. As part of the hearing, Ms Vasoodaven summarised the claimant's complaints into a list of eight issues, with the claimant's agreement. The claimant does not allege that this grievance was a protected disclosure.

84. On 14 August 2018 the home was subject to an unannounced inspection by the Care Quality Commission (CQC). The evidence from Ms Patel, which was unchallenged by the claimant, was that this was because a member of staff blew the whistle to the CQC over staffing levels. Ms Patel told the Tribunal that she had considered this whistleblower to be the claimant. The claimant and her daughter told the Tribunal that it had in fact not been the claimant who had blown the whistle. Nothing turns on whether or not the claimant did contact the CQC on this occasion but we accept that Ms Patel believed that she did at the time.

85. On the night of 14 August 2018 the claimant was instructed by the nurse on duty that night to provide care on another floor of the home. The claimant refused as she was providing care for a different resident at the time. The claimant's evidence at

the time, and again at this hearing, is that part of the arrangements of her return to work in May 2017 was that she would be stationed on Jasmine Wing only. The assistance requested was to be given in a part of the respondent's home not on Jasmine Wing, and the claimant insisted on abiding by the terms of her agreement from May 2017. Her reasons for this was that she was concerned that she would be punished for neglecting her resident had she left to go outside Jasmine Wing.

86. On 16 August 2018, the claimant had a meeting with the then home manager, Ms Chibanda, about the events of 14 August. The respondent had received a complaint from the relative of a resident that he had been obliged to provide personal care for the resident because the claimant had refused to assist. The claimant told the Tribunal that at this meeting she disclosed to Ms Chibanda that the respondent's home was short-staffed, contrary to CQC requirements and that residents were neglected because of this. She asserts to the Tribunal that this was a protected disclosure. She also asserts that she told Ms Chibanda that staff were fearful to raise concerns due to a fear of dismissal.

87. ACAS early conciliation ended on 21 August 2018. However, no claim was presented to the Tribunal until these proceedings were issued after further ACAS early conciliation on 28 December 2018. However, we find that it would have been clear to the respondent that the claimant's relationship with the respondent was deteriorating as of July and August 2018.

88. Ms Vasoodaven's report providing the outcome of the grievance was significantly delayed. The claimant did not receive it until 27 September 2018. The claimant's grievance was only upheld in relation to her having been denied mandatory training and annual leave and having suffered deductions from her wages. All other complaints were not made out, according to Ms Vasoodaven.

The Claimant's accident in September 2018 and her complaints about her chair and workstation in 2018

89. The claimant had an accident at work on 11 September 2018. It is the claimant's evidence that she had been complaining to the respondent about the chair provided to her for several months at the time of her accident. The chair that the claimant had been using during her night shift was a moulded stackable green plastic garden chair with plastic legs. The claimant provided photographs as part of her evidence to this Tribunal of the chair in question. The photographs also indicated that there was another chair in the office next to the garden chair, which was a standard grey moulded plastic office chair with metal legs. The claimant was asked during the hearing why she did not use the grey office chair to sit on but did not give a clear answer as to why but indicated that she considered the other chair to also be unsuitable for sitting in for longer periods of time.

90. The claimant also told the Tribunal that she had attempted to take a more comfortable chair from the home's reception area but had been prevented from doing so because on a subsequent night shift she discovered that a makeshift wooden gate with a bolt had been placed across the end of the reception area, meaning that she was not able to remove the chair from the reception desk.

91. It was the respondent's evidence, given by Ms Patel, that the claimant or another member of staff must have brought the green plastic chair in from the garden to sit on, as these chairs were not provided by the respondent for staff to use in the office. Her evidence was also that the claimant should not have been sitting for long periods of time during the night shift in any case, as she would have been conducting ongoing checks on residents and going to answer call bell alarms. Any writing up of notes, Ms Patel said, was to be done at a makeshift table in the corridor and not in the main office.

92. On the night of 11 September 2018, the claimant sat down on the plastic garden chair in the nurse's office, and it gave way beneath her. She fell to the floor and became wedged between the workstation and cupboard and injured her lower back and left leg. She reported this to the nurse on duty at the time and completed an accident report. The claimant was subsequently signed off work sick for two weeks.

93. On 22 October 2018, the claimant appealed against the outcome of her grievance, which had been provided to her on 27 September 2018. The claimant did not receive all parts of the external HR consultants' report (largely in the form of missing appendices) until 15 October and indicated that she would not be able to issue an appeal until after that had been received.

94. The claimant appealed against each of the decisions of Ms Vasoodaven which did not uphold her grievances and added further complaints about the incident of 14 August and the meeting of 16 August and the claimant's accident on 11 September. She also complained that the notes taken by Ms Patel "cherry picked" the evidence and were not an accurate reflection of the actual conversation that took place at the hearing. An appeal hearing took place on 5 November 2018, conducted by another third party consultant engaged for that purpose, George Hickman. His report was eventually sent to the claimant by Ms Patel on 7 February 2019. The claimant asserts to the Tribunal that her "*disclosure to George Hickman about everything that [she] had been saying*" was a further protected disclosure.

95. The claimant's evidence to the Tribunal is that she made a protected disclosure to Mr Kamara about the workstation on Jasmine wing on 24 October 2018, showing him a photograph of the unsuitable chairs. She told him that the chairs provided caused damage to her back and that of other staff. Mr Kamara is alleged to have told the claimant that she was the only member of staff complaining about the workstation.

The events of 27/28 and 30/31 October 2018

96. The claimant was notified on 26 October 2018 that her appeal hearing had been scheduled for 5 November 2018. The claimant, we accept, told Ms Chibanda in her grievance appeal letter of 22 October 2018 and Ms Patel by email on 26 October 2018 that she was using prescribed sleeping tablets.

97. It is the claimant's evidence to the Tribunal that when she arrived for her night shift on 27 October 2018, she had been put on the rota with a member of staff, Gloria, who usually worked during the day and was unfamiliar with the duties of the

night staff.

98. On 30 October 2018 the claimant was called on her mobile phone by the respondent, to inform her that she should not attend work that night as she was instead to attend a meeting at noon on 31 October to investigate her second and new grievance raised, which was that the respondent failed to notify her promptly when it became aware of a breach of the claimant's personal data. However, the claimant's evidence, which we accept, was that she decided to go straight to work and arrived two hours early, not knowing that she had been instructed not to attend. On arriving at work, she spoke to Ms Chibanda. The claimant's daughter telephoned the home at 8pm to pass on the message that the claimant should not be in work. However, the claimant and Ms Chibanda agreed that as she was on the premises, she would stay and carry out her shift.

99. The claimant's evidence, which we accept, was that she was again paired with Gloria. She told the Tribunal that she began to feel dizzy after a while and went to see the nurse on duty, who took her blood pressure and noted that it was very high. The claimant was given paracetamol and returned to Jasmine wing. The claimant's undisputed evidence was that "*I had been using sleeping tablets*". In fact, the claimant's daughter's evidence, which was again undisputed, was that the claimant had gone to her GP on 26 October 2018 and had been given an increased prescription for sleeping tablets.

100. The claimant's evidence and that of her daughter, which we accept, was that Ms Patel and Ms Chibanda knew that the claimant was taking sleeping tablets as of 26 October 2018. The claimant has not established, and the respondent has not provided any other evidence, to establish whether the respondent knew that the claimant was taking a higher dose of sleeping tablets as of 26 October 2018.

101. On 2 November 2018, as the claimant was about to leave the home at the end of her shift, she was stopped by Mr Kamara to say that she was to be suspended, as she had been found to be sleeping while at work, via CCTV. It was the claimant's assertion to the Tribunal that she had been "*set up to fail*" because "*I was the only one they monitored on CCTV*".

102. We do not accept the claimant's evidence that she was the only one monitored on CCTV. This is not made out on the evidence before us. As early as 2016 in relation to the misconduct allegations against her at the time, the claimant is noted as having said that CCTV monitoring was carried out in relation to all staff. She was therefore aware, and had been for some considerable time, that staff were monitored by CCTV. It was also the claimant's evidence and that of Ms Patel, that Gloria was also found to be sleeping on duty at the same time and that she was due also to have been disciplined but instead she resigned before that happened.

103. The claimant's evidence, which we accept, was that "spot checks" on staff were rare and only happened a couple of times a year, and there had already been two that year. Ms Patel alleged that she had reason to examine the CCTV for those nights because nursing staff found patients soaked in urine having been not attended to on those nights. This information would, we find, have been recorded in patient notes and we also find that Ms Patel or the other responsible person on duty

would have made a note of any conversation where this was reported to management. However, the respondent has disclosed no evidence whatsoever in this regard and we find on the balance of probabilities that we do not accept Ms Patel's evidence that concerns over the claimant's conduct were reported to her by the nurses or the day staff. We find that she examined the CCTV because she became aware that the claimant was taking sleeping tablets.

