



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case no 4110145/2021

Held at Edinburgh on 4 and 5 November 2021

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Employment Judge W A Meiklejohn
Tribunal Member Ms J Grier
Tribunal Member Mr I Ashraf

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Ms Nonkululeko Khawula

**Claimant
In person**

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Randolph Hill Nursing Homes (Scotland) Ltd

**Respondent
Represented by:
Ms G Moore – Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is as follows –

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(a) The Tribunal decided unanimously that the respondent had not discriminated against the claimant and her complaint of direct race discrimination is dismissed;

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(b) The Tribunal decided by a majority (the Employment Judge dissenting) that the claimant had been constructively dismissed by the respondent, that her dismissal was unfair, and that the respondent is ordered to pay to the claimant the sum of **SIX THOUSAND AND SIXTY FOUR POUNDS (£6064.00)**.

REASONS

1. This case came before us for a final hearing, conducted in person in Edinburgh on 4 and 5 November 2021. The claimant appeared on her own behalf. The respondent was represented by Ms Moore.

Procedural history

2. The claimant presented her ET1 claim form on 22 June 2021, intimating complaints of unfair dismissal and discrimination on the grounds of race. The respondent lodged an ET3 form resisting these claims. It was apparent from their ET3 that the respondent understood the claimant to be alleging direct discrimination.

3. A preliminary hearing (before Employment Judge Mackay) took place on 27 August 2021. In advance of this both parties provided agendas. In her agenda the claimant stated that her complaint under the Equality Act 2010 ("EqA") was one of indirect discrimination. The respondent queried this in their agenda.

4. At the preliminary hearing the nature of the discrimination complaint was discussed and it was agreed that it was a claim of direct discrimination, the protected characteristic being race. The claimant identifies as Black African.

5. The outcomes of the preliminary hearing were orders covering the provision by the claimant of a schedule of loss, the preparation by the respondent of a draft list of issues, and the exchange of documents and preparation of a joint bundle.

List of issues

6. We had an agreed list of issues (81) which was as follows –

5 ***Constructive unfair dismissal***

1. *The Respondent appointed an external candidate to the vacant post of Senior Staff Nurse.*

10 1.1 *Did the Respondent's conduct in not appointing the Claimant to this post amount to a repudiatory breach of contract?*

1.2 *If yes, did the Claimant resign in response to this breach?*

15 2. *If it is held that the Claimant was dismissed by the Respondent, was the Claimant's dismissal fair?*

Direct Race Discrimination

20 3. *Was the Claimant not appointed to the vacant post of Senior Staff Nurse because of her race?*

4. *In relation to the Senior Staff Nurse position, was the Claimant treated fairly and given the same support/opportunity as others who do not share her race? If not, was this because of her race?*

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Remedy

5. *The claimant seeks a recommendation. Is it appropriate for the Tribunal to make a recommendation in circumstances where the Claimant's employment with the Respondent has ended?*

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(Note: section 2 of the Deregulation Act 2015 amended section 124(3) of the Equality Act 2010 to remove the Employment Tribunal's power to make recommendations for the benefit of persons other than the

claimant. Section 124(3) of the Equality Act 2010 states that an appropriate recommendation is a recommendation that within a specified period for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.)

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6. *If it is found that the Respondent constructively unfairly dismissed the Claimant and/or directly discriminated against the Claimant:*

6.1 *Is it just and equitable for the tribunal to award compensation?*

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6.2 *Has the Claimant suffered any financial loss?*

6.3 *Has the Claimant unreasonably failed to mitigate her loss?*

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6.4 *Has the Claimant suffered injury to feelings?*

6.5 *Should any compensation be reduced on the basis of Polkey v AE Dayton Services Ltd?*

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7. We did not believe that this list was entirely accurate in capturing the issues that we had to decide. We explain this in the Discussion section of our Judgment below.

Applicable law

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8. The following provisions of the Employment Rights Act 1996 ("ERA") are engaged (or potentially engaged) in this case –

Section 94

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

Section 95

(1) *For the purposes of this Part an employee is dismissed by his employer if....*

5 (c) *the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

10 **Section 98**

(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 –*

15 (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 such as to justify the dismissal of an employee*
20 *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*
25 *performing work of the kind which he was employed by the employer to do,*

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

30 (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.

5 *(3)....*

(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) –

10 *(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.

15 9. The following provisions of EqA are engaged (or potentially engaged) –

Section 13

20 *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

Section 23

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

Section 39

(2) An employer (A) must not discriminate against an employee of A's (B) –

....(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service.

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Section 136

(1) This section applies to any proceedings relating to a contravention of this Act.

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(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

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Evidence

10. We heard evidence from the claimant. For the respondent we heard evidence from –

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- Ms C Morrison, Care Home Manager
- Ms F Reive, Deputy Manager
- Ms C Allen, Director of Nursing Home Operations

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11. We had a joint bundle of documents extending to 178 pages, to which we refer above and below by page number.

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Findings in fact

12. The respondent owns and operates seven nursing homes across central and east Scotland. One of these is Ashley Court in Edinburgh where Ms Morrison is the Manager and Ms Reive is the Deputy Manager.

