EMPLOYMENT TRIBUNALS

Claimant: Miss S Goodier

Respondent: Pallotine Missionary Sisters of the Catholic Apostolate

HELD AT: Manchester (by CVP) **ON:** 10, 11, 12, 13, 14 January and a chambers day on 3 February 2022

BEFORE: Employment Judge Johnson

MEMBERS: Mrs D Radcliffe
Dr H Vahramian

REPRESENTATION:

Claimant: in person (supported by her sister – Ms L Kirton)
Respondent: Mr J Jenkins (counsel)

JUDGMENT

The judgment of the Tribunal is that:

(1) The complaint of constructive unfair dismissal is well founded and succeeds, subject to the application of the findings relating to *Polkey* and contributory fault.

(2) Those allegations of disability discrimination which arose before 16 September 2019 were presented out of time and it is not just and equitable to extend time in accordance with section 123 Equality Act 2010.

(3) Those complaints of disability discrimination brought under sections 26, 13, 15, 20 & 21 of the Equality Act 2010 and which were presented in time are not well founded and fail.

(4) The successful complaint of constructive unfair dismissal will now proceed to a remedy hearing on a date to be confirmed with a hearing length of 1 day.

Introduction

1. The claimant presented her claim to the Tribunal on 18 December 2020 following a period of early conciliation from 5 December 2019 until 19 January 2020. She brought complaints of unfair dismissal and disability discrimination.

2. The respondent presented a response resisting the claims and there a number of case management hearings took place with the case becoming increasingly complicated as the Tribunal sought to identify the issues and the claimant was requested by the respondent to provide further particulars.

The Issues

3. The list of issues was finally agreed by the parties at the preliminary hearing case management before Employment Judge Benson on 17 August 2020.

4. The list of issues was as follows (and was read in conjunction with EJ Benson's Note of Preliminary Hearing:

Time limits

5. Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 16 September 2019 may not have been brought in time.

6. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010 ('EQA')? The Tribunal will decide:

a) Was the claim made to the Tribunal within 3 months (allowing for any early conciliation extension) of the act to which the complaint relates?
b) If not, was there conduct extending over a period?
c) If so, was the claim made to the Tribunal within 3 months (allowing for any early conciliation extension) of the end of that period?
d) If not, were the claims made within such time as the Tribunal thinks is just and equitable? The Tribunal will decide:
    i) Why were the complaints not made to the Tribunal in time?
    ii) In any event, is it just and equitable in all the circumstances to extend time?

Constructive unfair dismissal

7. Can the claimant prove there was a dismissal?

a) Did the respondent do the following things:

    i) Allowing the claimant to suffer by not taking her communications and complaints seriously, [as described and on dates in q2 p 98]
    ii) Not supporting the claimant or acting upon concerns raised about issues at work [dates and details provided at q2 p98]
    iii) Not making reasonable adjustments requested in February to April 2019 although claimant now seeks to extend this period to January 2019 to September 2019 [details q13 c's answers p141].
    iv) Deliberately requiring the claimant to work with Veida

v) Misleading the claimant about the nature and purpose of the meeting on 25 September 2019
vi) Holding the meeting on 25 September 2019 without notice and without providing the opportunity for the claimant to be accompanied.
vii) Being falsely accused of falling asleep on duty and not thoroughly investigating the allegation.
viii) Not engaging with her grievance and being *'obstructive and unprofessional'*
ix) Not allowing the claimant to work set nights.
x) Singling the claimant out by changing or attempting to force the claimant to change her contractual working hours from night to days.
xi) Requiring the claimant to work alone at Keele Crescent.
xii) Not providing flexible working such that the claimant would not have to work the same shifts as Veida.

b) Did the conduct breach the implied term of trust and confidence? Taking into account of the actions or omissions alleged in the previous paragraph, individually and cumulatively, the Tribunal will need to decide:

i) Whether the respondent had reasonable and proper cause for those actions or omissions, and if not;
ii) Whether the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

c) Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

d) Was the fundamental breach of contract a reason for the claimant's resignation?

e) Did the claimant affirm the contract before resigning, by delay or otherwise? The Tribunal will need to decide whether the claimant's word or actions showed that they chose to keep the contract alive even after the breach.

8. Has the respondent shown the reason or principle reason for dismissal, or (in the case of constructive dismissal), the reason or principle reason for the fundamental breach of contract]?

9. Would the claimant have otherwise been fairly dismissed by the respondent, had she not resigned? The respondent will rely upon the fair reasons of:

a) Gross misconduct in respect of the admitted conduct of falsifying the respondent's daily diary stating that care had been given when it had not;
b) Gross misconduct in respect of admitted conduct of falling asleep on duty; and,
c) Gross misconduct in respect of breach of confidentiality and data breaches.

10. Was it a potentially fair reason under section 98 Employment Rights Act 1996 ('ERA')?

11. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as sufficient reason to dismiss the claimant? the Tribunal will usually decide, in particular, whether:

a) The respondent genuinely believed the claimant had committed misconduct;
b) There were reasonable grounds for that belief;
c) At the time the belief was formed the respondent had carried out a reasonable investigation;
d) The respondent followed a reasonably fair procedure; and,
e) Dismissal was within the band of reasonable responses.

Harassment related to disability (section 26 EQA)

12. Did the respondent do the following alleged things:

a) Allowing the claimant to suffer by not taking her communications and complaints seriously, [as described and on dates in q2 p 98]
b) Not supporting the claimant or acting upon concerns raised about issues at work [dates and details provided at q2 p98]
c) Not making reasonable adjustments requested in February to April 2019 although claimant now seeks to extend this period to January 2019 to September 2019 [details q13 c's answers p141].
d) Deliberately requiring the claimant to work with Veida
e) Misleading the claimant about the nature and purpose of the meeting on 25 September 2019
f) Holding the meeting on 25 September 2019 without notice and without providing the opportunity for the claimant to be accompanied.
g) Being falsely accused of falling asleep on duty and not thoroughly investigating the allegation.
h) Not engaging with her grievance and being 'obstructive and unprofessional'
i) Not allowing the claimant to work set nights.
j) Singling the claimant out by changing or attempting to force the claimant to change her contractual working hours from night to day.
k) Requiring the claimant to work alone at Keele Crescent.
l) Not providing flexible working such that the claimant would not have to work the same shifts as Veida.

13. If so, was that unwanted conduct?

14. Was it related to disability?

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

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

Direct disability discrimination (section 13 EQA)

17. The claimant's protected characteristic is disability, (obsessive compulsive disorder) ('OCD'), intrusive and ruminative thoughts, Generalised Anxiety Disorder ('GAD') and depression), it is conceded the claimant is disabled within the meaning of the EQA.

18. What are the facts in relation to the allegations?

a) Allowing the claimant to suffer by not taking her communications and complaints seriously, [as described and on dates in q2 p 98]
b) Not supporting the claimant or acting upon concerns raised about issues at work [dates and details provided at q2 p98]
c) Not making reasonable adjustments requested in February to April 2019 although claimant now seeks to extend this period to January 2019 to September 2019 [details q13 c's answers p141].
d) Deliberately requiring the claimant to work with Veida
e) Misleading the claimant about the nature and purpose of the meeting on 25 September 2019
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k) Requiring the claimant to work alone at Keele Crescent.
l) Not providing flexible working such that the claimant would not have to work the same shifts as Veida.

19. Did the claimant reasonably see the treatment as a detriment?

20. If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances without a disability was or would have been treated? The claimant says she was treated worse than Samantha Goodier, Sharon Goodier, Karen Jejeh, Jackie Ross, Kai Boldman and Viada (regarding allegations d) to l) above) or otherwise, the claimant relies upon hypothetical comparators.

21. If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of disability?

22. If so, has the respondent shown that there was no less favourable treatment because of disability?

<u>Discrimination arising from disability (section 15 EQA)</u>

23. Did the respondent know, or could it have reasonably been expected to know that the claimant had the disability? From what date?

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

a) Allowing the claimant to suffer by not taking her communications and complaints seriously, [as described and on dates in q2 p 98]
b) Not supporting the claimant or acting upon concerns raised about issues at work [dates and details provided at q2 p98]
c) Not making reasonable adjustments requested in February to April 2019 although claimant now seeks to extend this period to January 2019 to September 2019 [details q13 c's answers p141].
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j) Singling the claimant out by changing or attempting to force the claimant to change her contractual working hours from night to days.
k) Requiring the claimant to work alone at Keele Crescent.
l) Not providing flexible working such that the claimant would not have to work the same shifts as Veida.

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

a) An enhanced vulnerability to deal with the effects of stress and/or pressure. The claimant alleges that the respondent knew that putting her under stress and pressure would exacerbate her condition.

26. Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?