104. Ms Patel did, however, tell the Tribunal during her evidence that she had reason to dismiss several members of staff after the claimant's dismissal for sleeping on duty and that she accepted that this was not uncommon. We find that the respondent had developed a tolerance to staff sleeping on duty which it subsequently decided to take action on. However, the claimant was not warned in advance that such action would be taken or that checks would be carried out in future. Nevertheless, having viewed the respondent's CCTV footage during these proceedings we accept that the respondent did reasonably conclude that the claimant was asleep on duty and that she should not have been.

105. The claimant alleges that Mr Kamara and "Samet" were laughing at her on 2 November when she was told she was suspended. The respondent has provided no witnesses from that time to dispute the claimant's allegations. Ms Patel at best was only able to say that she thought this unlikely and that she was not able to identify who "Samet" might have been. On the balance of probabilities we find that the claimant has consistently maintained that Jonathan Kamara and "Samet" were laughing at the time, but has not established that this was because of her suspension. We find that the person alleged to be "Samet" was Samit who is described by Mr Kamara in an email of 30 October 2018 as being the person who "*sorts out the rota*".

106. Separately on 2 November 2018, the claimant's daughter wrote on her mother's behalf to the respondent with a subject access request, requesting copies of all electronic timesheets from Jan 2016 to October 2018, the *"incident report of 11th September 2018"* and CCTV footage of her on the night shift from 2 October 2018 to 2 November 2018.

107. The issue of the claimant's alleged misconduct for sleeping on duty was never investigated as part of a full disciplinary process. Following her suspension on 2 November 2018 she was written to by Mr Kamara, the home manager on 5 November 2018 and told that she was on suspension for

> "*breach of company rules and procedures namely Care Standards Procedures in respect of the care of vulnerable service users/residents. Further being that it is alleged that on 28 and 31 October 2018 you failed to provide for the care and wellbeing of vulnerable service users when you acted in the capacity of night carer in that you were found to be asleep whilst on duty."*

108. She was told that her grievance appeal hearing, and separate grievance hearing would take place first and that there would be no investigation into the disciplinary matter until this had been done. The claimant and her daughter, along with Jack Philips from the claimant's trade union, attended the grievance appeal

hearing conducted by George Hickman on 5 November 2018, who was an external consultant engaged by the respondent.

Admissibility of evidence of the "protected conversation" under s111A Employment Rights Act

109. An offer of settlement was made to the claimant of £3000 on 12 November 2018. The offer was made by George Hickman to the claimant's union representative Boyana Petrovich and was of £3000 to resign by way of a settlement agreement. The claimant was told that she did not have to accept the settlement offer, but that if she did not, the respondent was (as the claimant put it) "*looking toward gross misconduct with the possibility of dismissal*" because the claimant had, according to the respondent, been seen sleeping on two separate occasions while on duty.

110. It is the respondent's case that this was a "protected conversation" under s111A Employment Rights Act 1996 and as such, evidence of it cannot be considered by the Tribunal in relation to the claimant's unfair dismissal complaint. S111A has no application to discrimination complaints and so this evidence may be properly considered in relation to the claimant's discrimination complaints and her complaints of detriment by reason of having made protected disclosures. Evidence of pre-termination settlement conversations may be admitted in a complaint of unfair dismissal if there is evidence of "improper behaviour" on the part of the respondent.

111. We find that the manner in which the offer of £3000 was made to the claimant was improper behaviour on the part of the respondent, for the following reasons. The settlement discussions were conducted before any disciplinary investigation had started and the claimant had not been given access to the CCTV footage on which the respondent relied. We accept the claimant's evidence that she was told that she "would" face dismissal because she had been caught sleeping on two occasions while on duty, if she did not accept. We accept that she considered herself to be under considerable pressure to accept the settlement and that if she did not she would not be given a fair disciplinary hearing, because the respondent had already made its mind up about the charge of sleeping on duty.

112. Ms Patel's evidence was that the £3000 had been an opening offer and not an ultimatum. She said that the claimant responded to the offer with a request for what she considered to be an outlandish six-figure sum. Her evidence was that as the claimant's request was so unreasonable, she did not consider there to be any point in continuing to discuss matters with her and so she did not continue the discussions any further. We find this to be evidence that the discussions were indeed an ultimatum and not a negotiation as no proper negotiation took place. The respondent could, as is usual practice when negotiating, have responded with a slightly increased offer or alternative inducements for the claimant to consider accepting, but they did not. They made a low offer to the claimant and walked away from any further discussions. There were also no assurances given by the respondent that the claimant could reject the offer and continue with the disciplinary investigation. This is improper behaviour and the evidence of this conversation is therefore admissible in these proceedings and has been taken into account in our determinations.

113. The claimant, as already indicated, became concerned as a result of the offer

of settlement that the respondent had already made up their mind to dismiss her and that they would therefore not follow a proper process. She considered this to be an ultimatum with a threat of dismissal and did not accept it when it was made.

114. In a letter dated 3 December 2018 she was invited to an investigation meeting on 7 December 2018 at 8pm. Her first subject access request of 2 November and her second, more specific subject access request of 14 November had not been complied with at that point. Furthermore, despite assuring her in the letter of 5 November 2018 that no disciplinary investigation would go ahead until her grievance and grievance appeal had been determined, the letter of 3 December indicated that this would not be the case. The respondent had also refused to provide her with any CCTV footage by this point. In Mr Kamara's letter of 29 November, he requested an extension of time to February 2019 to comply with the narrowed-down request for it and the other items in the subject access request.

115. The claimant was also aggrieved that her disciplinary hearing was at 8pm on a Friday, which was not a working day of hers and which was at a time outside the normal working day when she was concerned she would not be able to have anyone from her union available to represent her.

116. The claimant resigned by letter with immediate effect on 7 December 2018. Her reasons for her resignation were stated in the letter to be "*as my employer you have behaved so poorly towards me that I have no choice but to resign… this is the last straw in the series of breaches and I consider this to be a fundamental breach of trust and confidence in you as my employer.*" The claimant specified the issues around pay, disciplinary sanctions in 2016, refusal of her annual leave 2017/2018, the recent grievance which had not been completed, the refusal to provide the information requested by the subject access request, and the suspension from work due to sleeping on duty. Her letter concluded by noting that she was resigning "with immediate effect" and asked for her outstanding 5 weeks' annual leave to be paid for her. The claimant told the Tribunal that she also resigned because the offer of £3000 indicated that the respondents had already decided that they would dismiss her no matter what and so a disciplinary process would have been pre-judged.

117. Ms Patel's email in response, dated 14 December 2018, said simply:

> *"Received.*
> *Payments for annual leave will be arranged.*
> *Kind regards"*

118. There followed an exchange of emails between the claimant's daughter and Ms Patel in connection with the annual leave payments to be made. The claimant's daughter said that the claimant would refuse to accept any overpayments and wanted only the exact amount due to be paid. The claimant was paid £2767.61 and her annual leave was said to be £1302.48. Ms Patel said "*any outstanding monies owed to you have also been sent in a separate transaction*." There followed a dispute via email whereby the claimant asked to pay back monies overpaid and refused to accept them.

119. Ms Patel then sent a letter dated 28 December 2018 to the claimant in which

she appears to move back from her email of 14 December. In the later letter, she states,

> *"I believe that you may have mistook (sic) my acceptance of receipt of your resignation letter as my acceptance of your resignation. The monies sent to you was an administration error, I apologise for this."*

120. The letter offers the claimant the opportunity to retract her resignation and for both of the parties to address "underlying issues in respect of your employment". The claimant is then offered the opportunity to "*raise a formal grievance within 7 days*" so that arrangements can be made for a "*formal meeting in line with our procedures*".

121. We find that this letter was not a genuine attempt at resolving the issues that caused the claimant to resign. Instead, we find that this was in all likelihood written on the advice of the respondent's HR consultants or other professional advisors, in order to limit the risk of an adverse decision against the respondent in the event that the matter progressed to litigation. The respondent already knew that the claimant had been to ACAS early conciliation once earlier in 2018 and so it would have been quite possible that she would do so again.

122. We find that on the balance of probabilities, Ms Patel's earlier email of 14 December 2018 was far more reflective of the respondent's attitude to the claimant. Indeed, Ms Patel emailed once more on 18 December where she confirmed the amount calculated by way of outstanding holiday pay and other monies.

123. Although we accept that there was evidence that the claimant may have been asleep on duty when she should not have been, we find that the respondent seized on the opportunity that this presented to dismiss the claimant and applied pressure on her to accept the settlement offer of £3000. The claimant knew that this was the respondent's attitude, and this was, we find, the breach of trust and confidence that caused her to resign on 7 December 2018.

124. The claimant was provided with the outcome of her grievance appeal on 7 February 2019, two months after her resignation. The outcome was that all of her grounds of complaint were dismissed.

The claimant's illnesses/disabilities and the respondent's knowledge

125. The respondent accepts that the claimant was a disabled person in relation to her back condition. The respondent presented no evidence to counter the claimant's claims that she was disabled at the time to which these proceedings relate, and we accept on the balance of probabilities and considering the disability impact statement and her medical evidence that she was disabled at the time to which these proceedings relate.