13. The claimant commenced employment at Ashley Court on 14 April 2015 as a Staff Nurse, normally working on day shift. This was her first job as a nurse following her graduation from Edinburgh Napier University. Before pursuing her nursing career, the claimant had worked in care homes as a Carer.

Ms A Livingston

14. When the claimant started work at Ashley Court, Ms Livingston was employed there as a Staff Nurse. She is white and Scottish. Like the claimant, this was her first nursing post. She had commenced her employment at Ashley Court some five or six years earlier.

15. According to the claimant, at some point in 2015, after the claimant started to work for the respondent, a vacancy for a Senior Staff Nurse at Ashley Court was advertised internally within the staff room. At that time it was routine for internal vacancies to be advertised in this way. Ms Livingston applied and was appointed. A couple of years later (the date is not relevant) Ms Livingston was promoted again to Charge Nurse.

16. Ms Morrison's evidence about the circumstances of Ms Livingston's promotion differed. She said that there was a "*chance to employ a second Senior Staff Nurse*" and she (Ms Morrison) felt that Ms Livingston was a suitable candidate to move up to a senior role, although not yet ready for the role of Charge Nurse. There was no vacancy as such (ie no vacancy was advertised) but rather an opportunity to promote Ms Livingston. This occurred in July 2015.

17. It seemed to us that Ms Morrison, having been involved in Ms Livingston's promotion in 2015, was more likely than the claimant to be aware of the details of it. For that reason, we preferred her evidence as to the circumstances in which Ms Livingston was promoted.

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Claimant's appraisals

18. It was the respondent's practice to carry out annual staff appraisals. These were recorded in a document headed "*Senior Staff Performance Review and Development Plan*". Within the bundle we had the claimant's appraisals for 2017 (98-101), 2018 (107-110), 2019 (111-114) and 2021 (122-125). The 2017 appraisal was undertaken by Ms Reive, the others by Ms Morrison. As a consequence of the Covid-19 pandemic there were no staff appraisals done in 2020.

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19. From these appraisals we noted the following –

(a) The claimant initially lacked confidence but this improved. Her 2019 appraisal stated –

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"Nonku is confident dealing with residents, visitors, she is polite, friendly. I do feel that her confidence has grown when dealing with visitors etc."

(b) The claimant's abilities as a nurse were recognised by the respondent.

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Quoting again from her 2019 appraisal –

"Very competent and caring staff nurse, reassuring for residents and relatives."

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(c) The claimant had some issues with completing residents' care reviews timeously. From her 2018 appraisal –

“Nonku has to be more aware of when care reviews are due, and to let Carol or Fiona know if she is unable to meet the time scales so support can be put in place.”

5 And from her 2019 appraisal –

“maintain care plans and care reviews – discuss with management if targets set out unachievable and why. Management will offer support and advise on solutions.”

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(d) While Ms Morrison ‘s evidence to us was that the claimant lacked initiative and proactivity, this was not wholly supported by her appraisals. From the 2017 appraisal (under “*Development Plan*”) –

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“For Nonku to become more proactive particularly with relatives, and to become more confident as the nurse in charge.”

And from the 2019 appraisal –

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“continue to be proactive with relatives and staff”

Issues with care reviews

20. The claimant was routinely behind with residents’ care reviews. She was not
25 alone in this. She said that the Charge Nurse with whom she worked had the same issue. Ms Morrison acknowledged that none of the staff was up to date with care reviews. She (Ms Morrison) sent reminders to staff whose documentation was not up to date. We had in the bundle copies of such reminders sent to the claimant between 6 November 2017 and 30 July 2019
30 (102-106).

21. Ms Morrison acknowledged that delivery of care to residents took priority over paperwork. However the paperwork was an element of that care and could

not be ignored. She described the claimant as being one of the staff who had to be chased most to complete paperwork.

22. The claimant was given some support in relation to overdue documentation. She was given time off rota and was paid when she came in on non-working days to catch up, as were other staff who did likewise. However she referred to an occasion when Ms Morrison had declined her request for time off rota. Ms Morrison explained this by reference to the fact that the unit in which the claimant worked had 15 residents at the time compared with a capacity of 21, the implication being that the claimant should have had sufficient time to attend to care reviews in her normal working hours.

Senior Staff Nurse vacancy

23. Around the start of May 2021 Ms Livingston was promoted from Charge Nurse at Ashley Court to become Deputy Manager at another home. Ms L McFarlane, then a Senior Staff Nurse, was appointed to the position of Charge Nurse. The claimant said that Ms McFarlane had been "*persuaded*" to take this position. This was disputed by Ms Morrison who said that Ms McFarlane had been interviewed. We did not see any necessary conflict here – it might well be that Ms McFarlane needed some encouragement to step up to become a Charge Nurse before being interviewed for the post.
24. The consequence of Ms McFarlane's promotion was that a vacancy then existed for a Senior Staff Nurse. This was known to the claimant and her colleagues. The claimant referred to there being congratulations posters.
25. Ms McFarlane encouraged the claimant to apply for the Senior Staff Nurse position. Other colleagues did likewise. The claimant intended to apply. She said that it was "*generally known*" that she was interested in the Senior Staff Nurse post.
26. The claimant was waiting for the post to be advertised in the office and/or staff room at Ashley Court. When she did not see the post being advertised,

she looked on line with Ms McFarlane but they could not see the post. The claimant did not speak with Ms Morrison or Ms Reive to express her interest in the post, nor had she previously expressed an interest in promotion.

