



EMPLOYMENT TRIBUNALS

Claimant: Mr A Organista
Respondent: Abbey Total Care Group
Heard at: London South Employment Tribunal
On: 24.01.2023 – 27.01.2023 (principally by videolink)
Before: Employment Judge Dyal sitting with Ms Grayson & Mr Murphy
Representation:
Claimant: in person
Respondent: Mr Hussain, Consultant

RESERVED JUDGMENT

1. The complaints fail and are dismissed.

REASONS

Introduction

1. The matter came before the tribunal for its final hearing.

The issues

2. The Claimant complains of direct race discrimination contrary to s.13 Equality Act 2010. He defines his race as white, Mediterranean (Portuguese).
3. The complaints were identified at a Preliminary Hearing on 25 January 2022 subject to the provision of a few further particulars. Those further particulars were provided on 21 February 2022.
4. The complaints, as fleshed out by the additional information, are as follows:
 - a. *On 14 October 2020, being asked for a fit note showing him as fit to return to work at the end of a period of sickness resulting in a delayed return to work.*
 - b. *On 23 October 2020 having his hours of work reduced from 30 to 15 on his return from work after a period of sick leave.*

- c. *Being spoken to by Mr Amit Patel in a rude and intimidating manner at a meeting on 28 October 2020. The Claimant raised concerns about a lack of cleaning of certain areas whilst he had been on sick leave. Mr Patel spoke to the Claimant harshly with a rude tone stating that it was not for the Claimant to supervise the cleaning work. Mr Patel tone remained rude and harsh until the end of the meeting.*
- d. *On his return to work new rules had been put in place specifically to make his work harder and to target him. In particular, at a staff meeting on 11.12.2020 a distorted definition of whistleblowing was given by Ms Dusoruth by which it included reporting co-workers. Further she said that if a resident is sleeping and a cleaner entered the room without knocking and asking the resident if he could clean that was abuse and a form of gross misconduct in relation to which other staff could blow the whistle. This made the Claimant's job harder.*
- e. *Being required to sign documents including clauses the Claimant says are illegal in order to create a circumstance whereby he would lose his job.*
- f. *Mr Amit Patel asking the Claimant not to send certain matters (maintenance list, for example) by email in order to prevent the Claimant gathering evidence and reporting to management.*
- g. *Management making excuses when certain duties require that the resident has to be temporarily removed for carpet washing (for example) in order to prevent the Claimant doing his work, and then make an allegation that he did not perform a certain task. The excuses were:*
 - a. *That the resident was asleep so the carpet could not be cleaned;*
 - b. *That a nurse or carers needed to work in the room.*
- h. *Not being allowed to report other staff who are not doing their work.*
- i. *The management asking other staff members to report how the Claimant is doing his work, for example which parts of the building he has failed to clean.*

The hearing

- 5. On 23 January 2023, the Claimant applied to join the final hearing remotely stating that he felt it would be impossible for him to join in person but without explaining why. Employment Judge Wright ruled that the hearing would be in person initially with the panel hearing the case determining any further application.
- 6. At 08.59 on 24 January 2023, the Claimant renewed the application by email - this time providing a detailed explanation and medical evidence in support. In essence he has bowel problems that mean he needs the toilet urgently at short notice. We granted the application for him to attend the hearing remotely and granted the Respondent the like permission but also with the option of attending in person or a combination of both. However, the hearing was then beset by technology problems.
- 7. On day 1 (24 January), the Claimant was able to join the CVP room using his smartphone but was unable to see or hear anyone else. We were able to see him but not hear him. The tribunal's digital support officers spent around 2 hours attempting to resolve this problem but without success. The Respondent was in

attendance in person. Ultimately, when all else failed the Claimant joined the CVP room by telephone only and we were able to hear him and he us. We did not think a fair trial was possible with this setup so declined to commence the evidence and instead dealt only with case management. The Claimant said that he had a laptop, that it was currently not working but he anticipated being able to get it fixed overnight. In the circumstance we were content to adjourn overnight. The tribunal used the day to read the entire bundle and the witness statements.

8. In the event, the Claimant was not able to get his laptop fixed and the technology problems thus continued on day 2. Matters progressed in that after a further approximately 1.5 hours assistance from the DSOs we were able to see and hear the Claimant and he was able to hear us. He was not, however, able to see us or the Respondent's representative/witnesses. That problem could not be surmounted despite best efforts. We did not think that this setup was sufficiently good to proceed substantively.
9. The Claimant said he was unable to buy another device (unaffordable), unable to borrow one and unable to get his laptop fixed in short order. He remained unable to attend in person. Employment Judge Dyal raised the possibility of the Respondent loaning the Claimant a device for the duration of the hearing. This was raised simply as a possibility and he emphasised that he was not telling the Respondent to do this nor ordering it to. Ultimately, Mr Patel volunteered to loan the Claimant a device and said he would deliver it to the Claimant overnight. We agreed that the hearing would resume on day 3.
10. We were able to commence the hearing on day 3. Mr Patel had delivered the Claimant a laptop which, after some teething problems, was properly operational. We were all able to see and hear each other. On day 3, there was however, a time-lag on the connection that was longer than usual. Although this was sub-optimal we were able to communicate properly with each other. On day 4, there were no connection problems.
11. *Documents before the tribunal:*
 - 11.1. 281 page bundle;
 - 11.2. Additional documents added in the course of the hearing by consent: pp. 52.1 – 52.3, 58A, 214A, 215.1 – 215.5, 226.1, 282 – 5;
 - 11.3. Respondent's list of issues;
 - 11.4. Witness statements for:
 - 11.4.1. The Claimant;
 - 11.4.2. Ms A Dusoruth (primary statement and supplemental statement);
 - 11.4.3. Mr Amit Patel (primary statement and supplemental statement).
12. The tribunal heard oral evidence from each of the above witnesses. Both sides made brief closing statement which we had careful regard to.

