



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A E Rudnik

**Respondent:** Midshires Care Limited (trading as Helping Hands Home Care)

**HELD at Newcastle CFCTC**

**ON: 12 to 23 February 2024**

**BEFORE:** Employment Judge Johnson  
**Members:** Mr G Gallagher  
Mr S Wykes

## REPRESENTATION:

**Claimant:** In person  
**Respondent:** Miss Akers of Counsel

**Interpreter:** Mr M Juszczak, Polish/English

# JUDGMENT

**The unanimous judgment of the Tribunal is as follows;**

1. The claimant's complaints of unlawful race discrimination (harassment contrary to section 26 of the Equality Act 2010) are not well founded and are dismissed.
2. The claimant's complaints of unlawful race discrimination (direct discrimination contrary to section 13 of the Equality Act 2010) are not well founded and are dismissed.
3. The claimant's complaints of unlawful race discrimination (victimisation contrary to section 27 of the Equality Act 2010) are not well founded and are dismissed.
4. The claimant's complaint of wrongful dismissal (failure to pay notice pay) is well founded and succeeds.
5. The claimant's complaint of unfair dismissal is well founded and succeeds.
6. The parties will be notified of the date, time and place of a remedy hearing (with a time estimate of three hours) at which the Tribunal will consider what, if any, remedies should be awarded to the claimant in respect of the Judgments on wrongful dismissal and unfair dismissal.

# REASONS

1. The claimant conducted this hearing herself. The claimant gave evidence herself and called to give evidence on her behalf Miss Malgorzata Sjekeinska. The respondent was represented by Miss Akers of counsel, who called the following witnesses to give evidence:-
  - 1.1. Ms A Birdsall (registered branch manager).
  - 1.2. Ms M Dutton (registered manager).
  - 1.3. Mr N Duran (area manager).
  - 1.4 Miss A Flynn (area manager).
2. When evidence was given by Miss Siekeinska for the claimant, the Tribunal had the benefit of assistance from Mr M Juszczyk (Polish/English interpreter). The Tribunal is grateful to Mr Juszczyk for his assistance.
3. By a claim form presented on 20 February 2023, the claimant brought complaints of unlawful race discrimination, unfair dismissal and wrongful dismissal. The respondent defended the claims. The respondent admits dismissing the claimant on 17 January 2023 for reasons which the respondent says related to her conduct. Following a suspension and investigation, the respondent found that the claimant had been guilty of bullying, aggressive and confrontational behaviour which it alleged created a toxic atmosphere within her workplace. The respondent considered that to amount to gross misconduct which justified summary dismissal. The claimant denied that she had behaved in the way alleged, maintained that she had been subjected to behaviour by her colleagues which amounted to race discrimination and that her dismissal without notice was unjustified, unfair and itself an act of unlawful race discrimination.
4. The case was extensively case managed, with 5 preliminary hearings taking place on 19 May 2023, 31 July 2023, 14 August 2023, 23 November 2023 and 14 December 2023. At the hearing on 14 December 2023, Employment Judge Aspden (with the agreement of the claimant and respondent) set out a detailed list of each individual allegation brought by the claimant under the provisions of the Equality Act 2010. Judge Aspden listed 47 separate allegations of harassment contrary to section 26 of the Equality Act 2010, 12 allegations of direct discrimination contrary to section 13 of the Equality Act 2010 and 10 allegations of victimisation contrary to section 27 of the Equality Act 2010. Each of those allegations was pursued by the claimant at this final hearing, together with the complaints of unfair dismissal and wrongful dismissal. In this Judgment, the Tribunal follows the numbering of those individual allegations as set out in the Order dated 14 December 2023.
5. The claimant first worked for the respondent between September 2009 and January 2012 as a live-in carer. The claimant re-joined the respondent's organisation in July 2015, again as a live-in carer. In May 2020 she began an apprenticeship with the respondent in Leadership and Management, working at

the respondent's Newcastle branch. From May 2020 until December 2021 the claimant worked as a Care Training Practitioner, which was a supervisory position. From January 2022 until December 2022 the claimant worked at the respondent's Gateshead branch as a Care Co-ordinator.

6. The evidence from the respondent's witnesses was that the claimant was regarded as both diligent and efficient, but was extremely difficult to manage. Her colleagues and managers found her to be frequently stubborn and occasionally truculent. The claimant considered herself to be someone who tried to work to the highest standards, but expected similar standards from both her colleagues and managers. The Tribunal found it likely that the claimant's approach to her work, her colleagues and her managers, frequently caused disharmony within the workplace and on occasions caused genuine upset and ill-feeling.
7. Those traits were frequently displayed by the claimant throughout this hearing. On numerous occasions, the claimant insisted on pursuing lines of questioning which were directed towards satisfying her demands for answers or information on matters which had no relevance to the issues in this case. The Tribunal frequently attempted to direct the claimant towards those issues and to focus upon those parts of her own evidence and that of the respondent's witnesses. Despite those attempts by the Tribunal, the claimant frequently returned to the same line of questions with each of the respondent's witnesses. The Tribunal acknowledged that the claimant is a litigant in person and that English is not her first language, but nevertheless found the claimant to be unwilling to accept the guidance offered by the Tribunal. Throughout the hearing the claimant insisted that the respondent's witnesses did not and could not provide any evidence to support its reasons for dismissing her, insisting that they were no more than "accusations" and "allegations". However, the claimant then insisted that the Tribunal should accept her own oral, unsupported accusations and allegations of unlawful race discrimination as "evidence" to support those allegations.
8. Having expressed those concerns about the claimant's approach to these proceedings, the Tribunal also had considerable reservations about much of the evidence presented to the Tribunal about the respondent's approach to its dismissal of the claimant. The respondent admits summarily dismissing the claimant on 17 January 2023 for reasons which the respondent said related to her conduct. The respondent is a sizeable organisation with a dedicated HR department. In an unfair dismissal case where the reason proffered by the employer is one related to the employee's conduct, the Tribunal would ordinarily expect to hear from the investigating officer, the dismissing officer and the officer who conducted the appeal. On the morning of the first day of the hearing, the Tribunal took time to read all of the witness statements from both sides and the documents referred to in those statements. The witness statement from the investigating officer (Michelle Dutton) contained no evidence about the conduct or the investigation itself. The witness statement of the dismissing officer (Nathan Dutton) deals with the disciplinary hearing in a total of 14 lines over four paragraphs and makes no mention whatsoever of the misconduct for which the claimant was actually dismissed. There was no witness statement from the officer who dealt with the appeal. When that was pointed out to the respondent's representative, the Tribunal was informed that the appeal officer (Amanda Stewart) was no longer employed by the respondent and therefore a statement could not be obtained from her. The following morning, an application was made to introduce a witness statement from Miss Stewart, who, it turns out, is the

Regional Director – (North) of the respondent company and had been so throughout these proceedings.

9. The claimant had been suspended on 7 December 2022, due to concerns regarding her conduct, following a grievance raised against the claimant by her manager Ms Amanda Birdsall. A copy of that grievance was not included in the hearing bundle and was never produced to the Tribunal. The claimant's unchallenged evidence to the Tribunal was that this grievance was never disclosed to her and she was never invited to any meeting to discuss Ms Birdsall's grievance. Nevertheless, Miss Dutton's investigation reports states that the grievance was "upheld". This was a material factor in the respondent's decision to suspend the claimant and thereafter to subject her to formal disciplinary proceedings.
10. The Tribunal found the investigating officer Miss Dutton and the dismissing officer Mr Duran to be particularly unimpressive witnesses, whose evidence was regarded by the Tribunal as being unreliable and unpersuasive.
11. The fractious relationship between the claimant, her colleagues and managers first came to a head towards the end of 2021. Complaints were made about the tone adopted by the claimant in written and verbal communications with colleagues and management. The claimant was invited to a meeting on 11 October 2021 for a "discussion in relation to attitude and conduct". The claimant was then invited to a formal disciplinary hearing on 5 November 2021 to discuss "allegations of inappropriate behaviour and communications following a number of complaints from Helping Hands employees." The outcome of those proceedings was that the claimant was issued with a final written warning, a copy which appears at page 211 in the bundle and is dated 23 November 2021. There were 6 allegations against the claimant:-
  - (1) Offensive emails by intentionally using capital letters and exclamation marks in several emails.
  - (2) Negligence in the performance of your duties by not following the correct procedure when wanting to work from home.
  - (3) Negligence in the performance of your duties by not following the correct procedure when wanting to reduce your working time due to a private appointment.
  - (4) You sent an inappropriate feedback email to the branch care manager.
  - (5) Several inappropriate and direct emails sent to colleagues.
  - (6) Inappropriate communication with employees as per their statements.

Allegations 1, 4, 5 and 6 were upheld, whilst numbers 2 and 3 were not upheld.

The final written warning at page 213 states as follows:-

*"In light of the allegations and subsequent evidence presented to us, the decision was made to issue you with a final written warning for conduct. This warning will remain on your personnel file and will normally be disregarded for disciplinary purposes after 12 months expires, should no further disciplinary matters occur within this time limitation. Further to the warning being issued, it is also expected that you will work to improve your written and verbal communication style to ensure it is in keeping with Helping Hands values. You will also go through a mediation process with*

*your team, in order to facilitate a productive return to work. Should there be any repeat of these issues, or any other misconduct on your part, further disciplinary action may be commenced which may result in further sanctions up to and including your dismissal.”*

12. The letter issuing that final written warning advised the claimant of her right to appeal and how to go about lodging that appeal. The claimant chose not to appeal against the issue of the final written warning.
13. In January 2022, the claimant was transferred from the respondent’s Newcastle office to its Gateshead office, where she was working as a Care Co-ordinator. That transfer to Gateshead coincided with the appointment of Ms Amanda Birdsall as the branch manager at Gateshead. Ms Birdsall was responsible for the development and day to day running of that branch and her duties included recruiting, supporting and managing the office and care team in line with the respondent’s policies and standards, whilst implementing the requirements of the Care Quality Commission. Ms Birdsall has a Level 5 diploma in leadership and management.
14. The claimant’s role as Care Co-ordinator involved preparing and overseeing the rotas for those carers employed by the respondent, fielding emergency calls and allocating staff those calls, attending the homes of the respondent’s clients to provide care and being “on-call” from time to time to cover emergencies.
15. Ms Birdsall was responsible for the line management of the claimant. Ms Birdsall’s evidence to the Tribunal was that she found the claimant to be someone who was particularly difficult to manage. Ms Birdsall found the claimant to be a challenging employee, who was frequently reluctant to accept guidance, direction or specific instructions. Ms Birdsall found the claimant to be argumentative, obstructive and at times uncooperative.
16. There were frequent disagreements between the claimant and Ms Birdsall relating to the preparation and implementation of rotas and the allocation of work to the various carers employed by the respondent. The claimant frequently complained that she was being expected to undertake a disproportionate amount of “on-call” duties and emergency cover, when other staff were unavailable or when emergency situations arose. The claimant frequently challenged Ms Birdsall’s authority and was frequently critical of her colleagues. In her evidence to the Tribunal, the claimant insisted that her disagreements with Ms Birdsall were caused by Ms Birdsall’s refusal to accept that the claimant’s version of matters was correct, whilst Ms Birdsall’s was frequently incorrect. Under cross-examination, the claimant refused to accept that her attitude towards Ms Birdsall was both disrespectful and inappropriate.
17. Ms Birdsall was responsible for conducting 1-1 meetings with the claimant on a monthly basis, as Ms Birdsall did with the other staff under her management. Ms Birdsall found those meetings to be particularly challenging, as the claimant frequently “talked over the top” of Ms Birdsall, frequently interrupted and frequently refused to allow Ms Birdsall to finish what she was saying. The claimant refused to accept what Ms Birdsall intended to be offers of guidance, support and mentoring. Any suggestion by Ms Birdsall that the claimant may benefit from additional training was regarded by the claimant as being told that she was “no good at her job.”