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

28. If not, was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

    a) In respect of allegations 5.3 e, f and g regarding the investigation process, to ensure that all allegations of misconduct on duty are properly, promptly and reasonably investigated; and/or,
    b) In respect of allegations 5.3 d, i, j, k and l – an aim of managing its workforce effectively to ensure sufficient cover is provided to maintain satisfactory levels of care.

29. The Tribunal will decide in particular:

    a) Was the treatment an appropriate and reasonably necessary way to achieve those aims;
    b) Could something less discriminatory have been done instead; and,
    c) How should the needs of the claimant and the respondent be balanced?

<u>Failure to make reasonable adjustments (sections 20 & 21 EQA)</u>

30. Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability? From what date?

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

a) The respondent's grievance/disciplinary policy

32. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she would find it difficult to deal with the effects of increased stress and pressure in a hostile environment?

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

34. 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:

a) Give the claimant notice of the meeting on 25 September including advising her of the nature and purpose of the meeting;
b) Allow her to be accompanied;
c) Allow her to have breaks; and,
d) Allow the meeting to be rescheduled until the claimant had recovered from her night shifts and lack of sleep

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

Evidence used

36. The claimant gave oral evidence and also relied upon the evidence of a number of other witnesses who had provided statements. She said that some of them were unwilling to give witness evidence orally, because they remained employed by the respondent. Accordingly, Employment Judge Johnson explained that the claimant and these witnesses should be aware that they were free to attend the hearing to give evidence and an employer is not allowed to victimise or intimidate them if they choose to do so.

37. Employment Judge Johnson did add that if the claimant was unable to secure their attendance, then it would be possible to ask the Tribunal to consider the written statements without oral evidence being given. However, it was explained that because this evidence would not be supported by oral testimony, with the witness exposing themselves to an examination under oath, the Tribunal would give these statements less weight than they would give to the evidence of those witnesses who had given oral evidence during this hearing.

38. It was also explained that because the claimant's witnesses had only provided typed statements which were unsigned and undated, unless they gave oral evidence, the statements produced would have very limited evidential value and the Tribunal would not be able to use them in their deliberations, when making findings of fact. Moreover, there was also an anonymised witness

statement produced by the claimant who was only identified as 'Witness 'A'. It was explained that no Rule 50 anonymity application had been made by the claimant which would allow this person to give their evidence while retaining anonymity. As they were not attending to give oral evidence at the hearing, their statement could not be considered to have any evidential value.

39. Accordingly, insofar as the claimant's evidence was concerned, the Tribunal heard from the claimant and also her former colleague Tammy Chapman who unfortunately had limited availability due to work commitments. The Tribunal did find it surprising that the claimant had not alerted her witnesses to be available for this hearing given that it had been listed at the initial preliminary hearing case management on 17 August 2020. However, we accepted that Ms Chapman could give evidence on the final day of the listed hearing, (day 5), for the reasons given below concerning the availability of witnesses and the realisation that it would not be possible for an oral judgment to be given before this hearing concluded. The other witnesses: Karen Jajeh, Samantha Goodier, Maria Williams, Alison Simpson and 'Witness A', did not give oral evidence and their statements could not be considered in written form alone, for the reasons described above.

40. The respondent relied upon the witness evidence of Jennifer Trotter (Chief Executive Officer of the Trust ('CEO')), Lisa Cook (Care Home Manager), Allyson Attward (Assistant Manager/grievance hearing officer) and Father John Martin (Trustee/grievance appeal officer).

41. The respondent experienced difficulties with their witnesses for reasons beyond their control because 2 of them had tested positive for Covid 19 and had experienced significant symptoms. This affected the timetabling of the case and initially, it was considered likely that the case would need to conclude 'part heard', with a further 3-day listing being required to conclude the respondent's witness evidence because of their anticipated incapacity. As it happened, circumstances took a more positive turn and it was possible for all of the witness evidence to be heard, even if it meant that judgment had to be reserved as it was only possible to reach final submissions by the end of day 5 of the final hearing.

42. As is often the case with litigants in person and non-legally qualified representatives, Ms Kirton expressed some concerns about the giving of final submissions, their preparation and having enough time to complete them. In accordance with the overriding objective under Rule 2 and the relevant provisions of the Equal Treatment Bench Book, Employment Judge Johnson discussed the format of the final hearing in general terms and also the provision of final submissions on several occasions throughout the course of the hearing and beginning on day 1.

43. Once it became clear that there would be sufficient time to conclude submissions before the end of day 5, Employment Judge Johnson informed the parties that they would be heard from 2.30pm, with Mr Jenkins as the respondent representative going first, and each party being given approximately 40 minutes to deliver them to the Tribunal. It was explained to Ms Kirton that although she would have preferred additional time following the final hearing to deliver written submissions, it would not be proportionate or in

the interests of justice for submissions to be delayed until after the hearing concluded on day 5. This was considered particularly important because the claimant had sent an email before the Tribunal resumed the hearing on day 2, explaining the severe anxiety she was experiencing and her desire to complete the hearing by the end of that week on day 5. As a consequence, the completion of the witness evidence and submissions by the end of the 5-day listing was a positive outcome and will hopefully have relieved the claimant's anguish as the only remaining matter was the deliberation of the case in chambers by the Tribunal.

44. A hearing bundle of documents running to almost 700 pages was made available to the Tribunal in both hard copy and pdf formats. It contained the usual Tribunal proceedings, contractual documents, letters concerning incidents which gave rise to the claimant's decision to resign, together with details of processes followed, copies of text and WhatsApp messages, the resignation letter and subsequent grievance documents.

45. No additional documentation was produced during the hearing and the relevant sections of the hearing bundle were considered throughout the examination of the parties' witnesses. A reading list was also provided to be used during the reading time on day 1 together with a cast list and chronology.

Findings of fact

Introduction

46. The respondent ('Pallotine') is a charity which was formed by the Pallotine Sisters, an international Catholic religious order. As part of its charitable purpose, Pallotine operated Park Mount Care Home and had done so since 1984. It was managed by a board of trustees comprising of Sister Mary McNulty, Sister Elizabeth Rowan, Reverend John Martin and Sister Anna Maldrzykowska. They appointed a Chief Executive Officer ('CEO') to manage the home and this is Ms Trotter.

47. Within the management structure and below Ms Trotter, there is a management team of two Care Registered Home managers to ensure 7 day cover within the home. In addition (and at the material time), they employed a night deputy home manager, catering manager, maintenance manager, night supervisor and housekeeping supervisor and 65 staff.

48. It is understood that the home looks after a number of vulnerable adults, many of whom lack capacity and have communication difficulties. The Tribunal acknowledges that carers in this sector have a great deal of responsibility placed upon them and good team work is an essential part of the role to ensure that personal care and medication is properly carried out during each shift as well as looking after the general welfare of those being cared.

49. The claimant ('Miss Goodier') was employed by Pallotine as a care worker and has worked in this role for a number of employers since 2002. However, she started work for Pallotine from 14 December 2016. Until the time of the issues identified above, Miss Goodier's employment with Pallotine had been relatively uneventful.

50. Her contract of employment provided that she would work 42 hours per week and that the hours of work would be agreed with management. Miss Goodier preferred to work night shifts rather than days, because of her caring responsibilities which include looking after a disabled grandchild. The Tribunal also accepted that she did face financial pressures and would work additional hours when they became available to increase her income.

51. Miss Goodier did have health issues and in August 2017, she had a stroke. As a consequence, she had to attend hospital to ensure that her blood pressure was monitored. Although this health issue did not directly feature as a disability in this claim (as no functional loss or impairment was identified to the Tribunal by the claimant). Miss Goodier did report to Ms Trotter that the hospital staff had suggested her ongoing stress might have been the cause for the stroke happening.

52. Miss Goodier identified her disability as relating to a number of mental health conditions which varied to some extent in the documents before the Tribunal. But in terms of what was agreed between the parties and what was relied upon in the list of issues, the Tribunal recognises generalised anxiety disorder, recurrent depression and obsessive-compulsive disorder, ('OCD').

53. Pallotine was aware of these conditions and discussed them with Miss Goodier on 13 February 2019 when a risk assessment was completed. It records that these conditions began in 1990 and had continued since then and Miss Goodier continued to see her GP on a regular basis. Due to the infrequency of symptoms arising, (while noting that *'attacks can be serious'),* the risk of these conditions was considered by Pallotine to be low, but a number of measures described as 'Guidelines for management' were drafted. However, the 12 points recorded appeared to place responsibility upon Miss Goodier rather than management being placed 'on alert' as to the symptoms they should be aware of, for example:

    "1) If Sandra is feeling anxious about any issue, then she is to inform a manager so that the situation can be discussed and if needed action can be taken for example. Sandra could book a GP appointment.
    …
    2) Should Sandra suffer an anxiety attack during the night Staff are to assist Sandra to sit somewhere quiet and encourage her to use breathing.
    …
    12) Management are to ensure that Sandra seeks support from her GP and reserve the right to arrange an appointment with Occupational health if required'.