126. The respondent does not accept that the claimant was so disabled by reason of her mental health. The evidence that was before the Tribunal concerning the claimant's mental health issues consisted of her medical notes from her GP and a number of reports and letters to do with her engagement with therapeutic services for anxiety and stress, however these were all from the period after her employment

with the respondent ended. For the purposes of considering whether the claimant was disabled by reason of anxiety during her employment, these cannot be considered as they post-date her employment with the respondent.

127. The claimant's disability impact statement has been carefully considered. It is three pages long and contains a significant amount of information about the claimant's back condition, but only one short paragraph about her mental health condition, which states:

> *"I also suffer from associated conditions of Anxiety and Depression termed as mental impairments developed as a result of work related stress for which I was signed off from work on 3 April 2017 as "Becoming Depressed" and "Low mood". These associated problems also contributes to the intensity of my Back Pain."*

128. The amended particulars of claim also state about the claimant's anxiety issues that her anxiety and depression developed during her 9 month suspension from work between September 2016 and May 2017. On her return to work the respondent agreed, as stated earlier in this judgment, to accommodate her on a different wing and with bi-monthly supervisions to monitor this. The particulars of claim make reference to a referral to "Talking Therapies" for anxiety in November 2018 but the medical evidence in the bundle indicates that the claimant's issue of anxiety and particularly sleeplessness was not consistently present during the period to which her claim relates.

129. The claimant's evidence as to when she was and was not taking sleeping tablets was unclear. Her medical notes state that she was prescribed sleeping tablets by Dr Saif, who she last saw in September 2017. In April 2018, in relation to the issue over her C-Difficile infection and the dispute over her test results and return to work, she describes becoming stressed and having difficulty sleeping, but the GP recommended she try an over-the-counter remedy such as Nytol, and take some more exercise. She was not prescribed any sleeping tablets until August 2018. In between these dates she informs the GP (for example in July and September 2017) that she was happy to be back at work and was feeling much happier. The GP reports that she "*looks more relaxed*".

130. In terms of what had been reported to the respondent about the claimant's anxiety, we find that she told Mr Moomba in May 2107 that she had been on sleeping tablets The claimant was also on sleeping tablets as of September 2016, and suggests that she told Ms Sayir about this during her investigation, although there is no evidence in the records of the investigation that this was made known to Ms Sayir. In her initial supervision meeting in June 2017 with Anca Pomona, the claimant made clear to Ms Pomona that the events of September 2016 onwards had caused her great stress and anxiety and affected her sleep, but there is no evidence that this problem persisted once she had returned to work on Jasmine Wing in June 2017.

131. There is no evidence that her anxiety persisted to the extent that if affected her sleep or had a substantial adverse impact on her normal day to day activities after that date until the issues arose again in April 2018, that prompted the claimant's

return to her GP for assistance and the GP's suggestion that she try an over the counter medication and exercise. There was no evidence before us of any underlying mental health condition that would have made it likely that the claimant's issues of anxiety and low mood would have been likely to recur in the future.

132. We accept that the issues she had with the respondent would have been difficult and stressful for her, but her stress, we find, was a reaction to events at work and did not amount to a substantial and long-term mental health condition during the period to which these proceedings relate.

133. On the balance of probabilities we therefore do not find that the claimant was "disabled" within the meaning of s6 Equality Act 2010 by reason of her mental health.

What leave did the claimant take during her employment and what holiday pay and wages are owed to her?

134. Because of the application of section 23(4A) Employment Rights Act 1996, the Tribunal can only consider unlawful deductions from wages claims for the period of two years before the date her claim was presented to the Tribunal. Therefore unpaid wages can only be recovered for the period 6 March 2107 onwards. As the Tribunal has no jurisdiction to consider earlier claims, we have not made any findings of fact for the claimant's entitlement to wages for the period before 6 March 2017.

135. By way of background, and as described above, the claimant was on paid suspension from 9th September to 28th October 2016. She did not receive notification until mid-November 2016 that her suspension had been lifted. On 18 November 2016, Ms Sayir told the claimant to leave coming back to work until after holiday to Nigeria. The claimant then travelled to Nigeria but on her return was off sick between 6 January and 7 February 2017.

136. The claimant's occupational sick pay entitlement ran from April to April each year and entitled her to 10 weeks on full pay and 6 weeks on half pay for sickness absences each year.

137. During February 2017 and to 8 March, the respondent did not contact the clamant. The claimant had been told in mid-November 2016 that her suspension had been lifted and that she could return to work but she and her union representative Mr Woolgar challenged the validity of the disciplinary sanction applied to her. Ms Sayir deferred dealing with it until after the claimant's return from Nigeria. The claimant was therefore entitled to expect that she would be contacted again on her return from Nigeria.

138. The claimant and her union representative contacted the respondent in early February. There is an email in the bundle from the claimant (drafted by her daughter) to Mr Moomba dated 9 February 2017 in which the claimant says "*I am hoping that this issue would come resolved with much clarity as soon as possible and to know when my suspension from work ends*". We find that the claimant appears to have not accepted that her suspension from work was lifted in mid-November 2016. She was, we find, not willing to return to work until she had been given confirmation by the respondent that as the disciplinary sanction had been applied without proper process

(and applied unannounced at an investigation meeting for another matter) that she would be able to return to work with the sanction removed from her records and a reassurance that if she needed a reference that this would not be affected by this sanction. She received no response to this email.

139. As set out above, the claimant wrote to Mr Subir Patel, the owner of the home and Ms Patel's father, on 14 February and 10 March 2017 but received no response from him, despite him being the designated responsible individual for the home.

140. The claimant, her daughter, Mr Moomba and Ms Pomona had a meeting on 16 March 2017. Following that meeting, an email was sent by Mr Moomba on 22 March 2017 to say that the claimant was to return to work, that the sanctions were withdrawn and that the respondent wanted to "*welcome you back to the team*" and move forward and that Ms Pomona, the new home manager, should be telephoned as soon as possible to arrange a return date "*starting next week*". The letter finished with the following *"I hope this draws to a close the issue and gives you closure and peace of mind*."

141. However, this did not satisfy the claimant and her daughter, who wrote again on 27 March 2017 notifying Mr Moomba that she refused to return to work, despite being telephoned by Ms Pomona on 21 March in order to do so. In the letter, the claimant's daughter repeated the complaints that had been addressed in the meeting of 16 March and stated "*I feel petrified that I will be subjected back to the employer who has caused me traumatic experiences consecutively for the past 7 years…. I do not feel comfortable coming back to work for St Mary as my employer*. "

142. Mr Moomba responded in an email of the same day and stated "*I will study [this] in detail as it is a deviation from what we agreed on that day*". He then wrote on 29 March to ask the claimant if she intended to resign by her letter of 27 March, as her intention was unclear.

143. However, the claimant's daughter wrote again to Mr Moomba on 6 April 2018 to say "*I have been unable to respond to your previous emails as I have been in the hospital so I have not been able to feed back to my mum your correspondence sent to her via my email*." The respondent's documentation indicates that the letter of 22 March was sent by email and by post to the claimant.

144. The next correspondence is from Mr Moomba to Mr Woolgar on 3 May, where Mr Moomba notes that the claimant's sanction was withdrawn in the letter of 26 October 2016 (from Ms Sayir, received in mid-November by the claimant) and that she was informed again in March 2017 that the suspension was lifted but that the claimant has failed to attend work nonetheless, nor appealed, nor put in a grievance. On 17 May Mr Moomba wrote to Mr Woolgar offering to meet the claimant for her to return to work on 19 or 22 May and noted that any periods of leave apart from the unpaid leave in December would be classed as unauthorised absence unless accompanied by a valid sick note. The claimant attended a return to work meeting on 19 May and returned to work thereafter.

145. We make the following findings of fact in this regard. The claimant is entitled to her contractual sick pay for any of the period 6 March 2017 onwards that was

covered by valid sick notes from her GP. Any absence after the meeting of 16 March 2017 was, we find, unauthorised absence. The claimant had asked for confirmation that sanctions had been withdrawn against her and had received it and the respondent had understood that the claimant had agreed to return to work.

146. The claimant failed either to return to work, obtain a sick note, lodge a grievance or appeal, or resign at this point. She therefore allowed her contract with the respondent to continue and was obliged at that point to comply with her obligation to turn up to work. It is not an adequate reason that her daughter may have been in hospital, as the claimant is not without capacity to speak to the respondent herself or travel to the respondent's home to discuss this in person with her manager, and for the period from 16 March 2017 until she obtained a sick note for 3 April to 1 May, she did not do so.

147. She is entitled to full pay from 6 March to 16 March, in the period when she sought to return to work but was ignored by the respondent, but no pay from 17 March to 2 April. She is entitled to contractual sick pay from 3 April to 2 May. There is no evidence before the Tribunal that a further sick note was obtained to cover the period 3 May onwards, until her return to work, and without this and with, we find, no other valid reason not to attend work the claimant is not entitled to recover pay for this period as this was unauthorised absence.