Findings of fact

13. The tribunal made the following findings of fact on the balance of probabilities.
14. The Respondent is a care home provider. It operates around 10 homes including the Bhakti Shyama Care Centre ('the Home'). The residents at the Home are elderly people invariably of Indian ethnic origin. The Home is aimed at the Gujurati community. It serves vegetarian Gujrati food and is next door to a Hindu Temple. Most of the staff employed at the Home, of which there are around 25, are of Indian ethnic origin.
15. The Claimant is a white, Portuguese man. He was employed by the Respondent as a domestic assistant from 25 March 2020 onwards. In practice he was a cleaner although his contract also provided for him to work in the laundry. He was contracted to 30 hours per week.
16. At the outset of his employment the Claimant was not given a written contract of employment. However, he did sign a Notification of Appointment form that contained the most basic details including his job role, hours of work and rate of pay. This document was only disclosed by the Respondent in the course of the hearing. Ms Dusoruth's primary witness statement said, inaccurately, that at the outset of the Claimant's employment there had been no agreement as to his working hours. The Claimant believes this was deliberate false evidence on her part to mislead the tribunal. We do not agree. We accept her evidence that it was just a mistake. We note that the mistake was corrected voluntarily by the Respondent. The notification of appointment form was disclosed and a supplementary witness statement produced voluntarily.
17. On 25 March 2020, the Claimant signed to indicate he had received the staff employee handbook. The Claimant's evidence is that in fact he had not, and he did not get it until around January 2021. We accept that the Claimant's evidence that he was not given a copy of the employee handbook at this time notwithstanding that he signed a document stating that he had.
18. At the outset of the Claimant's employment he was one of two cleaners. The other cleaner was Muntas¹, a woman of Indian ethnic origin. She was also contracted 30 hours per week. However, she worked some of her hours in the laundry.
19. As the dates makes clear, the Claimant's employment commenced concurrently with the early part of the Coronavirus pandemic. This was a time of national crisis. It was time of confusion, disruption and immense change. The emergency situation it created was particularly acute in care homes where elderly residents were highly vulnerable.
20. Against that background, upon his appointment the Claimant was not provided with a uniform. This is a matter that he gave significant emphasis too in this

¹ We are not certain of the spelling of this employee's given name and her surname is not in evidence at all. No disrespect is intended by referring to her in the way we have.

hearing. We accept Mr Patel's evidence that there were no uniforms in stock, that there were no second hand ones to offer the Claimant and the supplier was unable to provide one because it was affected by the pandemic. Thus initially the Claimant simply wore his own clothes. He was quickly provided with a uniform when he returned to work after the period of absence described below.

21. On 2 July 2020 the Claimant commenced a period of sickness absence with wrist tendonitis. His GP's fit-note advice was that he was 'not fit for work'.
22. The Claimant's sickness absence protracted and on 21 August 2020, the Respondent employed Mr Mahendra Patel. Mr M Patel² is of British Nationality and Indian ethnic origin. He was employed as a domestic assistant also with a contract for 30 hours per week.
23. The Claimant continued to provide fit notes certifying his absence with the same advice from the GP: that he was not fit for any work. This was ultimately the position until 4 October 2020.
24. On 9 September 2020, Mr Patel emailed the Claimant stating that before the Claimant returned to work he needed to meet with him to discuss his "absence and work performance." He also said that the Claimant needed to provide a fit note from his GP to show he was fit to work and that without one he would not be allowed to continue his shifts.
25. During his evidence Mr Patel was asked to explain what the reference to discussing the Claimant's "work performance" meant. His evidence was that there was no concern nor had there ever been, about the quality of the Claimant's work. When he referred to "work performance" he was simply referring to the Claimant's sickness absence which was having a significant impact on the business. We accept that evidence.
26. By a letter dated 17 September 2020 (but sent to the Claimant on 22 September 2020), Mr Patel sought the Claimant's consent to obtain a medical report, the letter said this:

I would like to obtain a medical report from your GP and/or Consultant which will provide details on the current state of your health so that I may properly understand the nature of your illness. We will use this information to help us make decisions on how best we can support you in returning to work, whether any reasonable adjustments are required to your working arrangements and for future work planning.

27. The Claimant gave his consent on the same day (22 September 2020). However, the Respondent did not seek a report so far as the evidence shows. The request it made was overtaken by events.

² We refer to Mr Amit Patel simply as Mr Patel. We refer to Mr Mahendra Patel as Mr M Patel.