    While the document attempted to be helpful, The Tribunal believes it would have been better if a proactive approach had been taken and staff were advised as to awareness of these conditions and how they may become symptomatic in the workplace.

54. Ms Trotter felt that the risk level was low and saw the condition as being *'historical'* which suggested to the Tribunal that management on behalf of Pallotine did not believe the conditions remained significant. This perhaps can

be partly explained by Miss Goodier not having frequent sickness absence, not referring to GP appointments and appearing to carry out her duties without difficulty. Ms Chapman did say in evidence that she was not really aware of Ms Goodier's conditions, nor the risk assessment or support plans. However, the Tribunal noted that she left Pallotine's employment at the end of February 2019 and might not have been in work when the risk assessment was shared with managers.

55. The Tribunal notes that it does not have to consider whether or not the claimant was disabled in this case. Nonetheless, it feels important to acknowledge that the risk assessment arose from incidents which began in December 2018 and which continued into 2019 and which aggravated (or were aggravated by) the claimant's mental health issues.

Events in December 2018

56. The issues arising in this case appeared to begin in December 2018. Miss Goodier was working routinely on the night shift at this time, and this involved a 12-hour shift allocated on a rota. The rota was prepared at least 6 weeks in advance in order that staff knew when, where and who they would be working with.

57. On 26 December 2018 Miss Goodier says she was verbally attacked by her colleague Vaida. This appeared to arise from a complicated dispute which involved Miss Goodier's sisters who also worked at Pallotine and Vaida's perception that Miss Goodier did not step in to support her sister in relation to a personal matter. This gave rise to a complicated dynamic at work whereby different members of staff found it difficult to work with each other. However, for the purposes of this case, it is the relationship between Vaida and the claimant which continued to cause problems.

58. The Tribunal is not aware of any formal management intervention during the remainder of December 2018, but in January 2019 Miss Goodier gave evidence to an investigation concerning workplace matters relating to her sister which she believed upset Vaida. A meeting took place on 13 January 2019 between Vaida, Miss Goodier and the managers Steve Axton and Tammy Chapman.

59. The Tribunal appreciates that these events must have been challenging for management to deal with given that members of the same family were working in the same workplace and a dispute had arisen which caused disagreements amongst the staff with a number adopting strong positions concerning who was at fault. The Tribunal understand that Miss Goodier and Vaida were warned about not letting a dispute of this nature happen again, but Miss Goodier believed that from this point Vaida commenced a vendetta against her. However, it is noted that Miss Goodier continued to volunteer for overtime, which could mean that she would work the same shift as Vaida. For the reasons given above, the Tribunal does not criticise Miss Goodier for seeking overtime given the financial need that she had to work as many hours as she could. Ms Trotter gave evidence that hours would be offered whenever possible, and management recognised that she needed the opportunity to earn additional money. However, the Tribunal also recognised, that by seeking overtime in addition to what appeared to be carefully arranged shifts by management, Ms

Goodier made it more likely that she would be on shift at the same time as Vaida.

60. The ongoing difficulties in this relationship resulted in several events being alleged by Mrs Goodier concerning Vaida's behaviour, many of which involved hearsay comments from work colleagues. However, Miss Goodier clearly believed at this time that she was under a great deal of scrutiny from Vaida, whom she believed was looking for opportunities to find fault with her work. It is understood that at this time, Miss Goodier and Vaida were placed on the rota so that they did not work the same shifts or alternatively, (if placed on the same shift), they would allocated to work on different floors. At this time, management were faced with the challenge of trying to keep several members of staff who had been involved in the December dispute working apart.

61. Ms Trotter explained that as an attempt to resolve these staffing difficulties, Pallotine advertised for a night shift supervisor on 16 February 2019 even though this created an added staffing cost.

62. The Tribunal accept that support was given by Pallotine to Miss Goodier at around this time, including messaging taking place by WhatsApp, but it is appreciated that it would have been difficult to resolve this matter which appeared to bear similarities to feuds that occur between pupils in a secondary school. It is not possible nor necessary for the Tribunal to consider the staffing dispute in any detail, but it is recognised that management were placed in a very difficult position by the apparent absence of self-awareness and reflection between Miss Goodier and her colleagues concerning ongoing issues. Nonetheless, management have a responsibility to manage and attempt to create a harmonious working environment.

Suspension February 2019

63. In February 2019 the Care Quality Commission ('CQC') who regulate the care sector, communicated an allegation of the abuse of two residents at Pallotine's home by two members of night staff, one of which was Miss Goodier. The CQC had contacted the Safeguarding Manager at Cheshire East which is the local authority where the respondent's home is based. The Safeguarding Manager informed Ms Trotter of the complaint and that the two members of staff must be suspended pending an investigation by letter on 22 February 2019. The letter sought to reassure Miss Goodier that this was a neutral act and did not indicate any guilt on her part. This is understood to be standard practice and while unpleasant for Miss Goodier and her colleague, it was a necessary part of the safeguarding process when an allegation of this nature was made.

64. Moreover, the complaint was resolved relatively quickly, and the investigation resulted in no safeguarding issues being identified. Miss Goodier was allowed to return to work and was informed of this decision on 1 March 2019 by letter and WhatsApp message from Mr Axton. It appears there were concerns by both Miss Goodier and management that the complaint had been malicious, but the Tribunal is unable to make any findings as to who was responsible. However, we accept that Pallotine sent a letter to all of its night staff on 28 February 2019, informing them of the complaint and that they believed it to be malicious. The letter reminded them that while staff were encouraged to raise

genuine complaints, malicious complaints would not be tolerated and staff asked to reflect upon the stress and anxiety that these allegations could cause upon the person to whom they relate. A copy of whistleblowing policy was sent.

65. It should also be recorded that the letter also referred to a malicious complaint of smoking on duty and the Tribunal understood that this was a complaint made by Vaida to Miss Goodier on 12 February 2020, but other than this letter being sent, no further action appeared to have been taken by the respondent.

66. This incident does of course illustrate the tension that exists between the clear duty placed upon managers and staff and the care system to raise safeguarding issues and the fact that for misguided or more sinister reasons, individuals may on occasion make allegations that are incorrect. Ultimately, safeguarding must be of paramount importance and management must ensure that a neutral process is followed until a decision can be reached.

The claimant's return to work

67. Miss Goodier informed Steve Axton by WhatsApp message on 1 March 2019, saying that she was *'scared of coming bk especially if I'm working when both Vaida and Sharon [Goodier] are on same shift [in case] I get accused again?'* Mr Axton tried to reassure her by replying *'Don't worry about it. Things will sort and calm'.* However, the later messages in the hearing bundle between Miss Goodier and management, indicate that these concerns continued to be raised. Miss Goodier returned to work but continued to express her anxiety about the rotas and that she would have to work alongside Vaida and Sharon.

68. It appeared that management sought to resolve this matter and the Tribunal was taken to the letter dated 8 March 2019. While Miss Goodier says that she did not receive it, the Tribunal accepts it was sent and in any event there was clear evidence that discussions were taking place between Ms Trotter and Miss Goodier and a number of WhatsApp messages were exchanged concerning her being offered a move to work days. The intention of management was therefore that the issues at work could be resolved by formally moving Miss Goodier to day shifts and she was given notice either in writing or verbally that she would start working days from 8 April 2019.

69. The subsequent discussions between Miss Goodier and Ms Trotter by WhatsApp during March showed her reaction to these proposals. On 10 March 2019 Miss Goodier said that *'days would not be an option at present as I have commitments with helping with grandchildren…'* She then messaged on 13 March 2019 to say *'…I don't mind dropping 2 shifts a month making it (3 nights) 32 hours, so could I possibly do this over 4 day shifts (07.30am-3.30pm) that way I can always maybe pick up somewhere.'* The Tribunal understood that Miss Goodier thought it might be possible to make up the shortfall in hours by working for another employer for a single shift. However, Ms Trotter replied to say that this was not possible because no staff were available to cover the remainder of the day shift from 3.30pm to 7.30pm.