18. The nature of the working relationship between Ms Birdsall and the claimant deteriorated to such an extent that Ms Birdsall required a colleague to attend her 1-1 meetings with the claimant, as she felt that she required someone to be present to witness the discussions between her and the claimant and also to keep a note of both what was said and how it was said. Another reason for Ms Birdsall requiring the attendance of a colleague, was because the claimant had begun to allege that Ms Birdsall's notes of those meetings were not just inaccurate, but deliberately distorted and/or altered to suit Ms Birdsall's narrative.
19. A number of incidents took place about which no complaint was made at the time by the claimant, but which she subsequently raised as allegations of race discrimination by Ms Birdsall. For the reasons set out below, the Tribunal found that none of those allegations were proven to be acts of race discrimination.
20. The claimant was similarly critical of a number of her work colleagues, who began to complain to Ms Birdsall about the claimant's general attitude and behaviour towards them. Matters finally came to a head in September 2022, following a further deterioration in the working relationship between the claimant and some of her colleagues, who were saying they were made to feel uncomfortable by the claimant's negative attitude towards them.
21. Ms Birdsall organised a staff meeting on 20 September 2022 to try and resolve what she had identified as a breakdown in communication within the team. However, that meeting was unsuccessful. There was a clear conflict between the claimant and Ms Abbey Megginson. A further meeting took place on 23 September, at which Ms Birdsall made it clear that her staff were expected to work as a team and went on to identify a specific number of issues which had to be resolved by the end of that week. A copy of the minutes of that meeting appear at page 265 in the bundle.
22. There followed a lengthy exchange of correspondence between the claimant and Ms Birdsall, during which the claimant took exception to Ms Birdsall's indication that she would arrange some additional training for the claimant in the role of Care Co-ordinator. The Tribunal found that Ms Birdsall's proposal was entirely reasonable in all the circumstances and that the claimant's allegation that she was being told she was "no good at her job" was inaccurate and unreasonable. In that exchange of correspondence, the claimant made it clear that she would need to "read carefully the notes of any discussions, especially that require my signature in that I have discovered the notes taken are not a clear and true reflection of what I have said." The claimant's letter of 27 September headed "re training" appears at page 277-281 in the bundle. Comments made by the claimant in this letter include the following:-

*"I feel that I am more than capable of completing my role on a daily basis. I also note that I am excellent at arranging my diary and I take real pride in what I am doing to achieve the highest of standards. I am very much quality driven and I believe that everyone in the team should put as much effort and spread the task equally between the members of staff. I also have mentioned that I fear not "managed" but rather "controlled" and therefore not being able to complete my work to the standards I wish them to be completed. I feel undermined at every step. No matter if I do something correctly or not. I also won't be forced anymore to sign any documents as it has happened with previous ones."*

23. A second letter dated 28 September appears at page 282. Comments made by the claimant include the following:-

*I would like to be able to complete my task without feeling that I have nothing to say at any step and then when I express my opinions I am being humiliated. I feel extremely sad and disappointed that you keep trying to undermine my abilities even when I have approached you now several times and asked you not to do it. You have instructed and informed me yesterday that Rebecca will be booking co-ordinating training to "train me in my job role". I am very much disappointed and I must say that I am being patronised and belittled constantly."*

24. On 10 October 2022 the claimant wrote to the respondent's HR department in the following terms:-

*"I am writing to you for professional advice to help resolve an unpleasant conflict between one of my colleagues and myself. I have found that during my 1-1 or supervisions she has completely dissed my answers to her questions. I understand that the answers don't need to be word for word when written down, but they should be accurate, honest and reflect what I am saying. Unfortunately, lots of aspects I emphasise were dismissed and ignored. I have also previously been told that I must sign the document even when I have pointed out that I need time to read it and when I said that it is not factual and not a true record of my answers, some "bullying and threat" has been used and I was told that it is what the manager says so just sign."*

In the same letter the claimant goes on to say, *"I have felt for a while now that I have been treated in a different way compared to my other colleagues within the team. I felt that my work abilities have been undermined on every possible occasions. Recently it had become more belittling behaviour which has left me going home stressed and ill."*

25. On 30 September Ms Abbey Megginson wrote to Mandy Birdsall in a three-page letter setting out her concerns about the claimant's attitude and behaviours. Relevant extracts are as follows:-

*"I have found the atmosphere in the office to be quite uncomfortable. Reasonable requests given to Aga (the claimant) have been met with a block, simple tasks set by Mandy are ignored or disagreed with which makes me feel very uncomfortable seeing what I can only describe as a lack of respect towards Mandy from Aga. Aga does not wish to listen to anybody else with their opinion, fact or other. Aga will speak over you and keep talking, even when asked to stop by the branch manager if things get heated. I am sometimes unable to get on with my own work because of the atmosphere in the office from Aga, shouting over desks and putting a negative mood in the office. I sometimes feel pressurised and almost bullied into agreeing to do things that I have already said I cannot do. However, if Aga is asked to do something and she cannot, she will simply say no and if asked again this seemed to get her back up and she will reiterate that she has said no, however cannot accept no from other people. I do not feel Aga is a team player in the office setting. When trying to communicate with Aga regarding things passed on to me from carers, I find this to offend Aga in a way, almost as if it is a personal insult to herself."*

26. A further 1-1 meeting took place between the claimant and Ms Birdsall on 21 October in which Ms Birdsall made it clear that, *"within the team there needs*

*to be action set from today to improve performance. Mandy discussed conduct and she will not accept such conduct within the branch and due to having these discussions previously this will be taken further if conduct has not improved. Aga expressed she does not feel issues are dealt with that she has raised and although there have been emails (chosen way of communication) sent back explaining – trying to explain some issues, Aga does not agree to what Mandy’s explanations had been. Aga has mentioned she feels intimidated by Mandy’s approach.”*

Notes of the meeting were sent to the claimant on 21 October. The claimant replied on 24 October with a 10-page email, defending her own position and challenging the approach adopted by Ms Birdsall.

27. A further meeting took place between Ms Birdsall and the claimant on 8 November, the purpose of which was to conduct claimant’s 1-1 monthly meeting, but also to work through the email which had been sent by the claimant. Minutes of the meeting appear at page 315 in the bundle. Those minutes display how Ms Birdsall challenged the way in which the claimant persistently “talked over” Ms Birdsall during the meeting to the extent that she had to ask the claimant not to interrupt. Ms Birdsall stated that issues around “bad feeling” were due to the claimant’s consistent argumentative and undermining nature having a detrimental effect on the team and environment, as well as not meeting targets or expectations for the role. The notes show that the claimant then interrupted Ms Birdsall to state that this was not her behaviour. The notes of the meeting are littered with references to the claimant frequently interrupting Ms Birdsall to make her point. Ms Birdsall informed the claimant that she had received from other members of staff, concerns relating to the claimant’s conduct and that they felt they could not voice their opinions around the claimant as she would speak over them and raise her voice. The claimant did not acknowledge any of this. Ms Birdsall made it clear that she had tried on many occasions to support the claimant and to help her achieve the company’s expectations, but that the claimant was still not meeting those expectations, despite that support having been offered regularly. The claimant was challenged about her failure to attend new business meetings and also record that the claimant “defended her decision and said that she was right to ignore instruction from Mandy as she felt it was right.”

28. At page 323 in the bundle is an email from the claimant to Ms Birdsall dated 9 November (the following day), which states as follows:-

*“Firstly, I appreciate you and Rebecca taking the time to conduct this 1-1 interview with myself. I also appreciate the opportunity to be able to speak up and express my concerns after each of the points Mandy has made. There were lots of points Mandy has addressed and I have responded to each of them at this meeting so thank you for allowing me to do so, I appreciate this. I understand this meeting wasn’t easy for anybody. I am very committed to work with the team to improve our branch’s culture to the high standards required and expected of the organisation.”*

The email goes on to discuss a number of the matters which were raised at the meeting.

29. A further incident occurred on 5 December, again in a discussion between the claimant and Ms Birdsall. The claimant insisted that Ms Birdsall had referred to her work as “disgusting”. Ms Birdsall’s version was that the claimant had



misunderstood what had been said and that this was probably due to the claimant interrupting whilst Ms Birdsall was trying to speak. The discussion had been about a colleague not sorting out a rota, in response to which Ms Birdsall has said it was disgusting if that colleague left due to not sorting out the rota. The claimant refused to accept Ms Birdsall's explanation.

30. At 4pm on 7 December 2022 the claimant was informed by Michelle Dutton, (area care manager) that she was suspended with immediate effect "due to concerns regarding your conduct". The suspension was confirmed in a letter dated 7 December which appears at page 336 in the bundle. The letter states as follows:-

*"I'm writing further to our discussion on 7 December 2022 at 16:00pm Michelle Dutton, area care manager to confirm the details of your immediate suspension from employment. You were advised that your suspension is due to concerns regarding your conduct. Your suspension allows us to investigate impartially and fairly; it is in no way a form of disciplinary action against you. We will try to complete our investigation as quickly as possible. Should it be determined that there is a case to answer you will be invited to a disciplinary hearing. I have enclosed a copy of our disciplinary policy and procedure for you to understand the steps we may take."*

31. Ms Dutton's witness statement contains 34 paragraphs over 6 pages. Despite being proffered to the Tribunal as the respondent's investigating officer, Ms Dutton makes no mention whatsoever in her statement of that investigation. In her oral evidence to the Tribunal, Ms Dutton accepted that she was already aware of "ongoing issues with the claimant's conduct." That knowledge came about because Ms Birdsall had contacted Ms Dutton on a regular basis, requesting advice on how to deal with the claimant. Ms Dutton accepted that she had prior knowledge of the claimant's written warning and the reasons behind it. It was put to Ms Dutton by the claimant that Ms Dutton had in fact provided a statement adverse to the claimant during that investigation, to which Ms Dutton replied that she could not remember. The Tribunal found that Ms Dutton was not being truthful in this regard. The Tribunal found it likely that Ms Dutton had provided a statement adverse to the claimant as part of that process.