148. In January 2018, the claimant became ill. She self-certified and then was signed off from 13 to 27 January 2018 by her GP and signed off again for the periods 27 January to 10 February, and again 10 February to 28 February, and 28 February to 7 March 2018. This period in total is covered by the claimant's contractual sick pay and should have been paid at the contractual rate of 10 weeks at full pay and 6 weeks at half pay. On 8 March the claimant's GP confirmed that she had recovered from her C-Difficile infection and was fit to return to work.

149. On balance the respondent, although entitled to require further information and tests from the claimant's GP, was not entitled to insist that the claimant remain on unpaid leave while this took place. She is entitled to recover her wages from that point until her actual return to work which was on 7 April 2018.

150. The claimant is owed outstanding annual leave of two weeks from that leave year, which she requested to take in the period while she was off and waiting for her additional test results to come back. Mr Moomba refused to allow her to do this, insisting that she gave them four weeks' notice to take her leave. We find that the respondent could have, but did not, allow the claimant to take this leave during March while she was not attending work but did not allow it, without good reason. The claimant had clearly not been able to take the leave earlier as she had been unwell. It was unreasonable of the respondent to insist on the four weeks' notice, particularly at a time when the claimant was able to return to work but the respondent refused to allow her to do so.

151. The respondent alleges that the claimant has been reimbursed almost all of the monies owed. The issue of the amounts outstanding to the claimant will be determined on the production of further evidence at the forthcoming remedy hearing.

152. The claimant asserts that she is still owed £47.37 for PPE purchased but not refunded to her. The respondent must now pay this sum.

Did the respondent fail to provide accurate pay statements?

153. The claimant's pay statements were often inaccurate and difficult to read. The respondent's payroll processes are not robust and have not been easily interpreted by the Tribunal. The respondent has failed to provide the claimant with timely or clear pay statements during her employment. Payslips were late or not provided at from January 2017 to April 2017 and in January and February 2018, and again from September to December 2018.

The Claimant's Application for a Workplace Pension

154. There is clear contemporaneous documentation in the bundle that the claimant asked to join the respondent's workplace pension scheme on 20 and 21 August 2015, that she was entitled to do so and that on 16 October 2015 changes were made to her terms and conditions to reflect the same. The respondent did not facilitate it. It is clear that she raised this issue several times during her employment, but none of the respondent's staff or HR consultants addressed this and did not ensure that she was so enrolled. She is entitled to recover compensation for the respondent's failure to do so.

The Law

Discrimination

155. The claimant's disability discrimination complaints covered a time period which began in 2016 and continued until her resignation. The claimant brings a number of complaints of discrimination and the Tribunal considered the following in relation to each complaint:

a. Was the treatment complained of a one-off act or an ongoing act of discrimination?
b. Was the treatment complained about to the Tribunal within three months (subject to ACAS Early Conciliation) of the incident or the last act in a series of incidents?;
c. If there was no complaint within three months (subject to ACAS Early Conciliation) of the incident or the end of the ongoing act, was the complaint made within such further period as the Tribunal considers is just and equitable (as per s123 Equality Act 2010)?

156. Discrimination complaints are subject to the time limits set out in the Equality Act 2010 at s123(1), as follows:

> *Proceedings on a complaint within section 120 may not be brought after the end of –*
>
> *the period of 3 months starting with the date to which the complaint relates, or*

such other period as the employment tribunal thinks just and equitable."

157. Section 123(3) and (4) Equality Act 2010 make special provision relating to the date of the act complained of in the following situations:

> *(3) For the purposes of this section—*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
> *(a)when P does an act inconsistent with doing it, or*
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

158. The Tribunal must consider a number of factors in deciding whether a claim presented late can still be considered on a "just and equitable" basis.

159. These include, but are not limited to, the prejudice each party would suffer as a result of the decision reached, and the circumstances of the case, such as the length of the delay and the reasons for the delay, the extent to which the evidence might be affected by the delay and the steps taken by the claimant to obtain advice once he knew of the possibility of taking action. The Tribunal must also take into account the merits of the claim.

160. It is not the case that it is never just and equitable to extend time where there is no good explanation for the delay. *Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA* held that any explanation put forward by the claimant is a matter that the Tribunal should consider but is not the deciding issue of whether or not the Tribunal should extend time.

161. In discrimination claims, a claimant must engage with ACAS Early Conciliation before an ET1 can be submitted. The ACAS Early Conciliation must begin within three months of the date of the act complained of.

162. Section 6 of the Equality Act 2010, defines a 'disabled person' as a person who has a 'disability' — S.6(2). A person has a disability if he or she has 'a physical or mental impairment' which has a 'substantial and long-term adverse effect on [his or her] ability to carry out normal day-to-day activities' — S.6(1). The burden of proof is on the claimant to show that he or she satisfies this definition.

163. Direct discrimination: Did the respondent commit acts which treated the claimant less favourably that it treated or would treat a comparator, being a person not of the claimant's race in not materially different circumstances? Was that less favourable treatment because of the claimant's race? (s13 Equality Act 2010). Comparators: The comparator must not share the claimant's protected characteristic and there must be "*no material difference between the circumstances relating to*

each case" when considering whether the claimant has been treated less favourably than a comparator, as per s23(1) Equality Act 2010. It is also possible for a claimant to construct a purely hypothetical comparison if no suitable actual comparator is available.

164. Indirect discrimination (Equality Act 2010 section 19). A "PCP" is a provision, criterion or practice. Did the respondent have a PCP which was applied to the claimant? Did the respondent apply any such PCP to persons with whom the claimant does not share the characteristic of disability or would it have done so? Did the PCP put persons with whom the claimant shares the characteristic, that is, persons disabled due to a back complaint at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic? Did the PCP put the claimant at that disadvantage? Was the PCP a proportionate means of achieving a legitimate aim? The Tribunal will decide in particular: was the PCP an appropriate and reasonably necessary way to achieve those aims; could something less discriminatory have been done instead and how should the needs of the claimant and the respondent be balanced?

165. Duty to make reasonable adjustments: Provision, criterion or practice (s20(3) Equality Act 2010). Did the respondent have a provision, criterion or practice (PCP) that put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time? If so, did the respondent know or could it reasonably have been expected to know, that the claimant was likely to be placed at any such disadvantage? If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

166. Duty to make reasonable adjustments: Physical features (s20(4) Equality Act 2010): Did the respondent's premises have a physical feature that put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time? If so, did the respondent know or could it have been reasonably expected to know the claimant was likely to be placed at any such disadvantage? If so, were there steps that could have been taken by the respondent to avoid any such disadvantage? If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

167. Burden of proof: Section 136(2) Equality Act 2010 states that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person contravened a provision of the Equality Act, the Tribunal must hold that the contravention occurred. This means that once there are facts from which a Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof is then on the respondent to prove a non-discriminatory explanation for any less favourable treatment. Section 136(3) states that this does not apply if the person shows that he or she did not contravene the relevant provision.

Unlawful deductions from wages

168. In section 13(1) of the Employment Rights Act, it states that: '*An employer shall not make a deduction from wages of a worker employed by him*.' This

prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction (s.13(1)(a) and (b)).

169. Section 23(4A) Employment Rights Act 1996 imposes a two-year limit on the backdating of unlawful deduction from wages claims presented on or after 1 July 2015. This means that a claimant can now only claim in respect of a series of deductions going back two years from the date that the claim was presented to the Tribunal. In the claimant's case this was 6 March 2019, so the Tribunal can only consider unlawful deduction from wages complaints by the claimant from on or after 6 March 2017.

170. *Delaney v Staples (t/a De Montfort Recruitment) 1991 ICR 331, CA*, is binding authority that an employment tribunal has jurisdiction to resolve any issue necessary to determine whether a sum claimed under S.13 ERA is properly payable, including an issue as to the meaning of the contract of employment.

171. Determining what wages are 'properly payable' requires consideration of all the relevant terms of the contract, including any implied terms (as per *Camden Primary Care Trust v Atchoe 2007 EWCA Civ 714, CA*). In the absence of any contractual right to suspend without pay, a worker's wages are 'properly payable' while he or she is suspended from work, so long as the worker is ready and able to work as required. (*Kent County Council v Knowles EAT 0547/11*). Whether or not a worker is 'ready and willing' to work during his or her suspension involves examining the worker's situation and intentions. It also involves deciphering exactly what the worker's contractual duties are.

Annual leave

172. Regulation 13(9)(a) of the Working Time Regulations 1998 ("WTR") prohibit the carrying-over of annual leave. This is because the requirement for workers to take minimum periods of annual leave is a health and safety measure to protect the health and well-being of workers. The payment of workers in lieu of annual leave is therefore discouraged by the WTR and workers are encouraged to take their annual entitlement as leave wherever possible.

