



EMPLOYMENT TRIBUNALS

Claimant: Mr Kingsley Okeke
Respondent: Ranc Care Home Limited
Heard at: East London Hearing Centre
On: 30 & 31 March, and 1 & 27 April 2022
Before: Employment Judge Crosfill
Members: Ms J Clark
Ms A Berry

Representation

Claimant: In Person
Respondent: Sarah Jane Wood (Litigation Consultant)

JUDGMENT

1. The Claimant's claims of harassment related to race arising from, the contents of the incident report prepared by Charlie Lebatt and his dismissal contrary to Sections 26 and 40 of the Equality Act 2010 succeed.
2. The Claimant's claim of direct discrimination because of race arising from his dismissal contrary to sections 13 and 39 of the Equality Act succeed.
3. All of the other claims brought by the Claimant under the Equality Act 2010 fail.
4. The Claimant's claim for breach of contract (wrongful dismissal) brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 succeeds.

REASONS

Introduction

1. The Respondent operates a Care Home for the elderly. The Claimant was first employed by the Respondent on 11 March 2020 in the position of a Staff Nurse. Following

an incident that took place on 18 August 2020, which involved an injury to a resident, the Claimant was summarily dismissed on 16 November 2020. The Claimant presented an ET1 to the Employment Tribunal on 14 October 2020. The claims that we have had to deal with are claims of direct race discrimination, harassment related to race, victimisation and wrongful dismissal.

Procedural History

2. The matter was first listed for a Telephone Preliminary Hearing before Employment Judge Elgot on Monday 22 February 2021. In the course of that hearing, the Claimant was able to clarify his claims and a direction was made for the Respondent to produce a draft list of issues reflecting those discussions. Further directions were made in respect of disclosure and documents.

3. There was a further Preliminary Hearing on 17 November 2021 before Employment Judge Lewis. EJ Lewis spent time looking at the issues in the case. Both she, and EJ Elgot have treated the Claimant as bringing some claims that post dated the presentation of his ET1. Those claims were anticipated in the Respondent's ET3 and have been included in the list of issues prepared by the Respondent without protest. Insofar as is necessary we give the Claimant permission to amend his ET1 to include the matters set out in writing in the List of Issues.

4. During the hearing before EJ Lewis, the Claimant asserted that his manager Charles Lebatt was provided with a copy of a written account of events compiled by his colleague Fanica Dragustin, a Health Care Assistant ('HCA'), of the incident that took place on the early morning of 19 August 2020. The Respondent suggested that they had carried out a search for that document, but it did not exist. The Litigation Consultant then acting for the Respondent, Mr Hussain, confirmed that Fanica Dragustin would be called as a witness by the Respondent and would therefore be available for cross-examination. Employment Judge Lewis recorded that Mr Okeke understood that if no written document was produced as a result of the search referred to above, then that would be something he would be able to cross-examine Fanica Dragustin about.

5. Employment Judge Lewis made further Case Management Orders and set the matter down for a hearing to take place for three days on 30, 31 of March and 1 April. We were able to hear all of the evidence and submissions on those days. We had insufficient time to deliberate and met again on 27 April in order to deliberate and reach our conclusions.

The hearing before us

6. We were provided with a trial bundle running to 316 pages. Each party had prepared witness statements in accordance with the previous case management orders.

7. We were informed in advance of the hearing that two of the Respondent's witnesses Pauline Manning and Mark McDonald had symptoms of covid and were unable to attend in person. We were told that they were well enough to give evidence by video link. The Claimant was sceptical about this but in the end was in agreement with those two witnesses giving evidence by video.

8. At the outset of the hearing we discussed the issues in the case. The Respondent had prepared an updated list of issues. The Claimant had responded but his list lacked any focus. We considered that the draft list prepared by the Respondent did encapsulate the claims brought by the Claimant. We shall not set out that list in full but have drawn from it in our discussions and conclusions below. References to paragraph numbers are references to the paragraph numbers in the list of issues.

9. We then discussed the order that we would hear from the witnesses. At that stage the Respondent, who had served a witness statement from Fanica Dragustin, informed the Tribunal and the Claimant that she would not be attending. It was suggested that the Respondent was unwilling to call her because of her concerns about her health. The Claimant stated that he had been told she would be giving evidence. We explained to the Claimant the possibility of a seeking a witness order and, if granted, the restrictions on cross examination if the Claimant called Fanica Dragustin as a witness. The Claimant did not ask for a witness order as he wanted to proceed with the hearing.

10. The Respondent asked to call Charlie Lebatt first. The Claimant had no objection to the order in which witnesses were called. We adjourned to read the bundle and witness statements. We reconvened after an early lunch at 13:30. We then heard from the following witnesses:

10.1. Charlie Lebatt who gave evidence in person, he was the Claimant's Line Manager and the Deputy Manager of the Respondent. He was the person who undertook an initial investigation into the incident that took place in the early hours of 18 August 2020; and

10.2. Torie Pollard who was at the time of the Claimant's dismissal the General Manager of the Care Home. She was the person that took the decision to dismiss the Claimant; and

10.3. We then heard from Mark McDonald who is the Respondent's Regional Operations Director and the person who heard the Claimant's appeal against the dismissal of his grievance. He gave evidence via CVP because of concerns in respect of the Covid 19.

10.4. We heard from Pauline Manning, she is the Head of HR for the Respondent and was the person who heard the Claimant's grievance. She also gave evidence via CVP having recently contracted Covid. Before she gave evidence, we ascertained that she was fit and able to do so and she reassured us that she was.

10.5. We heard from the Claimant himself.

11. An issue arose during the evidence of Torie Pollard about a 'body map' that had been completed and might show the position and extent of any injuries to the resident. An 'Accident/Incident/Near-miss' report that had been completed by the Claimant indicated that a body map had been completed. The extent to which the Claimant had documented the incident was contentious. In the afternoon of 30 March 2022 Torie Pollard referred to the body map. She was in the witness box at the end of the day. Having given the usual warning to witnesses about discussing the evidence in the case we asked that Torie Pollard provide the Tribunal with a copy of the body map the following day. On 31 March 2022 Torie Pollard resumed her evidence but she did not provide a copy of the body map. In the course of her evidence she referred again to the body map and said that it 'just had a cross' on it. She suggested that she had seen it overnight. Having reminded the parties that we had asked for this to be produced. We were then told that there was a difficulty locating it. The tension between those two positions was clear. We ordered that the original document was brought to the Tribunal the following day. Torie Pollard was recalled to give evidence in relation to the body map. She told us that she had not seen the body map during the hearing. That evidence directly conflicted with what she had said earlier. She said a search had been completed and the document located in an archive. The document bore no handwriting in sections where the Resident's name was required, the name of the person completing or the section requiring the date. A section requiring a description of the injury is blank. In a section where a drawing of an outline of a human body is shown there was a cross in the area of the left forehead which had been circled.

12. At the conclusion of the evidence, there was sufficient time for both parties to make oral submissions in respect of the position they took in the claims. We shall not set out here the entirety of the submissions but shall refer to the main points that were made before us within our discussions and conclusion set out below. Regrettably, at the conclusion of the oral submissions it proved that there was insufficient time for the Tribunal to deliberate and a further day in Chambers was necessary. The parties were notified of this at the time and indeed of the likelihood of a delay to the judgment being promulgated.

Our findings of fact

13. At the outset of his employment, the Claimant was managed by Rebekah Allan who held the job title of Clinical Lead. Rebekah Allen had recently returned to clinical practice. She needed to update some of her competencies. She was not able to carry out a full range of clinical duties until she had. The Claimant was allowed to do some but not all clinical tasks.

14. We were provided with a number of e-mails and documents that concern Rebekah Allan's supervision of the Claimant. They start with an e-mail where Rebekah Allen raises a concern that the Claimant had not administered a prescribed drug. It appears that the Claimant was suspended from work by Rebekah Allen. The Claimant made a statement about this allegation, which we were not shown, and attended a meeting on 4 May 2020 with Rebekah Allen and a note taker to discuss this. The Claimant accepted that he had not administered a drug that had been prescribed. He said that he had believed that the resident was being prescribed a lot of psychotic medication and due to his concerns believed that the matter should be discussed with the Resident's GP. He says that he made a note of that in a diary for a member of the day staff to deal with. He accepted that he had made a clinical

judgment but had failed to communicate it properly. A further incident was discussed with him and again he accepted a degree of fault.

15. On 20 May 2020 there was another incident. The issue concerned the administration of an injection. The claimant noted that the instructions were that the injection was to be administered by a District Nurse. On 26 May 2020 Rebekah Allen sent an e-mail complaining about the Claimant's role in this. She said that she had asked the Claimant to speak to the senior person on the ward and seek clarification. There was a dispute about what the Claimant had or had not done. We heard no evidence about this cannot, and need not, resolve that dispute. The injection was administered a little late with no harmful effects.

16. On 25 May 2020 Rebekah Allen wrote a long e-mail complaining about the Claimant. She started off by referring to a discussion she had had with the Claimant about nurses doing 'personal care'. She reported that she had told the Claimant that *'every nurse does personal care'*. She said that his response was to say *'your old fashioned training may say that but I am a modern nurse and you will not find it in any job description now for a nurse'*. We return to that debate below. Rebekah Allen went on to criticise the Claimant's approach to hygiene, to the administration of medicines, she accused him of using a *'childish high pitched voice'* to speak to residents with dementia. She raised a dispute she had with the Claimant about changing a catheter for a patient. She said that she was unable to do it herself as it was outside her current competency. The Claimant had suggested that he could only do it if supervised. It appears that this had led to a disagreement.

17. On 28 May 2020 the Claimant brought a grievance. He set out that grievance in a long e-mail. He set out his account of the 'catheter incident'. He said that Rebekah Allan had attacked his personality due to *'racial/gender biasness'*. He said that Rebekah Allen had falsely accused him of *'assumed language'*. He protested that he did not use the language quoted by Rebekah Allen about personal care. He accepts that he did say that the new generation of nurses had not much experience of personal care. He said that he had been assisting with personal care since he joined the Respondent. He set out a point by point rebuttal of Rebekah Allen's criticism of him in her e-mail of 25 May 2020. On 30 May the Claimant wrote a further e-mail as a part of his grievance. It was headed *'Grievance about discrimination at work'*.