5 ***Vacancy is filled***

27. Towards the middle of May 2021, the claimant saw Ms Morrison and a lady she did not know walking around the Ashley Court building. Ms Morrison introduced the lady as someone who was to be *“joining our team”* but did not
10 say in what capacity.

28. On 17 May 2021 the claimant was told by Ms McFarlane that a new Senior Staff Nurse was to be starting the following day. Ms McFarlane told the claimant that the appointee was the lady she had seen with Ms Morrison and
15 that she (the claimant) was to do her induction.

29. The process followed by Ms Morrison, in conjunction with Ms Reive, to appoint a new Senior Staff Nurse was as follows. They considered whether there was a suitable internal candidate within Ashley Court and decided that
20 there was not. Ms Morrison’s evidence was that they would only advertise internally if they felt there could be an internal candidate who could fulfil the role. Accordingly the post was not advertised internally. Notwithstanding this, we found that the post should, in terms of the respondent’s normal practice, have been advertised internally, not least to allow other Randolph
25 Hill staff the opportunity for progression.

30. In deciding that the claimant should not be considered for the Senior Staff Nurse position, Ms Morrison and Ms Reive recognised that the claimant’s clinical skills were good but felt that she had shown no initiative or willingness
30 to promote herself. They were looking for someone interested in learning and developing more. They took account of the claimant’s time management. Ms Morrison said that she *“would have expected someone to be on top of their own work before expanding their role”*.

31. An approach was made to Ms A Little, a Staff Nurse on night shift. Ms Little had been employed at Ashley Court for only three months, and had resigned because she did not want to work on night shift. She had previous management experience. Ms Little agreed to attend for an interview, but
5 changed her mind.

32. The position was then advertised externally. Ms P Kerr applied, was interviewed and appointed. Ms Kerr had held a management role, had done training and had senior staff experience. She was the person who had been
10 introduced to the claimant by Ms Morrison as mentioned above.

Claimant decides to resign

33. The claimant was very upset to discover that the Senior Staff Nurse position
15 had been filled without being advertised internally. She undertook Ms Kerr's induction during the morning of 18 May 2021 but described herself as "*distraught*" and said that "*being made to do her induction really hurt*".

34. During her lunch break on 18 May 2021 the claimant wrote her letter of
20 resignation. It was in these terms –

"Please accept my letter of resignation. I would like to give four weeks notice starting from today."

25 The claimant said that she felt very emotional. She was crying. She did not feel appreciated. She said that it was not "*an environment in which I could develop and feel safe*".

35. The claimant met with Ms Morrison around 2.30pm on 18 May 2021 and
30 submitted her letter of resignation. Ms Morrison asked the claimant why she was resigning and the claimant responded that she "*felt unhappy that there was a new Senior Staff Nurse who had filled the position without it being advertised*". Ms Morrison told the claimant that Ms Kerr had a lot of experience. When the claimant asked why the post had not been advertised,

Ms Morrison said that she felt the claimant relied on her (Ms Morrison) too much. Ms Morrison gave one or two examples.

5 36. According to the claimant, she said to Ms Morrison that she “*was not looking for a free pass*”, just an interview, and Ms Morrison told her that she would not have got the job anyway. Ms Morrison accepted that she had said this, or something similar.

10 37. When asked at what point she had decided to resign, the claimant said that it was on 17 May 2021 when she found out that Ms Kerr had been appointed. She would have written her letter of resignation earlier in the day on 18 May 2021 if she had had a chance to do so.

Ms Morrison meets with claimant on 20 May 2021

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20 38. There was a further meeting between Ms Morrison and the claimant on 20 May 2021. Ms Morrison said she had heard that the claimant had started to tell people she was leaving. The claimant told Ms Morrison that colleagues were asking her why she did not get the Senior Staff Nurse job and she (the claimant) did not have answers. The claimant told us that she did not think Ms Morrison “*took it seriously*” (which we understood to be a reference to the claimant’s decision to resign).

25 39. At (or perhaps after) this meeting Ms Morrison completed the claimant’s 2021 appraisal (122-125). This was overdue, the claimant having completed her part of the appraisal form on 26 March 2021 (117-120). The intention had been to deal with the claimant’s appraisal on 18 May 2021 but this was overtaken by her resignation. Under “*Development Plan*” Ms Morrison referred to the claimant’s time management and the need for her to be more
30 proactive.

40. Ms Allen (when dealing with the claimant’s subsequent complaint) asked Ms Morrison to prepare a statement covering her meetings with the claimant on

18 and 20 May 2021, and Ms Morrison did so on 16 June 2021 (141). This included the following –

5 *“I did say to her we advertised externally and not internally as I did not feel she would be able to do the role of senior staff nurse at this time, I told her the role was evolving just as the Charge Nurse role had as expectations from all staff had increased.”*

10 *“I explained that I did not feel she was ready for the post as she had not shown any signs or inclination to me that she wanted to progress. I explained the senior staff nurse had to lead by example and I have to constantly chase her for her care reviews and care plans, and this is not what I would expect in a senior role.”*

15 *“I also spoke about when she brings issues to me, I said I felt that instead of looking for a solution herself she will come to me first, and ask rather than coming to say I’ve done this or thought about this, again this did not show me that she would want to progress.”*

20 *“I also advised her that now she had made it clear she wanted to progress I would support her as there are always career moves within the company.”*

41. The claimant accepted that she had not expressed interest in promotion at her appraisals. She said that she did not recall Ms Morrison saying the things
25 contained in her statement. Our view was that Ms Morrison’s statement did reflect what she said to the claimant across the two meetings on 18 and 20 May 2021. It was prepared within four weeks of those meetings when matters would have been reasonably fresh in Ms Morrison’s mind.