32. Ms Dutton was asked if she had at the time considered whether or not it was appropriate for her to carry out the investigation, particularly when there were at least 15 other area managers who could have done so. Ms Dutton's response was that she had consulted the respondent's HR department, who had advised that there was no reason why she should not carry out the investigation. Ms Dutton stated that she was told at that stage that she should do the investigation and that Mr Duran should undertake the disciplinary hearing. It was put to Ms Dutton that this could be interpreted as meaning that the decision had already been made that there would indeed be a disciplinary hearing, even though the investigation had not even commenced. Ms Dutton accepted that she had sought advice from HR, who had advised that the claimant should be suspended. It was when answering this question that Ms Dutton said to the Tribunal:-

*"I knew the claimant had caused a breakdown in relationships at the Newcastle office in the earlier proceedings and all the staff had left and I didn't want that to happen again."*

33. Ms Dutton confirmed that the trigger for the suspension of the claimant had been an incident on 7 December between the claimant and Ms Birdsall. Ms Birdsall had contacted Ms Dutton, alleging that the claimant had deliberately approached her and obstructed her with a chair. Ms Dutton informed the Tribunal that she had no notes of that discussion with Ms Birdsall. Ms Dutton confirmed that she was aware that a grievance had been raised by Ms Birdsall, but when asked to identify where that grievance appeared in the bundle, Ms Dutton's reply was that the grievance had been dealt with by another area manager. Ms Dutton was unable to state whether, and if so when, the grievance had ever been disclosed to the claimant. When asked why the grievance had never been disclosed to the claimant, Ms Dutton's reply was, "We had enough evidence to go to the disciplinary hearing." Ms Dutton informed the Tribunal that she did not look at Ms Birdsall's grievance, but knew that it had been upheld because she was told that by Mr Andy Guppie, who had dealt with the grievance. Ms Dutton confirmed that she knew of the grievance and its outcome before she began her investigation into the allegations against the claimant.
34. Ms Dutton's investigation comprised interviews with Abbey Megginson on 12 December 2022, Mandy Birdsall on 15 December 2022, the claimant on 29 December 2022 and Alex Flynn on 5 January 2023.
35. Following those interviews Ms Dutton prepared a "case overview", equivalent to the investigation outcome, a copy which appears at page 332-335 in the bundle. The document states that the investigation commenced on 7 December 2022 and concluded on 6 January 2023. It refers to the ACAS guidance on conducting workplace investigations and to the respondent's disciplinary policy and procedures. Under the section "Live Sanctions or Improvement Notes on record" it refers to "previous sanction for conduct and behaviour – final written warning." The document states that the investigation was regarding "conduct and behaviour" and also refers to, "upheld grievance submitted to Andy Guppie – ACM, from Mandy Birdsall."
36. In the section headed "Overview of Concerns" the following matters are recorded by Ms Dutton under specific bullet points:-
- A grievance was submitted by the branch manager of Gateshead following ongoing issues around capability, refusal to follow reasonable requests and conduct stemming back to June 2022.
  - Evidence has been produced by Mandy to prove she has attempted numerous times during 1-1, 5 at 10 and branch meetings to support Aga and prevent any further conflict, but has failed.
  - On 7 December following another conflict in the 5 at 10 meeting where Aga is refusing to follow a reasonable request by Mandy (a manager). Mandy states she felt threatened by Aga's tone and conduct within a meeting where they were discussing a carer's availability and also told the CTP to "put up with it" when she raised her concern on the tone and manner of the meeting. Mandy states Aga came out in her chair in front of her to block her access to leaving and this left Mandy shaking.
  - Due to both of these concerns it was decided that Aga should be suspended as of 7 December 2022 pending investigation.

37. In the section headed "Overview and Investigation" Ms Birdsall again sets out in bullet points the following issues:-
- The CTP (Abbey Megginson) can no longer be happy in work because of the way Aga makes her feel, shouting over her, being rude, not a team player and refuses to do simple tasks requested by her manager which makes Abbey feel uncomfortable. Abbey alleges that it is difficult as she witnesses Aga refusing to follow instructions daily which causes conflict and this is awkward and impacting her own work.
  - Previous ACM (Alex Flynn) confirms in the investigation she was aware that the ACM (Mandy Birdsall) was trying to address "capability" due to constant issues.
  - At a 1-1 on 11 November 2022 Aga's rudeness is recorded and she interrupts Mandy over 20 times, despite alleging that it is her who is not listening.
  - The week prior to 7 December a discussion took place in the 5 at 10 meeting regarding on-call which was disbanded due to it not being resolved. It ended with Aga stating that if her rota plan was not adhered to, she would not be doing on-call until 5.30pm and if a carer rings in sick she won't be doing any care calls.
  - 7 December a meeting took place when Mandy raised concerns about a carer's welfare and asked Aga not to overwork her, which Aga refused and she believes it is her duty to give carers the opportunity to work as much as possible.
  - Aga has denied all allegations made against her regarding her conduct towards Mandy and Abbey and states Abbey is influenced by Mandy.
38. In the section headed "Investigation Findings", Ms Dutton records the following:-
- The conflict on a weekly basis has been happening since June 2022 and more recently since September 2022 on a daily basis.
  - Mandy has evidence where she has attempted numerous times to find a way they can all communicate effectively and understand each other to improve the situation in branch but this is not had any impact.
  - The meetings taking place are toxic and leave everyone feeling deflated which they have all agreed on.
  - Aga has a disregard for her manager by completing tasks as she sees fit and in her own timeframe.
  - Aga does not offer any accountability for her part in the branch ongoing conflict or acknowledgment of how she has made people feel (example denied all allegations of conduct which was witnessed by two people).
  - Mandy and Abbey have both witnessed Aga causing the conflict and have both said they feel comfortable challenging each other if they have a difference of opinion, but not Aga and that they will just do whatever is easier to stop any conflict even if this is at a detriment to themselves (example doing care calls).

39. Under the section headed “Facts that could not be Established” Ms Dutton records, “If Aga had purposely moved in her chair from her desk into the centre of the room to intimidate Mandy”. Under “mitigating factors” Ms Dutton records that the claimant had produced emails as part of the investigation on 3 January 2023, which emails suggest that Alex Flynn knew of conflict in the branch and had already sent emails to HR. Finally, under “Other Relevant Information”, Ms Dutton records, “Aga has previously had a sanction due to how she communicates with people in an aggressive manner. That was from November 2021 and should be referred to in the disciplinary hearing as a previous sanction.”
40. In the section headed “Conclusion” Ms Dutton recommended formal action and summarised the allegations as follows:-
- Behaviour deemed as bullying displayed towards your line manager whereby you have undermined her and have refused reasonable requests set by a manager time after time.
  - Repeated unacceptable behaviour towards your line manager whereby you have further conducted yourself in an appropriate way. .
  - Behaviours that do not reflect Helping Hands values, whereby your behaviour does not demonstrate the foundation of kindness that we live and breathe.
  - Repeated insubordination towards your line manager whereby you have gone over your manager by changing agreed work, deleting work set by your manager or refusing to complete work.
  - Unacceptable behaviour demonstrated towards your colleagues whereby your behaviour, lack of accountability and remorse with the actions you are taking is affecting branch moral. This is not in line with company’s policy, procedures and values.

No specific examples of the claimant’s alleged behaviour are set out by Ms Dutton in that summary.

41. At the bottom of the investigation report (case overview) on page 335 the section headed “Investigation Appropriately Concluded” and that headed “Disciplinary Chair Appointed” are left blank.
42. By letter dated 12 January 2023 (page 363) the claimant was invited to attend a disciplinary hearing on 17 January 2023 at 16:00pm via Microsoft Teams. The Tribunal noted that the 12 January 2023 was a Thursday and 17 January a Tuesday. The 4 days in-between were Friday, Saturday, Sunday and Monday, when the claimant was supposed to be able to prepare for the disciplinary hearing. After setting out in 5 bullet points the allegations against the claimant, the letter includes the following statement:-

*“The evidence I will be referred to at the hearing are enclosed for your information. Should you wish to rely on any other documentation, please provide copies to me at least 24 hours in advance of the hearing so that they can be properly considered with all other relevant evidence.”*

The letter also enclosed a copy of the respondent’s disciplinary policies and procedures. The allegations against the claimant are set out in the following terms:-

- Behaviour deemed as bullying displayed towards your line manager whereby you have undermined her and have refused reasonable requests set by a manager time after time. Clear examples have been documented 121.
  - Repeated unacceptable behaviour towards your line manager whereby you have failed to conduct yourself in an inappropriate way. Examples have been 5 at 10s where you have demonstrated conflicting behaviour. This has been recorded three times a week from January 2022.
  - Behaviours that do not reflect Helping Hands values, whereby your behaviour does not demonstrate the foundation of kindness, that we live and breathe.
  - Repeated insubordination towards your line manager whereby you have gone over your manager, by changing agreed work, deleting work set by your manager (detailed in the investigation meeting on 15 December 2022) or refusing to complete work.
  - Unacceptable behaviour demonstrated towards your colleagues whereby your behaviour, lack of accountability and remorse with the actions you are taking is affecting branch moral. This is not in line with the company's policy procedures and values.
43. At the end of a letter is a list of those documents said to be enclosed with it:-
- Abbey Megginson investigation notes 12 December 2022.
  - Mandy Birdsall investigates notes 15 December 2022.
  - Aga Rudnik investigation notes 29 December 2022.
  - Alex Flynn investigation notes 5 January 2023.
  - 1-1 meeting notes dated 27 July 2022.
  - 1-1 meeting notes dated 21 October 2022.
  - 1-1 meeting notes dated 8 November 2022.
  - Email from Aga to Mandy dated 15 July 2022.
  - Email statements sent to Mandy Birdsall by Abbey Megginson on 2 November 2022.
  - Discussion summary 23 September 2022.
  - Discussion summary general 23 September 2022.
  - Photo of 1-1 meeting notes 11 July 2022.
  - Photo of 1-1 meeting notes 14 July 2022.
  - Staff discussion record 15 December 2022.
  - Suspension letter dated 7 December 2022.

There is no mention of the investigation report (case overview), Mandy Birdsall's grievance or the outcome of Mandy Birdsall's grievance.