173. Regulation 15 of the WTR sets out the notice requirements that must be met by workers when seeking to take annual leave. These are, at Regulation 15(3), that a worker must give notice in the following terms:

> *"(3) A notice under paragraph (1) or (2)—*
> *(a) may relate to all or part of the leave to which a worker is entitled in a leave year;*
> *(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and*
> *(c) shall be given to the employer or, as the case may be, the worker before the relevant date."*

174. Regulation 15 (4) specifies that the "relevant date" in the claimant's case is twice as many days before the earliest day of the holiday as the number of days in the holiday request.

175. In England and Wales, a workers' annual leave entitlement is made up of four weeks or 20 days' leave (or the pro-rata equivalent for part-time workers) under Regulation 13 of the WTR and an additional 8 days' leave (often referred to as public and bank holidays, and again pro-rated for part-time employees) which is granted under Regulation13A of the WTR. The leave in Regulation 13 comes from the European Working Time Directive. Regulation 13A leave is a domestic measure implemented by the UK government and is therefore not directly subject to European law.

176. The additional 8 days' leave provided for in Regulation13A of the WTR cannot be carried over from one leave year to the next, even in situations of long-term sickness absence (*Dominguez v Centre Information de Centre Ouest Atlantique & others 2012 [ICR D23 ECJ], Sood Enterprises v Healy [2013] IRLR 865).*

177. There is no need to put in a request to carry over annual leave (*Larner v NHS Leeds [2012] EWCA Civ 1304*).

178. Any claim presented on or after 1 July 2015 will be limited to deductions made within 2 years before presentation of the claim under ERA s23(4A), save that under *King v Sash Window Workshop CJEU Case C-214/16 29 November 2017* if the worker has been deterred from taking any Regulation 13 leave it is all carried forward so the deduction is made upon termination.

Protected Disclosures

179. Disclosures qualify to be protected disclosures if they fall within the definition set out in section 43B of the Employment Rights Act 1996. That is, they must, in the reasonable belief of the worker making the disclosure, be made in the public interest and tend to show one or more of the matters in section 43B(1) Employment Rights Act 1996 ("ERA"). In the claimant's case, she alleges that her disclosures tend to show all of the six categories:

> *that a criminal offence has been committed, is being committed or is likely to be committed — S.43B(1)(a)*
> •
> *that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject — S.43B(1)(b)*
> •
> *that a miscarriage of justice has occurred, is occurring or is likely to occur — S.43B(1)(c)*
> •
> *that the health or safety of any individual has been, is being or is likely to be endangered — S.43B(1)(d)*
> •
> *that the environment has been, is being or is likely to be damaged — S.43B(1)(e)*

- *that information tending to show any matter falling within any one of the above has been, is being or is likely to be deliberately concealed — S.43B(1)(f).*

180. Protected disclosures must also be made in accordance with one of the six methods of disclosure set out in ERA. The claimant here relies on section 43C, disclosure to employer or other responsible person.

181. A complaint that a worker has been subjected to a detriment for making a protected disclosure must be presented to an employment tribunal before the end of the period of three months, beginning with the date of the act or failure to act to which the complaint relates, or, where the act or failure to act is part of a series of similar acts, the last such act or failure to act (s.48(3)(a) ERA). The employment tribunal considers when the alleged detriment is said to have occurred, not when the disclosure or disclosures relied upon were made (*Canavan v Governing Body of St Edmund Campion Catholic School EAT 0187/13*). A Tribunal has the power to extend the time limit for a reasonable period if it is satisfied that it was not reasonably practicable for the complaint to have been presented in time (s.48(3)(b)).

182. A worker or employee must show that they have a reasonable belief that the information disclosed tended to show the relevant failure. There must be some objective basis for the worker's belief (*Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4 EAT*). The standard applied is partly determined by the personal circumstances of the discloser and therefore a higher standard is applied to professionals as opposed to lay persons.

183. Tribunals are advised that their task, in relation to matters of public interest, is not to determine what is in the public interest, but instead to determine whether the individual employee had a belief that what he disclosed was in the public interest and whether that belief was reasonable (*Chesterton Global (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979*).

184. A qualifying disclosure can still count as a qualifying disclosure even if the employee or worker is wrong in their belief, provided that it is demonstrated that the belief was reasonable.

185. Employees and workers making protected disclosures are given protection from being subjected to detriments for having made such disclosures by virtue of section 47B of ERA. The threshold for establishing that such disclosures caused such detriments is lower than that for establishing that disclosures caused a dismissal as per s103A ERA. The causation test in *Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372 CA* is whether the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the whistleblower. Establishing the 'ground' on which an act was done (or not done) is frequently done through a Tribunal being asked to draw an inference that this has influenced the decision-maker's actions.

Notice Monies

186. On termination of their contract of employment, employees have a right either to a statutory minimum notice period by virtue of s86 ERA or the notice period set out in their contract of employment, whichever is greater.

Application of the Law to the Facts Found

187. Taking each of the claimant's allegations in turn, we conclude as follows.

Are some or any of the claimant's discrimination claims out of time?

188. In relation to the claimant's discrimination complaints, the Tribunal has to consider, of those that were brought out of time, were they presented within such period as the Tribunal considers just and equitable as per s123 Equality Act 2010?

189. We find that the allegations of discrimination which were brought out of time are all of the claimant's claims of direct discrimination. The claims of discrimination arising from disability under s15 are brought within three months of the alleged acts (plus time allowed for ACAS early conciliation). The allegations of a failure to make reasonable adjustments are ongoing acts which continued to the date of the claimant's suspension from work, 2 November 2018, and are therefore presented in time. The claims of indirect discrimination, save for the first allegation of supplying inappropriate PPE, are in time. The allegation relating to PPE is out of time, as different PPE was supplied to the claimant when she complained about it and that issue was not outstanding at the date of the claimant's suspension. Is it just and equitable to extend time for those discrimination complaints presented late?

190. The Tribunal notes that the claimant was provided with the assistance of her trade union throughout her employment and made complaints regularly about her treatment during her employment. There is no evidence that the claimant was in any way unable to issue her complaints to the Tribunal earlier than she did but we note that she did not have the assistance of her trade union, or indeed any professional representation, during the hearing, although she did have the assistance of her daughter.

191. What is the balance of prejudice to the parties if the Tribunal does not consider the claimant's out of time complaints? In terms of prejudice to the respondent, as this issue is being determined at the final hearing, they have already had to prepare to address these issues at the final hearing and as some allegations of ongoing discrimination throughout the period in question are in time, we find that it would be not unduly prejudicial to the respondent to address those additional claims which remain. There was significant factual overlap between the claims.

192. In terms of prejudice to the claimant, the Tribunal notes that the claimant experienced difficulties during the hearing in explaining her complaints and the basis on which her claim was put.

193. It was at times challenging for the Tribunal to obtain direct answers to our questions from the claimant in relation to specific allegations, as noted above. We therefore considered that it was preferable to allow the claimant to present her

evidence on the allegations as a whole and the respondent's witness was also questioned on the allegations as a whole.

194. On balance, the Tribunal found that had the claimant not been allowed to present the entirety of her claims, there would have been the considerable risk of prejudice to her and the Tribunal's role as a fact-finding tribunal would have been hindered. Therefore, the balance of prejudice to the parties falls in favour of allowing all of the claimant's allegations to be heard, including those which are out of time, to allow the Tribunal to determine what the ongoing circumstances were in at the claimant's place of work and whether the claimant had been subjected to any unlawful discrimination.

Was the claimant a disabled person and do her disability discrimination claims succeed?

195. The respondent accepts that the claimant was a disabled person at the material time in relation to her back condition. The respondent does not accept that the claimant was so disabled by reason of her mental health. The Tribunal finds on the balance of probabilities that the claimant was not disabled by reason of her mental health, for the reasons set out above.

196. The claimant's claim for discrimination arising from disability is based on the claimant taking sleeping tablets, which she did for stress and anxiety. Therefore these claims fail, as we have not found that she was disabled by reason of stress and anxiety.

Discrimination on the grounds of disability, s13 Equality Act 2010

197. We do not find that the claimant has established facts from which we could conclude, in the absence of an explanation from the respondent, that there was less favourable treatment of the claimant because of her disability in relation to any of the reasons listed in 2.3.1 to 2.3.12. The claimant must show some evidence of a causal link between this treatment and her back condition. It is not sufficient to show this treatment took place and to show that she has a back condition; this is not enough to establish that there is a causal link from one fact to the other. As we have found in our findings of fact above there are a number of reasons for the less favourable treatment complained of by the claimant, and these include poor communication and poor management by the respondent, as well as the claimant's own limitations in communication but none show any indication of any causal link with her disability, that is, her back condition.

198. The claimant was subjected to less favourable treatment in that she was required to provide a copy of the legacy staff handbook before being given occupational sick pay. We accepted the claimant's evidence that she was the only member of staff on the same terms and conditions who was asked to do this and the claimant says she was asked to do this because she had taken more sickness absence because of her disabilities. This is properly framed as a claim under section 15 of the Equality Act 2010, and we will consider it in this context.