28. The Claimant then sent a further medical certificate that extended his period of certified absence to 4 October 2020.
29. On 4 October 2020, the Claimant presented himself for work. He went straight to the lounge. Ms Dusoruth spoke to the Claimant and raised two issues. Firstly, that the Claimant needed to provide evidence of his fitness to work. Secondly, a concern about Covid. There is some confusion about what exactly was said, and the Claimant thinks it significant that there were no cases of Covid in the Home at the time. We do not think she told the Claimant that there were current cases of Covid-19 in the home although it is clear that this is what he heard. There was thus a miscommunication. Having heard the evidence, we accept that Ms Dusoruth's concern was that the Claimant had come straight into the home - to the lounge - bypassing what by then was the usual procedure of taking a covid test first at the entrance. This was a reasonable concern in the circumstances.. The Claimant was sent away.
30. There then followed a period of time that was understandably frustrating for the Claimant. He wanted to return to work, pressed for this to happen but for a period of time was met with silence.
31. On 8 October 2020, the Claimant emailed Mr Patel. The email records that it is the Claimant's third attempt to clarify matters. We accept this was the third attempt, though the first two attempts are not before us. The Claimant stated that he had looked into the matter and there was no requirement to produce a fit note in order to return to work.
32. On 15 October 2020, the Claimant wrote to Mr Patel again stating that his GP had told him that a fit note of the sort requested would be chargeable (£10). He also said he had reported to ACAS and that there may be a claim to the employment tribunal if the matter did not resolve.
33. On 15 October 2020, Ms Dusoruth emailed the Claimant inviting him to a return to work meeting. She said that no fit note was required as they could discuss his fitness to return at the meeting.
34. The return to work meeting took place on 16 October 2020. At the meeting the Claimant said he was fit to return to work and that further absence on account of wrist tendonitis was unlikely.
35. On 23 October 2020, the Claimant returned to work. Ms Dusoruth met with him. In the meeting she told the Claimant that during his absence another cleaner had been recruited (Mr M Patel). There were now three cleaners. Ms Dusoruth said that they were thus overstaffed and that the three cleaners would be given 15 hours of cleaning each. This meant that the Claimant's hours would be cut in half and so to would Mr M Patel's. Muntas would also have her cleaning hours cut to 15 but since she worked in the laundry she was able to make up the hours there.

36. On 26 October 2020, the Claimant emailed Mr Patel and Mrs Dusoroth. He complained about the cut in his hours and suggested alternatives so that the cut was less drastic and fairer. This was a constructive and helpful email.
37. On 28 October 2020, the Claimant had a meeting with Mr Patel and Ms Dusoruth:
- 37.1. The Claimant expressed concern about his cut in hours;
 - 37.2. Mr Patel told him that the three cleaners would be given similar hours;
 - 37.3. Mr Patel said that Claimant could work additional hours in the laundry and if he wanted to do so he would have 30 hours a week work. The Claimant said he was willing subject to being given the necessary training.
 - 37.4. At this meeting, the Claimant reported that whilst he had been away on sick leave certain cleaning duties had not been done at all.
 - 37.5. The Claimant's evidence is that Mr Patel reacted badly to this, became arrogant, intimidating and took a hostile and angry tone for the remainder of the meeting. Mr Patel's evidence is that he did not and that he remained polite, Ms Dusoruth agrees with Mr Patel. Both sides agree that Mr Patel told the Claimant that supervising the other cleaners was not his role but the role of the manager.
 - 37.6. In our view the truth of the matter lies somewhere in the middle. We do not accept that Mr Patel was arrogant or intimidating. We do not think that is consistent with his management style. However, we do think he was irritated by the Claimant in this meeting and in particular that he considered the Claimant to be unduly critical of his colleagues. He did not accept that cleaning had been left undone for the duration of the Claimant's sickness absence because it would have been very obvious if so. He thought the Claimant was being unfairly critical of his colleagues. His irritation is likely to have been reflected in his tone. However, we think this stopped very far short of being intimidating or anything of that nature.
 - 37.7. Mr Patel also told the Claimant to make a maintenance list and leave it in the manager's office rather than emailing though maintenance concerns.
38. After the meeting on 28 October 2020, an agreement was reached whereby the Claimant would work 24 hours per week doing cleaning. He had the option of doing additional work in the laundry but for his own reasons he preferred not to. He was happy with 24 hours per week. The other cleaners were treated in the same way.

Mobile phone use

39. In October 2020, Mrs Dusoruth challenged the Claimant about his mobile phone use in the workplace. He was in the habit of taking photographs of his work. Mrs Dusoruth asked him why he did this. He said that it was to prove he had completed his tasks. Mrs Dusoruth told him not to. There was a mobile phone policy which prohibited workers using their mobiles while at work. And there was a risk of photographing residents many of whom were vulnerable.

40. The employee handbook said this:

Personal Mobiles

Unless a personal mobile phone has been approved for personal use, you should not use your mobile phone during working hours. Under normal circumstances personal phones must be turned off and left in lockers (where provided) during working hours and only used during authorised work breaks.

Where special circumstances dictate and you need to have the use of a personal phone during working hours, you must refer this to your Manager who will deal with such a request on an individual basis.

Unauthorised use of a personal mobile phone during working hours may result in a disciplinary warning or dismissal, depending on the circumstances.

41. Beyond asking the Claimant not to use his mobile phone in the workplace there was no consequence of him having done so.