18. We make the following specific findings about the parties' respective stance on the extent of a nurses' duty to undertake personal care. The Claimant is more recently qualified than his managers. He told us, and we accept, that there is a widespread body of opinion amongst recently qualified nurses that as the qualifications and expectations of what nurses might do (for example giving injections) and, as the use of HCA's has become the norm, undertaking personal care was not something ordinarily part of the role. The Claimant had recently attended a seminar at which this very matter had been discussed. Torie Pollard, Rebekah Allen and Charlie Lebatt were of the view that assisting with personal care was a core duty of a nurse. We find that this debate has arisen amid changes to the profession and that both points of view are widely shared. When the matter was raised by the Claimant he was always at pains to point out that he did assist with personal care whenever necessary. We return to that below.

19. We find that the Claimant's relationship with Rebekah Allan had descended to a level where each was criticising the other in vociferous terms.

20. Torie Pollard joined the Respondent organisation on 1 June 2020. She had been a registered nurse for 27 years and had had 15 years' experience in the care sector. One of the first matters that she had to deal with was the Claimant's grievance. She tells us, and we accept, that she had a meeting with Rebekah Allen at which the Claimant's grievance was discussed. On its face the Claimant had made an allegation of discrimination. That was something we would have expected to be investigated in an even handed way and with at least some vigour. We find that there was no record made of any meeting with Rebekah Allan. We accept that Rebekah Allan was leaving the organisation but that does not fully explain why there was no record kept of what she said. In Torie Pollard's witness statement at paragraph 11 she suggests that the Claimant did not in fact mention race discrimination at all. She goes further and says that the Claimant failed to refer to the provisions of the NMC code that deal with discrimination. She has identified the incorrect document in her witness statement. The Claimant did raise issues of a race discrimination and they are dealt with in the outcome letter which says as follows:

'I refer to the grievance hearing, which was held in the Manager's Office, Brentwood Care Centre on 15th June 2020 at 18:00.

You were given the opportunity of being accompanied by a work colleague of your choice or accredited Trade Union Official, however you attended alone.

The hearing had been arranged to discuss:

- *Bullying and harassment by the Clinical Lead*

Please be assured that the company takes any employee's concerns seriously.

Having concluded the investigation into your concerns, I give my decision as follows:

It is evident from speaking to both yourself and the Clinical Lead that there were difficulties in communication between you both, which had become more difficult when an incident in regards medication management was raised. On speaking to you, you have felt the Clinical Lead has not recognised your leadership and in particular had ignored you and called a colleague to discuss why you had attended for a shift. You have felt negative undertones from the Clinical Lead and whilst you felt these may be racially or gender orientated, you were not able to provide specific examples of this.

Having spoken to the Clinical Lead there was justification for the call to Brentwood Care Centre. The Clinical Lead and Deputy Manger had both been trying to call the home and both spoke to the person answering to clarify staffing numbers and presence of team members.

Following investigation your grievance is not upheld.

As we have discussed the Clinical Lead has left Brentwood Care Centre and therefore the difficulties between you have naturally resolved as you do not share a workplace'.

21. We consider that the approach taken by Torie Pollard lacked any intellectual rigour, it is not enough in our view to dismiss a personality clash as being the reason for any treatment. The personality clash could disguise a racially discriminatory attitude. Overall, we find that when the Claimant read the outcome letter of 19 June 2020, he could be reasonably displeased the lack of rigour in the grievance investigation process and consider that his complaints had not been taken as seriously as been warranted given the fact that there were complaints of race discrimination.

22. Over 5 paragraphs of her 44 paragraph witness statement Torie Pollard set out some *'context of the Claimant's attitude at work'*. She described the Claimant as *'very aggressive on some occasions and passive aggressive on others'*. She said she had *'difficulty dealing with the Claimant'*. She said that his attitude was one of *'I am stating or I am telling'*. She said that he showed no *'niceness or kindness in his communications'*. She said *'I had no doubt to state that the Claimant did not recognise, or had any kind of kudos for females in a management position or wherever a woman may be in a position where the Claimant had to submit to her authority in some way'*. The Claimant *'on a number of times tried to be intimidating and I found it very challenging not only to work with him but also to have any day to day communications with him'*.

23. When cross examined by the Claimant Torie Pollard accepted that she had not made the Claimant aware that anybody found that he was intimidating. She said that she had received reports from Rebekah Allen and one of the other nurses. She said that the Claimant was a tall man with a projecting voice who could appear angry. She described him as animated in tone and manner. When asked about her statement about the Claimant having *'any kind of kudos for females'* her response to the Claimant was that other women had said the same thing. She suggested that the Claimant would not look at her directly. When asked by the Tribunal about the same comment Torie Pollard suggested that she was not equipped to comment on whether the Claimant was generally sexist. Despite spending some time setting out these matters in her witness statement, in her oral evidence Torie Pollard dismissed any suggestion that her opinion of the Claimant had any direct bearing on her decision to dismiss him. We return to this matter in our discussions and conclusions below.

24. Torie Pollard gave evidence that in her view it was a part of a nurses ordinary responsibilities to provide personal care. When the tribunal explored with her whether there was an alternative school of thought she acknowledged that there was in some quarters (although expressing her disagreement). She stated that the Claimant was *'entitled to his opinion'*. We understand her to be acknowledging that however strongly she feels there is a debate about this issue within the profession. As we have said Claimant was very clear before us and in his conversations with his managers that whatever his views he recognised that on a practical level carrying out personal care was something he needed to do and had done.

25. A night staff team meeting took place on 16 July 2020. This was attended by Torie Pollard, Charlie Lebatt, Fanica Dragustin, the Claimant and others. The minutes record that the staff were informed about the approach being taken to safeguarding issues such as falls and medication administration. The minutes state (with emphasis added): *'If any staff witness incidents or accidents then an incident/accident form should be completed. This*

should be written by the first person to see/witness the Nurses and Seniors can help the care staff if required'

26. The Claimant and Fanica Dragustin were on night duty on 17 August 2020. They were allocated to the Balmoral Ward where there were four residents who required care. The Claimant has suggested, and did suggest during the disciplinary process, that there was an inadequate staffing level on the ward. The Claimant completed a checklist on 17 August 2020 which had provision for reporting staff shortages. He did not note that there were any. We find that whilst the Claimant believed that the ordinary level of staffing was low the level of staffing on this particular occasion was normal and within reasonable expectations.

27. In the early hours of the morning of 18 August 2020, Fanica Dragustin approached the Claimant and asked for assistance with a Resident 'A'. A was receiving end of life care and was suffering from pressure sores which required attention, including changing a dressing. There was a care plan in place for resident A that identified the level of assistance she needed to safely undertake a number of tasks. For rolling in bed, a necessary action to change an incontinence pad, 2 people were required. When Fanica Dragustin asked him to help her we accept the Claimant's account of events which was the same as he gave in an interview with Charlie Lebutt on 19 August 2020. He says that he told Fanica Dragustin that he would join her in a few minutes once he completed the tasks he was engaged with. When interviewed formally on 19 August 2020 Fanica Dragustin said that she had spoken to the Claimant and then 'waited' for 15 minutes. She says the same thing in her witness statement prepared for these proceedings although she goes further in that statement to suggest that the Claimant indicated that he would not assist her. Had that been correct it begs the question why she waited for him. She did not attend to be cross-examined on her statement and we place little weight on it. The fact that she waited supports our finding that the Claimant had indicated that he would assist her.

28. Fanica Dragustin waited for some time; she suggests 15 minutes, before deciding that she would turn the resident A by herself. When she did so the A's forehead contacted the bumper rail, being elderly she had thin skin, she bruised and there was a skin tear. At this stage the Claimant arrived on the scene. He attended to the wound by bathing it and comforting resident A. Resident A did not show any great distress.

29. Once resident A was settled the Claimant asked Fanica Dragustin to complete a standard pro-forma headed 'Accident/Incident/Near Miss Report'. She did not want to do so and so the Claimant completed the form. The form included the following description of events (pro-forma questions and completed responses):

'Circumstances of the accident? – [A] was assisted with her incontinent care and pad changed. She was rolled to the left side when she sustained a skin tear on the bumper rail. [A] was reassured, wound area washed with warm water solution and pressure applied to stop bleeding. No distress expressed, incident report done, family to be informed. Staff to liaise with GP surgery for any concern.

How did the accident... happen? - In bed during incontinent care,

Was the accident...due to faulty equipment of environmental hazard – No

Were there any witnesses.....- it was an unwitnessed incident

Was an injury sustained (bruising, skin tear, cut etc). Where is the precise location of the injury on the body (left arm, right leg etc)? – Bruise was sustained on the left forehead.

What corrective action was taken to reduce the risks of another incident? Incident form. Reassured and pressure applied for bleeding to stop. Incident report done. Family to be informed.'

30. The form has a section to indicate whether a body map had been completed and the Claimant ticked that box indicating that there was a body map. He indicated that the family had been informed about the incident at 7:30am. When Torie Pollard spoke to resident A's daughter later the same morning she got the impression that the Claimant had informed her that her mother had been injured when turned in bed by a single HCA. The Claimant says that he did not say that in terms but had said that he was working with a single HCA. We find that any difference is minor. The Claimant said sufficient that resident A's daughter was aware that her mother had been injured when turned in bed by a single HCA. That was a truthful explanation.

31. The Claimant's shift finished at 8:00am. Prior to finishing his shift the Claimant made an entry in a diary used to record information principally for the purposes of ensuring a smooth handover between the day and night shifts. The material parts of that say: *'[Resident A] was reported to have sustained a skin tear on the left fore head. Cleaned with warm water solution and allowed to air.'*

32. The Claimant handed the incident report to his manager Charlie Lebatt at around 8am. He was not asked in any detail about what had happened and returned to his home intending to sleep. Charlie Lebatt informed Torie Pollard about the incident. This must have been first thing in the morning because Torie Pollard was able to speak to Fanica Dragustin before she left. Torie Pollard also rang resident A's daughter. She decided that the Claimant would be suspended pending an investigation. She called him to inform him of that decision. She prepared a letter of suspension dated 18 August 2020. She said:

'I refer to our conversation today, 18th August 2020, in which I suspended you from your employment pending investigations into allegations of:

- Mis-management of an incident in which a resident sustained a facial skin tear and significant bruising.*
- Poor documentation of the incident and injury which are not factually correct.*
- Failure to identify poor practice and take any steps to reduce the risks to vulnerable residents.*

We have considered whether suspension is a necessary step in the circumstances of this case. Following consideration of alternatives to suspension, we have concluded, subject to on-going reviews, that this is the most appropriate action at this

time. Please be assured that no decisions have been made regarding potential disciplinary action in relation to the above issues.'