70. Ultimately, Miss Goodier was not required to move to day shifts and it was agreed that she could remain on the night rota. However, the Tribunal do find

that Pallotine's management did give the impression that they were seeking to compel her to move to days, albeit with the intention of solving the ongoing difficulties between Miss Goodier and other colleagues. This gave her the impression that *she* was the problem rather than her colleagues and despite this situation, the WhatsApp messages do reveal that she was trying to explore solutions with Pallotine, including reducing her hours. She was not being intransigent, but understandably had to be honest about personal circumstances. She also raised health issues and her concerns regarding blood pressure arising from stress and that her stroke had only happened 18 months previously. She also remained anxious about the CQC investigation and whether this would undermine her attempt to find alternative work, which was important given that she was willing to work days and make up the shortfall in hours elsewhere. The Tribunal accept that these events placed Miss Goodier under a great deal of stress and finds that Pallotine following the risk assessment in February 2019 and management's more general knowledge of her health issues should have led them to consider what steps could be taken to reduce the impact of management decisions upon the claimant.

71. While the circumstances of Miss Goodier's disagreement with Vaida was not explored in detail, the Tribunal heard evidence from Miss Goodier that she was allowed to work fixed nights. Given that Pallotine could accommodate her particular requirements, it seems surprising that they did not work more collaboratively with Miss Goodier to ensure that her stress and anxiety was kept to a minimum.

72. The Tribunal accepts Ms Trotter's evidence that Miss Goodier did not at any time make a formal request for flexible working, but she was very clear about when she could work and the discussions in March 2019 involved a conversation between management and her as to how she could work flexibly in a way that suited both parties.

Keele Crescent

73. Pallotine also operated another home close to Park Mount where Miss Goodier worked. It was a smaller home operating with fewer staff and only one staff member working at night.

74. Miss Goodier says that she was encouraged to move to this location as an alternative to working day shifts during March 2019. However, Ms Trotter argued that all members of night staff at Park Mount were told they could work at Keele Crescent and it was thought that this more relaxed environment might *'give them a break from the tension.'*

75. The Tribunal accepted on balance that Ms Trotter's evidence was correct concerning this matter and that it was offered to all of the night staff for the reasons given. However, given the risk assessment and the clear indication that it gave regarding Miss Goodier not working alone, it is surprising that she was even considered for the night shift role at Keele, although she could have perhaps been able to work the day shift, if suitable working arrangements had been provided. We did not hear evidence concerning the details of what was offered to Miss Goodier and so are unable to make any further findings concerning this particular matter.

Continuing tension between staff members of the night shift

76. The difficulties in working relationships between the night staff continued into the Spring of 2019. This ultimately led to a mediation taking place on 7 April 2019 involving all staff members and Ms Trotter and Maggie Bennison as managers. There was some confusion concerning the letters which were sent to staff following the mediation as two letters were included in the bundle: one dated 7 April 2019 and the other dated 8 April 2019. Ms Trotter was asked by Dr Vahramian whether both letters were sent to all staff but was unable to explain why two letters were produced. Miss Goodier said she received the first letter and not the second in her witness statement but was more vague when questioned about this during cross examination.

77. The Tribunal noted that the contents of the letter dated 8 April 2019 were generic and could be applied to any member of staff and therefore we find that this was sent to all staff invited to the mediation and who worked nights. It was short but made a clear statement that *'it is unacceptable to work alongside your colleagues and not to speak to each other, communication is key to enable all staff to work efficiently and effectively.'* Each letter enclosed a copy of Pallotine's code of conduct. We therefore find on balance that all members of staff received that letter including Miss Goodier.

78. However, the earlier letter dated 7 April 2019 appeared to be specifically prepared for Miss Goodier and we find that this would have been sent to her alone. It included a statement that *'your night shifts will be restored on the following basis: No more than two shift changes/days off requests per month. You will be expected to work flexible across all the seven days.' It goes on to say that 'We have recently spent a copious amount of time and resources on mediation, meetings, malicious gossip and unfounded 'whistle blowing'. Whilst we encourage whistle blowing to ensure our residents safety, we will not condone any further recurrences on any other incidents as you may face disciplinary action'.*

79. What concerns the Tribunal in relation to the first letter is that it is harsher in tone and singles Miss Goodier out as a troublemaker who needed to be specifically cautioned about her future behaviour. We are not satisfied by Ms Trotter's argument that this letter (or a letter like it) was sent to everyone and it gives the appearance that Miss Goodier is seen as a problem rather than the nightshift as a whole.

80. However, following this mediation, things did settle down. The new night supervisors commenced work in April 2019 and the night shift appeared to be less troublesome that they had been earlier that year.

81. Nonetheless, Miss Goodier remained vulnerable and during her appraisal following mediation in May 2019, expressed how the work-related matters had affected her.

82. There were occasions when numerous WhatsApp messages took place between Miss Goodier and (primarily) with Ms Trotter, particularly during April 2019. While Ms Trotter and the Reverend Martin did give evidence to suggest

she subjected them both to a '*barrage of messages'*, the Tribunal does not accept that this was the case. Quite reasonably as CEO, Ms Trotter made herself available to Miss Goodier, being aware that she had a number of concerns about work. In reality the messages took the form of a conversation between Miss Goodier and Ms Trotter and related to matters which were of a genuine concern to her at that moment in time. They could not be considered a barrage and were not prolonged, Once the matter had been discussed, it appeared that the conversation would cease. There was no suggestion that Miss Goodier was vexatious in her communications with management and she took advantage of a helpful offer from Ms Trotter. While Ms Trotter may have regretted making this offer, Miss Goodier did not behave inappropriately or disproportionately based upon our consideration of the available evidence.

<u>September 2019</u>

83. On 1 September 2019, Ms Attward found that service user JW (who has been understandably anonymised to preserve their privacy), had two tablets in their medication drawer. It appeared to her that Miss Goodier had either failed to give them to the resident or concealed them, had they been refused. Miss Goodier had signed a 'Notes/Observation sheet' accepting that it was a medication error which would be entered on her personnel file.

84. However, on 5 September 2019, Miss Goodier messaged Ms Trotter to say how anxious she was about residents at Parkmount and said, *'I'm finding myself worrying bout [sic] certain ones when I'm not even in wrk'.* She also expressed these anxieties in messages to Lisa Cooke on 5 September 2019 and requested a meeting.

85. On 5 September 2019 Miss Goodier met with Lisa Cooke and asserted that Ms Attward had incorrectly accused her of a medication error. The Tribunal did find the circumstances giving rise to accusations of medication errors to be confusing and not logically straightforward errors. It may be that there are very good reasons for these incidents to be recorded in this way, but the Tribunal finds that Miss Goodier with her underlying anxieties would have quite reasonably have become distressed and would have felt vulnerable from accusations of this nature. Her complaint on 5 September 2019 to Ms Cooke represents clear evidence to management of her distress on this point.

86. On 17 September 2019, Lisa Cooke carried out a supervision with Miss Goodier and questioned her about a medication error. She had failed to provide a resident with their medication which she attributed to a confusion regarding the contents of the medication book and the number of tablets available and that they didn't 'tally up'. Ms Cooke told Miss Goodier that because this was her second medication error, she would need to shadow a colleague on 3 medication rounds before she could return to her own medication round. This was confirmed in a letter sent to her on 18 September 2019 and which identified 3 medication errors instead of 2 errors as recorded in the supervision note. The letter warned that any further errors could result in disciplinary action and this was clarified in a further letter to Miss Goodier on 24 September 2019 when 3 incidents were identified on 31 August, 13 September and 14 September.

87. Miss Goodier argued that she was treated more harshly in relation to these errors than colleagues had been in similar circumstances. However, while she alleged this difference of treatment, the Tribunal did not hear sufficient evidence from the parties to support this contention. Nonetheless, the Tribunal does feel that these incidents were not managed in a particularly thorough way and it is not surprising that Miss Goodier was left confused and unhappy in how she was treated. While it is understandable that, if possible, potential disciplinary matters should be dealt with informally, medication errors are a fundamental part of the carer role. It is important that carers feel fairly treated if accused of such errors. This is especially the case, when an employer knows that an employee has specific mental health issues involving heightened levels of anxiety.

88. On 22/23 September 2019, Miss Goodier was working a night shift. The rota for this shift had been prepared in a way which meant that both she and Vaida were working on the same floor together. The night supervisor swapped the rota around so that Miss Goodier was working on a different floor to Vaida. Miss Goodier felt that Ms Attwood had deliberately arranged the rota in this way to cause distress to her. However, the Tribunal did not hear any convincing evidence that this was the case and finds that it arose from an error of judgment or omission on the part of the manager concerned. Miss Goodier did give convincing evidence however, that whatever the cause of this rota arrangement, it nonetheless caused her a great deal of anguish when she felt that she would have to work with Vaida.