44. Minutes of the disciplinary hearing appear at page 366-370 in the bundle. The minutes show that the meeting began at 16:00 and ended at 17:35. Mr Duran's evidence was that he had a break for deliberations, following which the hearing

reconvened at 17:20 and that his decision was delivered by 17:35. Mr Duran's evidence was that he deliberated for approximately 20 minutes, which meant that the hearing itself lasted no more than one hour. The notes which deal with the allegations begin halfway down page 368 and then halfway down page 370. After two introductory questions, Mr Duran asked only 6 questions in total, the last of which was to do with the imposition of the previous final written warning. The questions noted as having been asked by Mr Duran were as follows:-

- It is clear from the evidence provided, that there is a breakdown in working relationships between yourself and the branch team members including your line manager, how do you feel this could be resolved?
  - Why do you feel the 5 at 10 meeting process isn't working within the Gateshead branch?
  - Can you explain why your behaviour within the branch and during meetings may be seen by others as disruptive and has been described as toxic.
  - What do you think you can do to change your behaviour to aid a positive working environment within the branch.
  - On the day of 17 December could you have acted differently? If so how should you have acted that would have presented escalation of this point?
45. None of the 5 allegations contained in the disciplinary invite letter dated 12 January 2023 were specifically put to the claimant. The claimant asked Mr Duran to look at copies of some documents which she had brought with her, but Mr Duran refused to do so. His reason was that the letter inviting the claimant to the disciplinary hearing stated, "should you wish to rely on any other documentation, please provide copies to me at least 24 hours in advance of the hearing." Mr Duran accepted that nowhere in the respondent's disciplinary policy (page 153) is there any requirement for documents to be submitted at least 24 hours before the hearing. The Tribunal found that Mr Duran had not properly acquainted himself with that policy prior to the hearing. The Tribunal found that no reasonable officer conducting a disciplinary hearing in these circumstances would have refused to even examine those documents which the claimant wished to introduce.
46. Mr Duran insisted that he had been able to consider all of the evidence and draft his written letter of dismissal (page 375-377) within the 20-minute deliberation period. The Tribunal found it highly unlikely that he could have done so. Mr Duran admitted in cross-examination that he had needed to attend to another meeting immediately prior to the claimant's disciplinary hearing and had been somewhat "rushed". Mr Duran insisted that he had looked at all of the paperwork in the 5 days prior to the disciplinary hearing. The Tribunal found that the notes of the hearing and Mr Duran's oral evidence, particularly his refusal to even look at the documents which the claimant had produced, strongly indicate an unreasonable element of pre-judgment of the allegations against the claimant. The Tribunal found that the conduct of the disciplinary hearing in its entirety was unreasonable in all the circumstances and did not satisfy the general test of fairness expected and required of an organisation with the resources of the respondent. The claimant was informed at the end of the hearing that she was being summarily dismissed for gross misconduct. The claimant was not informed of any specific findings in respect of the 5 allegations contained in the letter

inviting her to the disciplinary hearing. The letter confirming the claimant's dismissal appears at page 375-377 in the bundle. The 5 individual allegations are set out on page 376 and Mr Duran's findings are recorded as follows:-

- This is upheld. The evidence presented from three employees details your behaviour which does not meet the expectations of Helping Hands' employees.
- This is upheld. I was unable to review all five 5 at 10 meeting notes, however the records I did review called into question your behaviour and when questioned you did not acknowledge or take any responsibility or accountability for poor behaviour.
- This is upheld. Your behaviours which have been described by three Helping Hands' employees do not meet the expectation of Helping Hands and do not adhere to the code of conduct for health and social care workers. This has been the second occasion where your behaviours in the workplace have resulted in disciplinary action being taken.
- This is partially upheld. There is conflicting evidence provided by Helping Hands' employees and yourself. It is clear that your actions have been seen by others as insubordinate whereas you detail a lack of support.
- This is upheld. From the evidence presented and during the meeting it is evident that you do not recognise that your behaviour towards others is a cause for concern. The lack of accountability towards the breakdown of working relationships is in breach of the code of conduct.

In light of the allegations and subsequent case you presented to us, the decision was made to summarily dismiss you on the grounds of gross misconduct with effect from 17 January 2023. As this is an act of gross misconduct you will not receive any payment or notice, however any accrued untaken annual leave will be paid in your final pay.

47. The final sentence refers to "an act of gross misconduct", but no specific act of misconduct is identified. No specific examples are given of the claimant's behaviour that is alleged to have been bullying, or unacceptable, or insubordination.
48. Mr Duran was asked whether he had addressed his mind to the possibility of alternatives other than dismissal, for an example an extension of the final written warning, another warning, demotion or transfer to another office. Mr Duran insisted that he had considered those matters, but there is no record anywhere that he had done so. The Tribunal found it unlikely that Mr Duran had considered any other options other than immediate dismissal.
49. In his witness statement at paragraph 14, Mr Duran states as follows:-

*"I considered the consistency of the accounts and the demeanour of the claimant during the hearing. The claimant made no acknowledge of her behaviour towards her colleagues and took no accountability for her attitude and behaviour which I consider was well documented in the evidence provided."*

Mr Duran does not give any examples of any inconsistency between the claimant's version and those of the other witnesses. Mr Duran gave no adequate explanation as to why, in his first question to the claimant, he had already decided that it was clear from the evidence provided that there had been a

breakdown in the working relationship between the claimant and her colleagues. The Tribunal found that this again indicated pre-judgment on the part of Mr Duran.

50. The dismissal letter advised the claimant of her right to appeal against the decision. By letter dated 20 January, the claimant submitted a letter of appeal in the following terms:-

*“I am writing this letter to inform you that I would like to formally appeal against the unfair decision of my dismissal that has been imposed of me on 17 January 2023 in regard to my disciplinary hearing. I believe that the outcome has been too harsh and in my work environment I was exposed to constant threats and undermining which made me harassed and humiliated.”*

51. The appeal hearing took place on 3 February 2023 and was conducted by Ms Amanda Stewart, Regional Director – North.

52. At paragraph 8 of her witness statement, Ms Stewart confirms that she received the following documents prior to the appeal hearing:-

- Anonymised redacted statement.
- Case overview form.
- Grievance outcome letter.
- Investigation documents (those are the ones listed in the letter inviting the claimant to the disciplinary hearing).

The anonymised redacted statement is presumed to be that of Ms Birdsall which comprised her grievance and which was never disclosed to the claimant. Similarly, the grievance outcome letter was never disclosed to the claimant. Even at the stage of the appeal hearing, the claimant was never provided with copies of those documents.

53. An employee’s right to appeal is dealt with in section 11 of the respondent’s disciplinary policy which appears at page 160-161 in the bundle. The relevant extracts are as follows:-

“11.1 If you feel that we have not fairly considered your submissions under our disciplinary policy and procedure, you can request an appeal of the original decision. You should appeal in writing, stating your full grounds of appeal, to the named manager in your outcome letter within seven calendar days of the date of your outcome letter.

11.2 In your appeal submission, you should clearly set out your full grounds detailing any new evidence or inconsistency in our procedures. The right to appeal is not on the basis of an outcome being “unfair” and employees must outline (and provide) evidence the original chair person has not considered, or been aware of, which would have impacted on the original outcome.

11.6 If you raise any new matters in your appeal, we may need to carry out further investigation. If any new information comes to light, we will provide you with a summary including, where appropriate, copies of any additional relevant documents and witness statements. You will have a reasonable opportunity to consider this information before the appeal hearing, and you or your companion may comment on any new evidence arising during the appeal before any decision is taken.”



54. Ms Stewart confirmed under cross-examination that she was already aware of the previous proceedings in which the claimant had been involved and that there had been “issues with the staff at Newcastle”. Ms Stewart acknowledged that she had visited the Gateshead branch as part of her role as regional director north. Ms Stewart’s attention was drawn to the document at page 455 in the bundle which shows that the claimant had emailed Ms Stewart on 12 October 2021 in relation of those earlier matters.
55. Ms Stewart accepted in cross-examination that the claimant had not been dismissed for any single act of misconduct, including her refusal to wear the uniform. Ms Stewart’s evidence was that the claimant’s dismissal was “a cumulation of all these instances of behaviour”. Ms Stewart accepted that she had the power to order a further investigation of any matters raised by the claimant, but felt it unnecessary to do so. Ms Stewart’s approach to the appeal hearing was that it was for the claimant to introduce evidence to challenge what was in the statements which had been used to prepare the case overview (investigation report) and that if the claimant failed to do so to Ms Stewart’s satisfaction, then the appeal would fail.
56. Ms Stewart was asked whether the claimant’s length of service and standard of performance was given due weight during the appeal, and stated that she believed it had been. Ms Stewart again confirmed that, despite what the claimant had said and despite Mr Duran’s failure/refusal to look at the documents she wished him to examine, the original decision was fair and should be upheld.
57. Ms Stewart was asked by the Tribunal as to whether she believed the detailed allegations against the claimant could properly have been dealt with in a disciplinary hearing which lasted no more than an hour. Ms Stewart’s reply was, “it is quick, but it can be done.” Ms Stewart was asked why such a disciplinary hearing had been arranged to take place at 4pm and accepted that perhaps it had not been appropriate. When asked whether sufficient attention could have been given to deliberations and preparing the letter of dismissal in no more than 25 minutes, Ms Stewart again said that it would be possible to do so.
58. During the appeal hearing, the claimant complained on a number of occasions that it was she that had raised complaints about the behaviour towards her of a number of her colleagues. Ms Stewart asked whether the claimant had ever raised a formal grievance, to which the claimant confirmed that she had not. Even at that stage, the grievance raised by Ms Birdsall and its outcome were never disclosed to the claimant. The Tribunal noted that the appeal hearing began at 2pm and lasted until 5.25pm. The notes go from pages 394-412 in the bundle.
59. By letter dated 6 February 2023 (page 417-418) Ms Stewart dismissed the claimant’s appeal. Ms Stewart recorded the claimant’s grounds of appeal as follows:-
1. Talk about evidence not provided that was not taken into consideration in your disciplinary meeting due to not providing this within the 24 hours window as per the disciplinary meeting invite letter.
  2. Talk about any process that was not followed in accordance with the disciplinary policy.
  3. You needed to be specific about point 2 with a clear breakdown.

Ms Stewart's findings on the first point about the documents which Mr Duran failed to consider, was that those documents did not "specifically address the five points raised in your disciplinary, all of which related to an acceptable behaviour and instead were more related to issues you felt you had with your line manager and that these points were grievance related."

"With regards to points 2 and 3, I have found that during both your initial hearing and subsequently your appeal that all facts were taken into account and that you had enough opportunity to respond. I have found that a full and thorough investigation was carried out before a decision to move to a disciplinary process was made. I am happy that the correct process was followed. I have found that you were given opportunity in both hearings to present your case.

In light of your appeal grounds and the subsequent case you presented to us, the decision was made to confirm the original decision to summarily dismiss you on the grounds of gross misconduct."

60. Once again, no specific findings were made by Ms Stewart as to the original investigation which led to the disciplinary hearing. No consideration was given by Ms Stewart as to whether the allegations against the claimant ought to have been dealt with as matters related to the claimant's performance or capability, rather than her conduct.

### **The law**

61. The statutory provisions which are engaged by the claimant's complaint of unfair dismissal are contained in Sections 94 and 98 of the Employment Rights Act 1996:

#### **94The right.**

- (1) An employee has the right not to be unfairly dismissed by his employer.

#### **98 General.**

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

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and  
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

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

- (b)relates to the conduct of the employee,

- (c)is that the employee was redundant, or

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

- (3)In subsection (2)(a) —

- (a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)“qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

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

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

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

(6) Subsection (4) is subject to—

(a) sections 98A to 107 of this Act, and

(b) sections 152, 153 , 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

62. Where an employee is dismissed because the employer suspects or believed that she has committed an act of misconduct, in determining whether that dismissal is unfair the Employment Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief – that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case. (**British Home Stores Limited v Burchell** – 1978 IRLR 739).
63. In applying the test laid down in *British Homes Stores Limited v Burchell*, the question to be determined is not whether, by an objective standard, the employer’s belief that the employee was guilty of that misconduct in question was well founded, but whether the employer’s believed that the employee was guilty and were entitled so to believe, having regard to the investigation carried out. (**Scottish Midland Co-Operative Society Limited v Cullion** – 1991 IRLR 261). In determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. The investigator carrying out the enquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as on the evidence directed towards proving the charges. (**A v B** – 2003 IRLR 405). The range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. (**Sainsbury’s Supermarket Limited v Hitt** – 2003 IRLR 23).