33. Torie Pollard asked Charlie Lebatt to investigate the matter. Torie Pollard did not suspend Fanica Dragustin at that stage or at all. She appears to have accepted without question that she had done nothing that would merit her being investigated. Within her witness statement Ms Pollard says:

'I also looked at the incident form, care notes for AL and could see that the documentation was incredibly poor [p. 67-68], I also had discussion with the carer. Given that I am a registered nurse myself, on the basis, the gaps in the documentation were incredibly evident. Moreover, it appeared that the Claimant took no steps to manage that in any way. The documents as recorded were not as they should have been and clearly not fit for purpose.'

34. In the course of her oral evidence, Torie Pollard sought to distance herself between the extent of her involvement on the morning of 18 August 2020 suggesting that she only briefly spoke with Fanica before passing the matter on to Charlie Lebatt. We find that Torie Pollard was responding to a perceived criticism by the Claimant, or perhaps by the Tribunal, that she has become over involved at the early stage of the investigation but somehow prejudiced her position to be the decision maker in the disciplinary hearing. We consider that she sought to row away from that position and tried to minimise her own involvement. We were unimpressed at her explanations and find that she had spoken at some length with Fanica Dragustin prior to taking the decision that she took later in the morning to suspend the Claimant.

35. The same day the Claimant received a further telephone call from Charlie Lebatt. During that telephone call the Claimant said that he had been present in the room with the injured resident. Charlie Lebatt later challenged him and said that he had suggested that he was present when the injury occurred. We find that the Claimant did not say this. Fanica Dragustin has never suggested that the Claimant was present at the time the resident sustained her injury nor has the Claimant. We find that this was one instance of Charlie Lebatt looking for inconsistencies where none existed.

36. On 19 August 2020 Charlie Lebatt interviewed both Fanica Dragustin and the Claimant. He told us, and we accept, that he prepared questions for both in advance. We note that in total he asked Fanica Dragustin 9 questions. Those questions did not include any challenge to the account given. At no stage was Fanica Dragustin asked whether she ought to have gone ahead with turning resident A when the Claimant had kept her waiting. She is not asked about the written documentation or the body map. It does not appear from the record of the meeting that any note taker was present.

37. When asked for a general account of what happened Fanica Dragustin is recorded as saying *'Kingsley only helps me with [three residents]. I went in to do personal care with [resident A] I said to Kingsley that her pressure sore is deteriorating I waited for him for 15 minutes. I tried to change [resident A's pad as he did not come so I did this on my own. A caught her face on the bed bumper...'* We find that at the outset of her interview Fanica Dragustin acknowledged that the Claimant had been assisting her with personal care for 3 residents. She later on suggested that the Claimant would not answer buzzers and does

not help with residents. When asked if she had previously asked Kingsley for help she said *'Yes and he said I should do residents on my own as the residents do not like men'*. She was not asked any follow up questions about whether those tasks required two people. She was asked if the Claimant knew she was supporting A by herself. She said *'Yes I have to support all of the residents by myself as Kingsley will not help me'*. She was not asked to explain her opening comments about the Claimant assisting her with three residents. We find that this was an interview without any real rigor. There was at least a possibility that Fanica Dragustin bore some real responsibility for the incident. She was the person who, in the light of the recent instruction, should have completed the incident report.

38. As we have indicated Charlie Lebatt had prepared 31 questions for the Claimant. The Claimant is adamant that when he met with Charlie Lebatt nobody took notes. Charlie Lebatt says that a member of the HR team Karen Curtis-Brown was present and typed notes directly into the same computer that he had used to prepare the questions. The record of the meeting includes a record that Karen Curtis-Brown was present as a notetaker. Whilst the means of making a record of the meeting were hotly disputed the Claimant did accept that many of the answers he is recorded as giving broadly corresponded to what he said. We have not found it necessary to resolve the dispute. We find that a record was made of the meeting either during the meeting or shortly after it.

39. Amongst the questions prepared in advance there were a series of questions designed to draw out the Claimant's views on whether the duties of a nurse extended to giving personal care. The Claimant set out the views that we have set out above. However consistent with his stance that as a matter of practice he did actually assist with personal care. He referred to having assisted Fanica Dragustin with the same three residents that she had acknowledged he had assisted her with on the same evening. He referred to them as 'doubles'. He explained that he had been on his way to assist Fanica Dragustin when he discovered that she had turned resident A by herself. He said that he did not know that she was going to do that. He accepted that if he was not assisting her there would be nobody else. He later explained that it was common to ask from assistance from others working in other parts of the care home.

40. The Claimant was asked, *'who did you think was supporting Fanica Dragustin if you weren't'*. He is recorded as replying:

'Nobody will be there helping her. I do tell staff that if I am free and available please call me. When the residents are comfortable and sleeping in bed I tell the staff that the residents don't need to be disturbed from their sleep. There is no understanding of what the essential care needs are. Like Taiwo. If she is asleep she will manage. You just need to make sure she is breathing and ok. Even Gwen if she is sleeping we shouldn't be moving her as she is asleep. She should be repositioned when she is alert. Ann can buzz and ask for help.'

The Claimant accepted that the first two sentences accurately encapsulated what he said. However, at the disciplinary meeting and before us he did not accept that the latter passages accurately set out his position. The Claimant was given no opportunity to check the record of the meeting.

41. Charlie Lebatt then prepared a report entitled *'Root Cause Analysis and Investigation report'*. He reached a number of conclusions many of which are expressed in robust terms. These included:

- 41.1. He set out the Claimant's position that he had been unaware that Fanica Dragustin had been attending to residents that required two people to assist. He did not accept that was true because *'it is clear that if nobody was supporting her that FD was undertaking these tasks on her own'*.
- 41.2. He says that there was no evidence of the Claimant having an *'immediate'* recorded discussion with Fanica Dragustin.
- 41.3. He criticised the Claimant for saying that he would not wake a resident saying that that is in conflict with the care plan that they are moved each hour.
- 41.4. He suggested that there were conflicting versions about whether the Claimant had been in the room *'at the time of the incident'*.
- 41.5. He acknowledges the fact that the Claimant did the right thing by informing Resident A's daughter of the incident but says that that confirmed that Fanica Dragustin had been providing care by herself.
- 41.6. He says that the NMC code of conduct says at paragraph 1.2 that nurses *'must make sure they deliver the fundamentals of care effectively'* and at 1.4 that they *'must make sure that any treatment, assistance or care for which you are responsible is delivered without delay'*. He concludes that the Claimant's stance is *'in direct contradiction to the standards set out by the NMC and clearly demonstrates that [the Claimant] is not working with the requirements set out by his regulatory body'*. That conclusion must have been predicated on a finding that the Claimant had been refusing to do personal care.
- 41.7. He says that the Claimant failed to record that there was a skin tear.
- 41.8. He says that there was no evidence that the Claimant had challenged the poor practice. He infers that the Claimant did this because he was aware of the practice. He inferred that that was *'an attempt to deviate from the truth in order to cover facts'*.
- 41.9. He concluded by saying *'It is evident that [the Claimant] has breached the NMC code of conduct and has not acted in a way that protects and safeguards the residents within Brentwood Care Centre leading in [sic] direct harm to 'A'. [The Claimant has identified that he and the team are not providing care as per resident's care plan and this is due to [the Claimant]'s direct instructions. [The Claimant has a clear idea of what he considers a nursing duty and does*

not recognise that basic fundamental care is a nurse's responsibility therefore [the Claimant] continues to pose a risk to resident and staff safety. It is therefore recommended that this investigation progresses to a formal disciplinary hearing'.

42. In the list of appendices to Charlie Lebatt's report there was no reference to a body map.

43. It appears to us that Charlie Lebatt had concluded that the Claimant had refused to provide personal care to patients. He appears to have found that that is consistent with the Claimant's stance that that is not a nursing duty. He does not deal with the Claimant's position that, whilst nurses providing personal care is not a modern practice, he had provided personal care where necessary and had done 3 'doubles' on the night in question. That evidence being supported by Fanica Dragustin.

44. There is a logical fallacy in the conclusion that if the Claimant knew he was not helping Fanica Dragustin it followed that he knew she would undertake a task reserved for two people by herself. Before that conclusion could be reached the Claimant would have to know or assume that Fanica Dragustin would perform the task on her own.

45. Charles Lebatt's suggestion that the Claimant had failed to record a skin tear is wrong. The report prepared by the Claimant refers to a skin tear and applying pressure until bleeding stopped.

46. We accept that the Claimant had failed to record in terms on the incident report that Fanica Dragustin had been alone when she turned resident A. He should have done as this was the cause of the accident. It was not something that he actively concealed because that is what he told resident A's daughter very shortly afterwards. He consistently gave that account throughout the investigation.

47. By a letter dated 20 August 2020 the Claimant was invited to a disciplinary hearing to be conducted by Torie Pollard on 25 August 2020. That letter informed the Claimant that the allegations that would be considered at the hearing would be were as follows:

1. *'That on the 18th August 2020 you failed to support the care of resident AL on Balmoral Unit. In doing so, you acted in breach of the Code of Conduct, the job description for your role as Registered Nurse and in breach of the NMC Code of Conduct in regard to ensuring delivery of the fundamentals of the care effectively and ensuring that any treatment, assistance or care for which you are responsible is delivered without delay.*
2. *That on the 18th August 2020 you failed to accurately document the incident in regards the injury to resident AL. In doing so you failed to meet the requirements of the NMC Code of Conduct in respect of documentation and breached the Code of Conduct and your job description.*

3. *That on the 18th August 2020 you failed to identify poor practice in regard to Moving and Handling of resident AL. In doing so you breached the Code of Conduct specifically in regard to incident and accident reporting.*
4. *That on the 18th August 2020 you failed to follow the documented plan of care for AL. In doing so you breached the Code of Conduct, the NMC Code of Practice in respect of delivering the fundamentals of care, and your job description.*
5. *That during your investigation meeting you have stated that you do not follow documented plans of care in respect of repositioning for residents in order to prevent breaks in skin integrity. In doing so you have breached the NMC Code of Conduct in respect of delivering the fundamentals of care, the Code of Conduct and your job description.*
6. *That on the 18th August you failed to provide supervision and leadership to the care team in order to ensure safe and effective care to residents on Balmoral Unit. In doing so you breached the Code of Conduct and your job description.'*

48. The Claimant was advised that he was entitled to be accompanied by a work colleague or a Trade Union Official of his choice. He was asked to notify Torie Pollard whether he was going to have someone accompany him. He was also warned that the allegations are believed to be proven it would be considered gross misconduct under the company disciplinary rules that his employment might be summarily terminated.