89. That night was a very busy evening because one of the residents had reached end of life and Miss Goodier had made an error entering on the 'Daily Notes' record on the computer system that she had repositioned a resident when she had not done so when she carried out a check on them. She told her colleague Karen who confirmed Vaida and her had carried out this repositioning themselves. This was something that caused Pallotine's management considerable concern and formed part of the action they subsequently took. An incident also arose on the night shift of 23 September 2019, when Miss Goodier was recorded as not answering the emergency bell was found by colleagues in a reclining chair in Lounge room 2 and which was in darkness. During this shift, Miss Goodier is not recorded as carrying out checks at around 4am as this is carried out by colleagues and then she carried out checks from 6am onwards. This was confirmed in the Daily Notes for each resident whom Miss Goodier looked after on that shift. Jackie Ross who was the night supervisor reported this at handover in the morning shift changeover.

90. On 25 September 2019, a message was sent by Lisa Cooke to Miss Goodier, which appeared to be a response to Ms Goodier's request for a letter of clarification about the medication errors, and which said '*Hi Sandra any chance you could come into work about 11….ive got your letter and I want to explain a few things….'.* It is understood that the purpose of this meeting was to discuss the letter which clarified to Miss Goodier the nature of the 3 medication errors.

91. Ms Cooke told Ms Trotter that Mis Goodier was coming into work for this meeting and Ms Trotter decided that she would also meet with her to discuss the repositioning error and the falling asleep incident. No letter or message was sent to Miss Goodier before this meeting took place in order that she could

understand what would be discussed and whether this meeting would form part of part of any disciplinary process.

92. The meeting did take place, but no note taker was present. Miss Goodier did carry out a covert recording and while the actual recordings were not available to the Tribunal, she had provided a 'transcript' of the recording. This transcript had not been agreed by Pallotine as being an accurate verbatim account. The Tribunal felt that Miss Goodier undermined the provenance of her note by inserting comments in brackets which suggest forms of delivery of speech such as '*sarcastic tone'.* However, within this lengthy note, she is recorded as acknowledging that *'I could have dozed off, I could have dozed…'.* She goes on to say, *'I want to leave I don't stand a chance…'.* Then, *'I'm going to get the sack anywy I don't stand a chance'.* Miss Goodier then recorded that in reply, Ms Cooke said *'So why don't you resign'.* This was denied by Ms Cooke, but she did concede that she (had she been in Miss Goodier's position), would not have wanted to have *'this'* on my record – which the Tribunal meant to understand that a resignation might be preferable to disciplinary action and a finding of falsification of records and being asleep on duty in a care home. Miss Goodier also recorded that she asked how much notice she needed to give, and that Ms Cooke suggested that if she resigned, she would not need to tell anyone of what had led to her resignation.

93. The failure by management to properly invite Miss Goodier to what was clearly a disciplinary meeting was inappropriate and ill judged. While Ms Trotter may have thought that it was sensible use of time and taking advantage of Miss Goodier's attendance at the workplace, it is not surprising she felt intimidated and ambushed. The absence of process meant that it is difficult to be absolutely certain of what happened. It is not entirely clear whether Miss Goodier's 'transcript' was accurate, but we do find that she found herself placed in a position where she was taken by surprise as to what was being discussed and understandably felt that her job was under threat.

94. It would have been far more sensible for a short letter or message to be sent to Miss Goodier inviting her to a meeting and explaining the reason for it taking place. There were clearly disciplinary matters contemplated by Pallotine's management at this time, but they should have adopted a more careful approach in carrying out a disciplinary process. As it happened, Miss Goodier was not given any indication that she was being invited to a disciplinary meeting, what that meeting would be about, who would be present, whether she could be accompanied and the potential consequences of the meeting.

95. In practical terms, the Tribunal does accept that Ms Trotter did have to complete questions for the CQC relatively quickly following the death of a patient on 22/23 September 2019 and it was understandable that a brief meeting would have been reasonable given Miss Goodier's attendance at work, providing it did not drift into a more prolonged meeting. There appeared to be some confusion between Ms Trotter and Ms Cooke as to the overall purpose of this meeting and they ended up focusing upon the two incidents involving Miss Goodier and ultimately gave her the impression that this was a disciplinary meeting, potentially giving rise to serious sanctions which could affect not only her job with Pallotine, but also her overall employability in the care sector.

96. This is unfortunate, especially given Pallotine's knowledge of Miss Goodier's mental health issues identified in the earlier risk assessment. It is therefore reasonable to expect their managers to have adopted on this occasion, a more careful and nuanced approach focusing on capability, underlying health issues and possible retraining, in addition to the question of whether disciplinary actions should take place.

97. Following this meeting Miss Goodier sent a letter of resignation on 25 September 2019 which simply said: *'I Sandra Goodier wish to give notice of leaving park mount, and insist on my notice been kept confidential, I give the required notice of [blank]'.* This was accepted by Pallotine in their letter of 25 September 2019 and the Miss Goodier's effective date of resignation was 31 October 2019. There was some discussion concerning her taking more than her pro rata annual leave allocation and whether a deduction should be made from her final payslip. However, Miss Goodier was not required to work her notice and did not work any further shifts.

<u>The grievance</u>

98. Miss Goodier did subsequently raise a grievance on 12 October 2019 concerning the way in which the meeting on 25 September 2019 had taken place which suggested that she was *'bombarded with questions in a way I felt very intimidated, and the questions were repeated over and over…* She described herself as not having *'…a clue what was going on'.*

99. In the meantime, the night time supervisor produced a statement to management on 14 October 2019, confirming that Miss Goodier did not answer the emergency bell on 23 September 2019 and that she found her *'in a reclining chair in darkness in Lounge 2 asleep'.*

100. Miss Goodier was invited to a grievance meeting *'as per our policy and procedure'* 'on 21 October 2019 at Park Mount with Ms Trotter and Ms Bailey as note taker. Following the request of Miss Goodier for an independent person to be provided, she confirmed that Ms Attward would hear the grievance instead. She was informed that she could have a representative with her and that she could have a copy of her employee file. In WhatsApp messages exchanged with Ms Trotter, Miss Goodier reminded her that she was suffering *'…massively with Anxiety and depression, this whole situation is causing me great anxiety and making me ill, could you please confirm the 4th November is ok for my representative to attend the grievance meeting…'.* This message was also repeated in an email sent on the same date.

101. The grievance hearing date was revised to 5 November 2019 and it took place as agreed. Miss Goodier was supported by her union representative, Sharon Allen and the meeting lasted from 4pm until 4.45pm. Ms Attward asked Miss Goodier what outcomes she wanted, and she mentioned a full investigation, an apology and an acceptance of her retraction of her resignation. Ms Attward confirmed that she would investigate and interview witnesses. Miss Goodier questioned whether she could be impartial as she was part of the grievance, but in reply, Ms Attward said she would only make her decision based on the information received as the appointed person and also confirmed by letter dated 6 November 2019, that *'as you aware, we are small charity with*

limited resources, and I have been appointed in good faith to be independent with decision making'.

102. Ms Attward produced her decision letter on 13 November 2019. She noted that Miss Goodier had agreed on 25 September 2019, to have an informal discussions and that during their meeting she admitted to falsifying documentation and also to not responding to the emergency call bell and that she could have 'dozed off', she was in the dark, on a recliner and with the lights to the lounge switched off. She added that Miss Goodier had handed in her resignation of her own volition. Ms Attwood recorded that she then communicated with Ms Trotter and Ms Cook 'freely' and sent 'numerous emails and WhatsApp messages' to them. A great part of the decision letter repeated correspondence from Miss Goodier and in particular the grievance complaint letter. She concluded that the respondent's managers had not treated her unfairly or intimidated her but notified her of her right of appeal.

103. There were a number of emails sent in the interim with Miss Goodier seeking a decision as a matter of urgency. However, once she received the decision she replied by email on 19 November 2019 and asserted that the issues raised in her grievance were not dealt with. She argued that she had not received any evidence of the investigations which Pallotine said had taken place. Ms Goodier said she would be appealing grievance and would deliver her letter by hand later that day. In addition, she qualified the findings made by Ms Attward arguing that she did not agree to a formal meeting taking place, that she admitted accidentally repositioning documentation because of stress, but that these actions were not falsification. She was equivocal concerning whether or not she fell asleep and questioned whether there was an actual emergency when the buzzer went off as it was *'for literally seconds'* in terms of the time that it was ringing. She disputed that she resigned of her own free will and argued that she was pressurised into doing so by Ms Cooke. She questioned why Vaida not investigated – this did not seem to part of grievance.

104. An appeal was heard on 10 December 2019 before Father Martin as chair and also Kai Baldowa and Maggie Bennison. Miss Goodier said it was too short notice and eventually agreed on 27 January 2019. Ms Sandra Allen also attended as her union representative.