30 ***Comparison with Ms Livingston***

42. The claimant believed that her position relative to the Senior Staff Nurse vacancy in 2021 was comparable with Ms Livingston’s position relative to a

similar vacancy in 2015. Both had worked at Ashley Court for a number of years before a Senior Staff Nurse position became available.

5 43. Ms Morrison gave evidence about Ms Livingston's appointment in 2015. As mentioned in paragraph 16 above there had not been a vacancy as such, but rather what Ms Morrison described as "*a chance to employ a second Senior Staff Nurse*". Ms Morrison had felt that Ms Livingston was a suitable candidate to move up to a senior role. She said that Ms Livingston was "*positive, always looking for new things to do*" and that she "*wanted to learn and develop and showed initiative*". Ms Morrison was unsure whether Ms 10 Livingston had said that she wanted promotion but it was "*obvious she wanted to move forward*" and she had "*asked to take on extra things*".

15 44. Ms Morrison was asked about Ms Livingston's appraisal dated 16 January 2015 (82-85). The comments recorded there about Ms Livingston's performance were as follows –

20 "*Ann's confidence in her own abilities has grown. She has taken on the role of senior cover very successfully and has shown she has gained more knowledge of this extended role. She has excellent clinical skills and has shown she can follow through on individual residents' needs. Ann's documentation skills are excellent and care planning is always very clear and precise.*"

25 45. In fairness to the claimant we should record that her 2018 review notes that she was on a mentorship course (106) and she had subsequently mentored a student. Ms Livingston had started but not completed the same mentorship course. The claimant had prepared, we understood on her own initiative, a student induction pack. She had given this to Ms Morrison who said that she 30 had spoken with the claimant about this and that the pack was "*very good*".

46. We should also record that the claimant was on occasions the senior nurse in charge of the unit (and the building) where she worked. She was also the senior nurse in charge when she worked on night shift. No issues arose

when the claimant undertook this responsibility. This involved the claimant doing part, but not all, of the role of a Senior Staff Nurse when she was the senior nurse in charge.

5 ***Claimant's NMC revalidation***

47. On 21 May 2021 the claimant met with Ms Reive to deal with her NMC (Nursing and Midwifery Council) revalidation. Ms Reive was complimentary towards the claimant. According to the claimant, Ms Reive said that she
10 *“may have been overlooked”* for the Senior Staff Nurse position. Ms Reive also told the claimant that she should not *“cut off her nose to spite her face”* which the claimant understood to mean that she should not be leaving Ashley Court because she was upset when she did not have another job to go to.

15 48. Ms Reive confirmed she had made the *“cut off your nose”* comment and indicated that she had offered the claimant the chance to stay. She did not recall telling the claimant that she might have been overlooked for the Senior Staff Nurse position. Her evidence to us was that the claimant had not been overlooked – she had been discussed as a potential candidate but Ms
20 Morrison and Ms Reive had decided against this. Our view of this was that Ms Reive probably did say something about the claimant being overlooked but perhaps not quite in the same context as the claimant understood.

Claimant complains

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49. On 9 June 2021 the claimant sent an email to Ms Allen (127-128) in which she complained about how she had been treated in relation to the Senior Staff Nurse position. The claimant referred to management being
“unapproachable” and connected this with staff leaving. The claimant also
30 referred to an occasion when she said Ms Morrison had shouted at her.

50. Ms Allen spoke to Ms Morrison about the claimant's allegations. Ms Morrison told her that she (Ms Morrison) did not feel that the claimant had been ready for the Senior Staff Nurse position. Ms Allen looked at the claimant's

appraisals and noted that these disclosed “*development needs*” around using her initiative and keeping up to date with her care reviews. Ms Allen also checked staff resignation letters and found nothing to indicate that staff had left because they were unhappy.

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51. Ms Allen emailed the claimant on 15 June 2021 (127). She referred to the claimant’s “*upset and disappointment*” prior to her resignation and told the claimant –

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“I have looked into this and other concerns you have raised.... and I am satisfied with the outcome of my investigation.”

52. The claimant responded to Ms Allen on 15/16 June 2021 (135-137). In her email of 16 June 2021 (135-136) the claimant said –

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“....the most important issue....was pointing out the discrimination that was displayed....I guess I was looking for clarification if that was a Randolphhill way or just Ashley Court management? Moving forward I think this answer is important to me and would appreciate it being addressed.”