42. From time to time, the Claimant encountered colleagues using their mobile phones in the workplace. He reasons that since they did this the rule about not using mobile phones did not apply to them or was not enforced in relation to them. We do not accept that and we found the Claimant's evidence highly speculative. The reality of the situation is that rules are often broken in the workplace and the mere fact an employee breaks the rules does not mean that the rules do not apply to them or are not enforced in relation to them. Ms Dusoruth's evidence is that if and where she became aware of employees using their mobile phones she would address the matter with that employee. She would do so confidentially and would not tell the Claimant about it. We accept that evidence.

43. The Claimant says that he reported colleagues using their mobile phones to listen to music while working in the laundry to Manisha³ and the mobile phone use continued, nonetheless. That may be true, but Manisha was an administrator not a manager and it was not her job to manage the employees in the laundry. We accept Ms Dusoruth's evidence that she was not contemporaneously aware of this matter.

44. The Claimant also reports that some colleagues made personal telephone calls on their mobile phones in the course of their work. However, we accept Ms Dusoruth's evidence that as and where managers became aware of this they would have a word with that employee and ask them not to.

³ We are not certain of the spelling of this employee's given name and her surname is not in evidence at all. No disrespect is intended by referring to her in the way we have.

45. There is also a qualitative difference between what the Claimant was doing with his mobile phone and what he says others were doing. He was taking photographs in the workplace which was the home of vulnerable residents. The risk to breaching residents' privacy is quite different with that sort of mobile phone use than where a mobile phone is used to play music or make a phone call.

Maintenance book

46. In December 2020, the Claimant was asked to report maintenance issues in the maintenance book. The Claimant says he was never told about this book before. We can accept he was not specifically told about it, however, we find that the book had always been in existence and was there to be used by anyone who wanted to use it. It is referred to in standard documentation like the 'Cleaning Schedule' which cleaners including the Claimant were required to sign frequently to indicate they had cleaned an area.

Staff meeting of 11 December 2020

47. On 11 December 2020, there was a staff meeting. Several carers including the Claimant were present, as was a nurse, an administrator, kitchen staff and laundry staff. Ms Dusoruth led the meeting:

47.1. At the meeting the staff were told that if they witnessed any sort of abuse they could report it. That included wrongdoing by co-workers. This was described as whistleblowing.

47.2. An example of wrongdoing was given as entering a resident's room without knocking or while the resident was sleeping.

48. This guidance was given to all staff. It was not targeted at the Claimant. It was a general reminder about whistleblowing and a general reminder about basic courtesy to residents of knocking before entering their bedrooms and not working in their rooms while they were asleep.

49. The Claimant thinks there is a big discrepancy because a particular resident later told him that she did not require him to knock before entering and this was contrary to Ms Dusoruth instructions. He says that Ms Dusoruth had given this resident as an example of someone that would be sensitive to people coming in without knocking or while she was asleep. We can accept this evidence, and the upshot is that Ms Dusoruth was mistaken in her assessment of what this resident's preferences would be. We do not, however, think there is any particular significance in that.

50. The rules – knock before entering, do not enter if the resident is asleep (at least absent a very good reason such as to give medication) – were not, as the Claimant believes, a 'smart trap' to trip him up and dismiss him. They were simply appropriate basic courtesies to protect the residents' privacy and dignity.

51. Again we can accept the Claimant's evidence that from time to time he saw colleagues break the rules by entering rooms while residents slept without a good reason for doing so. It is not unusual for rules to be broken. There were also sometimes good reasons for entering a room while the resident was sleeping (e.g. to administer medication or to wake a diabetic patient to eat). The Claimant would not always have been aware of what the reason was.

Stalking

52. The Claimant's case is that management sent co-workers to monitor/stalk him hoping he would make mistakes so that he could be dismissed. We found his evidence in support of this proposition extremely speculative. It amounted to little more than a suspicion that people were going out of their way to look at what he was doing. We found his evidence about this extremely vague.

53. There was one more tangible example. On one occasion the Claimant failed to clean some cobwebs. This was raised by a co-worker with management. The Claimant says that his co-workers were happy about this and were talking about it excitedly. However, he cannot give direct evidence of that because they were speaking in Gujrati and he does not speak Gujrati. He says that someone else told him that they were amused by his mistake.

54. We do not accept that the Claimant was being stalked/monitored at all, least of all at management's direction in order to find errors that could lead to his dismissal. The cobweb incident is a telling one. In his evidence the Claimant was asked what happened when it was pointed out that he missed some cobwebs. The only consequence was that the cleaning miss was pointed out to him so he could complete the job. Nothing more.

55. We do not accept that there is any reliable evidence that colleagues were happy at the Claimant making a mistake or laughing at him for us to make such a finding.