199. We accept that the claimant had taken more time off sick than her colleagues at the point when she was asked to obtain the original handbook but we find that none of this sickness absence was on account of her disability, that is, her back complaint. The debate with the respondent took place in March and April 2018 at a time when the claimant had been sick for reasons other than her back complaint – she had been off sick at the time because of an illness which progressed to a C Difficile infection. Therefore the issue was not "arising" out of her disability.

Discrimination arising from disability, s15 EA 2010

200. The claimant alleges that she was treated unfavourably in four alleged respects which arose in consequence of her taking sleeping tablets at the relevant time. However, she has not established before the Tribunal that her anxiety and stress amounted to a "disability". The evidence before the Tribunal was that the claimant's sleeping tablets were not prescribed for her back injury. The claimant's witness statement and her daughter's witness evidence was that the sleeping tablets were increased in dose on 26 October 2018 due to the claimant's high blood pressure. She has therefore not established before us that the sleeping tablets arose in consequence of her disability and these claims therefore fail.

Indirect Discrimination and Reasonable Adjustments, s19, ss 20-22 EQA 2010

201. In terms of the claimant's claim for indirect discrimination, we find that the claimant has not established on the balance of probabilities that any of the alleged "PCPs" or practices that she says were applied to all staff equally, were in fact applied to all staff equally, or that the respondent would have done so. The practices alleged to apply to others as well as the claimant were the practice of supplying inappropriate PPE, the practice of providing carers with inappropriate workstations and the practice of allocating a workload of 13 "double handed" residents per carer. The claimant has not managed to establish on the balance of probabilities that the PPE supplied to all staff was inappropriate. We accept that she personally believed that her PPE was inadequate, but she has not established that it was, in fact, inadequate by any objective standard. She has also not established that other carers were provided with inappropriate workstations as even from her own evidence we have observed that other chairs were available for her and others to sit on. She has also not presented us with any evidence from which we could find that carers were allocated 13 "double handed" residents, even though she says that both of these issues applied to her personally.

202. In terms of the reasonable adjustments that the claimant alleges were not provided to her, only the PCP of a failure to carry out risk assessments applied to her back condition. We find that the respondent did have a practice of failing to carry out risk assessments and that this put her at a substantial disadvantage compared with someone without the claimant's back condition. The respondent knew that the claimant had a long-standing back problem and so could have reasonably been expected to know that this would likely put the claimant at a substantial disadvantage. It would have been reasonable for the respondent to have taken steps on her return to work in the Jasmine wing in May 2017 and after her accident in September 2018 to carry out a risk assessment for the claimant.

203. However, we do not find that the garden chair on which the claimant chose to sit was a physical feature of the premises that put the claimant at a substantial disadvantage compared to someone without the claimant's disability. The photographs supplied to us show that there were two chairs next to one another that the claimant could have sat on; one was the plastic garden chair that broke and the other was a more substantial office chair with metal legs. The claimant chose to sit on the garden chair and it was this chair that broke when she sat in it, and that caused her to fall on the floor at work which exacerbated her back problem.

204. The respondent via Ms Patel sought to say that the claimant was not supposed to sit on that particular chair and that it must have been brought in from the garden or elsewhere. There is no reason why the claimant needed to sit on this chair when a more robust one was available immediately beside it. The claimant has not established any reason why it was necessary for her to sit down for long periods during her shift or why a different chair ought to have been provided for her.

Did the claimant make one or more protected disclosures? Are her complaints in time? Did she suffer detriments as a result?

205. There are a number of allegations of the claimant having made protected disclosures over a lengthy period of time. Although the claimant will say that these are linked incidents, the complaints can be, we find, divided into several categories as follows:

a. Complaints about staffing levels and the adequacy of care in September 2016;
b. Complaints about payslips in May 2017;
c. Complaints about the adequacy of PPE in April and June 2018;
d. Complaints about the excessive workload and adequacy of care in August 2018;
e. Complaints to Mr Kamara about her workstation which was in September 2018, at the time of her accident; and
f. Complaints to George Hickman, which the Tribunal takes to be at the grievance appeal hearing on 5 November 2018.

206. The detriments that are said to have happened in consequence of these disclosures are vaguely pleaded. They are "*being subject to purported grievances, disciplinary and suspension which are linked*" and "*loss of earnings and having to purchase PPE personally*". The dates on which these detriments are said to have happened have not been clearly pleaded before the Tribunal and we have found it extremely difficult in the large amounts of information and argument presented by the claimant to narrow down from the claimant's evidence and her daughter's evidence what dates are relied on. There is some suggestion that the "disciplinary and suspension" referred to was the suspension in 2016, but in other places the pleadings are more general. The claimant was the subject of two disciplinary processes, one in 2016-2107 and one in November 2018.

207. We have taken the claimant's case at its highest for the purpose of considering whether or not the claims are in time, that is, taking the latest possible interpretation of the alleged detriments in considering the issue of time limits. We conclude as follows.

208. We accept that for each of the above "disclosures", there was a disclosure of information by the claimant to the respondent. It does not matter if the person to whom it was disclosed already knew this information. There must be "information" disclosed and not a baseless allegation. We accept that the claimant disclosed "information" to the respondent in relation to each of these disclosures, as set out in the findings of fact above.

209. Did the claimant reasonably believe that the information disclosed tended to show that there were the breaches alleged in categories 1-6 in the legislation i.e. criminal act, breach of legal obligation, breach of health & safety and so on, as per s43B(1) ERA? The claimant alleges that her disclosures show breaches of every single category. We accept that, as an individual with a low level of formal education but a long career in care work, that the claimant believed, on the basis of her past experience, that the information she disclosed tended to show breaches as alleged. It is not determinative whether or not the claimant was correct in her belief, but instead that her belief was reasonable, which we find it was, in her circumstances.

210. We also find that the claimant reasonably believed that the disclosures were made in the public interest, save that relating to the disclosure about the workstation to Mr Kamara, which we find the claimant did not believe was in the public interest, as the claimant was complaining because of an accident at work that had happened to her. She has not established, unlike with the other disclosures, that she had the residents' or other staff's wellbeing in mind in relation to this disclosure. Finally, in all cases, disclosure was made to her employer or other responsible person in the case of the HR consultants engaged by the respondent.

211. Has the claimant been subjected to a detriment by any act or failure to act? It is clear that the claimant has suffered detriments due to the disciplinary sanctions, suspensions, loss of earnings and the personal purchase of PPE. Has the claimant established facts from which (a "prima facie case") the Tribunal could conclude that the detriments were suffered because the claimant made a protected disclosure? If so, it is for the respondent to show the reason why the detriments happened to the claimant.

212. The complaints about staffing levels and adequacy of care in September 2016 led to the alleged detriments of the suspension and disciplinary sanctions in September 2016 to early 2017. We find that this complaint was brought out of time. The claimant had the support of her union representative throughout this process and we find that it was reasonably practicable for her to have presented this claim within three months of her return to work in May 2017, which is the last possible time a detriment relating to this issue was felt by her and that presentation of a complaint about this in March 2019 was not done within a reasonable time thereafter.

213. If the claimant complains of unpaid wages and PPE purchases arising out of this period of time, which deductions are said by the claimant to be ongoing detriments outstanding at the date of her resignation, we do not find on the balance of probabilities that the claimant has established that what she says was the inaccurate payments of wages were because she made protected disclosures. We find that the respondent has made attempts through its own calculations to

determine whether the claimant has been paid correctly, but that significant disagreements remain, mostly due to the respondent's poor record-keeping and poor management practices. The claimant has not established that these disagreements were materially influenced by her disclosures, as opposed to the respondent's accounting or payroll or record-keeping deficiencies, or their differing interpretation of the claimant's contractual obligations.

214. Finally, was the claimant's second disciplinary suspension on 2 November 2018, which was within three months (plus ACAS early conciliation) of the date of the presentation of the ET1 claim form and is therefore in time, done on the ground that the claimant had made a protected disclosure?

215. Disciplinary action can amount to a detriment. However, to succeed in a claim of whistleblowing detriment, the claimant must establish that the detriment was materially influenced by the disclosures. The disclosures she can rely on are those which she identified in her claim and which are recorded in the agreed list of issues. They are those (1) relating to her wages in 2017, (2) those relating to PPE in April and June 2018 and (3) those to Ms Chibanda in August 2018. She cannot rely on the disclosure to George Hickman, because this took place at the grievance appeal hearing on 5 November 2018 which was after the detriment (that is, after her suspension on 2 November 2018). No further disciplinary action actually took place after 2 November 2018, because the investigation and investigation meeting did not happen, as the claimant resigned before it took place.

216. Therefore the question for the Tribunal is whether the wages disclosures in 2017, PPE disclosures in 2018 and disclosure to Ms Chibanda in August 2018 had a material influence on Ms Patel's decision to suspend the claimant on 2 November 2018. "Material" means "more than trivial". Was Ms Patel influenced by these disclosures in a way that was more than trivial? The claimant does not say that raising her grievances with the respondent in June 2018, and then her appeal in October 2018, were protected disclosures.