105. At this time, the respondent's managers sent a letter to Miss Goodier on 6 February 2020 concerning their belief that she was misusing confidential information, in relation to covert audio recordings made during meeting, accessing service user care plans and sharing this information with third parties including union representatives. In the letter, they required her to cease and desist and to provide an undertaking that she agreed to comply with this request. The respondent reported the matter to the Information Commissioners Office ('ICO'), but this body concluded that insufficient evidence was available to suggest a criminal breach by Miss Goodier. This matter appeared to be a 'one off' and was solely used in relation to disciplinary and grievance processes and was unlikely to be used elsewhere. While the Tribunal understands the need for data handlers to ensure that confidential information is managed securely and their obligation to self-report identified breaches, it does seem that the ICO indicated no real disciplinary issue concerning Miss Goodier.

106. In any event, an appeal decision letter was sent to Miss Goodier on 2 March 2020. The appeal panel considered the nature of the conduct meeting appropriate. They expressed surprise that Miss Goodier did not report the incident involving the documentation, if as she alleged it was a simple error. They took the view that any separate conversation with Ms Cooke at the disciplinary meeting was as a friend and not as her manager. It was concluded that it was reasonable for Ms Trotter to accept Miss Goodier's resignation. Ultimately, the overall decision was that Miss Goodier was treated fairly, because she admitted sleeping and falsifying records and her appeal was dismissed.

The Law

Constructive unfair dismissal

107. Section 95(1)(c) of the Employment Rights Act 1996 ('ERA') provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

108. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:

(i) that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach).

(ii) that the breach caused the employee to resign – or the last in a series of events which was the last straw.

(iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

109. In Croft v Consignia plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.

110. It is open for an employer to argue that, despite a constructive dismissal being established by the employee, that the dismissal was nevertheless fair. The employer will have to show a potentially fair reason for the dismissal and that will be the reason why the employer breached the employee's contract of employment. The employer will also have to show that it acted reasonably. If an employer does not attempt to show a potentially fair reason in a constructive dismissal case, a Tribunal is under no obligation to investigate the reason for the dismissal or its reasonableness.

Direct discrimination

111. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting him to a detriment.

112. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (race in this case), A treats B less favourably than A treats or would treat others.

113. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual. The circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13, the protected characteristic is disability.

Discrimination arising from a disability (section 15 EQA)

114. Section 15 of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. However, this kind of discrimination will not be established if A shows that he did not know, and could not reasonably have been expected to know, that B had the disability.

Failure to make reasonable adjustments

115. Sections 20, 21 and 39(5) read with Schedule 8 of the Equality Act 2010 provide, amongst other things, that when an employer applies a provision, criterion or practice ("PCP") which puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. Paragraph 20 of Schedule 8 provides that an employer is not expected to make reasonable adjustments if he does not know and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage.

116. In the case of the ***Environment Agency v Rowan*** **[2008] IRLR 20,** the Employment Appeal Tribunal held that in a claim of failure to make reasonable adjustments the Tribunal must identify:-

(a) the provision, criterion or practice applied by the employer;

(b) the identity of non-disabled comparators where appropriate; and

(c) the nature and extent of the substantial disadvantage suffered by the Claimant.

Harassment

117. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010. A person (A) harasses another (B) if:

(a) A engages in unwanted conduct related to a protected characteristic (race in this case); and
(b) the conduct has the purpose or effect of : -

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

118. Section 26(4) provides that whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account:

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

119. Thus, the test contains both subjective and objective elements. Conduct is not to be treated as having the effect set out in section 26(1)(b) just because the complainant thinks it does. The Tribunal is required to take into account the Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.

Discussion

Time limits

120. The claim form was presented on 18 February 2020 and taking into account the early conciliation period, it was agreed that any complaint about something which took place before 6 September 2019 may not have been brought in time.

121. The claimant has of course brought two separate complaints: unfair dismissal and disability discrimination. Section 111 of The Employment Rights Act 1996 ('ERA') applies to the former complaint and section 123 Equality Act 2010 ('EQA') applies to the latter complaint in terms of considering the question of time limits.

122. The Tribunal is satisfied that the claimant gave notice of her resignation on 25 September 2019, but that her effective date of termination of employment was 31 October 2019. Although she presented her claim form more than 3 months from the date of the effective date of termination, there was a period of early conciliation from 5 December 2019 until 19 January 2020. As a

consequence, he presented her claim in time and in accordance with section 111 ERA.

123. She has brought a complaint of constructive unfair dismissal, but the Tribunal notes that the key triggering event for the resignation was the meeting on 25 September 2019 and which was on the same day that notice of resignation was given. There were a series of earlier events which she relies upon in this case, but as will be discussed below, these were not contributory factors to her decision to resign, with the causative factor being what happened on 25 September 2019. Accordingly, this complaint was presented in time and can be accepted by the Tribunal.

124. The allegations of disability discrimination involve a diverse range of allegations beginning at approximately Christmas 2019 and continuing until after the date of her resignation. However, the Tribunal is unable to find that those matters which preceded 16 September 2019 were connected with the triggering act which led to her resignation on 25 September 2019, (and events which took place on and after this date and which were alleged as acts of discrimination). As such these earlier events were out of time and were not part of conduct extending over a period which could be treated as ending on a date after 16 September 2019 in accordance with section 123(3) EQA.

125. The Tribunal did consider whether it was just and equitable to extend time in accordance with section 123(1)(b) EQA so that these allegations preceding 16 September 2019 could be accepted. However, it did not hear anything from the claimant that justified an extension on just and equitable grounds and accordingly, any complaints which took place before that date are out of time and cannot be accepted by the Tribunal.

Constrictive unfair dismissal

126. The claimant did give notice of her resignation which was accepted by the respondent with effect on 31 October 2019 and a dismissal did take place.

127. Taking into account the challenges which existed in these proceedings concerning the finalising of a list of issues, the Tribunal will discuss below in general terms, the things which the claimant alleges led to her decision to resign. The respondent did make genuine efforts to resolve the problem among the night shift staff as a whole including the claimant. It did explore changes of

working patterns and did cooperate with her concerning more flexible working, such as different hours of work. However, there was minimal compulsion placed upon the claimant and she was not required to move and/or work alone at the Keele House site.

128. Management also tried to keep Vaida and the claimant apart, which was of course a key concern for the claimant. Inevitably errors would happen from time to time, and in addition, the claimant would want to work overtime at times when Vaida was working. There was evidence that when faced with these scenarios, the manager working that shift would quickly react and separate them onto different floors so as to reduce their contact. No evidence of conspiracy or deliberate attempts to undermine the claimant on the part of management could be found by the Tribunal.

129. In terms of resolving the ongoing staffing problems, the Tribunal is satisfied that there was no coercion placed upon the claimant by management and ultimately, once the claimant explained that she could not work days in a way which management suggested, she was allowed to return to night shifts.

130. The meeting which took place on 25 September 2019, however, was a bigger problem for the Tribunal. We accepted that the way in which it was arranged and conducted did not arise from an attempt to mislead or trick the claimant, but instead, it arose from an absence of planning and demarcation. No thought was given as to how the issues would be separated and what opening remarks should be made so that the claimant fully understood the purpose of the meeting and when each matter was being dealt with and indeed, the overall purpose of the meeting(s). Understandably, these failures left the claimant feeling that she had been ambushed with a disciplinary hearing being 'shoehorned' into another meeting without warning.

131. The message inviting claimant to this meeting was innocuous and in appeared to be solely for the purpose of seeking clarification regarding medication errors and the consequential letters. Ms Trotter behaved opportunistically and allowed the meeting to expand into what effectively became a disciplinary meeting which took the claimant by surprise. This left her feeling vulnerable and at risk of not only losing her job but with sanction which would bring into question her competence and reliability to work in the care sector in other roles that she might later apply for.

132. The Tribunal understood the reasons for Ms Trotter's desire to take advantage of the claimant's visit to the workplace on 25 September 2019, especially as she normally worked shifts and would not be present during office hours. But while she was supposed to interview her about an urgent CQC matter involving a resident's death, the question of the claimant's conduct in relation to repositioning record incident and the falling asleep incident seemed to be the main focus of the meeting and not this more pressing matter.

133. This conduct was unreasonable and understandably the claimant felt that she was likely to lose her job because of what was discussed. There seemed to be no attempt to 'row back' and there was an element of prejudgment of the claimant's conduct without a proper investigation taking place.

Did any or all of these 'things' give the claimant a reason to resign?

134. The Tribunal felt that the earlier matters while challenging for the respondent and upsetting for the claimant, did not amount a breach of the implied term of trust and confidence. In dealing with the ongoing staffing issues and the claimant's reaction to them, we did feel that the respondent's managers were doing the best they could in difficult circumstances.

135. However, the same cannot be said about the things which related to the meeting on 25 September 2019. The Tribunal is of the view that these things could amount to breach of the implied term of trust and confidence and gave the claimant reason to resign.