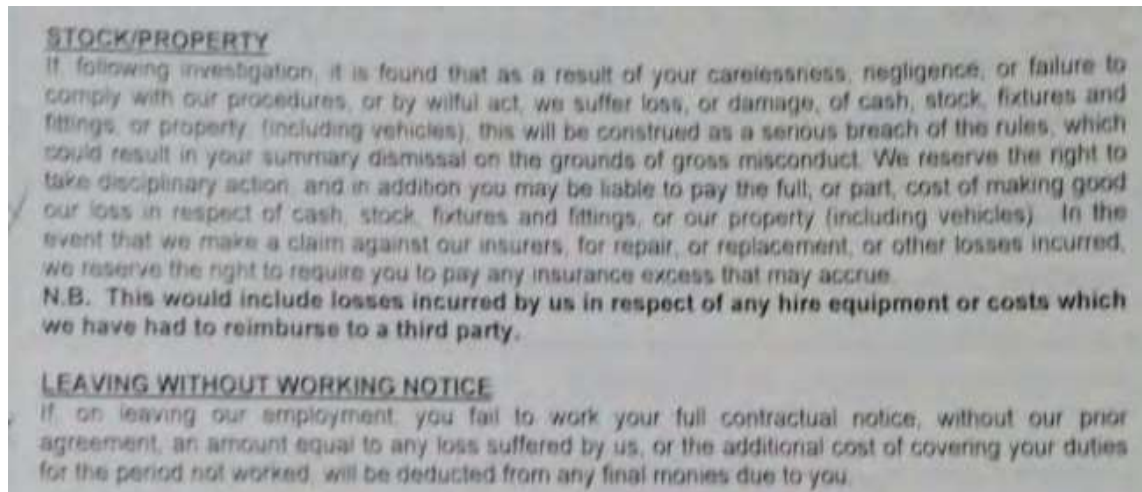
56. In any event, it is plain that at every stage the Claimant was managed with a light touch that is not in any way suggestive of a desire to trip him up, force him to resign or to sack him. We return to this below.

Terms in relation to deductions

57. In around December 2020 the Claimant was given the employee handbook and was also asked to sign a number of documents in an employee starter pack.

58. In his oral evidence, the Claimant said for the first time that he had been told to sign the documents without reading them first (by Manisha). The Claimant believes that this was done deliberately as a trap for him. However, he insisted on reading the documents and this took an hour and a half. He did this in front of Manisha.

59. The Claimant objects in particular to the following terms which he believes are “illegal” because of vicarious liability (sic):



60. Manisha was not one of the Respondent’s witnesses nor was there any reason to anticipate in advance of the hearing that she should be. We have therefore not had the benefit of hearing from her.
61. We think that what is likely to have happened here, based on the evidence that we do have set in its full context, is that Manisha tried to hurry the Claimant into signing the document because he was taking a very long time to do so, which other employees did not. We reject any suggestion that this was done with the intention of trapping the Claimant. It is highly implausible that the administrator had any interest in doing anything of that kind. It is yet more implausible that she had given thought to those particular terms set out above and decided to try and trap the Claimant by hurrying him into signing them.
62. We find that the documents the Claimant was asked to sign were part of the Respondent’s standard documentation that it asked all employees to sign. This was Mr Patel’s evidence and we accept it. The Claimant also thought that was likely.

Stockroom

63. On a particular occasion, the Claimant locked himself in the stockroom during his break. Other staff needed some stock and found the door locked. They knocked on the door and the Claimant did not initially answer. He eventually did open the door. Ms Dusoruth asked him to use the break area for his breaks.
64. In the course of the hearing, the Claimant objected to the fact that Ms Dusoruth had recounted this incident in her witness statement. He suggested it was misleading because it implied there was a practice of him locking himself in the stock room and that on the occasion he did so he had had a good reason to. The reason was that he had needed to change his trousers and then forgot to unlock the door.

65. On analysis, nothing that Ms Dusoruth said about this incident in her statement was misleading - rather it was true. She did not say there was a practice. The stock room was an odd place to get changed. Once the Claimant was changed it was odder still that he remained in the stock room for the rest of his break.

Washing carpets

66. Washing the carpets is quite noisy, leaves the carpet wet and slippery. The carpet cleaning detergent had a strong smell. For these reasons the Claimant was told not to wash carpets whilst residents were in their rooms.

67. There were times that the Claimant was not able to access rooms because nurses or carers were with the resident.

68. This did mean that on occasion the Claimant could not clean carpets at a time that was convenient to him.

69. The Claimant was never criticised for not washing a carpet or not washing it at a particular time.

Mr M Patel leaving and someone else falsely signing as Mahindra?

70. The Claimant's evidence is that someone told him that at some point in time Mr M Patel left the Respondent's employment, a further person was recruited and that person signed internal documents 'Mahindra' though that was not their name in order to make it appear Mr M Patel remained employed. This was done to give an appearance of having a valid reason to reduce the Claimant's working hours.

71. We entirely reject this evidence, such as it is. The Claimant had no first hand knowledge of this and we consider what he reports to be totally implausible. Firstly, the Respondent was obviously not wedded to the idea of reducing the Claimant's hours since as soon as he complained about that, it agreed to increase them. Secondly, the ruse which is described is convoluted and improbable. Thirdly, there are payslips before us for Mr M Patel that extend to at least March 2021. We simply do not accept that Mr M Patel left and that a different person then began operating under his name.

Further sickness absence

72. In January 2021, the Claimant commenced a further period of sick leave with bowel issues. He remains on leave.

Law

Direct discrimination

73. Section 13 EqA provides: "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

74. Section 23 EqA provides:

(1) On a comparison of cases for the purposes of section 13...there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include each person's abilities if – on a comparison for the purposes of section 13, the protected characteristic is disability...

75. In **Nagarajan v London Regional Transport** [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, 'why the complainant received less favourable treatment...Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?'.

76. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 at [11-12], Lord Nicholls:

'[...] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant [...]

77. Since **Shamoon**, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in **Martin v Devonshire's Solicitors** [2011] ICR 352 at [30]:

'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, e.g., D'Silva v NATFHE [2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009 , para 37; though there

seems so far to have been little impact on the hold that “the hypothetical comparator” appears to have on the imaginations of practitioners and Tribunals.’