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53. In response to this Ms Allen spoke with Ms Morrison again and asked her to prepare a statement, which Ms Morrison did (141). Ms Allen also revisited the claimant’s appraisals. Ms Allen emailed the claimant on 22 June 2021 (135) in these terms –

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“I have investigated the issues raised in your email as far as I can with the information available. In relation to the issue of recruitment, I appreciate why you were disappointed not to be offered the opportunity to apply for the Senior Staff Nurse vacancy. I have investigated your concerns and I am satisfied that the manager’s recruitment decisions were motivated by the need to recruit someone with more experience to meet the needs of the residents, and was not in any way discriminatory. I agree that there could have been better communication around this, and we will take this on board as a learning point in future.

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I have also investigated your concerns regarding management at Ashley Court, and the recent departures of staff. It would not be appropriate for me to provide information about other staff members, but I would like to reassure you that your concerns have been noted and investigated. Randolph Hill takes allegations of discrimination very seriously, and discrimination will not be tolerated in our homes. You have not provided specific details of the discrimination you believe was displayed. However, I have investigated based on the information available and am satisfied that there is no evidence of discriminatory behaviour by management towards you or any other member of staff.”

54. Ms Allen prepared an investigation report dated 16 June 2021 (138-139) in which she set out her investigation findings as follows –

“There may have been a need to advertise the post internally to be seen to be fair.

I could see no evidence of discrimination nor any evidence that staff were leaving due to Carol’s attitude. There had been staff who had left over the last few months but reasons appeared valid i.e. moving to another job, retirement.

There were appraisals completed that indicated Nonku’s development needs. There was no appraisal completed in 2020. All appraisals were behind due to the pandemic. I did not see that any previous development needs had been reviewed.

There was no evidence to say Carol had shouted at Nonku however Carol agreed that she was frustrated.”

55. Ms Allen's report stated the following at the "*Recommendations*" section –

5 "*Advertise all vacant posts internally including posts whereby promotion may be an option. Email sent by Clare Allen, director 16/6/21 to all managers and deputies.*"

56. Ms Allen sent an email to the respondent's "*Managers Distribution List*" on 16 June 2021 (140) instructing that the weekly staff vacancy list should be placed in the staff room. She also instructed the recipients to "*let me know if you have promoted internally and any vacancies that have arisen from this*".

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Claimant seeks employment

57. The claimant described feeling "*defeated*" after her resignation. She said that her confidence was affected and that she felt "*really anxious*". Notwithstanding this, the claimant started to apply for jobs during her notice period. She obtained two job offers but felt unable to take these up. She wanted employment but had "*lost trust*" and was "*afraid of being mistreated or discriminated against*".

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58. The upshot of this was that the claimant secured work with a nursing agency in mid July 2021. She remained in that role. She indicated that she was not seeking an award in respect of future loss. She had not received benefits while unemployed. She had not sought medical advice.

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59. We understood the respondent's position at the start of the hearing to be that the claimant had failed to mitigate her loss. However, in the course of the hearing, Ms Moore indicated that the respondent was no longer contending that there had been a failure to mitigate. We regarded that as a sensible concession.

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Composition of respondent's staff

60. We heard some evidence about other non-white people being employed at Ashley Court and progressing in their careers while there. We also had
5 evidence from Ms Morrison about the racial mix of the respondent's workforce. She told us that of the current staff of 65, 37 were from an ethnic background other than white Scottish/British. Most of these were Carers rather than Nurses. Of the 10 Staff Nurses, 3 were white Scottish and the remainder were from other racial backgrounds.

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61. Ms Morrison also told us that the respondent was sponsoring people from Nigeria, Uganda and India to become Principal Carers and to undertake training with a view to becoming Staff Nurses. This applied across the respondent's organisation.

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Comments on evidence

62. It is not the function of the Tribunal to record every piece of evidence presented to it and we have not attempted to do so. We have sought to focus
20 on those parts of the evidence which had the closest bearing upon the issues we had to decide.

63. We found all of the witnesses to be credible. Where there were conflicts between their versions of events, we considered that these were matters of
25 differing recollection which did not impact on credibility.

Submissions - claimant

64. The claimant disputed that the feedback from her appraisals indicated that
30 she lacked initiative. She was described as "*clinically excellent*". She accepted that her paperwork had been identified as a development need but argued that all of the nurses at Ashley Court struggled with this, including the Charge Nurse with whom she worked. There had been no follow-up after the annual appraisals, a point highlighted by Ms Allen.

65. The claimant compared her treatment with that of Ms McFarlane and Ms Little. Ms McFarlane was promoted without approaching her managers. Similarly Ms Little was asked to take the Senior Charge Nurse position after working at Ashley Court for only three months. In contrast, the claimant was ruled out for the Senior Charge Nurse position “*even before interview*”.
66. The claimant was critical of the fact that Ms Allen had failed to address her concern about discrimination, requiring the claimant to write to her a second time. She was also critical of the fact that nothing was shown to her at the time. She did not see Ms Allen’s report until it appeared in the joint bundle.
67. The claimant referred to her finding out on 17 May 2021 that the Senior Staff Nurse position had been filled by someone external to Ashley Court. Her observation prior to that had been that vacancies were advertised in the staff room. It had been unfair that she had not been given a chance to apply.
68. The claimant said that she had been building trust with the respondent by covering night shift when required, including doing so at the last minute. That trust had not been reciprocated. She had felt that she could no longer work at Ashley Court. She was “*no longer safe*” there. She did not feel appreciated. That was why she resigned.