64. The ACAS Code of Practice on Disciplinary and Grievance Procedures emphasises that the more serious the allegations against the employee and the more serious the consequences, the more thorough the investigation conducted by the employer ought to be. An investigation likely to lead to a warning need not be as vigorous as one likely to lead to dismissal. (**A v B** – 2003 IRLR 405).
65. The ACAS guide also stresses that employers should keep an open mind when carrying out an investigation – their task is to look for evidence that supports as well as weakens the employer’s case. In **Moyes v Hylton Castle Working Men’s Social Club** (1986 IRLR 482) the Employment Appeal Tribunal found that the involvement of two witnesses of the alleged misconduct who also acted as investigators, was a clear breach of the rules of natural justice in that there was a lack of complete impartiality in those circumstances. Much would depend upon the size and administrative resources of the employer’s undertaking.
66. In Miss Rudnik’s case, the Tribunal found that the involvement of Miss Dutton as the investigating officer was inappropriate and unnecessary. Miss Dutton accepted that she had provided a statement, which was critical of the claimant, in the disciplinary procedure which led to the final written warning. The Tribunal found it likely that this had tainted Miss Dutton’s opinion of the claimant at the time when her investigation was carried out. Indeed, Miss Dutton confirmed that in her evidence to the Tribunal, stating that she was aware of the impact the claimant’s behaviour had on the Newcastle office and did not want staff at the Gateshead office to leave in similar circumstances. The respondent is a sizeable organisation with a dedicated HR department and with several persons at managerial level who could have carried this investigation.
67. Furthermore, Ms Dutton had in her possession documents and evidence (in particular Ms Birdsall’s grievance and the outcome of that grievance), which were never disclosed to the claimant and which the Tribunal found were likely to have had a material influence on the manner and outcome of the investigation. The Tribunal had further concerns about the appointment of Ms Dutton and Mr Duran at the same time, as investigating officer and disciplinary officer. The Tribunal found that this indicated that the outcome of the investigation would inevitably lead to disciplinary proceedings.
68. When allegations of misconduct are brought against an employee and which result in a formal disciplinary hearing, it is important to frame the disciplinary charges carefully in order to ensure that a misconduct dismissal is for a matter charged, which has been fully investigated and to which the employee has had a proper opportunity to respond. It is important that the employee is given adequate time in which to prepare for the disciplinary hearing. How much time is reasonable depends upon the nature and extent of the allegations raised against him. In the claimant’s case, the Tribunal found that the letter inviting the claimant to the disciplinary hearing (page 663) did not contain sufficient and specific information to enable the claimant to properly prepare for the disciplinary hearing. No examples are set out of any of the alleged poor behaviour or insubordination. The Tribunal found that the respondent was not absolved from its duty to fairly set out the allegations by enclosing copies of the investigation notes and meeting notes. The Tribunal found it unreasonable to expect an employee to sift through those documents to try and extract those parts which may form the subject matter of allegations of misconduct.

69. The Tribunal found that Mr Duran failed to conduct a fair and thorough disciplinary hearing, failed to give the claimant a fair opportunity to respond to the allegations and in particular refused to consider those documents which the claimant sought to introduce. There is nothing in the respondent's formal disciplinary policy which requires an employee to provide any documentation 24 hours prior to the disciplinary hearing. That was simply a request contained in Mr Duran's letter inviting the claimant to the hearing. The Tribunal found it unreasonable of Mr Duran to refuse to look at the documents and to refuse to postpone the hearing to enable him to consider them.
70. The Tribunal found it unlikely that Mr Duran could have conducted a reasonable and thorough disciplinary hearing within what was no more than one hour. Furthermore, the Tribunal found it unlikely that Mr Duran could have properly considered the evidence and the claimant's explanations and prepared a letter of dismissal within the 20 minutes that he says he did. The Tribunal found it likely that Mr Duran had already decided before the disciplinary hearing that the claimant was to be dismissed.
71. The Tribunal found that the flaws identified above in both the investigation and disciplinary hearing were capable of being corrected at the appeal hearing. The employer's actions at the appeal stage are relevant to the reasonableness of the whole dismissal process. The Tribunal found that Ms Stewart could and should have identified the flaws in both investigation and disciplinary hearing, when she conducted the appeal hearing. It is clear from the claimant's appeal letter dated 19 January that the claimant had raised Mr Duran's refusal to examine the paperwork she had submitted at the disciplinary hearing. It was clear that the claimant was raising a different version of what had happened or what had been said in the various incidents upon which the respondent sought to rely. Ms Stewart was unable to explain why she had failed to postpone the appeal hearing so that further investigations into those matters could be carried out. Ms Stewart failed to identify that documents had been in the possession of, and relied upon, by Ms Dutton, Mr Duran and herself, yet which had not been disclosed to the claimant. The Tribunal found that Ms Stewart's insistence upon relying only upon the matters referred to in the appeal invite letter, was unreasonable in all the circumstances.
72. At no stage did Ms Dutton, Mr Duran or Ms Stewart consider whether the nature of the charges brought against the claimant could and should have been dealt with under the respondent's "capability" procedure, rather than as misconduct. The Tribunal found this to be unreasonable in all the circumstances, bearing in mind the size and administrative resources of the respondent's organisation.
73. For those reasons, the Tribunal was satisfied that the respondent's dismissal of the claimant was unfair and the complaint of unfair dismissal succeeds.
74. In her closing submissions, Miss Akers for the respondent reminded the Tribunal that, were it to find that the dismissal was unfair, the Tribunal was obliged to consider the provisions of section 123(6) of the Employment Rights Act 1996 and invited the Tribunal to find that the dismissal was caused or contributed by the claimant's conduct and accordingly that any compensatory award should be reduced by such proportion as is just and equitable. Miss Akers accepted that this would require the Employment Tribunal to make a finding that there had been blameworthy conduct on the part of the claimant which either led to or contributed to her dismissal.

75. Examples given by Miss Akers were the various incidents described by Ms Birdsall and in particular those other employees who had provided statements during the course of the investigation. The claimant's submissions were either that those incidents had never happened, had not happened as described by those witnesses, or should not be regarded as blameworthy conduct.
76. The Tribunal was satisfied that the description of the claimant's behaviour given on frequent occasions by her colleagues could reasonably be described as "blameworthy conduct" by the claimant. The claimant frequently failed or refused to observe and implement reasonable instructions given to her by Ms Birdsall as her manager. The claimant's attitude towards her colleagues was on occasions tantamount to "bullying" and was behaviour which led those colleagues to be upset and distressed. The Tribunal noted that much of this conduct was alleged to have taken place during the existence of the final written warning, which had been given about similar matters. The claimant was therefore aware of the risk to which she exposed herself by continuing with such conduct.
77. Having made that finding, the Tribunal must then decide the amount of any reduction in the compensatory award, which will be such proportion as it considers just and equitable having regard to its finding. The Tribunal found the claimant's conduct to be significant to the extent that the respondent had decided that the only way of resolving the internal conflict within the Gateshead office was by removing the claimant from her working environment. The claimant's contribution was substantial and the Tribunal found it just and equitable to reduce any compensatory award by 60% to reflect that contribution.
78. In her closing submissions, Miss Akers also invited the Tribunal to make a deduction under section 123(1) of the Employment Rights Act 1996, submitting that these were circumstances where (if unfairly dismissed on procedural grounds) the claimant could have been dismissed fairly at a later date if a fair procedure had been followed. This is what is generally known as the "no difference rule". That rule provides that where there is a proven procedural irregularity (such as the failure to properly investigate in this case) but that it could be shown that carrying out a fair investigation would have made "no difference", then the dismissal would be fair. While such a rule cannot make an otherwise unfair dismissal, a fair dismissal, it nevertheless remains relevant with regard to the level of compensation to be awarded to the claimant for that unfair dismissal. What the Employment Tribunal must do is assess the chances of the claimant being fairly dismissed had a fair procedure been followed. In the claimant's case, the Tribunal has identified the flaws in investigation, disciplinary hearing and appeal hearing. Nevertheless, the Tribunal was satisfied, had the respondent conducted a fair and reasonable investigation, a fair and reasonable disciplinary and a fair and reasonable appeal hearing, there was a reasonable chance that the claimant would have been fairly dismissed. Having considered all the circumstances of the case, the Tribunal was satisfied that the appropriate reduction in compensation payable to the claimant for unfair dismissal, should again be 60%.
79. **Wrongful dismissal**
80. The claimant was dismissed without notice for what the respondent described as "gross misconduct", such that she was not entitled to be paid notice pay. The Tribunal found that there was no conduct by the claimant which amounted to a

fundamental breach of her contract of employment, and accordingly she was entitled to be paid notice pay and that complaint succeeds.

81. **Unlawful race discrimination**

82. In addition to the complaint of unfair dismissal, in her claim form ET1 the claimant ticked the box stating “I was discriminated against on the grounds of race”. Attached to the claim form is a discursive 7-page document setting out various allegations of behaviour by her former colleagues. It is difficult to extract from those exactly which are said to be allegations of unlawful race discrimination. Because of that, at the final case management hearing on 14 December 2023, Employment Judge Aspden spent a considerable amount of time with the claimant, assisting her to identify specifically which allegations were to be pursued and under which of the statutory provisions in the Equality Act 2010 there were to be pursued. In the Orders made on that occasion, Employment Judge Aspden identified 47 individual allegations of harassment contrary to section 26 of the Equality Act 2010, 12 allegations of direct discrimination contrary to section 13 of the Equality Act 2010 and 10 allegations of victimisation contrary to section 27 of the Equality Act 2010. In respect of those allegations of victimisation, Employment Judge Aspden identified 4 alleged “protected acts” upon which the claimant relied as the cause of the acts of victimisation. At this final hearing, the Tribunal went through each of those allegations individually and the Tribunal’s findings in respect of each allegation follow the numbers set out in those Orders.

**Harassment contrary to Section 26 of the Equality Act 2010**

83. Section 26 of the Equality Act 2010 states as follows

**“26 - Harassment**

*(1) A person (A) harasses another (B) if —*

*(a) A engages in unwanted conduct related to a relevant protected characteristic, 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.*

84. The definition of harassment has a wide scope, in that it covers harassment which “relates” to the relevant protected characteristic (in this case race) and not merely harassment which is “because of” the characteristic. In deciding whether the unwanted conduct “relates to” a protected characteristic, the Tribunal must undertake a consideration of the mental processes of the putative harassers in determining whether conduct has the effect of violating B’s dignity or creating a relevant environment for the purposes of S.26, the Tribunal must take into account B’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. In **Land Registry v Grant** (2011 EWCA – Civ – 769) the Court of Appeal focused on the words “intimidating, hostile, degrading, humiliating or offensive” and observed that, “Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.”