49. By an email sent on 23 August 2020 the Claimant requested a postponement of the disciplinary hearing in order to accommodate the attendance of his Trade Union Representative. He asked for seven working days in order that a suitable representative could be found. He indicated that the request for 7 days was the suggestion of his trade union.

50. On 25 August 2020 Torie Pollard sent an email back to the Claimant agreeing to reschedule the hearing to 31 August 2020 via MS Teams which permitted five working days for him to arrange representation as stated in the policy guidance: *"In respect of the hearing, this has been rescheduled to Monday 31st August 2020 at 13:00, allowing 5 working days for you to arrange representation as stated within our policy guidance"*. The Claimant was told that he should not contact anybody but her during his suspension.

51. 31 August 2020 was a bank holiday and was a date that proved inconvenient to the Claimant's Trade Union Representative. The PA to Tony Duncan, a senior RCN Officer, asked for a further postponement in order to accommodate Mr Duncan's availability. She proposed two dates, the 4th and 7th September. That prompted a response from Torie Pollard and an agreement was reached that the hearing would be rescheduled on 4th September 2020. That letter included the following sentence *'whilst your suspension remains in place this will now be unpaid as you have requested to extend the period beyond our expected time scale for hearings to be completed'*.

52. When Torie Pollard gave evidence about how the decision to suspend the Claimant without pay was taken, she indicated that it was not her decision but that she was following advice given by Pauline Manning that there was a policy in place which permitted the Respondent to withhold pay in circumstances where an employee was putting off disciplinary hearing. When Pauline Manning gave evidence and she was asked about this, she initially seemed very surprised at the suggestion that this had been her decision or indeed that Torie Pollard was following her advice. She did however later confirm that there had been a policy in place as described by Torie Pollard. We find this a further instance of Torie Pollard trying to distance herself from a decision making process at the very least it was clear that she had participated in the decision that the Claimant should be suspended without pay for a period pending the outcome of the disciplinary process. When Pauline Manning was asked by the Tribunal whether the request for postponements were in any sense unreasonable and she immediately acknowledged that they were not. She agreed that the policy that might have been in place it would have had no application in the present case.

53. On 2 September 2020 the Claimant sent Torie Pollard an email in which he set out that he had on reflection decided to offer his resignation taking effect immediately and without notice. He proposed that this offer was accepted 'in full and final settlement for all outstanding concerns' and suggested that he would be notifying his Trade Union as soon as possible. On the same day at 15:33 Torie Pollard responded to the Claimant. She said *"thank you for your email, I confirm that I accept your resignation with immediate effect, should you not have resigned the disciplinary would still stand and the natural conclusion would have been found. However, due to the seriousness of the allegation and the open safeguarding we are duty bound to refer yourself to the NMC and the DBS based on the evidence we have"*. The Claimant then responded later in the same day stating that If the Respondent was to carry on with the disciplinary proceedings and safeguarding and any referral to the NMC or DBS he would like to continue with the process in order to clear himself.

54. He says he indicated that he had only offered to resign due to the *'biasness of the investigation, the inaccurate account of the meeting with Charlie, the Deputy Manager'*. He indicated he wished to withdraw his resignation and carry on with the disciplinary procedure in order to clear himself. He said that he would be in attendance with the Union for the meeting. The position taken by the parties before us was that that email amounted to a request to withdraw the resignation which was accepted by the Respondent. The Respondent then treated the employment relationship as subsisting by proceeding with the disciplinary hearing and with the Claimant's grievances. We consider the Respondent's concession that the employment relationship continued was properly made. An alternative analysis is that the Claimant made a conditional offer to resign *'in full and final settlement of all outstanding concerns'* i.e. that no findings were made against him. That offer was not accepted. On either analysis the employment continued and was treated as continuing by both parties.

55. On 3 September 2020 the Claimant sent Torie Pollard A letter in which he set out in writing his account of the events of 18th August 2020. He also sent a grievance. In his grievance the Claimant complains about the way his earlier complaints of discrimination had been dealt with, He says that the current disciplinary process amounted to him being used

as a 'scapegoat' on account of his ethnicity/race. He complained of the decision not to maintain his full pay pending the disciplinary hearing blaming the Respondent for attempting to hold a hearing on a public holiday. He makes reference to the Equality Act 2010 and asks for a response within 14 days.

56. On 3 September at 3:57 in the afternoon Torie Pollard responded to the Claimant, she notes that the Claimant had sent in a grievance and says as such the disciplinary meeting would be postponed in order that the grievance process takes place. She said that she had passed that information to Pauline Manning the Head of HR who would be in contact with the Claimant directly. The hearing that was due to take place on 3 September 2020 was converted to a grievance hearing. That meeting was chaired by Pauline Manning the Head of HR and the Claimant was represented by a Trade Union Representative, Paul Schroder.

57. We were provided with minutes of the meeting which we accept provided a summary of the discussions. Pauline Manning told us, and we accept, that she had observed the Claimant was conducting the Teams meeting from a car. Pauline Manning said that she would not reopen matters raised by the Claimant in his earlier grievance. She said that anything that related to the disciplinary matter should be raised at the disciplinary hearing. When the Claimant complained that he had not been told that when he attended the meeting on 19 August 2020 with Charlie Lebatt that it was a formal investigation meeting the minutes record Pauline Manning saying that it might have been an oversight. We are unsurprised that the Claimant viewed that as looking for an innocent explanation. She could not have known whether it was an oversight without asking Charlie Lebatt about it. The Claimant is recorded as saying that she was siding with management. The response that was recorded was that Pauline Manning asked the Claimant to calm down as '*his voice was raised*'. The minutes then go on to say that the Claimant did not feel that he was raising his voice and that is how he speaks being a '*black African*'. The Claimant says that the actual language used during the meeting was that he was accused of shouting. He says that he finds that inherently racially discriminatory. We turn to that point below in our discussion and conclusions.

58. On 25th September 2020 Pauline Manning sent the Claimant an outcome of the grievance process. She did deal with the Claimant's contention that during his supervision by Rebekah Allen in April 2020 he had been suspended. It had been his position that that was an act of discrimination. Pauline Manning correctly sets out the Claimant's position in her letter but went on to reject his grievance. She stated that she had discovered that the Claimant had been suspended when queries about the administration of medicine were raised. In her letter she appears to go straight from that to a conclusion that race or ethnicity played no part in the decision. We conclude that Pauline Manning moved straight from the discovery of an ostensible lawful explanation for the treatment to accepting that that was the reason. We do not find that this was a rigorous approach.

59. Pauline Manning said that she had spoken to Charlie Lebatt and he had said that the Claimant had been told that the meeting on 19 August 2020 was an investigation meeting. She went on to say that, even if the Claimant had not been warned, the Respondent was within its rights to hold an investigation meeting at any time. She declined to deal with the Claimant's contention that the disciplinary process was discriminatory telling him that he

could raise that in the disciplinary process. She did not make any reference to the Claimant's complaint about being suspended without pay.

60. By an email sent on 1 October 2020 the Claimant sought to appeal the outcome of his grievance. In addition, he added in complaints about the manner in which Pauline Manning had behaved making the allegation that she had falsely accused him of raising his voice. He further took issue with the manner in which Pauline Manning conducted her grievance investigation and with the outcome.

61. By a letter dated 2 October 2020, the Claimant was informed that his appeal would be dealt with by Mark McDonald, the Regional Operations Director and was asked to attend a hearing on Monday 12 October 2020. It is sufficient to say that during the grievance appeal hearing the Claimant raised the points that he wished to bring to Mark McDonald's attention. In particular he complained that he had been suspended without pay. Mark McDonald suggested that he would make enquiries as to whether that was correct. In his appeal letter and in the appeal meeting the Claimant repeated his allegations that Rebekah Allen had discriminated against him. He suggested that the decision to investigate him for the incident on 18 August 2020 and the way the matter had been handled by Charlie Lebatt and Torie Pollard was also discriminatory. Whilst the thrust of what the Claimant said during the meeting was clear the minutes show that he did not always articulate his position as clearly as he might. He was heavy on assertion but light on evidence.

62. On 19 October Mark McDonald wrote to the Claimant confirming the position that he still remained an employee of the company and informed the Claimant that he was on unpaid suspension until the grievance is concluded. On 23 October Mark McDonald wrote to the Claimant a second time confirming that in fact the Claimant would be paid his salary for the period which he was suspended.

63. On 28 October 2020 Mark McDonald sent the Claimant a letter setting out the outcome of his findings in respect of the grievance brought by the Claimant. Whilst Mark McDonald acknowledges that the Claimant had said that the investigation and decision of Pauline Manning were not only unfair but also racially biased Mark McDonald himself concluded there was no substance to those allegations. He did not refer in detail to the Claimant's other broad allegations of discrimination but he did not uphold them. Ultimately he dismissed the grievance.

64. On 1 November 2020 the Claimant was informed by letter that the disciplinary hearing would be reconvened, and a date was fixed for 4 November 2020 at Brentwood Care Centre. The letter repeated the charges set out in the previous invitation and once again informed the Claimant that he had the right to be represented by a Trade Union Representative. He was warned that if the allegations are upheld, he might be dismissed.

65. On 2 November 2020 the Claimant sent an email to Torie Pollard protesting at the shortness of time between the notice and the hearing itself and suggesting that it is part of a pattern of racial abuse and victimisation. He suggested that the investigation had been biased.

66. The disciplinary hearing took place on 4 November 2020. The Claimant was represented by Tony Duncan, a senior officer of the Royal College of Nurses.