136. The claimant was faced with the prospect of serious allegations, and it appeared to her that management had concluded she had falsified records and fallen asleep on duty and ignored an alarm bell before a thorough investigation had taken place. The claimant therefore felt that she was going to be dismissed with these serious matters remaining on her employment record. Lisa Cooke's comments where she conceded that she would not want these findings on her employment record, persuaded the claimant that resignation was something that she should seriously consider, especially as a formal record of this conduct would prejudice her future employment prospects.

137. The claimant asserted that the meeting was the final straw which gave rise to her decision to resign. It certainly left her with the feeling that she had been subjected to a *'Kangaroo Court'*. Accordingly, the Tribunal find on balance that the conclusion of this meeting left the claimant with the clear impression that she must 'walk' or 'be pushed' ,(with very unattractive consequences for the claimant if she forced the respondent to take the latter approach).

Fundamental breach of conduct?

138. While we do not find that the earlier issues relating to the complaint of unfair dismissal arose as alleged, the way in which the meeting was conducted on 25 September 2019 seriously affected the employment relationship. Managements actions were profoundly ill-advised and placed the claimant in a position where she had no hope of fairness in any future action taken by the respondent. This was especially the case given that the CEO was involved, and this gave the claimant the impression of a decision being made 'from the top', before a thorough investigation had even taken place. This was a fundamental breach of contract.

139. For the avoidance of doubt, the Tribunal would note that the grievance which was also a subject of complaint by the claimant, actually took place following her resignation and was therefore not relevant to this particular complaint of constructive unfair dismissal. Accordingly, the decision to resign must be our focus in relation to this complaint.

Why did the claimant resign?

140. The claimant's resignation letter was brief and did not discuss the reasons. However, the note of the meeting and the evidence of Ms Cooke did suggest that the claimant was thinking of resigning because of the likelihood of her dismissal and the consequences for her future career. This arose from the unacceptable way in which the meeting on 25 September 2019 had taken place. The claimant had entered the meeting with no apparent intention of resigning and left with her mind made up that this was the only sensible course of action. The proximity of the sending of the letter to the meeting was also a matter to be taken into account. For these reasons, the Tribunal accepts that the fundamental breach of contract was the reason for the resignation.

141. There was no delay in the claimant giving notice of her resignation as it was given immediately after the meeting. There was not period of reflection or withdrawal of notice.

Would the claimant have been fairly dismissed in any event?

142. The respondent did identify conduct as a potential reason that could have ultimately led to claimant's dismissal. The Tribunal accepts that there was likely to be a justifiable reason for a misconduct investigation regarding the incorrect data entry by the claimant and her the falling asleep on duty incident. The respondent also referred to a potential data breach as being another issue relating to conduct, but the Tribunal finds that this incident happened following the claimant's decision to resign and was not relevant.

143. Accordingly, the falsification of records and falling asleep on duty could amount to potentially fair reasons for dismissal of conduct in accordance with section 98 ERA.

144. In terms of whether the respondent acted reasonably in all the circumstances, the Tribunal will say that the respondent genuinely believed that the claimant had committed the misconduct in question as she appeared to have admitted to the falsification of records and being asleep on duty. The Tribunal accepts that they had reasonable grounds for holding this belief. However, there had been no proper investigation in accordance with the ACAS Code of Practice principles relating to disciplinary procedures and in broader terms, there was no fair procedure at the time the claimant was questioned about the matter on 25 September 2019.

145. The Tribunal does accept that in respect of these conduct matters, her dismissal by a hearing officer for the respondent, would have been within the band of reasonable responses available, although it was possible that this was a case where a final written warning may well have been considered appropriate and substituted given the claimant's ongoing health issues.

What if a fair disciplinary process had taken place?

146. Accordingly, had a fair process been followed, the Tribunal assesses that there was a 50% chance that the claimant would have been dismissed and that this would have taken place 1 month following the date of resignation, being the estimated period of time that it would take this respondent to adopt a fair process in relation to this disciplinary matter. By applying the principles of

Polkey v AE Dayton Services Ltd [1987] IRLR 50 (HL), a reduction of 50% of the award for future losses from one month following the date of resignation would be just and equitable.

147. The Tribunal did consider the question of contributory fault on the part of the claimant and concluded that while the claimant was experiencing health issues which affected her work, she should have alerted management and sought help or at least ensured that colleagues knew of her difficulties. It did take into account the potential overlap between factors that it took into account for making the *Polkey* deduction, but felt that even by taking this overlap into account, it was just and equitable to consider the claimant's failure to alert management as described above as a separate matter to be dealt with under this particular aspect of our deliberation on the unfair dismissal claim. For this reason, the Tribunal believes the claimant's conduct was culpable and blameworthy and would have contributed to the claimant's dismissal. It would therefore be just and equitable to make a reduction of 20% for contributory fault to the compensatory award only, in accordance with section 123(6) ERA.

148. The Tribunal must also of course, take into account any failure by the respondent to comply with the relevant ACAS Code of Practice relating to disciplinary matters. There were clear procedural failures on the part of the respondent, and these have been discussed at length above. However, this does mean that the Tribunal believes an uplift to the claimant's compensation of 20% in the unfair dismissal complaint in accordance with section 207A Trade Union and Labour Relations (Consolidation) Act 1992, ('TULRCA').

149. The question of calculating remedy for this complaint will of course be dealt with at a subsequent remedy hearing unless the parties are able to agree an appropriate figure and thereby settle the case without the need for a hearing taking place. It is noted that the claimant does not seek reinstatement and/or reengagement and remedy will solely focus upon financial compensation.

Disability discrimination

150. The question of disability did not require consideration and the Tribunal only had to restrict its consideration of this complaint to the forms of discrimination alleged. The claimant was accepted by the respondent as having OCD, instrusive and ruminative thoughts, GAD and depression. All of these impairments affect the claimant's mental health. Each form of discrimination, however, will be considered in turn, although where there is likely to be repetition, we will simply refer back to our earlier findings under this complaint of disability discrimination.

151. Finally, the findings made in this section of the judgment are without prejudice to the findings above concerning time limits and those allegations which took place before 16 September 2019, are out of time and cannot be accepted by the Tribunal.

Harassment

152. Firstly, the Tribunal must consider the alleged 'things' referred to in the list of issues and we can quickly refer to each one of these reflecting upon our findings within the Findings of Fact section above. The nature of the allegations made by the claimant in relation to this form of discrimination are such that it is

appropriate to question whether it could be considered harassment as a number of the allegations included within this section, appear to be unsuitable for inclusion.

153. The Tribunal does not accept that the respondent allowed the claimant to suffer by not taking her communications and complaints seriously. We believe that they did try and support the claimant, even if at times she may not have believed that they were doing so. We also believe that the respondent did support the claimant when she raised concerns.

154. In terms of the allegation of harassment relating a failure to make reasonable adjustments, this cannot amount to harassment and cannot be considered as part of this complaint.

155. The respondent did not deliberately require the claimant to work with Vaida and this cannot amount to an act of harassment.

156. The Tribunal have of course discussed at length already, the meeting which took place on 25 September 2019 and is highly critical of the way in which the respondent managed this event. However, in the context of a complaint of harassment, this was not something that was done intentionally in a misleading way or to undermine the claimant, even if it was held without proper notice and without allowing the claimant an opportunity to be accompanied. In terms of the allegation of falling asleep on duty, the Tribunal cannot accept that the claimant was falsely accused as there were reasonable grounds for making the allegation and the claimant appeared to accept that she may have fallen asleep. It is fair to say that it was not thoroughly investigated, but it is difficult to see how this could amount to an act of harassment.

157. It is fair to say that the respondent did deal with the claimant's grievance, but they were restrictive in how they dealt with it.

158. The Tribunal accepts that the claimant was not allowed to work set nights.

159. The Tribunal does not accept that the claimant was singled out to change her hours from night to days, required her to work at Keele Crescent or that it did not provide flexible shifts so that she did not have to work with her colleague, Vaida. The respondent did try to support the claimant and did not force her to work particular working patterns. They tried to prevent her from being placed on the same rota as Vaida, but when the claimant requested overtime, she would sometimes be allocated to the same shift, but even then, managers would separate these two employees by allocating them to separate floors.

160. In terms of the above matters, we did give consideration whether those we accepted as taking place, amounted to unwanted conduct. in this respect, we accept that the restrictive way in which the grievance was carried out and the refusal to allow the claimant to work set nights were unwanted conduct within the meaning of section 26 of the EQA. The Tribunal acknowledges the unfortunate way in which the meeting took place on 25 September 2019 but does not accept that it was conducted in a deliberately misleading way and therefore happened as alleged.