217. We could not identify the specific disclosure or disclosures made by the claimant that may have been taken into consideration by Ms Patel in relation to her conduct of the claimant's suspension and other matters after 2 November. Ms Patel did not admit to any and the claimant and her daughter did not provide us with any specific evidence or allegations in this regard.

218. We find that from Ms Patel's involvement with the claimant, which appears to have been first documented on 9 August 2018 when she was note taker at her grievance hearing, Ms Patel viewed her as a troublesome employee. We find that Ms Patel was not respectful of the claimant and her daughter raising the issues that they did with the respondent's management, such as the grievance in June 2018, the grievance hearing on 9 August, the disclosure to Ms Chibanda on 16 August, the ongoing complaints about wages and payslips, the threat of litigation having finished ACAS conciliation on 21 August 2018, the background of the unannounced CQC inspection on 14 August 2018 instigated by a whistleblower, the complaints about her workstation and her accident at work, and so on.

219. Of all of these disputes, could it be said that the disclosure to Ms Chibanda on 16 August had a "more than trivial" influence on her decision to suspend the claimant? We find that it did not. There were a large number of reasons why Ms Patel seized the opportunity to suspend the claimant on 2 November but the disclosure of 16 August was not an incident that materially influenced her decision, out of all the others. She was therefore not subjected to a detriment by reason of having made protected disclosures.

Constructive and unfair dismissal

220. We do not consider that it was it a breach of the implied term of trust and confidence of itself for the respondent to suspend the claimant for sleeping at work. It was appropriate for them to investigate the matter in the interests of patient welfare. It was also not, we find, a breach of trust and confidence to use CCTV as part of that investigation per se, given that the claimant and other members of staff were aware that CCTV was in the home and that monitoring could take place.

221. However, we find that the manner in which the respondent dealt with the claimant after her suspension was a breach of trust and confidence. The respondent took a month from suspending the claimant to inviting her to a disciplinary meeting. The claimant had been promised that her grievance would be finalised before any disciplinary process took place, but this did not happen. She had made two applications for information via a subject access request that had not been responded to in any meaningful way by the respondent, including being given the opportunity to view the CCTV footage.

222. The claimant believed that she was being set up by the respondent and that they took advantage of her informing them that she was taking sleeping tablets. The respondent's evidence is that she was caught via spot checks and that nursing staff found patients soaked in urine having been not attended to on those nights, but has not disclosed evidence from the nurses of this and we did not accept Ms Patel's evidence in this regard. The claimant was allowed to work the night of 30th October, having been sleeping on 27/28 October as well. Had the respondent been concerned primarily for patient welfare, we do not find that she would have been allowed to work the second night without being reprimanded in some way as nurses' concerns would have been properly raised on the morning of 28 October and addressed straight away. The claimant has established before the Tribunal that "spot checks" on staff were rare and only happened a couple of times a year, and there had already been two that year.

223. Ms Patel was notified by the claimant's daughter in an email of 26 October 2018 at 8.55pm that the claimant was, amongst other matters, taking sleeping tablets. Ms Patel responded to the claimant's letter on 30 October 2018 at 10.17am. She was therefore aware, on the day of the claimant's second shift, that the claimant was taking sleeping tablets. On the balance of probabilities we find that Ms Patel monitored the claimant for the two shifts that took place after she was notified (on 26 October) that the claimant was taking sleeping tablets, in order to look for evidence that the claimant had been sleeping on shift.

224. She was offered a settlement of £3000 to resign "or face dismissal". There was no indication that the respondent would take her prescribed medication as a mitigating circumstance. She was invited to a disciplinary hearing at 8pm on her non-working day and feared that she would not be able to find anyone from the union to accompany her at that time. She also considered that the respondent should have taken into account the fact that there had developed a practice of allowing staff to sleep while on the night shift, and indeed her colleague Gloria did so on the same shift as the claimant.

225. Taken together, we accept the claimant's evidence that this amounted to a breach of trust and confidence which entitled her to resign. She did not consider that she would be given a fair hearing in the disciplinary process and she resigned in response.

Wages, holiday pay and sick pay.

226. No personnel file has been disclosed to this Tribunal for the claimant, and so the Tribunal has not had the benefit of any summary of annual leave taken, sick days taken, or unauthorised absence. We were told that there was a "fire book" daily signing in/out sheet which acted as a back-up for the biometric clocking in/out system although it was primarily for fire safety purposes, but this was not disclosed to the Tribunal either. The poor record keeping and inadequate disclosure by the respondent has made our task much more difficult.

227. We find on the balance of probabilities that the claimant has suffered unlawful deductions from wages, including of sick pay and annual leave. We have declined to make any assessment of the final amount and will make the final assessment at the forthcoming remedy hearing, subject to the compliance by both parties with case management orders that will be set down to obtain full and proper disclosure of the respondent's HR and payroll records in a format that is comprehensible and accessible by the Tribunal and the claimant. Despite our efforts, on the information available to us, we have not been able to determine what sums are yet to be paid to the claimant, as the respondent has made some payments several months after complaints were made, but has not made it clear what those payments were on account of. The deduction of 6 pence per hour complained of by the claimant was from 2016 and therefore does not fall within the time period able to be considered by these proceedings.

228. We have viewed the outgoing payments log from the respondent's bank account to the claimant and the document showing gross and net payments made to the claimant at page 1009 of the bundle. We note that the claimant presented the following valid sick notes to the respondent from her GP:

a. 3/4/2017-2/5/2017; - an absence period of 4 weeks
b. 13/1/2018-27/1/2018; - 2 weeks' absence
c. 27/1/2018-10/2/2018; - 2 weeks' absence
d. 10/02/2018-02/03/2018; 3 weeks' absence
e. 28/2/2018-07/03/2018; a further two working days absence; and
f. 24/09/2018 to 01/10/2018, a week's absence.

229. As a provisional indication, we find that as of 6 March 2017, the claimant is owed the following subject to further evidence being provided by both parties:

a. She is entitled to full pay from 6 March to 16 March 2017 for the reasons set out in our findings of fact, which is 5 working days at 11.5 hours per day, so 57.5 hours pay;
b. She is not entitled to pay from 17 March 2017 to 2 April 2017 for the reasons found earlier as she was neither covered by a valid sick note nor able to persuade the Tribunal that she was not able to return to work. This period was therefore unauthorised absence;
c. She is entitled to sick pay at her full pay rate for the period 3/4/2017-2/5/2017 of 4 weeks;
d. She is, as set out above, not entitled to recover pay for the period 3/5/2017 to 22/5/2017 as she was neither covered by a valid sick note nor able to persuade the Tribunal that she was not able to return to work. This period was therefore unauthorised absence.
e. She is entitled to her wages for the period 8 March to 7 April 2018;
f. Having submitted a valid sick note for the period 27/01/2018 to 10/02/2018 she is entitled to be paid contractual sick pay for that period of 2 weeks;
g. The claimant asserts that she is still owed £47.37 for PPE purchased but not refunded to her. The respondent must pay this sum.
h. Any further sums claimed by the claimant will be assessed on the basis of further disclosure of attendance records and absence records yet to be provided. These include the claimant's entitlement to the leave from 2017/2018 leave year that she asked to take in March 2018 (of two weeks' leave) that was denied to her. This has not been determined at this stage of the proceedings as no annual leave records have been disclosed so far.

230. The respondent has also failed to enrol the claimant in a workplace pension as she requested and she will be entitled to compensation for this, to be assessed.

Is the claimant entitled to her notice monies?

231. The claimant resigned "with immediate effect" because of a breach of trust and confidence by the employer. This was a fundamental breach of contract and the claimant was entitled to resign without notice. She did not waive her right to claim notice by doing so and is entitled to recover her notice monies.

Remedy Hearing

232. The parties will be contacted by way of a separate Order and Notice of Hearing with case management orders for a remedy hearing and a date and time to attend.

Employment Judge Barker

Date: 28 February 2022

APPENDIX – LIST OF ISSUES

Agreed on 17 March 2021 at third case management hearing:

1. **Constructive dismissal**

1.1. Was the Claimant treated in such a way that they were entitled to treat herself as constructively dismissed? The Claimant relies on the following:

1.1.1. Being subject to purported grievance and disciplinaries
1.1.2. On 02.11.2018 the Respondent suspended her and monitored her on CCTV on 28 and 31.10.2018
1.1.3. By not being provided itemised payslips for the period September 2018 to December 2018, PPE, occupational sick pay and suffering deductions from wages

1.2. Was the Respondent in repudiatory breach of the implied trust and confidence, i.e. did the Respondent (without reasonable or proper cause), conduct itself in a manner calculated (or likely to) destroy or seriously damage the relationship of trust and confidence between the parties by engaging in the above?

1.3. Was the above conduct or series of conduct relied upon sufficiently serious to entitle the Claimant to leave at once? Did the Claimant in fact leave in response to that conduct? Did the Claimant lose their right to do so by delay or otherwise electing to affirm the contract?