67. We were provided with minutes of the meeting of 4 November 2020. These were taken by Karen Curtis-Brown. The minutes are in narrative form and, whilst they may not be entirely complete, we accept that they are a broadly accurate summary of the meeting. During the hearing the Claimant was asked about the incident of 18 August 2020. He gave an account consistent with the initial account that he gave to Charlie Lebutt. He said that *'We started washing and dressing the residents around 5.30am before I did the medication round.* He said that he had been approached by Fanica Dragustin who had asked for some assistance. He said he had informed her that he was busy at that time but would join her shortly. He went on to say that she had taken the decision to turn the patient by herself before he arrived. He indicated in the course of the meeting that she had completed the body map. We have previously referred to above the fact that there is no discussion whatsoever about the body map despite it being indicated within the incident report that a body map had been filled in and the Claimant expressly referred to it during the hearing.

68. The Claimant was asked what action he had taken after he found out that Fanica Dragustin had moved the resident alone. He said: *'discussed this with the HCA but it didn't go well, I told her we must stick to what was on the care plan, she didn't call the family or fill in the incident form, she also answered me back. She is hardworking but also felt bad about me asking about the incident'*. The Claimant accepted that he had not documented that conversation or that it had taken place. When asked whether he has escalated the matter the Claimant said that he had handed the matter over to the day nurse and was suspended later the same day.

69. The Claimant was asked about what he had been recorded as saying during the investigatory interview about not waking residents. The Claimant complained that he had not had any opportunity to check the notes that had been produced and stated that the note of what he was reported as saying was inaccurate. He said that what he had said was that a HCA ought not attempt to do incontinence care whilst asleep. He said that it was better to wake the resident to manage any agitation than deal with any incontinence issues. We find that that account is reflected in some parts of the disputed notes of the investigatory meeting. For example where the Claimant says *'Even Gwen if she is sleeping we shouldn't be moving her as she is asleep'*. There was no follow up questions in the investigatory interview. We find that there was a failure to explore quite what it was that the Claimant was saying. Had there been any attempt to explore that he would have given the explanation he gave during the disciplinary hearing. His position was not that if a resident was asleep they should not be repositioned or have incontinence checks. His position was that they should be woken before being moved or disturbed. We would accept that he may not have explained this well at the investigatory meeting but his position was quite clear by the time of the disciplinary hearing.

70. The Claimant had complained about not having an opportunity to correct the minutes of the investigatory meeting. After the disciplinary meeting the Claimant was sent handwritten and typed minutes of the meeting which took place on 4th November and that cover of an email sent on 9th November Torie Pollard says *'please find attached notes of the meeting held on 4th November 2020 both handwritten and typed, these are not verbatim*

minutes but on account of the meeting I would be grateful if you could read through and confirm the notes for completeness by 5pm tomorrow 10th November. This provided the Claimant with just 24 hours to make any corrections.

71. The Claimant then sent a version of the minutes to Torie Pollard. The Claimant believes that he made changes to the minutes and sent them back. However, on 11 November 2020 Torie Pollard sent an email to the Claimant in the following terms *'following my email to you yesterday regarding the notes you had returned, can you please send with track changes or handwritten changes please by 2pm today. The original time frame was yesterday at 5pm'*. That prompted the Claimant to send a further version of the minutes in which he had underlined various passages with a felt tip pen. The Claimant believes that he was indicating parts of the minutes which he had previously made changes to. However, despite making efforts to search in the email sent box in the course of the Tribunal hearing he was unable to locate any document which actually had any changes recorded on it. We find it likely the Claimant at least believes he did make those changes and later tried to indicate what they were. He may not have saved the correct version on his computer.

72. On 16 November 2020 Torie Pollard sent an email to the Claimant in the following terms *'thank you for the meeting notes which you returned to me, however, having reviewed the notes, I do not accept your proposed changes'*. She provided an outcome letter to the Claimant. If, as appears likely, the original meeting minutes sent by the Claimant did not actually include any changes that was not made clear by Torie Pollard.

73. Torie Pollard set out her conclusions in respect of the disciplinary hearing in a letter dated 16 November 2020. She decided that the Claimant should be summarily dismissed. The material parts of her letter say:

'I believe that you understand your role as a Registered Nurse and the responsibilities this role has in supervising Carers whilst on shift. In discussing the incident during our meeting you verbalise that you had discussed with the carer to wait for you so that you could attend the care of the residents together, and that the carer failed to follow your instructions and wait for you. As there were only two of you on the unit at this time, the factual accuracy of this cannot be established.

Allegations 1 and 4 are not proven

you have failed to provide an acceptable explanation for the management of the incident in which a resident sustained significant bruising and a skin tear. You have stated that you discussed the care of the resident at 5:30 AM with the carer on duty and then you needed to give medications. Medications for residence on the unit were however due at 7 am according to the MAR charts and of the nine residents on the unit, only four required medications at 7am. This would have provided ample time for you to support the carer with repositioning and continence care prior to medications being administered.

Allegation 6 is found to be proven

The incident form completed by you was not factually correct and stated an injury of 'bruise'. An injury of 'skin tear' had further been identified and documented by you within the daily notes from the same incident. You did not however undertake or document the clinical assessment of the wound (size and depth of the wound, location and presentation, dressing requirement) and did not photograph the wound. Furthermore you have confirmed that you asked the carer to complete the body map, no documentation was provided on a wound care plan and no changes were made to identify the skin tear on the skin integrity care plan.

Allegation 2 is found to be proven

On identifying the skin tear you undertook some basic first aid, evidencing recognition that the injury had occurred. You confirmed at the meeting the resident required to people to assist in repositioning. During the investigation meeting new claim that you had spoken to the carer about her actions. There is no record that this conversation took place which you confirmed that you had not documented, or that you recognise the precipitating behaviours leading to the incident and attempted to reduce the risks of further events. This is supported by the incident form completed by you that states the actions taken to reduce further risks was the completion of the incident form. Whilst you are able to verbalise your understanding of safeguarding, I believe you did not raise concerns promptly or adequately to ensure the risks to residents were reduced if poor moving and handling had been a concern.

Allegation 3 is found to be proven

The care to residents during the night period in the waking of residents in order to provide care interventions such as continence care was discussed at the meeting and you have claimed that the investigation meeting did not document your opinion of the care process. At the disciplinary meeting you are able to explain that resident should be woken in order to prepare them for the intervention so as not to cause agitation.

Whilst you have disagreed with the investigation minutes accuracy, and though there were 2 residents with worsening pressure ulcers at this time, it is not possible to establish if the spin caused by omissions and care during night time period and as such allegation 5 cannot be proven.

I do consider that your actions in relation to the management of the incident, lack of detailed and adequate documentation and your lack of leadership and supervision to a member of the care team amounts to Gross Misconduct.

However, because of the concerns and poor management and leadership, along with the lack of documentation around injury and significantly the failure to take any actions to reduce the risk of a similar situation occurring in the future I feel I have no alternative but to dismiss...'

74. In her witness statement Torie Pollard adopted the reasons set out in her dismissal letter as her reasons for the dismissal.

75. The Claimant appealed against the decision to dismiss him by the letter found at page 174 of the bundle. The appeal was heard by Trisha King the Regional Director on 1st December 2020 by Microsoft Teams. The Claimant makes no complaint that the decision of Trisha King was discriminatory and therefore it is sufficient for us to record that the Claimant's appeal was dismissed. However for completeness we note that there was no exploration whatsoever during the appeal process of the facts that gave rise to the dismissal. The Claimant had alleged that the investigation and decision making was biased. Trisha King simply stated that the Claimant had failed to prove that that was the case.

76. On 31 March 2020 Pauline Manning provide the following information about dismissals by the respondent since 2020.

76.1. At Brentwood where the Claimant worked there had been 5 dismissals. Three were said to have been white British. The reasons for the dismissals were said to be physical abuse, theft and being drunk on duty. The fourth was Brazilian (ethnicity not given) who was dismissed for being drunk on duty the fifth was the Claimant.

76.2. Over the respondent's business 3 nurses had been dismissed. One was said to be white British dismissed for 'neglect'. One was said to be Indian dismissed for 'safeguarding. The Claimant was the third.

77. We were not told whether Black Africans were over or underrepresented in the workforce. We were told that there were female black staff in senior positions at Brentford.

The body map

78. The accident/incident report includes a question as to whether a body map had been completed and the answer is recorded as "yes". The joint bundle of documents did not include that body map. When Torie Pollard gave her evidence, she made express reference to the body map. She said that she had seen it at the time. Torie Pollard gave evidence on the first and second day of the hearing. Once the document was referred to the Tribunal asked Ms Wood whether a copy of the document could be produced, the initial indication was that this would not present any difficulties whatsoever. On the second day of the hearing, Torie Pollard stated that she had had the opportunity to review the body map overnight, she told us that it simply had a cross on it. We asked to see the body map at about lunch time on day two and initially it was suggested that it would be provided without difficulty. However, by the end of the day it had still not been provided and at this stage a somewhat different explanation was given to us suggesting that it could not be found. We

were surprised by this and reminded Torie Pollard that she had said that she had personally viewed it overnight. We made an Order that it be produced, and a document was duly produced the following morning.

79. Torie Pollard was recalled to explain why there had been delay in providing the document. The explanation that she gave was that it had been misfiled and had been located in an archive. When it was suggested to her that she had indicated on the second day of the hearing that she had looked at the document the night before Torie Pollard's initial response was to try and suggest that she had not said that at all. Whilst our notes were incomplete we all had a clear recollection that that is precisely what she had claimed. That is what led us to make an Order in the terms that we did. We checked our recollection with Ms Wood who agreed that we were correct.

80. The body map which Torie Pollard produced is a pro forma document with a picture of a human being from both the front and the back and the lower half of the document a ruler has been placed within the document and the top half requires completion by the nurse or healthcare worker. There are sections for the residents' name, the date and who it is completed by. The document that was produced by Torie Pollard is entirely blank within that section and only has a cross above the left eye on the front facing image of a person. When the Claimant was asked whether he accepted that this was the document that had seen completed contemporaneously he said emphatically that he did not believe it was the case. He particular made reference to the fact that it had not been completed in full and suggested that only a more recent document would have a ruler within it, that any document that he had seen did not. He made the point that the lack of any handwriting made it harder to identify the author.