Submissions – respondent

69. Ms Moore made oral submissions at the hearing and subsequently provided her submissions in writing. These are available in the case file and so we will deal with them briefly here.
70. Referring to the claim of direct race discrimination, Ms Moore said that the basic question was: what are the grounds or reasons for the treatment complained of? She referred to ***Amnesty International v Ahmed [2009] UKEAT 0447/08***.

71. Under reference to section 23(1) EqA, Ms Moore argued that Ms Livingston was not an appropriate comparator. There should be “*no material difference between the circumstances*” of the claimant and her comparator. The relevant circumstances were those that the respondent actually took into account when making their allegedly discriminatory decision – ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11***. Ms Moore invited us to find, based on the evidence of Ms Morrison and Ms Reive, material differences between the circumstances of Ms Livingston and the claimant.
72. Ms Moore argued that the claimant had shown nothing more than the difference of race and the difference in treatment between herself and her comparator. Per ***Madarassy v Nomura International plc [2007] EWCA Civ 33***, something more had to be shown before “*a reasonable tribunal could properly conclude from all the evidence*” that there had been discrimination. Ms Moore submitted that the claimant had not provided any evidence to show that a White British Staff Nurse in the same circumstances as herself either was or would have been treated differently.
73. If the Tribunal did find that the claimant had made out a prima facie case of race discrimination, Ms Moore submitted that the claimant’s race had no bearing on the decisions of Ms Morrison and Ms Reive. Their decision (not to consider the claimant for the Senior Staff Nurse position) was based on their assessment of how the claimant behaved and performed in her role as Staff Nurse. A White British Staff Nurse who behaved and performed in the same way would have been treated the same.
74. Turning to the claimant’s constructive unfair dismissal claim, Ms Moore stressed that the test was a contract one. She quoted Lord Denning in ***Western Excavating (ECC) Ltd v Sharp [1977] EWCA Civ 2*** –
- “If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the*

contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

- 5 75. Ms Moore acknowledged that the claimant in this case was not relying on breach of an express contractual term but was asserting that the respondent's actions in not promoting her because of her race, or not providing sufficient support or opportunity in connection with the Senior Staff Nurse post because of her race, amounted to a breach of the implied duty of trust and confidence. Per **Malik v Bank of Credit and Commerce International SA [1997] UKHL 23** –

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"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

- 20 76. Ms Moore referred to **Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168** where Etherton LJ said (at paragraph 61) that the legal test was –

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"whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."

- 30 77. In the present case, Ms Moore submitted, a reasonable person would not conclude that the respondent had the intention of abandoning the claimant's employment contract. The evidence showed that Ms Morrison and Ms Reive had considered the claimant for the Senior Staff Nurse role. They explained in their evidence why she was not currently suitable. Managers should be allowed to make an informed assessment of suitability for promotion based on their knowledge of their employees, without having to invite and consider applications from all potential internal candidates. While it was acknowledged that communication could have been better, Ms Morrison and

Ms Reive did not act in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence. They acted with reasonable and proper cause.

5 **Discussion**

78. We decided that it would be appropriate to deal firstly with the claimant's complaint of direct race discrimination. This was because, if we decided this in favour of the claimant, that would have a significant bearing on our approach to the constructive unfair dismissal complaint.

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79. We reminded ourselves of how this was addressed in the agreed list of issues (see paragraph 6 above) –

15 ***Direct race discrimination***

3 Was the Claimant not appointed to the vacant post of Senior Staff Nurse because of her race?

20 ***4 In relation to the Senior Staff Nurse position, was the Claimant treated fairly and given the same support/opportunity as others who do not share her race? If not, was this because of her race?***

80. We believed that what the claimant was complaining about in this case was not so much the respondent's failure to appoint her to the post of Senior Staff Nurse, but rather their failure to give her an opportunity to apply for that post. In this context, the respondent was right to acknowledge, as Ms Allen had done in her report, that "*there could have been better communication*".

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81. The claimant's evidence that she had been encouraged by colleagues to apply for the Senior Staff Nurse post and that it was "*generally known*" that she was interested in doing so was credible. The evidence of Ms Morrison and Ms Reive that they had considered whether there was a suitable internal candidate was credible. Their evidence as to their reasons for not

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considering the claimant to be a suitable candidate – her perceived lack of initiative and willingness to promote herself, and her time management – was also credible.

5 82. We speculate that if Ms Morrison had taken the time to speak to the claimant and explain to her the reasons why she was not being considered for the Senior Staff Nurse role, the claimant would have been disappointed but might well have accepted the position and applied herself to addressing the areas which prevented her from being considered. This would also have allowed
10 the claimant to tell Ms Morrison that she was interested in promotion. However, we had to look at what actually happened rather than what might have happened.

15 83. In her submissions Ms Moore highlighted a number of differences between the circumstances of the claimant's treatment and those of her comparator. These included –

20 (a) Ms Livingston was perceived as enthusiastic and keen to learn. The claimant was not perceived to show the same enthusiasm.

(b) The claimant had an issue with time management in relation to her care reviews. In contrast this was not an issue with Ms Livingston.