161. However, we are unable to accept that the conduct which we accepted as unwanted, *actually related to the claimant's disability.* There was simply insufficient evidence available to suggest to the Tribunal that such a connection existed. Moreover, we were not satisfied that the purpose of this conduct was to violate the claimant's dignity or indeed, to create an intimidating, hostile, degrading, humiliating or offensive environment. The Tribunal did take into account the claimant's perception of these matters but is unable to conclude that the conduct had this effect. The respondent was simply attempting to deal with these matters in a proportionate and reasonable way and while they were at times poorly executed, they did not amount to harassment at all, or harassment related to disability. Had we been satisfied that the meeting on 25 September 2019 had been misleading and therefore taken place as alleged, we would have accepted that this had the effect of creating an intimidating and hostile environment. However, for the reasons given above, we are not satisfied that this allegation happened as alleged.

162. Accordingly, this allegation of disability discrimination by reason of harassment must fail.

Direct disability discrimination

163. There is an element of repetition in these allegations when compared with the allegations made in relation to the complaint of harassment.

164. Accordingly, the Tribunal would refer to the findings which it made above in its discussion of the harassment complaint. However, we were unable to find that the claimant was treated by the respondent less favourably than it would have treated others.

165. We did consider the comparators identified by the claimant (named and hypothetical), but do not accept that in the same material circumstances, they would have been treated any differently. The exception to this, relates to the named comparator Vaida, whom we understand was provided with set shifts because of her personal circumstances. However, in all of these cases, even if this treatment was less favourable, it was because of the claimant's disability. There was some suggestion by the claimant that Vaida's race may have played a part in the respondent's decision to provide Vaida with these set shifts, although management asserted that it related to different contractual arrangements for Vaida and the claimant. However, the claimant must understand that the Tribunal was dealing with a disability discrimination complaint and it was unable to find that any of the treatment alleged by the claimant was less favourable than any of the comparators by reason of her disability.

166. Ultimately, the respondent appeared to cooperate with the claimant in terms of the way in which she worked following the incident in December 2019. The real failures on the part of the respondent arose in relation to the alleged conduct matters and the grievance in September 2019, onwards. However, the Tribunal did not hear any evidence to suggest the claimant's disability played a part in the treatment which has been found to have taken place. Instead, it

represented behaviour motivated by a desire to be efficient, but which failed to take account of fairness, rather than in a particular way connected with her mental health issues.

167. Accordingly, the complaint of direct disability discrimination cannot succeed.

Discrimination arising from a disability

168. Firstly, the respondent conceded that it knew the claimant had a disability at the time the alleged unfavourable treatment took place.

169. In relation to the unfavourable treatment identified in the list of issues, the Tribunal would repeat its findings concerning these allegations above as they appear to duplicate the allegations made in relation to harassment and direct discrimination.

170. In summary we find that allegations (a) 'communications and complaints', (b) 'not supporting claimant', (d) 'making claimant work with Vaida', (h) 'not engaging with grievance', (i) 'not allowing claimant to work set nights', (j) 'singling out claimant', (k) 'requiring claimant to work alone at Keele Crescent' and (l) 'not providing flexible working so claimant did not have to work same shifts as Vaida', did not happen as alleged and in any event and did not amount to less favourable treatment. In the case of allegation (c) 'not making reasonable adjustments', it was actually a complaint of failure to make reasonable adjustments and should be properly dealt with under those allegations.

171. However, it is accepted that the allegations relating to meeting on 25 September 2019 which were (e) 'nature and purpose of meeting', (f) 'holding meeting without notice' and (g) 'not thoroughly investigating the allegation', did occur as alleged and were unfavourable treatment.

172. It is accepted that the claimant was more vulnerable when dealing with stress and pressure. The respondent knew that this was the case from previous disclosures made by the claimant and the previous risk assessment and that these things arose from her disability. While this might be the case, the Tribunal does not accept that the alleged unfavourable treatment which the Tribunal accepts took place, was because of this vulnerability.

173. The one matter that required further consideration was the incident where she fell asleep on duty, as this was a matter which may have arisen from the increased vulnerability which she had described as arising from her disability. However, this matter was not actually what the claimant alleged to be unfavourable treatment. Instead, she said that it was the holding of the meeting which discussed the sleeping on duty incident, which the claimant described as being unfavourable. As such, it was not a matter which directly formed part of this form of discrimination which the claimant alleged. On this basis, the Tribunal did not accept that there was any unfavourable treatment because of something arising in consequence of the claimant's disability.

174. As a consequence, the Tribunal is unable to find that the claimant has proven facts which demonstrate that the treatment which she successfully alleged above in relation to this form of discrimination, actually happened because of the vulnerability which arose from her disability.

175. While there was some unfavourable treatment by the respondent in relation to allegations (e), (f) and (g) described in the list of issues and above, concerning the meeting on 25 September 2019, the Tribunal does not find that this treatment was because of something arising in consequence of the claimant's disability.

176. These findings do of course render the consideration of the statutory defence under section 15 EQA superfluous. However, for completeness we would say that in relation to allegations (e), (f) and (g) which were successfully made insofar as they were demonstrated to be unfavourable treatment, the Tribunal would say that while the treatment arose from a legitimate aim to investigate issues of conduct and capability, it was not proportionate to ignore well recognised disciplinary processes. The other allegations were not of course successfully proven and there is no need to consider this defence in relation to these matters.

177. In any event, for the reasons given above, the allegations of disability discrimination because of something arising from a disability must fail.

Reasonable adjustments

178. The respondent knew that the claimant had a disability at the material time and from December 2019.

179. It is accepted that the respondent's grievance and disciplinary procedures were PCPs which applied to all of its employees. The Tribunal accepted that these policies could put the claimant at a substantial disadvantage by reason of the stress and anxiety. However, we found that this disadvantage was not because of the grievance and disciplinary policies per se, but because of the way in which the respondent failed to apply them in an inappropriate or restrictive way. On this basis, the PCP did not place the claimant at a substantial disadvantage and the way in which the managers behaved towards the claimant in relation to the disciplinary matters and grievance matters could be considered a PCP , rather than because of a failure to follow the PCP. This was therefore a singular rather than a general approach, but reasons provided elsewhere, not connected with the claimant's disability.

180. If the Tribunal was wrong in relation to this finding, we do accept that the respondent was aware of the claimant's impairment and that she was more vulnerable to the way in which the disciplinary and grievance matters were executed, though arguably, any employee would have been similarly affected in similar circumstances based upon the claimant's allegations.

181. Our consideration of the adjustments requested are therefore academic. These adjustments are in fact things which would ordinarily have been expected by any employee regardless of disability being notice of the meeting

on 25 September 2019, the right to be accompanied and the right to have breaks. But if we were wrong in our findings above in relation to this particular form of discrimination, we accept that these would have been reasonable adjustments, especially in relation to the need for breaks. As it is, we find that the allegations relating to this form of discrimination are unsuccessful.

Conclusion

182. This was a very unfortunate case which could have been dealt with better by the respondent when faced with the matters which arose in late August and September 2019. But for these failures, it is likely that the claimant would have faced a proper disciplinary process. She may or may not have been dismissed, but there were clearly allegations which could have given rise if proven to a dismissal by reason of conduct.

183. The Tribunal felt that this claim was not really about the claimant's disability, but the respondent trying to tie up loose ends when the claimant was in work during the daytime, without thinking about due process. This is why the Tribunal's focus was upon the question of fairness under the ERA and is why the complaint of constructive unfair dismissal succeeds, albeit with the application of *Polkey* and contributory fault. The respondent should remind itself of its duty to follow fair procedures in disciplinary matters and take account of the ACAS Code of Practice. But we do not accept that the claimant was a victim of disability discrimination. The respondent overall appeared to have been sympathetic to her circumstances and tried to manage the workforce issues while recognising the claimant's need to work nights and work additional shifts. Ultimately, where it failed was when it felt there was a disciplinary matter that the claimant had to answer and they reacted in a way which was ill thought out and focused upon a quick resolution, rather than a fair one.

184. Accordingly, the findings of the Tribunal in this case are as follows:

(a) The complaint of constructive unfair dismissal is well founded and succeeds, subject to the application of *Polkey,* contributory fault of 20% and the uplift for the respondent's failure to comply with the ACAS Code of Practice.

(b) Those allegations of disability discrimination which arose before 16 September 2019 were presented out of time and it is not just and equitable to extend time in accordance with section 123 Equality Act 2010.

(c) Those complaints of disability discrimination brought under sections 26, 13, 15, 20 & 21 of the Equality Act 2010 and which were presented in time are not well founded and do not succeed.

(d) The successful complaint of constructive unfair dismissal will now proceed to a remedy hearing on a date to be confirmed with a hearing length of 1 day.

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Employment Judge Johnson

Date 19 April 2022

JUDGMENT SENT TO THE PARTIES ON

Date 21 April 2022

FOR THE TRIBUNAL OFFICE