85. The test as to whether conduct has the relevant effect is not subjective. Conduct is not to be treated as violating a complainant's dignity merely because he thinks it does. It must be conduct which could reasonably be considered as having that effect. However, the Tribunal is obliged to take the complainant's perception into account in making that assessment. As the Court of Appeal said in **Reverend Cannon Pemberton v Right Reverend Inwood** (2018 EWCA – Civ – 560):-

*“In order to decide whether any conduct falling within subparagraph (1)(a) has either of those proscribed effects under subparagraph (1)(b), the Tribunal must consider both (by reason of subsection (4)(a) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection 4(e)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also of course take into account all of the circumstances (subsection 4(b)). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.”*

86. Allegation 1.1 “from May 2020 – December 2021, Elaine Marsterton placed a loud radio near the claimant's desk.”

The Tribunal found it likely that Elaine Marsterton had placed a radio near the claimant's desk, which radio occasionally played loud music. The Tribunal found that this did not violate the claimant's dignity, nor did it create an intimidating, hostile, degrading, humiliating or offensive environment for her. If anything, it was no more than a minor irritation. More importantly, the Tribunal found that this was in no sense whatsoever related to the claimant's race.

Allegation 1.2 “between May 2020 and December 2021 when the claimant asked Elaine Marsterton, Natasha, Michelle Dutton, Deborah W and Faye S to complete tasks, they were not helpful and Faye S said she was harassing them”

The Tribunal found it likely that these colleagues of the claimant had failed or refused to complete tasks allocated to them by the claimant and that they had an unhelpful approach to the claimant's instructions. The Tribunal found it unlikely that this behaviour by the claimant's colleagues created an intimidating, hostile, degrading, humiliating or offensive environment for her. It was unreasonable for the claimant to believe that it did so. In any event, any such behaviour by her colleagues was in no sense whatsoever related to the claimant's race.

Allegation 1.3 “between May 2020 and December 2021 Elaine Marsterton, Michelle Dutton and Natasha W explained tasks in a patronising way to the claimant”

The Tribunal found it unlikely that these three colleagues had explained tasks to the claimant in the way described. There is no mention of any such matters in the claimant's supervisions with her line manager Ms Birdsall. If the claimant felt “patronised”, the Tribunal found that it did not (and could not reasonably be so described) create an intimidating, hostile, degrading, humiliating or offensive environment for her. Furthermore, such behaviour was in no such whatsoever related to the claimant's race.



Allegation 1.4 “on an occasion between August 2020 and December 2020 Elaine Marsterton was talking to the claimant about the partner of one of Elaine’s relatives who is Ukrainian and she said East Europeans “are all the same” and especially women and “they will do f... anything for money” and she described this woman as a whore, bitch, twat, slut”

The Tribunal found it likely that the claimant’s description of this conversation was correct. However, the Tribunal found that the comments were not directed towards the claimant and that the claimant could not reasonably have expected that any of the comments were intended to be directed towards her. It was unreasonable for the claimant to adopt that approach. No complaint was made at the time. The Tribunal found that the comments did not create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant and in any event in were in no sense whatsoever related to the claimant’s race.

Allegation 1.5 “between August 2020 to December 2020 Michelle Dutton said that foreigners looked good for pictures for social media”

The Tribunal found it unlikely that these comments were made by Ms Dutton – the claimant had failed to provide any meaningful evidence that she had done so. In any event, had the comments been made in that context, they would not have created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. They were in no sense whatsoever related to her race.

Allegation 1.6 “on an occasion in or around 2020 or the start of 2021, Natasha W said in front of Michelle Dutton and Elaine Marsterton that Polish women are good cleaners; she said this to mock the claimant because the claimant was using anti-bacterial wipes to clean the desk”

The Tribunal found the claimant’s description of this incident to be likely to be correct. However, the Tribunal found that they did not create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant and it was unreasonable for her to regard them as such. Even though the comments did relate to the claimant’s race, they were said in a manner in which the provisions of section 26 could not be engaged.

Allegation 1.7 “between October 2020 and March 2021, Elaine Marsterton, Michelle Dutton, Natasha W made false allegations about the claimant, that she was drinking at work, was sleeping with individuals and that her English was not good enough for the job”

The Tribunal found it unlikely that these comments had been made. Whilst, had they been made, they may have created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, the Tribunal found that they were in no way whatsoever related to her race.

Allegation 1.8 “on an occasion between October 2020 to March 2021, Michelle Dutton made a comment about the claimant’s face whilst using an Asian accent. The claimant could not make out exactly what she said, but it was something about the claimant’s face and she said it in an Asian accent.”

The Tribunal found it unlikely that this incident had occurred in the manner described by the claimant. Had they been made, they may well have created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, but they were in no sense whatsoever related to her race.

Allegation 1.9 “between September 2020 and March 2021 Elaine Marsterton deliberately mixed hard copies of her paperwork with the claimant’s and printed unnecessary copies whilst the claimant was also printing”

The Tribunal found it unlikely that this incident had happened in the manner described by the claimant. Had it so happened, it would not have created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In any event, it was in no sense whatsoever related to the claimant’s race.

Allegation 1.10 “in Spring 2021, Elaine Marsterton sprayed fly spray over the claimant and her food”

The Tribunal accepted the claimant’s evidence that Elaine Marsterton had indeed sprayed fly spray in the claimant’s vicinity. However, the Tribunal was not persuaded that this had been done deliberately and in particular that it had been directed at the claimant’s food. Whilst the claimant may well have been irritated by the use of fly spray in her general vicinity, it did not create an intimidating, hostile, degrading, humiliating or offensive environment for her and was in any event in no sense whatsoever related to her race.

Allegation 1.11 “in or around June or July 2021, a lady from Bulgaria was interviewed and when she left the building, somebody, believed to be Elaine and Deborah, called her “twat” and “f. bitch”

In the absence of any evidence to the contrary, the Tribunal accepted the claimant’s evidence that this incident had happened. However, the Tribunal was not satisfied that it created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant and it was in no sense whatsoever related to the claimant’s race.

Allegation 1.12 “in June/July 2021 Natasha W did not support the claimant when she applied for the role of recruitment co-ordinator and discouraged to apply for the recruitment co-ordinator job by stating, “we are busy in the branch, and it wasn’t a good time to apply; there was lots of customer visits to cover”

The Tribunal found that the role of recruitment co-ordinator was not filled on this occasion. The Tribunal accepted the respondent’s evidence, at that time, the respondent required the claimant to continue fulfilling the role that she was then undertaking. The Tribunal found that the claimant was subsequently given support for her apprenticeship. Whilst the claimant may have been disappointed not to secure the position, the Tribunal found that the respondent’s refusal of her application did not violate her dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her. More importantly, the respondent’s decision not to appoint the claimant was in no sense whatsoever related to her race.

Allegation 1.13 “in September 2021, Michelle Dutton and Natasha W conducted the claimant’s supervision meeting in earshot of Elaine Marsterton.”

The Tribunal accepted the claimant’s evidence that her supervision meeting was probably undertaken within Ms Marsterton’s presence. No objection was raised by the claimant at the time. The Tribunal found that, even if the incident occurred as described by the claimant, it did not violate her dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her. Furthermore, it was in no sense whatsoever related to her race.

Allegation 1.14 “in October 2021, Denise would shout and swear at the claimant and would sit on her desk with her back to her, or lean over the claimant’s desk.”

The Tribunal found that the claimant had not proved on the balance of probability that such incidents occurred. Whilst shouting and swearing may well have created an intimidating, hostile or offensive environment for the claimant, the claimant had not shown that such behaviour was in any sense whatsoever related to her race.

Allegation 1.15 “in October 2021 Michelle Dutton told the claimant “at Helping Hands we are all about kindness” when the claimant was expressing her concerns during a meeting.”

The Tribunal accepted the claimant’s evidence that Ms Dutton probably made this statement. However, the Tribunal was not satisfied it violated the claimant’s dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for her. It was in no sense whatsoever related to her race.

Allegation 1.16 “in January or February 2022, Mandy Birdsall told the claimant that Polish people drink a lot of vodka and Poland is very cheap.”

The Tribunal found that a discussion had taken place between the claimant and Ms Birdsall, during which Ms Birdsall commented that flights to Poland were particularly cheap. The Tribunal did not accept the claimant’s evidence that Ms Birdsall had said that “Polish people drink a lot of vodka”. The Tribunal was not satisfied that the claimant found such comments to have violated her dignity or created intimidating, hostile, degrading, humiliating or offensive environment for her.

Allegation 1.17 “between January and September 2022 Mandy Birdsall repeatedly referred to Poland as the claimant’s home, despite the claimant stating that the UK was her home.”

The Tribunal accepted the claimant’s evidence that these comments had been made. However, the Tribunal found that the claimant was being hypersensitive about such matters. No complaint was made at the time. The Tribunal did not accept that any such comments violated the claimant’s dignity or created intimidating, hostile, degrading, humiliating or offensive environment for her.

Allegation 1.18 “between January and September 2022 Mandy Birdsall asked the claimant whether her preference were Polish or English men.”

The Tribunal found it likely that Ms Birdsall had made comments to that effect to the claimant. Whilst those comments may have been made, the Tribunal found that they did not violate the claimant’s dignity or create intimidating, hostile, degrading, humiliating or offensive environment for her. They were comments or questions raised during a light-hearted conversation between the claimant and Ms Birdsall whilst travelling in the car to a business meeting. No complaint was made at the time.

Allegation 1.19 “in January or February 2022 Mandy Birdsall said to the claimant when moving furniture “to move my desk as the moon is in a good position to rearrange furniture” and asked the claimant if she believes in spiritual ways of doing things like that.”

The Tribunal found it likely that Ms Birdsall had made these comments, but also found that they did not violate the claimant’s dignity or create an intimidating,

hostile, degrading, humiliating or offensive environment for her. It was certainly not related in any way to her race.

Allegation 1.20 “throughout the year of 2022 Mandy Birdsall discussed the contents of the claimant’s HR file with Elaine Marsterton and Michelle D.”

The Tribunal found that there was no evidence whatsoever to support this allegation by the claimant. It was little more than a suspicion on the part of the claimant. Had it been true, it may well have violated her dignity or created a degrading or humiliating environment for her. There was no evidence to suggest that it was in any sense whatsoever have been related to the claimant’s race.

Allegation 1.21 “in Summer time 2022 Elaine Marsterton said to Mandy Birdsall “losing your job if you won’t behave”.

The Tribunal found it likely that this discussion had taken place, but there was no evidence to link that discussion to the claimant. It was in no sense whatsoever related to the claimant’s race.

Allegation 1.22 “in a meeting around April/May 2022, Vicky was aggressive and obnoxious and swore whilst speaking to the claimant – Vicky sat in her chair “half lying down” when speaking to the claimant and banged on the table whilst playing with a cigarette in her hand.”

The Tribunal found this incident probably did take place as part of a weekly meeting between Vicky and Nick. The Tribunal found Vicky’s behaviour to be unprofessional at work but nothing which would violate the claimant’s dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It was in no sense whatsoever related to her race.

Allegation 1.23 “between May and 2022 and November 2022, Mandy Birdsall made reference to “a poor Polish care worker” when speaking about Gosia”.

The Tribunal found it likely that such a comment was made whilst Ms Birdsall was discussing with the claimant the allocation of working hours to Ms Sieklinska. The Tribunal found it likely that the comment was made in the context of Ms Birdsall expressing concern about Gosia’s financial situation, which Gosia herself had explained to Ms Birdsall. The Tribunal found that the comment would not violate the claimant’s dignity, nor create an intimidating, hostile, degrading, humiliating or offensive environment for her. The comment could not be said to be related to the claimant’s race.