25 (c) A post had been created for Ms Livingston as she had been deemed suitable to take on a senior role. She did not apply for a post which had been advertised.

30 84. We found that these were material differences between the case of Ms Livingston and that of the claimant. The consequence of this was that Ms Livingston was not an appropriate comparator, having regard to section 23(1) EqA. That was fatal to the claimant's direct race discrimination case as pled by her. However, we also considered whether the claimant had been treated less favourably than a hypothetical comparator would have been.

85. We considered that the appropriate hypothetical comparator was a White British Staff Nurse with the same length of service and “*track record*” as the claimant. That included the claimant’s perceived lack of proactivity and her issue with care reviews. We believed that a White British Staff Nurse with the same attributes would, like the claimant, not have been considered as a suitable internal candidate for the Senior Staff Nurse position. It followed that the respondent’s treatment of the claimant was not because of her race.

86. We agreed with Ms Moore that the claimant had not shown more than the difference of race and the difference of treatment. She had not shown the “*something more*” required per ***Madarassy***. The burden of proof had not passed to the respondent in terms of section 136(2) EqA. The complaint of direct race discrimination had to fail.

87. We then considered the complaint of constructive unfair dismissal. The issues per the agreed list were expressed as follows –

Constructive unfair dismissal

1 The Respondent appointed an external candidate to the vacant post of Senior Staff Nurse.

1.1 Did the Respondent’s conduct in not appointing the Claimant to this post amount to a repudiatory breach of contract?

1.2 If yes, did the Claimant resign in response to this breach?

2 If it is held that the Claimant was dismissed by the Respondent, was the Claimant’s dismissal fair?

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88. Similar to what we said at paragraph 80 above, we did not believe the claimant was alleging that the failure to appoint her to the Senior Staff Nurse position was a breach of contract. The alleged breach related to the manner in which the respondent had dealt with filling that vacancy. The question we

had to decide (with reference to section 95(1)(c) ERA) was whether this amounted to conduct of the respondent which entitled the claimant to terminate her employment without notice.

5 89. We reminded ourselves that the test was a contract one – had the claimant resigned in response to conduct of the respondent which amounted to a significant breach going to the root of the contract? Looking at what Lord Denning said in ***Western Excavating*** (see paragraph 74 above) this was more applicable in the present case than the alternative of conduct which
10 showed that the respondent no longer intended to be bound by one or more of the essential terms of the contract.

90. With due respect to Ms Moore, we did not find the reference to ***Eminence Property Developments v Heaney*** to be of assistance. That was an English
15 property law case where one party had served a premature notice of rescission of a series of contracts. There may well be employment cases where the conduct of the employer shows an intention to “*abandon and altogether refuse to perform the contract*” of employment but that language did not sit comfortably with the present case.

20 91. The alleged breach was of the implied duty of trust and confidence. We found that there had been such a breach for the reasons set out in the next paragraph, but we did not reach a unanimous view as to whether that breach was so significant as to entitle the claimant to resign and claim that she had
25 been constructively dismissed.

92. The view of the majority of the Tribunal was that the claimant had been entitled to resign by reason of the respondent’s conduct. They identified a number of actions on the part of the respondent which were open to
30 criticism –

- The failure to advertise the position of Senior Staff Nurse internally. That this should have happened was acknowledged by Ms Allen. This was confirmed by her email to the respondent’s Managers on 16 June

2021 (140) instructing that the weekly staff vacancy list should be placed in the staff room and that internal promotions/vacancies should be notified.

5 • The exclusion of the claimant from consideration for the position of Senior Staff Nurse for the reasons stated, namely not showing initiative and her paperwork. The claimant had shown initiative in preparing the student induction pack. It was unfair to criticise the claimant for not putting herself forward for extra duties when she, in common with others, was behind with her paperwork.

10 • Asking the claimant to do Ms Kerr's induction was insensitive. The respondent should have recognised that this would upset the claimant. It was unusual to have a more junior member of staff deal with the induction of someone more senior, and it could be implied that in asking the claimant to deal with the induction of the more senior member of staff there was a recognition that the claimant was capable of performing the more senior role.

15 • Lack of support for the "*Development Plan*" items identified in the claimant's appraisals. Ms Allen recognised this – "*I did not see that any previous development needs had been reviewed*".

20 93. The majority of the Tribunal found that these matters amounted cumulatively to a material breach of contract by the respondent. The claimant was aware that there was a vacancy for a Senior Staff Nurse following Ms McFarlane's promotion. She reasonably expected this to be advertised because she understood (correctly) that this was normal practice. It came as a shock to the claimant to discover that an appointment had been made without the post being advertised internally.

25 94. The majority believed that the respondent's reasons for not considering the claimant as a potential candidate for the Senior Staff Nurse position were unjust. The claimant may have been perceived to show less initiative than

Ms Livingston and to have some issues with paperwork, but these were not sufficient reasons to exclude her altogether from consideration. In relation to paperwork, it was clear from the evidence that this was not unique to the claimant.