The burden of proof and inferences

78. The burden of proof provisions are contained in s.136(1)-(3) EqA:

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

79. In ***Igen Ltd & Others v Wong*** [2005] IRLR 258 the Court of Appeal gave the enduring guidance on the burden of proof. Although that was a case brought under the Sex Discrimination Act 1975, it has equal application to all strands of discrimination under the EqA:

- (1) *Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.*
- (2) *If the claimant does not prove such facts he or she will fail.*
- (3) *It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.*
- (4) *In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*
- (5) *It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*
- (6) *In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.*
- (7) *These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.*

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

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

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

80. In **Madarassy v Nomura Bank** 2007 ICR 867, a case brought under the then Sex Discrimination Act 1975, Mummery LJ said:

“The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.”

81. The position was summarised by Underhill LJ in **Base Childrenswear Ltd v Otshudi** [2019] EWCA Civ 1648 at [18]:

‘It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:

(1) *At the first stage the Claimant must prove “a prima facie case”. That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving “facts from which the Tribunal could conclude that the Respondent ‘could have’ committed an unlawful act of discrimination”. As he continued (pp. 878-9):*

“56. ... The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal ‘could

conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.

57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. ..."

- (2) *If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues: "He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim." He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'*

82. In ***Deman v Commission for Equality and Human Rights*** [2010] EWCA Civ 1279, Sedley LJ observed at [19]: *"the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'*
83. In ***Hewage v Grampian Health Board*** [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.
84. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

Discussion and conclusions

85. The central theme of the Claimant's case is that the Respondent had an agenda of trying to find a way of dismissing him or making him so uncomfortable that he would resign and claim constructive dismissal. And this because of his race.
86. Standing back from all of the evidence and looking at it as a whole, we simply do not accept the Claimant's central thesis that there was a desire to terminate his employment, and on the contrary reject it. Some key factors as to why:

- 86.1. At the time of his first period of sick leave for wrist tendonitis, the Claimant had short service, no right to claim unfair dismissal and the right to statutory minimum notice (1 week). If the Respondent had wanted to dismiss him, his protracted absence presented an ideal opportunity. However, in fact, the Claimant's absence was managed with a very light touch. No absence management process was commenced and he was not given even a single warning in respect of his absence. There was not the slightest suggestion that it might lead to dismissal. There certainly could have been had the Respondent been so minded.
- 86.2. The Respondent sought medical evidence in respect of the Claimant's return to work. However, as discussed further below, far from this being a malign indicator it was essentially the opposite. It was an attempt to become informed not only of the Claimant's fitness for work but moreover whether he needed any reasonable adjustments.
- 86.3. The Claimant's hours were reduced while he was away because another employee had been engaged during his absence. However, all affected employees were treated in the same way and when the Claimant objected to the cut in his hours, they were increased to 24 per week and would have been reinstated to 30 had he wanted them to be.
- 86.4. The Claimant was using his mobile phone in the workplace. The policy in the employee handbook provides that this could lead to disciplinary warning or dismissal. While we would not expect a first offence for the use of a mobile (save perhaps where there were serious aggravating factors not present here) to lead to dismissal, in this case it was managed with the lightest possible touch. He was simply given an instruction to stop doing it.
- 86.5. There was one single occasion when any criticism was made of the Claimant's work - when he missed some cobwebs. The miss was simply pointed out, the Claimant cleaned the cobwebs and that was the end of the matter.
87. We have considered all of the evidence in the round, including the fact that the Claimant was one of few non-Indian employees, and asked ourselves whether there is any basis for drawing any inference of race discrimination. There is none.
88. The burden of proof does not shift in relation to any complaint and in any event there is in a non-discriminatory explanation which we accept in each case.
89. We now deal with the complaints issue by issue.
- (a) On 14 October 2020, being asked for a fit note showing him as fit to return to work at the end of a period of sickness resulting in a delayed return to work.*
90. In broad terms the factual allegation here is correct. The Claimant was asked for medical evidence to support his return to work and the requirement for this (which was ultimately removed) did delay his return.
91. However, we have no hesitation in finding that the reason why the Respondent wanted medical evidence was nothing whatsoever to do with the Claimant's race. Rather, it was to be satisfied he was fit to return to work and to be informed of any reasonable adjustments that may be needed. The Respondent was

concerned both about the Claimant and about its own potential liability if the Claimant returned to work unfit and/or without the adjustments that may be needed. It was right to be.