1.4. If so, what was the reason for the dismissal? Was it a potentially fair reason? The Respondent relies on gross misconduct.

1.5. If so, was the dismissal fair or unfair having regard to the reason shown by the employer and taking account of section 98(4) of the Employment Rights Act 1996?

1.6. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove on the balance of probabilities, that the Claimant actually committed the misconduct alleged?

1.7. Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? And/or to what extent and when?

2. **Disability discrimination**

2.1. Does the Claimant qualify for protection as a disabled individual? The Claimant seeks to rely on depression, anxiety and back pain.

2.2. Did the Respondent have knowledge of the Claimant's disability?

2.3. If so, was the Claimant treated less favourably? The Claimant relies on the following less favourable treatment:-

2.3.1. Returning to work after 9 months suspension without full pay
2.3.2. Mr Moomba micromanaging the Claimant and refusing to make back payments from January 2016 –June 2018
2.3.3. Rejection of her annual leave for 7 March 2018 – 31 March 2018
2.3.4. Mr Moomba informing the Claimant that she could not return to work if she did not consent to medical records
2.3.5. Being provided defective PPE
2.3.6. Not being provided with an appropriate chair to sit and write her notes
2.3.7. Having a spot check conducted on her with the use of CCTV
2.3.8. Mr Moomba micromanaging the claimant as an external consultant from 5 January – June 2018
2.3.9. Rejection of her annual leave for 7th March 2018 – 31st March 2018
2.3.10. Mr Moomba refusing consent to medical records, refusing her certified fit to return to work note, refusing to pay for stool test and refusing to accept stool test result.
2.3.11. Refusing to pay Claimants OSP unless the Claimant provides handbook from Francis Taylor Foundation that states OSP entitlement
2.3.12. Refusing to pay her for the period of 5 weeks authorised absence causing her suffer loss of earnings

2.4. If so, was the less favourable treatment as a result of the Claimant's disability?

3. **PID – detriment**

3.1. Are the Claimants claims presented in time? If not, would it be just and equitable to extend time for submission?

3.2. Did the Claimant make a qualifying protected disclosure? The Claimant relies on the following:-

[3.2.1 to 3.2.7 withdrawn prior to the hearing by the claimant]

3.2.8 09.09.2016 – to Nadine Sayir– that residents and staff were being physically abused, there were staffing shortages, residents wandered off premises without staff knowledge, old carers tasked with training new inexperienced carers, staff were required to use personal money to purchase equipment and therefore the Respondent failed to provide adequate equipment.

3.2.9 30.05.2017 – to Mueti Moomba and Brian Woolgar that the Claimant's payslip for the same month had varying working hours, tax, NI contributions and final pay.

3.2.10 11.05.2017 – Mueti Moomba and Brian Woolgar that payslips reflecting annual leave when the Claimant was in fact working. A deduction of 6p from

wages and no pension contributions.

3.2.11 07.04.2018 – to Jonathan Kamara, Mueti Moomba – that the supply of PPE was not fit for purpose

3.2.12 23.04.2018 to Anca Pomona – that the supply of PPE was not fit for purpose

3.2.13 27.04.2018 to Jonathan Kamara – that the supply of PPE was not fit for purpose

3.2.14 04 & 08.06.2018 – to Johnathan Kamara and Mueti Moomba – pictures of the defective PPE and purchased PPE

3.2.15 16.08.2018 to Priscilla Chibanda – that excessive workload places service users and staff members at a higher risk, residents neglected due to lack of staff. Staff were fearful to raise concerns due to fear of dismissal.

3.2.16 Disclosure to Mr Kamara about the workstation on Jasmine wing

3.2.17 Disclosure to George Hickman about everything that the claimant had been saying

3.3. If the Claimant made any of the above qualifying disclosure(s) did she suffer any detriments because of them as alleged? The Claimant relies on the following detriments: -

3.3.1. Being subject to purported grievances, disciplinary and suspension which are linked.
3.3.2. [withdrawn by claimant]
3.3.3. Loss of earnings and having to purchase PPE personally

3.4. If the Respondent subjected the Claimant to the above detriments, has the Respondent shown the grounds for its act or failure to act?

4. **Breach of contract – notice pay**

4.1. How much notice pay was the Claimant entitled to?

4.2. How much notice pay was the Claimant actually paid?

4.3. How much notice pay actually remains unpaid?

4.4. What is the relevant net daily rate of pay?

5. **Holiday pay**

5.1. What was the Claimant's leave year?

5.2. How much of the leave year had elapsed at the effective date of

termination?

5.3. In consequence, how much leave had accrued for the year?

5.4. How much paid leave had the Claimant taken in the year?

5.5. How many days remain unpaid?

5.6. What is the relevant net daily rate of pay?

5.7. How much pay is outstanding to be paid to the Claimant?

6. **Unlawful deduction of wages**

6.1. Are the Claimants claims presented in time?

6.2. Did the Respondent provide itemised payslips?

6.3. Did the Respondent inform the Claimant of prior deductions and obtain written consent?

6.4. Is the Claimant owed outstanding wages?

6.5. If so, how much?

7. **Remedy**

7.1. Is the Claimant entitled to compensation for financial loss? If so, what level?

7.2. Is the Claimant entitled to compensation for injury to feelings? If so, at what level?

List of Additional Issues drawn up following adjournment on 14 July 2021

The following list was drawn up by consent and following a discussion with the parties during the hearing on 13 July and 14 July 2021. It arises out of the claimant's revised ET1 and the omissions from the list of issues drawn up at the Case Management Hearing on 17 March 2021.

8. Indirect disability discrimination

8.1. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

8.1.1. The practice of supplying inappropriate PPE;
8.1.2. The practice of providing carers with inappropriate workstations;
8.1.3. The practice of allocating a workload of 13 "double handed" residents per carer;

8.2. Did the respondent apply any of those the PCPs to the claimant?

8.3. Did the respondent apply any such PCP to non-disabled persons or would it have done so?

8.4. Did either PCP put persons with the claimant's alleged disabilities at a particular disadvantage when compared with those without her alleged disabilities, in that the practices increased her anxiety and perception of danger, and exacerbated her back pain?

8.5. Did the PCP put the claimant at that disadvantage?

8.6. Were the PCPs proportionate means of achieving a legitimate aim?

8.7. The Tribunal will decide in particular:

8.7.1. was each PCP an appropriate and reasonably necessary way to achieve those aims;

8.7.2. could something less discriminatory have been done instead;

8.7.3. how should the needs of the claimant and the respondent be balanced?

9. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

9.1. Did the respondent know or could it reasonably have been expected to know that the claimant had the disabilities alleged? From what date?

9.2. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

9.2.1. Failure to carry out risk assessments; and
9.2.2. Failure to support and identify triggers of work-related stress and anxiety

9.3. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that her back pain was worsened and her anxiety was made worse?

9.4. Did a physical feature, namely inadequate workstations and inadequate seating, put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant had an accident at work which exacerbated her back problem?

9.5. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

9.6. Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

9.6.1. Carrying out risk assessments on the following dates:

9.6.2. When she signed her supervision contract;
9.6.3. When she disclosed to Anca that she was on sleeping tablets (on 27 June 2017)
9.6.4. When she complained of back pain in December 2017;
9.6.5. When she told the respondent again that she was taking sleeping tablets on 22 October 2018.

9.7. Carrying out an occupational health assessment on the claimant's return to work on the following dates:
9.7.1. After her suspension in 2017; and
9.7.2. In April 2018.

9.8. By what date should the respondent reasonably have taken those steps?

10. **Discrimination arising from disability (Equality Act 2010 section 15)**

10.1. Did the respondent know or could it reasonably have been expected to know that the claimant had the disabilities alleged? From what date?

10.2. If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:

10.2.1. Monitoring her on CCTV on 28 and 31 October 2018;
10.2.2. Suspending her from work;
10.2.3. Jonathan and Samet laughing at her in October 2018;
10.2.4. Making her an offer of £3000 to leave work in November 2018

10.3. Did the following things arise in consequence of the claimant's disability:

10.3.1. The claimant taking sleeping tablets at the relevant time?

10.4. Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of that thing?

10.5. If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

10.6. If not, was the treatment a proportionate means of achieving a legitimate aim? The Tribunal will decide in particular:

10.6.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;

10.6.2. could something less discriminatory have been done instead;

10.6.3. how should the needs of the claimant and the respondent be balanced?

11. Protected Conversation (s111A Employment Rights Act 1996)

11.1. Was the offer made to the claimant on 12 November 2018 by the respondent and evidence of communications between the parties in this regard admissible in these proceedings?

11.2. It is the respondent's case that evidence of these negotiations is inadmissible in relation to the claimant's unfair dismissal complaint as this was a "protected conversation" as per s111A Employment Rights Act 1996,

11.3. It is the claimant's case that evidence of these negotiations is admissible due to the respondent's improper behaviour