81. We have taken into account the following matters in reaching the conclusion that the body map was produced to us by Ms Pollard was not an authentic document (by which we mean the one completed by Fanica Dragustin). The body map is poorly completed by any standards, missing out the resident's name, the date and who it was completed by and ignoring the instructions to carefully record the nature of any injury. Had this body map been the one viewed at the time; it would be surprising if these specific failures to complete the document properly had not been raised specifically. The Claimant did not complete it but might have been criticised for not making sure that Fanica Dragustin completed it properly. The fact that this was not mentioned contemporaneously suggest to us that this was not the document that was in front of Torie Pollard at the time. We are alive to the possibility that she might not have seen it at all at the time but, if she did not, she improperly claimed to have done so in her evidence. If it had been archived, Torie Pollard could not have been telling us the truth when she said that she had looked at the document overnight.

82. Having regard to all of the evidence as well as the specific points mentioned above we are not satisfied to the relevant standard that the document provided to us was the one completed on 18 August 2020 by Fanica Dragustin. If we are wrong about that Torie Pollard falsely claimed to have reviewed a document overnight.

The Law we applied

Equality Act 2010 - Statutory Code of Practice

83. The power of the Equality and Human Rights Commission to issue a code of practice to ensure or facilitate compliance with the Equality Act 2010 is afforded by Section 14 of the Equality Act 2006. Such a code must be laid before Parliament and is subject to a negative resolution procedure. The current code was laid before parliament and came into force on 6 April 2011. Section 15 of the Equality Act 2006 sets out the effect of breaching the code of practice. Paragraph 1.13 of the code explains that:

The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

The burden and standard of proof – discrimination cases

84. The standard of proof that we must apply is the civil standard that is the balance of probabilities. In other words, we must decide whether it is more likely than not that any fact is established.

85. The burden of proof in all claims brought under the Equality Act 2010 is governed by section 136 of that act the material parts of which are:

136 Burden of proof

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

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

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

86. Accordingly, where a claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the respondent. A protected characteristic need only have a material influence in detrimental treatment for discrimination to be established: **Nagarajan v London Regional Transport [2000] 1 AC 501.**

87. The proper approach to the shifting burden of proof has been explained in **Igen v Wong [2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332.** Most

recently in ***Base Childrenswear Limited v Otshudi*** [2019] EWCA Civ 1648 Lord Justice Underhill reviewed the case law and said:

17. Section 136 implements EU Directives 2000/78 (article 10) and 2006/54 (article 19), which themselves derive from the so-called Burden of Proof Directive (1997/80). Its proper application, and that of the equivalent provisions in the pre-2010 discrimination legislation, has given rise to a great deal of difficulty and has generated considerable case-law. That is not perhaps surprising, given the problems of imposing a two-stage structure on what is naturally an undifferentiated process of fact-finding. The continuing problems, including in particular the application of the principles identified in *Igen Ltd v Wong* [2005] EWCA Civ 142, [2005] ICR 93, led to this Court in *Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867, attempting to authoritatively re-state the correct approach. The only substantial judgment is that of Mummery LJ: it was subsequently approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054. In *Efobi v Royal Mail Group Ltd* [2017] UKEAT 0203/16, [2018] ICR 359, the EAT held that differences in the language of section 136 as compared with its predecessors required a different approach from that set out in *Madarassy*; but that decision was overturned by this Court in *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913, [2018] ICR 748, and *Madarassy* remains authoritative.

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

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

“56. ... The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

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

(2) If the claimant proves a prima facie case the burden shifts to the respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

“He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim.”

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.

88. Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' see **Chapman v Simon [1994] IRLR 124** see per Balcombe LJ at para. 33 or from 'thin air' see **Chief Constable of the Royal Ulster Constabulary [2003] ICR 337**.

89. Discrimination cannot be inferred only from unfair or unreasonable conduct **Glasgow City Council v Zafar [1998] ICR 120**. That may not be the case if the conduct is unexplained **Anya v University of Oxford [2001] IRLR 377, CA**. Whilst inferences of discrimination cannot be drawn merely from the fact that the Claimant establishes a difference in status and a difference treatment see **Madarassy v Nomura International Plc [2007] ICR 867** 'without more', the something more "*need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred*" see **Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279** per Sedley LJ at para 19.

90. Where there are a number of allegations each single allegation of discrimination should not be viewed in isolation, but the history of dealings between the parties should be taken into account in order to determine whether it is appropriate to draw an inference of racial motive in respect of each allegation **Anya v University of Oxford**.

91. The burden of proof provisions need not be applied in a mechanistic manner **Khan and another v Home Office [2008] EWCA Civ 578**. In **Laing v Manchester City Council 2006 ICR 1519** Mr Justice Elias (as he then was) said:

"the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race"

Such an approach must assume that the burden of proof falls squarely on the Respondent to prove the reason for any treatment. It is an approach that should be used with caution and is appropriate only where we are in a position to make clear positive findings of fact as to the reason for any treatment or any other element of the claim. We shall indicate below where we consider that it is open to us to follow this approach.

Direct Discrimination

92. Section 13 of the Equality Act 2010 contains the statutory definition of direct discrimination. The material part of that section read as follows:

'(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.'

93. In order to establish less favourable treatment it is necessary to show that the claimant has been treated less favourably than a comparator not sharing her protected characteristic. Paragraphs 3.4 and 3.5 of the code say:

3.4 To decide whether an employer has treated a worker 'less favourably', a comparison must be made with how they have treated other workers or would have treated them in similar circumstances. If the employer's treatment of the worker puts the worker at a clear disadvantage compared with other workers, then it is more likely that the treatment will be less favourable: for example, where a job applicant is refused a job. Less favourable treatment could also involve being deprived of a choice or excluded from an opportunity.

3.5 The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.

94. Section 23 of the Equality Act 2010 provides that any comparator must be in the same, or not materially different, circumstances. What is meant by 'circumstances' for the purpose of identifying a comparator it is those matters, other than the protected characteristic of the claimant, which the employer took into account when deciding on the act or omission complained of see - **MacDonald v Advocate-General for Scotland; Pearce v Governing Body of Mayfield Secondary School** [2003] IRLR 512, HL. Where no actual comparator can be identified the tribunal must consider the treatment of a hypothetical comparator in the same circumstances. Paragraphs 3.22 – 3.27 say (with some parts omitted):

3.22 In most circumstances direct discrimination requires that the employer's treatment of the worker is less favourable than the way the employer treats, has treated or would treat another worker to whom the protected characteristic does not apply. This other person is referred to as a 'comparator'.

Who will be an appropriate comparator?

3.23 The Act says that, in comparing people for the purpose of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.

Hypothetical comparators

3.24 In practice it is not always possible to identify an actual person whose relevant circumstances are the same or not materially different, so the comparison will need to be made with a hypothetical comparator.

3.25 In some cases a person identified as an actual comparator turns out to have circumstances that are not materially the same. Nevertheless their treatment may help to construct a hypothetical comparator.

3.26 Constructing a hypothetical comparator may involve considering elements of the treatment of several people whose circumstances are similar to those of the claimant, but not the same. Looking at these elements together, an Employment

Tribunal may conclude that the claimant was less favourably treated than a hypothetical comparator would have been treated.

3.27 Who could be a hypothetical comparator may also depend on the reason why the employer treated the claimant as they did. In many cases it may be more straightforward for the Employment Tribunal to establish the reason for the claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the claimant's to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can then be made.

95. An explanation of the differing ways in which treatment might be because of a protected characteristic was given in **Amnesty International v Ahmed [2009] IRLR 884** by Underhill P (as he was). He said:

'33. In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying "no blacks admitted", race is, necessarily, the ground on which (or the reason why) a black person is excluded. James v Eastleigh [Borough Council [1990] IRLR 288] is a case of this kind. There is a superficial complication, in that the rule which was claimed to be unlawful – namely that pensioners were entitled to free entry to the council's swimming-pools – was not explicitly discriminatory. But it nevertheless necessarily discriminated against men because men and women had different pensionable ages: the rule could entirely accurately have been stated as "free entry for women at 60 and men at 65". The council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it (at p.294, paragraph 36), "gender based". In cases of this kind what was going on inside the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose – will be irrelevant. The "ground" of his action being inherent in the act itself, no further inquiry is needed. It follows that, as the majority in James v Eastleigh decided, a respondent who has treated a claimant less favourably on the grounds of his or her sex or race cannot escape liability because he had a benign motive.

34. But that is not the only kind of case. In other cases – of which Nagarajan is an example – the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions) ...'

96. The proper approach to deciding whether the treatment was afforded 'because of' the protected characteristic is to ask what the reason was for the treatment. If the protected characteristic had a significant influence on the outcome then discrimination will be made out see - **Nagarajan v London Regional Transport [1999] UKHL 36; [1999] IRLR 572.**

97. The reason for the unlawful treatment need not be conscious but may be subconscious. In **Nagarajan** Lord Nicholls said:

'I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did.'

98. Section 39(2) of the Equality Act 2010 provides that:

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

- (a) as to B's terms of employment;
- (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;
- (c) by dismissing B;
- (d) by subjecting B to any other detriment.

99. A 'detriment' is something that a reasonable employee might consider to be a disadvantage **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11** an unjustified sense of grievance will not suffice.

100. Section 212 of the Equality Act 2010 provides that "*detriment*" does not, subject to subsection (5), include conduct which amounts to harassment'. The purpose of this definition is to prevent overlapping claims. Its effect is that where a tribunal find that an act or omission to amount to harassment for the purposes of Section 26 it cannot find that the same act or omission is unlawful contrary to sections 13 or 27 where the claim relies on establishing a that act or omission is a detriment contrary to Section 39(2)(d).

Harassment – Section 26 of the Equality Act 2010

101. A claim for harassment under the Equality Act 2010 is made under section 26 and 40. The material parts of Section 26 reads 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.

(2) ... (3)

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are— age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.

102. The Statutory Code of Practice at paragraph 7.18 says the following about when conduct should be taken as having the effect of creating the circumstances proscribed by Sub-section 26(1)(b):

7.18 In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended.

103. In ***Pemberton v Inwood* [2018] IRLR 542** Underhill LJ explained the effect of Sub-section 26(4) as follows [para 88]:

'In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) 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 the other circumstances – sub-section (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 environment⁴ 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.'