92. Not all periods of sickness absence are the same and, for example, where there is a short period of absence for a minor sickness no doubt medical evidence to aid the return to work is not required. Thus it makes sense that there is no fixed rule that that after each period of absence in every case there must be medical evidence of fitness to return to work.
93. There is no evidence before us that any other employee was absent from work for an extended period (measured in months) with an injury that as a matter of common sense might be aggravated by work duties (such as a bad wrist). There is no evidence of a relevant actual comparator being treated more favourably than the Claimant.
94. We are sure that a hypothetical comparator, someone of a different race with a similar injury to wrist tendonitis and a similar period of absence and similar manual job, would have been treated in the same way.
95. We can understand some frustration on the Claimant's part that it took time for him to return to work and that the communications with him were poor between 4 October and 15 October 2020. We accept Mr Patel's evidence, that this simply reflected the fact that the Respondent's priorities were elsewhere in what remained an extremely difficult operating environment for care homes.
96. There is no evidence of any race discrimination.
- b. On 23 October 2020 having his hours of work reduced from 30 to 15 on his return from work after a period of sick leave.*
97. The factual allegation is true in material respects in that the Claimant was told that his hours would reduce in that way. They never in fact did so because he complained, proposed alternatives, his complaint was listened to and an agreement was reached that he would work 24 hours (which could have been 30 had the Claimant wanted that). We commend the Claimant for proactively proposing alternatives and also the Respondent for being open to them.
98. In any event, the initial decision to reduce to 15 hours had nothing to do with race. The reason why it was made was because the Claimant's absence had protracted over a long period and as a result a further employee had been employed as a cleaner. When the Claimant returned the Respondent was overstaffed as regards cleaning.
99. Further, the Claimant was not treated less favourably than the other cleaners:
- 99.1. Mr M Patel's hours were due to be reduced from 30 to 15 on the same basis as the Claimant's;
- 99.2. Muntas' cleaning hours were also reduced to 15 albeit that she could make up the hours in the laundry where she already carried out part of her work.

The Claimant was not treated less favourably than her because he was also given the option of making up the hours in the laundry once it became clear he was not happy to reduce his hours.

100. A hypothetical comparator of Indian (or any) race would have been treated in just the same way as the Claimant. There is no basis to consider otherwise.

(c) Being spoken to by Mr Amit Patel in a rude and intimidating manner at the meeting of 28.10.202

101. The Claimant was not spoken to in a rude or intimidating manner - as set out in our findings of fact. At worst Mr Patel was irritated and had an irritable tone.

102. However, this had nothing to do with race. Rather, Mr Patel was irritated by what the Claimant said at the meeting which in turn was nothing to do with race it was about perceived inadequacies in other people's cleaning work that he did not think were justified.

103. There is no apparent actual comparator in relation to this allegation. A hypothetical comparator in similar circumstances to the Claimant but of Indian (or any other) race would have been treated in exactly the same way.

d. On his return to work new rules had been put in place specifically to make his work harder and to target him. In particular, at a staff meeting on 11.12.2020 a distorted definition of whistleblowing was given by Ms Dusoruth by which it included reporting on co-workers. Further she said that if a resident is sleeping and a cleaner entered the room without knocking and asking the resident if he could clean that was abuse and a form of gross misconduct in relation to which other staff could blow the whistle. This made the Claimant's job harder.

104. The rules in question were of entirely general application and were not put in place in order to make the Claimant's work harder nor to target him.

105. Ms Dusoruth simply reminded staff that they could report wrongdoing by their colleagues and described this as whistleblowing. The Claimant's belief is that whistleblowing involves reporting wrongdoing by the employer but does not involve reporting wrongdoing by colleagues. With respect, that is plainly wrong. Any sensible definition of whistleblowing in the workplace would need to encompass not only the reporting of wrongdoing by the employer but also the reporting of wrongdoing by co-workers. Certainly the statutory definition of whistleblowing, that is, making a protected disclosure, is broad enough to include disclosures about, among other, co-workers. If, for instance, co-workers are abusing residents then the whistleblowing policy must, in order to attain basic cogency, allow the protected reporting of this.

106. The good sense of this is also reflected in the Respondent's Whistleblowing Policy which provides:

Our procedure provides you with access to a safe and effective means of reporting matters of genuine concern. This could be something inappropriate about the way you believe we run our Company. It could be something inappropriate you believe another employee is doing. It

107. That the policy is drafted in these terms, supports our conclusion that none of this was directed at, or targeting, the Claimant.
108. As to a requirement to knock before entering a room and cleaning it and/or not cleaning a room if a resident was asleep, again this was a matter of the most basic courtesy in the interests of protecting residents' privacy and dignity. The rooms, were, after all, their bedrooms. The rules were not directed at and did not target the Claimant.
109. We can accept that, in practice, these rules would make the Claimant's job more difficult from time to time because he would not always be able to clean rooms in a convenient order. However, it was right that making his job as easy as possible should give way to privacy and dignity of residents.
110. We consider the fact that a particular resident told the Claimant he could enter without knocking is immaterial. The resident was free to say that. But any prudent person would still knock. For instance, to make sure the resident was not in a state of undress.
111. Most importantly, these matters had nothing whatsoever to do with race. They were rules of entirely general application. They were rules that were given to the whole workforce that was present at the staff meeting.
112. There is no evidence of less favourable treatment of any actual comparator. All employees were given the same rules to work under.
113. For completeness, there is no evidence of the rules being more harshly enforced against the Claimant than against anyone else. The Claimant says on occasion some colleagues did not follow these rules and so far as he knows they were not disciplined. However, there is no evidence that if the Claimant had breached the rule he would have been treated any differently and we do not think he would. There is no evidence in this case of the Respondent otherwise treating him in a harsh manner. If anything the reverse is true – as set out above the Claimant was managed with a light touch.
- (e) Being required to sign documents including clauses the Claimant says are illegal in order to create a circumstance whereby he would lose his job.*
114. This allegation relates to the terms set out above in respect of deductions from wages. Strictly, the Claimant was not 'required' to sign the documents. He declined to do so and there was no consequence for thus declining. That is significant because it completely undermines the allegation that this was a ruse to somehow lead to the termination of employment.
115. The Claimant believes that the clauses are illegal because of the principle of vicarious liability of employers for employees. That is, with respect, a

misunderstanding. Vicarious liability has no bearing on the legality of the terms that are in issue.