Allegation 1.24 “between January 2022 and August/September 2022 Mandy Birdsall referred to Polish girls as being thin, when customers and carers were present.”

The Tribunal found it likely that these comments were made by Ms Birdsall. However, they were likely to have been made in a complimentary manner and would not violate the claimant’s dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her, although related to her race.

Allegation 1.24.1 “between January 2022 and August 2022 Mandy Birdsall said to the claimant, “what do you Polish girls do that you look so thin and good”. “Is that a new handbag” and “your shoes look very expensive.”

Again, the Tribunal found that these comments were likely to have been made. The comments about Polish girls looking thin and good was made in a

complimentary manner and did not violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her. The other two comments were in no sense whatsoever related to the claimant's race.

Allegation 1.25 "between May 2022 and July 2022 Mandy Birdsall asked the claimant to post fake online customer reviews."

The Tribunal found it likely that Ms Birdsall had asked the claimant to do this. However, the request was in no sense whatsoever related to the claimant's race, even though the claimant may well have taken exception to it.

Allegation 1.26 "in June 2022 Mandy Birdsall called the claimant a poser"

The Tribunal found it likely that this comment was made. Whilst the claimant may have taken exception to it, the Tribunal found that it did not violate her dignity nor create an intimidating, hostile, degrading, humiliating or offensive environment for her. In any event, it was in no sense whatsoever related to her race.

Allegation 1.27 "on 29 June 2022 Mandy Birdsall did a dance move whilst standing close to the claimant."

Ms Birdsall admits that she had done this as a means of enlightening the atmosphere in the office at the time. The Tribunal found that it did not violate the claimant's dignity nor create an intimidating, hostile, degrading, humiliating or offensive environment for her. It was in no sense whatsoever related to her race.

Allegation 1.28 "on 29 June 2022 Mandy Birdsall accused the claimant of deleting meeting notes."

The Tribunal preferred the evidence of Mandy Birdsall in respect of this allegation and found that she had not accused the claimant of deleting any meeting notes. Had she done so, it may well have violated the claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for her. However, the Tribunal could not see how such comment would be in any sense whatsoever related to the claimant's race.

Allegation 1.29 "on 29 June 2022 Mandy Birdsall mocked the claimant and told the claimant that a former customer "had his religion as an excuse for everything" when comparing him to the claimant".

The Tribunal did not accept the claimant's evidence in this regard and was not satisfied that this comment had been made. Had it been made, it may well have violated the claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for her, but was in any event in no sense whatsoever related to her race.

Allegation 1.30 "on 29 June 2022 and 31 August 2022 Mandy Birdsall told the claimant during supervision that if the claimant disagreed with her line manager, it would be taken further to human resources and she would lose her job."

On the claimant's best case, the Tribunal found it possible that such a comment may have been made. The comment may well have violated the claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for her. However, it was in no sense whatsoever related to her race.

Allegation 1.31 "on 29 June 2022, 31 August 2022 and 7 September 2022, when making notes, Mandy Birdsall told the claimant that the notes will be "written the

way she wants, she will decide what to include into the notes as she is manager and will decide what the facts are.”

The Tribunal found it likely that these comments were made by Ms Birdsall, in circumstances where the claimant had persistently alleged that notes were not being kept to her satisfaction. The Tribunal found that the claimant may well have been offended by the comment, but found that it was in no sense whatsoever related to her race. It was related to her behaviour.

Allegation 1.32 “on 29 June 2022 Mandy Birdsall asked the claimant “if this is something to do with your religion” and told her that she will take the matter further when the claimant queried the need to wear uniform/and not to wear a coat.”

The Tribunal preferred Ms Birdsall’s version of this discussion. The claimant had refused to wear a uniform and her explanation to Ms Birdsall was that her client did not like her wearing a uniform. The Tribunal found that such comments would not violate the claimant’s dignity nor create an intimidating, hostile, degrading, humiliating or offensive environment for her. The comments were in no sense whatsoever related to the claimant’s race.

Allegation 1.33 “on 31 August 2022 Mandy Birdsall told the claimant that she must sign the meeting meetings and that what she says “is a fact”.

The Tribunal found that Ms Birdsall was likely to have made comments to this effect (in similar terms as was referred in 1.31 above). Again, the Tribunal found that the comments were in no sense whatsoever related to the claimant’s race.

Allegation 1.34 “on 7 September 2022 Mandy Birdsall kept on asking the claimant to sign an incomplete record of supervision for weeks, but no updates were made.”

The Tribunal found this allegation to be similar to those referred to in paragraphs 1.33 and 1.31 above. The remarks were made because the claimant refused to sign a set of notes. The comments were in no sense whatsoever related to the claimant’s race.

Allegation 1.35 “on 29 September 2022 Mandy Birdsall poked at the claimant’s screen and said that her work was “rubbish”.

The Tribunal accepted the respondent’s evidence in this regard to the effect that Ms Birdsall’s use of the word “rubbish” referred to a work issue in general and was not directed at the claimant’s work personally. It was in no sense whatsoever related to the claimant’s race.

Allegation 1.36 “in August/September 2022 Mandy Birdsall told the claimant that she had to undertake training with Nick.”

Ms Birdsall accepted that she had arranged for the claimant to undergo additional training with a senior colleague. The Tribunal accepted Ms Birdsall’s evidence that this was designed to assist the claimant in the performance of her duties, particularly with regard to organising rotas. The Tribunal found the claimant’s objection to this request to be totally unreasonable. Whilst the claimant clearly objected to it, it was in no sense whatsoever related to the claimant’s race.

Allegation 1.37 “on 21 October 2022 Mandy Birdsall conducted the claimant’s supervision meeting in the presence of Abbey M”

The Tribunal accepted the claimant's evidence in this regard, but found that the claimant knew from the outset that Abbey M was present and raised no objection at the time. One of the reasons why the meeting was conducted this way was because the claimant had refused to use the training room because it was "too cold". The Tribunal found that the arrangements did not violate the claimant's dignity nor create an intimidating, hostile, degrading, humiliating or offensive environment for her. The decision was in no sense whatsoever related to the claimant's race.

Allegation 1.38 "in November 2022 Mandy Birdsall asked the claimant to send an employee to work without the appropriate employment contract and DBS check."

The Tribunal preferred Ms Birdsall's version of this incident, namely that this new employee had been allocated minor tasks which did not contravene any requirement for a DBS check. Ms Birdsall's decision did not violate the claimant's dignity nor create an intimidating, hostile, degrading, humiliating or offensive environment for her. The decision was in no sense whatsoever related to the claimant's race.

Allegation 1.39 "on 21 and 29 November 2022, Mandy Birdsall called the claimant a liar."

The Tribunal found it likely that Ms Birdsall by this stage had become increasingly frustrated with the claimant's attitude and behaviour and may well have called her a liar. Whilst that may have violated the claimant's dignity and created an intimidating, hostile, degrading, humiliating or offensive environment for her, the comment was in no sense whatsoever related to the claimant's race.

Allegation 1.40 "on 4 December 2022 Mandy Birdsall called the claimant's work rota "disgusting"."

The Tribunal found it unlikely that Ms Birdsall used the word "disgusting" to describe the claimant's work rota. The word "disgusting" was probably used by Ms Birdsall to describe the situation if an employee decided to leave because of difficulties with their work rota. None of this violated the claimant's dignity nor created an intimidating, hostile, degrading, humiliating or offensive environment for her. The comments were in no sense whatsoever related to the claimant's race.

Allegation 1.41 "on 7 December 2022 Mandy Birdsall said to the claimant "I know what you're thinking about me" to provoke the claimant after a disagreement over the allocation of hours."

The Tribunal accepted that a comment to that effect was probably made by Ms Birdsall during the course of this disagreement. However, that comment was in no sense whatsoever related to the claimant's race.

Allegation 1.41.1 "on 12 January 2023, Nathan D presented a statement that contained untrue allegations about the claimant's performance made by Mandy and Abbey."

These comments were part of the evidence presented against the claimant which was sent to the claimant by Nathan Duran. The statements were not specifically related to the claimant's performance. Whilst the claimant clearly took exception to them, they were in no sense whatsoever related to her race.

Allegation 1.42 "on 7 December 2022 the respondent suspended the claimant."

The claimant was indeed suspended. The claimant clearly took exception to that and the Tribunal found that she may have felt that her dignity was violated or that the suspension created an intimidating, hostile, degrading, humiliating or offensive environment for her. However, the reason for the suspension was the claimant's conduct and behaviour and was in no sense whatsoever related to her race.

Allegation 1.43 "during the disciplinary investigation which led to the claimant's dismissal, the respondent failed to investigate the allegations properly."

As is set out in its findings in the claimant's unfair dismissal claim above, the Tribunal found that the respondent did fail to investigate the allegations properly. The Tribunal found however that this was in no sense whatsoever related to the claimant's race, but was due to their desire to remove the claimant from the workplace because of her behaviour.

Allegation 1.44 "the respondent then took disciplinary action against the claimant."

The Tribunal's findings are exactly the same as those set out in paragraphs 1.42 and 1.43 above. The disciplinary action was due to the claimant's behaviour and conduct and was in no sense whatsoever related to her race.

Allegation 1.45 "on 17 January 2023 the respondent dismissed the claimant."

Again, the Tribunal's findings are exactly the same as those set out in 1.42, 1.43 and 1.44 above. The respondent's dismissal of the claimant was in no sense whatsoever related to her race.

Allegation 1.46 "on 3 February 2023 Mandy Stewart failed to uphold the claimant's appeal against dismissal."

Again, the Tribunal's findings are exactly the same as those set out in 1.42-1.45 above. Ms Stewart's failure to uphold the claimant's appeal was in no sense whatsoever related to her race.

87. The claimant complained that the respondent subjected her to direct race discrimination, contrary to section 13 of the Equality Act 2010. The claimant alleged that, by doing the things listed below, the respondent treated her less favourably because of race than it treated or would treat others in circumstances that were not materially different.

Allegation 2.1 "from May 2020 until December 2022 the respondent did not offer the claimant additional payments for travel time."

The Tribunal found that there was no difference in treatment between the claimant and the respondent's other employees in the same circumstances as the claimant. The claimant never asked for payment for travel time and never complained about the lack of payment for travel time.

Allegation 2.2 "in 2021 Natasha W and Michelle Dutton did not allow the claimant to work from home or attend to domestic duties during work hours."

The Tribunal found that the claimant was not treated any differently to the respondent's British employees. The claimant took exception to being refused permission to remain at home while she had a sofa delivered. The Tribunal found that this decision was in no sense whatsoever related to the claimant's race and was no different to what would have been told to British employees.



Allegation 2.3 “in Summer 2021 the claimant was not offered the role of recruitment co-ordinator following application.”

The Tribunal refers to its decision above in paragraph 1.12. The Tribunal accepted the respondent’s explanation that its decision not to offer the role to the claimant because she was still required to undertake the duties she was then performing. The role was not in any event offered to anyone, let alone an employee of a different race to the claimant.