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95. Even if the claimant had been unsuccessful, the experience of going through an interview process would have been of benefit to her. She was recognised as a “*very competent and caring Staff Nurse*” (per her 2019 appraisal). She was trusted to be the Nurse in charge of the building, without any issues arising. Looking at matters in the round, her treatment by the respondent in relation to the Senior Staff Nurse vacancy was a breach of the obligation of trust and confidence. She had been constructively dismissed – this was a dismissal for the purpose of section 95 ERA meaning that section 94 ERA (the right not to be unfairly dismissed) and section 98 ERA (the general provisions dealing with fairness of a dismissal) were engaged.

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96. The Employment Judge took a different view. He agreed that the claimant had been treated poorly by the respondent over the Senior Staff Nurse appointment, and that this had breached the obligation of trust and confidence. Where he differed from the rest of the panel was in assessing whether that breach was sufficiently serious to entitle the claimant to resign without notice.

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97. Whether or not the claimant resigned with notice (as she did in this case), the question to be answered (in terms of section 95(1)(c) ERA) was whether the respondent’s conduct was such that the claimant had been entitled to resign without notice. While the Employment Judge agreed with the criticisms of the respondent’s conduct expressed at paragraph 91 above, he did not believe that they were sufficiently serious as to go to the root of the contract.

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98. The finding by the majority of the Tribunal that the claimant had been dismissed took us to section 98 ERA. Had the respondent shown a potentially fair reason for dismissal in terms of section 98(1)? To do so the respondent would need to advance an esto argument, ie if the Tribunal found

that the claimant had been dismissed, what was said to be the reason for that dismissal?

5 99. In this case no such argument was advanced. There was no reference to a potentially fair reason for dismissal in the respondent's ET3, nor in the agreed list of issues, nor in the closing submissions. No evidence was adduced by the respondent to show what the reason for dismissal (if dismissal was found to have occurred) might be.

10 100. The consequence was that we had no alternative but to find that the respondent had not shown a reason for dismissal, and therefore had not discharged the onus which section 98(1) ERA places on an employer. It followed that the claimant's dismissal was unfair.

15 101. Turning to remedy, we reminded ourselves of the relevant parts of the agreed list of issues –

6.1 Is it just and equitable for the Tribunal to award compensation?

20 ***6.2 Has the claimant suffered any financial loss?***

6.3 Has the claimant unreasonably failed to mitigate her loss?

6.4

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6.5 Should any compensation be reduced on the basis of Polkey v AE Dayton Services Ltd?

30 102. In terms of section 9(1) of her ET1, the claimant's preferred remedy was compensation. Section 118 ERA provides as follows –

“....where a tribunal makes an award of compensation for unfair dismissal....the award shall consist of –

(a) a basic award (calculated in accordance with sections 119 to 122 and 126), and

(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).”

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103. Section 119 ERA deals with calculation of the basic award. We did not understand it to be in dispute that this amounted to £3264.00 in this case. This was the product of £544 (the statutory maximum of a week's pay at the time of the dismissal) multiplied by 6 (years of service) multiplied by 1 (the appropriate multiplier in terms of section 119(2) ERA).

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104. Section 123 deals with the compensatory award and, so far as relevant, provides as follows –

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“(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer....”

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(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland....”

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105. The amount of the compensatory award sought by the claimant was £2500 representing four weeks' loss of earnings. Neither party had provided gross and net income figures in their ET1/ET3. No payslips were lodged. However, the accuracy of the figure of £2500 was not challenged by the respondent and we found no reason to question that it was an accurate assessment of the claimant's loss. We also found no reason to question that the loss was attributable to the actions of the respondent which had caused the claimant to resign.

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106. We had no information as to pension loss and so were not able to factor this into our calculation of the compensatory award.

5 107. As noted at paragraph 59 above, there was no assertion of failure to mitigate.

108. By reason of her dismissal the claimant no longer had the benefit of the statutory employment protection rights she enjoyed as at the date of termination of her employment. She sought £400 as compensation for the loss of those rights. We considered that figure to be on the high side, and that a figure of £300 would be more appropriate.

109. Accordingly we determined that the claimant was entitled to (a) a basic award of £3264 and (b) a compensatory award of £2800. The total award was £6064. The claimant had not received benefits while unemployed so that the Employment Protection (Recoupment of Benefit) Regulations 1996 did not apply.

110. Finally, we turned our attention to whether the claimant's compensation should be reduced on the basis of the decision in ***Polkey v AE Dayton Services Ltd [1988] ICR 142***. In that case the House of Lords quoted with approval what Browne-Wilkinson J (as he then was) said in ***Silifant v Powell Duffryn Timber Ltd [1983] IRLR 81*** –

25 *“There is no need for an “all or nothing” decision. If the industrial tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.”*

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111. We did not consider that this was a case where it was appropriate to consider a reduction in compensation to reflect the likelihood that the claimant would still have lost her employment. Prior to her resignation, the claimant's

employment was not at risk. Put another way, the percentage chance that the claimant would still have lost her employment was zero.

5 112. We should add that while we were not unanimous on the issue of whether the claimant had been unfairly dismissed, we were unanimous on the calculation of compensation and the non-applicability of *Polkey*.

Disposal

10 113. Our decision is that the claimant should be awarded compensation for unfair dismissal in the sum of £6064.

15 Employment Judge: Sandy Meiklejohn
Date of Judgment: 19 November 2021
Entered in register: 24 November 2021
and copied to parties