116. However, it is not necessary to decide the complaint on that basis, because even if the clauses are illegal in some respect this has nothing to do with race discrimination.
117. We have found that all employees were asked to agree to these clauses regardless of their race. The reason why they were asked to do so, was to enable the Respondent to make deductions from wages in the circumstances set out in the clauses.
118. The Claimant was not treated less favourably than any other employee nor than a hypothetical comparator would have been.
119. In the course of the hearing, our impression is that as the Claimant appreciated the difficulty in linking this matter with race, his case pivoted somewhat to a complaint that he had been asked to sign the documents without reading them.
120. That is not the pleaded complaint, but in any event we reject any suggestion that this was anything at all to do with race. There is not the slightest reason to think that the administrator asked him to sign the documents without reading them because of race. The suggestion that she did is completely implausible and is baseless.
- f. Mr Amit Patel asking the Claimant not to send certain matters (maintenance list, for example) by email in order to prevent the Claimant gathering evidence and reporting to management.*
121. It is true that Mr Patel asked the Claimant to stop sending maintenance issues by email. However, this was not to prevent the Claimant from gathering evidence and reporting it to management. It was simply not about stopping the Claimant from reporting things at all - it was asking him to do it by a different means that the Respondent found more convenient.
122. The Claimant was told to write the issue down and put it in the manager's office. He found that in practice the manager's office was often locked at the weekend. As a result the Claimant was eventually asked to write in the maintenance book, which perhaps may have been the better suggestion to make to him in the first place.
123. This was a very minor matter that has nothing at all to do with race. We do not accept any suggestion that there was any sort of attempt to suppress the existence of the maintenance book from the Claimant's knowledge. It was openly referred to on the cleaning schedule, a document he frequently had to sign. There is not the slightest thing to draw any cogent link between this matter and race.

124. There is no evidence of any comparator sending complaints by email or otherwise being given preferable ways of reporting maintenance concerns. A hypothetical comparator would have been treated in exactly the same way.
- (g) Management making excuses when certain duties require that the resident has to be temporarily removed for carpet washing (for example) in order to prevent the Claimant doing his work, and then make an allegation that he did not perform a certain task. The excuses were*
- a. That resident was asleep so the carpet could not be cleaned;*
 - b. That a nurse or carers needed to work in the room.*
125. We do not accept that the Respondent was making excuses at all. The fact of the matter was that cleaning the carpet was not always the priority and had to give way to other things whether that be the resident's sleep or the work of nurses/carers.
126. None of this had anything to do with trying to prevent the Claimant from doing his work nor making any allegation that he had failed to perform a task. There was never any occasion on which the Claimant was criticised for not carrying out his duties on account of either the resident being asleep or nurses/carers using the room. Nor was there any occasion when it was said that he had done it too late.
127. The allegation fails on its basic facts. However, for the avoidance of doubt, these matters had nothing at all to do with race.
128. We can accept the Claimant's evidence that from time to time his colleagues did enter rooms when residents were asleep. However, this does not take his complaint of race discrimination any further. It just shows that there was not complete compliance with the rules by his co-workers. Rules are often broken in workplaces. The Claimant says he complied with the rules. That may be so. But there is no evidence that he would have been harshly treated if he had broken the rules. All the evidence suggests that in that instance he would have been treated in just the same way as others.
- h. Not being allowed to report other staff who are not doing their work.*
129. This allegation relates to Mr Patel's comments in the meeting of 28 October 2020, to the effect that it was not for the Claimant to supervise the other cleaners.
130. There is perhaps a fine line between reporting poor work by colleagues to a senior manager (which must surely be acceptable if the view that the work is poor is genuinely held) and stepping into the role of a supervisor of immediate peers (which must surely be unacceptable). Where the line is drawn is a difficult matter.
131. We do have some sympathy with the Claimant in that he was reporting perceived cleaning deficiencies to Mr Patel rather than raising them directly with his peers. We also have some sympathy with Mr Patel who thought that the Claimant was going too far and did not think it remotely plausible that what the

Claimant reported was true. In the end whether this was good or bad management of the Claimant is marginal and views may differ.

132. However, what we are satisfied of, is that the approach Mr Patel took had nothing whatsoever to do with race. He said what he did in response to the issues the Claimant raised, and race was irrelevant to all of that. He would have reacted in the same way regardless of the race, and race was just not a factor.

133. There is no actual comparator in respect of this allegation. In our view a hypothetical comparator would have been treated in exactly the same way.

i. The management asking to other staff members to report how the Claimant is doing his work, for example which parts of the building he has failed to clean.

134. We do not accept that management asked other members of staff to report on the Claimant and his work. We accept Mr Patel's evidence that there were no concerns about the Claimant's work and there was neither any interest in monitoring him nor available resources to do so.

135. More generally, we do not accept that there was any general effort by co-workers to monitor the Claimant's work. There was an occasion where it was noticed that he had failed to clean some cobwebs. Since it was true that he had missed the cobwebs and that they needed to be cleaned away, there was nothing wrong with that being pointed out. The matter ended there.

136. This allegation fails on its facts.

Employment Judge Dyal
Date: 30 January 2023

Sent to the parties on
Date: 22 February 2023