Allegation 2.4 “in or around the end of January 2022 and start of February 2022, Mandy Birdsall subjected the claimant to an English writing skills assessment.”

The Tribunal found that Ms Birdsall’s description of this matter was clear and consistent, namely that she had offered to help the claimant if she was suffering with her English. The Tribunal found that there was no “less favourable treatment” in this regard.

Allegation 2.5 “from June 2022 to December 2022 Mandy Birdsall told the claimant that she needs to learn how to do her job”.

The Tribunal found it unlikely that Ms Birdsall had said any such thing to the claimant. The claimant was unable to identify a named or hypothetical comparator. The Tribunal found that the claimant was distorting the words used by Ms Birdsall who was doing no more than offering help to the claimant to assist her with her duties.

Allegation 2.6 “on 23 September 2022 Mandy Birdsall told the claimant that she has problems communicating with existing and potential new customers.”

Ms Birdsall accepted that she had told the claimant that she was being taken off discussions with new customers and that Ms Birdsall would attend to those herself. The Tribunal accepted Ms Birdsall’s explanation that this was due to the claimant’s difficulties in Ms Birdsall’s eyes with the preparation of care plans etc. The Tribunal accepted Ms Birdsall’s evidence that this had nothing to do with communication. Again, no comparator was identified. The Tribunal found that there was no less favourable treatment and accordingly no race discrimination.

Allegation 2.7 “from 17 October 2022 Mandy Birdsall failed to offer the claimant paid leave or a more flexible working condition when her car was undergoing repair in the garage.”

The Tribunal accepted Ms Birdsall’s version of this incident. The claimant’s car was in need of repair in October 2022. The claimant was absent for one week when she had covid, for a further week on holiday and then a further week when she had no car. By the fourth week Ms Birdsall required the claimant to ensure that she attended for work. Ms Birdsall’s evidence was that the claimant was offered a lift but refused and was then told to get the bus if necessary. The Tribunal found that there was no comparator (real or hypothetical) offered by the claimant and found Ms Birdsall’s instructions were in no sense whatsoever related to the claimant’s race.

Allegation 2.8 “on 7 December 2022 the respondent suspended the claimant.”

By reasons set out above, the Tribunal found that the respondent’s reason for suspending the claimant was due to the impact her behaviour was having on her colleagues within the office. A British employee would have been treated in the same way. The decision to suspend the claimant was in no sense whatsoever because of her race.

Allegation 2.9 “during the disciplinary investigations that led to the claimant’s dismissal the respondent failed to investigate the allegations properly.”

The Tribunal has already set out its findings in this regard. The Tribunal found that the respondent did fail to investigate allegations properly. However, that failure did not amount to less favourable treatment and was not because of the claimant’s race.

Allegation 2.10 “the respondent then took disciplinary action against the claimant.”

Again, the Tribunal has already provided its reasons and again found that the decision to take disciplinary action was not less favourable treatment, nor was it because of the claimant’s race.

Allegation 2.11 “on 17 January 2023 the respondent dismissed the claimant.”

For the reasons set out above, the Tribunal found that the respondent’s dismissal of the claimant was for reasons related to her conduct. The claimant was not treated less favourably because of her race.

Allegation 2.12 “on 3 February 2023 Amanda Stewart failed to uphold the claimant’s appeal against dismissal.”

Once again, the Tribunal’s reasons relating to the failure to uphold the claimant’s appeal are set out above. Whilst the dismissal was itself unfair, the Tribunal found that it was not because of the claimant’s race and that she was not treated any differently than a British employee would have been in the same circumstances.

## **Victimisation – Section 27 Equality Act 2010**

### **27 - Victimisation**

*(1) A person (A) victimises another person (B) if A subjects B to a detriment because —*

*(a) B does a protected act, or*

*(b) A believes that B has done, or may do, a protected act.*

*(2) Each of the following is a protected act —*

*(a) bringing proceedings under this Act;*

*(b) giving evidence or information in connection with proceedings under this Act;*

*(c) doing any other thing for the purposes of or in connection with this Act;*

*(d) making an allegation (whether or not express) that A or another person has contravened this Act.*

88. The claimant alleged that she had done four protected acts as follows:-

Allegation 4.1 “between September 2020 and November 2020 the claimant told Michelle Dutton verbally that Elaine Marsterton had been abusive and malicious towards her on account of her race whilst at the Newcastle branch.”

The claimant at no point during these proceedings has stated exactly what she actually said to Michelle Dutton. At page 168 in the bundle is an email dated 2 January 2021 from the claimant to Ms Dutton which states, “*I would like to know if Elaine has any issues with myself as I suspect she talks to the other members of the office also about me.*”

Nowhere is there any mention of race or any part of the Equality Act 2010. This is the only piece of evidence in the bundle which relates to any kind of complaint being made by the claimant to Michelle Dutton about Elaine Marsterton. The Tribunal found that nothing was said by the claimant to Michelle Dutton which could amount to a protected act under section 27(2).

Allegation 4.2 “on 10 February 2021 the claimant told Natasha W verbally on the telephone that Elaine Marsterton had been abusive and malicious towards her on account of her race whilst at the Newcastle branch.”

Again, the claimant does not recite exactly what she is supposed to have said to Natasha W. There is an email at page 170 in the bundle where the claimant says to Elaine directly, *“it has come to my attention that you have been saying some negative things about me to the carers and other office staff. Simply speaking I am not going to put up with any nonsense.”*

Nowhere in this document (which is the only one in the bundle relating to this allegation) is there any mention of the claimant’s race. Even in her further and particulars at page 488 the claimant simply says, *“I was harassed because of my Polish nationality.”* Without giving any specific details.

The Tribunal found that none of this amounted to a “protected act” in accordance with the definition in section 27(2).

Allegation 4.3 “on 27 and 28 September 2022 the claimant emailed Alexandra Flynn and Mandy Birdsall about being treated differently due to her race.”

There are two emails, one dated 27 September (page 277) and one dated 28 September (page 282). In the first email the claimant complains about the accuracy of notes being taken of meetings with her, she says that she is not being managed but rather controlled and that she felt undermined at every step. Nowhere is there any mention of the claimant’s race or the Equality Act. At page 280 the claimant states, *“you have asked me questions where I can see the different treatment between myself and the other team member. As an example even yesterday, Abbey said “I will leave earlier instead of the time I have spent on Sunday doing additional task.”* Nowhere is there any mention of any allegation of race discrimination. In the second email the claimant states, *“when I express my opinions I am being humiliated. I feel extremely sad and disappointed that you keep trying to undermine my abilities.”*

Nowhere is there any mention of the claimant’s race or any allegation of a breach of the Equality Act 2010. The Tribunal found that neither of these emails amounted to a protected act.

Allegation 4.4 “on 10 October 2022 the claimant emailed HR administrator about being treated differently on account of race.”

The email of 10 October appears at page 293 in the bundle. The claimant complains about Ms Birdsall being dismissive of the claimant’s answers to her question and being told by Ms Birdsall that she must “sign the document” even when I have pointed out I need time to read it. At page 294 the claimant states; *“I have felt for a while now that I have been treated in a different way compared to my other colleagues within the team. I’ve felt that my work abilities have been undermined on every possible occasion. Recently it has become more a belittling behaviour which has left me going home stressed and ill.”*

Again, although the claimant does mention being treated differently, there is no mention of the reason for that treatment being related to her race. There is no complaint of any breach of the Equality Act 2010.

The Tribunal found that this email did not amount to a protected act in accordance with the definition of section 27(2).

89. In the absence of any protected act, the Tribunal found that the claimant could not have been subjected to any detriment, as an act of retaliation, because she had done any protected acts.
90. Nevertheless, the Tribunal makes the following findings in respect of the 10 individual allegations of detriment because of a protected act.

Allegation 3.1 “On 26 November 2022 Nathan Duran slammed a champagne glass on the table close to the claimant.”

The claimant alleged that this incident had taken place at a business meeting in Birmingham. Mr Duran had no recollection of the incident. When asked why she thought Mr Duran had done this, the claimant said it was because he was aware of the difficulties within the Newcastle branch that led to the claimant receiving a final written warning. Accordingly, on the claimant’s best case, the slamming of the champagne glass could not have been because the claimant had done a protected act.

Allegation 3.2 “in late August to early September 2022 Mandy Birdsall told the claimant “you are not good””

The Tribunal found this to be a particularly vague allegation. Ms Birdsall denied ever saying to the claimant, “*you are not good.*” The Tribunal found it unlikely that such a comment was made to the claimant by Ms Birdsall. This could not have been because Ms Birdsall knew that the claimant had done any protected acts.

Allegation 3.3 “on 8 November 2022 Mandy Birdsall and Rebecca C did not allow the claimant to speak in the meeting, repeating that the claimant was interrupting Mandy.”

The Tribunal did not accept the claimant’s description of this meeting. The Tribunal found that the claimant did have the chance to speak and was given the chance to speak. Whatever was said, it was not capable of being a detriment because the claimant had undertaken a protected act.

Allegation 3.4 “on lots of occasions between July 2022 and December 2022 Mandy Birdsall forced the claimant to work out of hours, including the weekends”

The Tribunal found that the claimant was never “forced” to work weekends. Any requirement for the claimant to undertake weekend work was in accordance with the terms of her contract of employment and was due to the needs and demands of the service to be provided by the respondent to its clients. The Tribunal found that (no protected act having been done by the claimant), Ms Birdsall’s decision about weekend working was not retaliation for the doing of any protected act.

Allegation 3.5 “on 8 November 2022 Rebecca told the claimant that Mandy Birdsall can write the record of the meeting however she wants and that the claimant’s signature is not required.”

The Tribunal has already set out above its findings in respect of this allegation. If minutes were sent to the claimant which the claimant refused to sign, Ms Birdsall

was entitled to confirm that in the absence of the claimant's signature then the minutes will be regarded as accurate. It was in no sense whatsoever connected to any protected act (none have been undertaken by the claimant).

Allegation 3.6 "on 7 December 2022 the respondent suspended the claimant."

The Tribunal has already made its findings in this regard.

Allegation 3.7 "during the disciplinary investigation that led to the claimant's dismissal the respondent further investigate the allegations properly."

The respondent has already made its findings in this regard.

Allegation 3.8 "the respondent then took disciplinary action against the claimant"

The Tribunal has already made its findings in this regard.

Allegation 3.9 "on 19 January 2023 the respondent dismissed the claimant"

The Tribunal has already set out its findings in this regard.

Allegation 3.10 "on 3 February 2023 Amanda Stewart failed to uphold the claimant's appeal against dismissal"

The Tribunal has already set out its findings in this regard.

91. By way of summary, the Tribunal found that the claimant had not done any protected acts. The Tribunal found that none of the allegations raised by the claimant amounted to retaliatory action by the respondents because the claimant had done a protected act.
92. For those reasons the Tribunal found that the claimant's complaints of direct race discrimination contrary to section 13 of the Equality Act 2010, harassment contrary to section 26 of the Equality Act 2010, and victimisation contrary to section 27 of the Equality Act 2010 are not well founded and are dismissed.

G Johnson

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**Employment Judge Johnson**

Date: 16 May 2024

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### **Recording and Transcription**

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>