104. In **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, which dealt with the legislation in place prior to the Equality Act 2010 there is a reminder of the need to take a realistic view of conduct said to be harassment. At paragraph 22 Underhill P (as he was) said:

'Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

105. The question of whether unwanted treatment 'relates to' a protected characteristic is to be tested applying the statutory language without any gloss **Timothy James Consulting Ltd v Wilton UKEAT/0082/14/DXA**. In **Bakkali v Greater Manchester Buses (South) Ltd [2018] IRLR 906, EAT** Slade J held that the revised definition of harassment in the Equality Act 2010 enlarged the definition. She said:

'In my judgment the change in the wording of the statutory prohibition of harassment from 'unwanted conduct on grounds of race ...' in the Race Relations Act 1976 s 3A to 'unwanted conduct related to a relevant protected characteristic' affects the test to be applied. Paragraph 7.9 of the Code of Practice on the Equality Act 2010 encapsulates the change. Conduct can be 'related to' a relevant characteristic even if it is not 'because of' that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, 'related to' such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. As Mr Ciumei QC submitted 'the mental processes' of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the Claimant.'

106. The need for a tribunal to take a rigorous approach to the question of whether **conduct** related to a protected characteristic was recently emphasised in **Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, EAT** where the EAT said:

'The broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the tribunal which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in

question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the tribunal may consider it to be.'

Victimisation Contrary to Sections 27 and 39 of the Equality Act 2010

107. A claim for victimisation is brought under section 27 of the Equality Act 2010. The material parts of that section read as follows:

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.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

108. Victimisation in the employment field is rendered unlawful by reason of Section 39(4) of the Equality Act 2010. That sub section provides, amongst other things, that it will be unlawful to victimise an employee by subjecting him to a detriment. The meaning of 'detriment' is the same as we have set out above.

109. No comparator is required to establish victimisation **Woodhouse v West North West Homes Leeds Ltd [2013] IRLR 733**. What is necessary is that the employee establishes

that they did a protected act and that they have suffered a detriment. Thereafter the examination turns to the reason why the detriment was suffered and is subject to the burden of proof provisions which we have set out above. The question is whether the reason for the treatment was because the worker had done a protected act or that the employer knew that he or she intended to do a protected act, or suspected that he or she had done, or intended to do, a protected act? See - Baroness Hale in *Derbyshire and ors v St Helens Metropolitan Borough Council and ors* 2007 ICR 841, HL, and Lord Nicholls in *Chief Constable of West Yorkshire Police v Khan* 2001 ICR 1065, HL both cases decided before a change in the wording included in the Equality Act 2010 but not affected on this question.

110. The test of causation '*because*' is not to be approached by asking 'but for the Claimant doing the protected act would the treatment have occurred' but by asking whether the protected act was the reason for the treatment *Greater Manchester Police v Bailey* [2017] EWCA Civ 425 and *Nagarajan v London Regional Transport* [2000] 1 A.C. 501.

Discussion and conclusions

The discrimination claims

111. The Claimant has identified 9 acts or omissions that he says were unlawful harassment related to race or direct discrimination. In respect of the victimisation claim he says that only one, being 'held responsible' for the incident on 18 August 2020 was an act of victimisation.

112. We shall deal with each factual matter complained of in turn and say whether we find any complaint relating to that matter is made out. The headings that we have used are extracted from the list of issues and include references to the sub paragraphs of that list. The list of issues was not in our view very clearly expressed. The list of issues has been compiled based upon a summary of the Claimants case made by Employment Judge Elgot at the hearing on 22 February 2021. The parties were left to refine that list of issues between themselves. Neither party complained that they did not understand the case they had to meet. We have dealt with the substance of each complaint to the extent that it was dealt with in the evidence and submissions before us.

113. In places it is necessary for us to draw on our findings of fact set out above and make further findings of fact. Where we do so we hope that it is clear to the reader that we have done so.

Being accused of being a liar in the investigation meeting with Charlie Lebatt (paragraph 1(a))

114. This issue has not been well formulated. We do not understand the Claimant to be saying that Charlie Labatt called him a liar during the meeting that took place on 19 August 2020. As we have understood the Claimant's case he is complaining that Charlie Labatt suggested that he had been dishonest within the Root Cause Analysis and Investigation

Report that he produced after the meeting. In case we are wrong about that we shall deal with the Claimant's interview before moving on to the report.

115. The Claimant says that the minutes of the meeting that took place on 19 August 2020 were not produced during the meeting. In his witness statement the Claimant said that Karen Curtis-Brown did not take any notes in the course of the meeting with him. Charlie Labatt told us that she had type responses directly into the laptop upon which he had prepared a document with questions for the Claimant. As we have set out above it is not necessary for us to resolve that dispute. We are satisfied that the minutes of the meeting that we have seen were made by somebody either during or shortly after the meeting took place on 19 August 2020. We have accepted that some answers given by the Claimant have not been perfectly recorded. We would accept that the minutes are not a verbatim account.

116. The minutes of the meeting suggest that the questions were preprepared as Charlie Labatt has said. Nowhere within the minutes is there any challenge to anything said by the Claimant let alone a suggestion that he is being dishonest. The first mention of the suggestion that Charlie Labatt had called the Claimant a liar appears in the Claimant's letter of appeal against the outcome of his grievance sent on 1 October 2020. In that letter he complains that Charlie Labatt called him a liar 'in his findings'. The Claimant does not identify any lie told in the course of the meeting in his witness statement nor did he seek to persuade us that there was one. We are unable to identify any evidence which shows that Charlie Labatt called the Claimant a liar in the course of the investigation meeting. As noted above we understood that the parties understood the Claimant's case to be that Charlie Labatt had referred to him as being dishonest in his report.

117. We have carefully read the Root Cause Analysis and Investigation Report. There is no passage where Charlie Labatt states in terms that he believes the Claimant was 'a liar'. However the report has to be read as a whole. In the conclusions Charlie Labatt says *'it is evident that KO has breached the NMC code of conduct has not acted in a way that protects and safeguards the residents from Brentwood care centre leading indirect harm to a [A]'*. We find that that was a final and not a tentative conclusion and that the earlier parts of the report on the Claimant's account of events needs to be read in that light.

118. We find that there are places where Charlie Labatt suggests that the Claimant has been untruthful the key examples are as follows:

118.1. Charlie Labatt sets out the Claimant's position that he was unaware that Fanica Dragustin was attending to residents who required two people to assist by herself. He concludes that this cannot be correct because the Claimant accepted that if he was not helping her nobody else would be. He concludes: *'it is apparent that he was aware that FD was attending to residents alone'*. We find that that amounts to an express rejection of the Claimant's account.

118.2. The report includes the following passage: *'The incident form completed by KO states that the incident was 'unwitnessed'. That is in conflict with [A]'s*

daily notes where KO has documented that the incident has been 'reported' to him. During a telephone conversation with myself which is witnessed by KCB, KO had stated that he was in the room at the time of the incident, although in the investigation meeting KO states that he had walked into [A]'s bedroom after the incident. These various conflicting versions are of concern and would suggest that he was not present and had not attended [A]'s room, and that FD had reported the incident to him after the event as FD had stated in her investigation meeting.

- 118.3. Under a heading 'Clinical Considerations' the report includes the following. *'A skin tear caused by incorrect manual handling is a safeguarding concern and would have been an important factor to include within the documentation however KO failed to mention this'. The report goes on to say: 'There is no evidence that KO challenged or reported the poor practice which would suggest that he was aware that FD was supporting residents alone. KO had not been consistently accurate with documentation, and it could be suggested that this was an attempt to deviate from the truth in order to cover facts. This is in direct breach of the NMC code'*

119. We find that the report read fairly does include statements which reflect a concluded view that the Claimant's account of the events of 18 August 2020 both orally and in the incident report form were untrue. We needed to consider whether the statements went further and suggested the necessary dishonesty that elevates an inaccurate account to a lie. The third example we have given is in our view quite clear. What is suggested is that the Claimant has been dishonest. We have reached the same conclusion in respect of the other two matters. Read fairly the suggestion is not that the claimant has a poor recollection of events. The suggestion is that he has given an account that he must know is untrue.

Harassment

120. Given the effect of Sub-section 212(1) which we have set out above we shall first decide whether the conduct we have found proven amounted to harassment contrary to section 26 of the Equality Act 2010.

121. We would accept that the Claimant regarded his account of events being questioned in the terms that it was amounted to unwanted conduct. We then need to turn to the question of whether it had the purpose or effect of creating the circumstances described in sub-section 26(1)(b) (i) or (ii).

122. We shall deal firstly with the issue of whether creating the proscribed environment was Charlie Lebatt's purpose. Whilst below we have accepted that Charlie Lebatt's conclusions were one-sided and occasionally illogical we do not find that his purpose in writing the report in the terms that he did was to violate the Claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We find that the purpose in writing the report was to set out Charlie Lebatt's conclusions in the knowledge or belief that they would be considered at a disciplinary hearing. We find that Charlie Lebatt did not consciously recognise that his report may have included matters which were unfair or unjustified. We find that he was unaware of any unconscious bias in his investigation.

123. We turn then to the question of whether the unwanted conduct had the proscribed effect. We bear in mind the guidance given in *Richmond Pharmacology v Dhaliwal* which we have set out above. We accept that the Claimant was very upset about the suggestions that he had been dishonest. The allegations concerned his conduct as a professional. We find that his perception was that the contents of the report created a humiliating environment for him.

124. It is important to consider any (unwanted) conduct in context. The conduct we are considering took place in the course of an investigation. An employee is likely to be distressed and alarmed at any such investigation. We find that unless an employer departed from a fair, necessary and proportionate investigation the mere fact that allegations were made that an employee found upsetting would not mean that it was reasonable for the unwanted conduct to have the effect set out in sub-section 26(1)(b). The issue for us is whether the report went sufficiently far to cross that boundary.

125. We return to the unwanted conduct we have outlined above. In the first example Charlie Lebatt has concluded that the Claimant must have known that Facia Dragustin was attending to residents on her own when two people were required. He reached that conclusion because he asked the Claimant who would be helping her if he was not. The Claimant was recorded as saying nobody. Whilst he later explained that there were others who might have helped we shall assume in Charlie Lebatt's favour that the Claimant had accepted that only he could assist. Charlie Lebatt's conclusion, that the Claimant must have known that Facia Dragustin was attending to residents on her own when she should not have been, is irrational unless he had also concluded that the Claimant knew that the residents had been attended to. The Claimant had stated that he did not know that. In Facia Dragustin's interview she started by saying that the Claimant had assisted her with three residents. She then said that she had waited for him to assist with a third. In response to a direct question about whether the Claimant supported her with repositioning and personal care she is recorded as saying that the Claimant does not help. There is a clear and obvious inconsistency with her evidence. An impartial investigation would have needed to deal with that before concluding that the Claimant was aware that Facia Dragustin was attending to residents on her own when two people were required. We find that Charlie Lebatt failed to deal with this obvious issue in any meaningful way in his report.

126. In the second example we find that Charlie Lebatt has referred to conflicting versions of events when there were really none at all. He refers to on an undocumented telephone call where he recalls the Claimant saying that he had been in the room at the time of the 'incident'. When the Claimant was asked about this during the investigation meeting he explained that he arrived after the injury had occurred. That was consistent with the account of Fanica Dragustin. It was consistent with what the Claimant had told A's mother. It was consistent with his statement in the handover diary that the incident had been reported to him. The only alternative account is what Charlie Lebatt believes the Claimant said during a telephone call. If there was any confusion about what the Claimant's account was it was cleared up at the stage of the investigation meeting.

127. In the third example set out above there is a suggestion that the Claimant had not been consistently accurate with documentation. One 'inaccuracy' referred to by Charlie Lebatt was that the Claimant had suggested that the incident was unwitnessed. We return to that below. The fact that there had been a skin tear was set out clearly along with a description of how the injury occurred. The one omission was that the Claimant did not say in terms that Fanica Dragustin had been undertaking the personal care alone. There was

information held by Charlie Lebatt that the Claimant had told A's daughter that was the case. That was the account he gave orally. His incident report may not have been completed as fully as it might have been but noting in it is untrue or inconsistent with the Claimant's account of events.

128. Part of the context of this unwanted treatment is the fact that the Claimant knew that he, and not Fanica Dragustin was being investigated. He could have reasonably expected the investigation to have been conducted in an even handed manner. On Fanica Dragustin's own account she knew that A required two people to assist with personal care. She had gone ahead and rolled A in bed by herself resulting in an injury. We find it very surprising that she was not suspended or investigated when the Claimant was. We find that it would have been reasonable for that lack of even handedness to add to the humiliation of being accused of dishonesty.

129. Applying the statutory test set out in Section 26(4) we find that the conduct identified above did have the effect of creating a humiliating environment. To be clear we find that it was reasonable for the conduct to have that effect on the Claimant. The allegations of dishonesty might well have serious professional ramifications.

130. The remaining issue is whether the unwanted conduct relates to race. Conduct may relate to race either where the conduct is inherently connected to race (such as a racist remark or stereotype) but that is not the only possibility. Conduct may relate to race when the motivation for the conduct is because of race - **Bakkali v Greater Manchester Buses (South) Ltd**. We remind ourselves that it is essential that we identify how the particular conduct complained of relates to race in this case - **Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam**. We shall undertake this exercise by first asking whether the Claimant has proved facts from which we could infer that the conduct was unlawful disregarding at that stage any explanation for the treatment from the Respondent.

131. We consider that the following facts are sufficient that we would be entitled to draw an inference of unlawful treatment.

131.1. Whilst no comparator is necessary in a claim under section 26 there is no reason why the treatment of an actual or hypothetical comparator might not be used to support an inference of harassment. We accept that Fanica Dragustin was not in exactly the same material circumstances as the Claimant. She was a more junior employee. She was supervised by the Claimant. She only completed one piece of documentation. She would not be an appropriate direct comparator for the purposes of a direct discrimination claim. That does not mean that she cannot be regarded as an evidential comparator when looking at the motivation for any treatment or whether it relates to race. On the morning of 18 August 2020 Torie Pollard spoke to Fanica Dragustin and was aware that she had turned patient A by herself. Had the Respondent's policy been followed Fanica Dragustin ought to have completed the incident report with the Claimant's assistance. Fanica Dragustin was not suspended and there was no evidence before us that she was subjected to any disciplinary process. Charlie Lebatt was asked to investigate but has not questioned this decision.

131.2. We find that there is a marked difference between the manner in which Fanica Dragustin and the Claimant were interviewed. Fanica Dragustin was

asked very few pre-prepared questions. This is despite the fact that her decision not to wait for the Claimant was at arguably the cause of the injury. The Claimant is asked a large number of questions with excerpts from the NMC code of conduct put to him. The Claimant was interviewed with a notetaker Fanica Dragustin was not.

131.3. Charlie Lebatt's failed to deal with a significant inconsistency in Fanica Dragustin's statement. There was an obvious tension between her saying that the Claimant had assisted her with three residents on the same night and any suggestion that the Claimant had regularly refused to assist her. In his report Charlie Lebatt has made findings against the Claimant without testing Fanica Dragustin's account any further.

131.4. We find that Charlie Lebatt prepared in advance of the meeting to question the Claimant on his position or whether personal care was within a nursing role. He must have learned of the Claimant's stance in advance of the meeting as he put excerpts of the NMC code to the Claimant. The Claimant was asked if he considered continence care a nursing duty. He is recorded as saying *'it used to be, but has changed since October 2015. I went to a seminar for an induction to newly qualified nurses, they want nurses only to do clinical duties, personal care is not a nursing duty'...if the carers are effective, they can make sure these things are needed'*. Having said that the Claimant went on to say that he had been assisting with personal care all through the night of 17/18 August 2020. We find that Charlie Lebatt actually recognised that the Claimant was distinguishing between what he believed ought to be the case and what was expected of him in practice. The Claimant was not expressing some radical view. Despite this Charlie Lebatt found in his report that the Claimant *'was not working within the requirements set out by his regulatory body'*. We find that this is an unfair distortion of the position the Claimant consistently adopted.

131.5. Charlie Lebatt in his witness statement refers to the fact that on the Accident/Incident report form the Claimant indicated that the incident was unwitnessed. He suggests that it *'does not make sense'*. We find he is making something out of nothing. The form records that *'[A] was assisted with her incontinence care and pad changed. She was rolled to the left side when she sustained a skin tear on the bumper rail'*. It is obvious that the Claimant is not saying that the person who rolled A was not present. His reference to 'unwitnessed' cannot be understood as saying that resident A or Fanica Dragustin were not present. It is at least tolerably clear that he is saying that there were no other witnesses present. That was true and agreed by all. Whilst the Claimant might have expressed himself better we find that Charlie Lebatt actively looked for errors and placed more weight than was justified on this matter.

131.6. Whilst not sufficient of itself to shift the burden of proof the Claimant is a Black African and was subjected to the unwanted conduct we have identified.

132. In summary we find that there was a stark disparity of treatment between the Claimant and Fanica Dragustin. We find that Charlie Lebatt's approach was one of looking for fault. We find a reluctance to accept what the Claimant said in contrast to him saying

that he found Fanica Dragustin to be honest (without asking her to explain a significant inconsistency. We take into account the fact that in a residential care home any injury to a resident will be taken very seriously and that staff are expected to maintain the highest standards. We take into account the fact that the Claimant was senior to Fanica Dragustin and would be expected to work to higher standards. However we have concluded that we could properly infer that Charlie Lebatt's suggestions that the Claimant was dishonest related to race. To explain that, we find that we could infer that race played a material part in the decision to make those findings.

133. The next issue we need to deal with is whether the Respondent has satisfied us that there was no unlawful harassment. That would turn on the question of whether the Respondent can show that the reasons for the treatment complained of were in no sense whatsoever related to race.

134. Charlie Lebatt's first witness statement which deals with his reasons for the treatment complained of was only 14 short paragraphs long. He asserts in his witness statement that he carried out the investigation without bias and denied any racial bias.

135. At paragraph 11 he says: *'As a responsible nurse the Claimant was allowing the residents to be handled without the required staff. There were also issues with the accuracy of the documentation. Whilst accidents happen, accurate documentation is very important in this sector'*. He denies that he called the Claimant a liar during the investigation meeting. We have agreed with him that that he did not.

136. In his witness statement Charlie Lebatt says that the Claimant was *'allowing the residents to be handled'*. It is clear to us that he has decided that the Claimant knew what Fanica Dragustin was doing but permitted it to happen. As such he has disbelieved the Claimant's account that he told Fanica Dragustin that he would assist her. As we have said above that account was consistent with Fanica Dragustin's account that she waited for the Claimant. We would accept that there was some evidence from what Fanica Dragustin told Charlie Lebatt to support his conclusion but it certainly was not the only conclusion that could have been reached on the evidence.

137. We would accept that the incident report completed by the Claimant did not say in terms that the cause of the injury was that Fanica Dragustin had turned the resident alone. We accept that it ought to have done. We would further accept that the Claimant had failed to record that he had spoken to Fanica Dragustin about her actions. However, the Claimant brought the incident to Charlie Lebatt's attention and he had told the resident's daughter what had happened. The site and scope of the injury is quite clear from the documentation provided by the Claimant. Any inaccuracy is limited to the omission of the matters just mentioned.

138. We have had regard to the matters we considered sufficient to shift the burden of proof. We have found that Charlie Lebatt had produced an investigation report where he has disputed the Claimant's account of events and attacked his professional integrity. We find that he has misrepresented the Claimant's views towards undertaking personal care and elevated an opinion about what a nurse ought to be expected to do into a refusal to undertake personal care. We have had regard to his evidence that his investigation was not tarnished by considerations of race. We have had regard to the fact that incidents of this nature are routinely taken very seriously in a care home setting. We have taken account of

the fact that there was no evidence before us that any action whatsoever was taken against Fanica Dragustin for her part in the incident.

139. Having regard to the entirety of the evidence we are not satisfied that the Respondent has discharged the burden or showing that the conclusions in Charlie Lebatt's report where he questions the Claimant's professional integrity were not because of race. We would accept that they were not consciously based on race but that is not sufficient to show that race played no part in the conclusions reached.

140. It follows that we find that when Charlie Lebatt reached the conclusions we have identified in his report those conclusions did 'relate to' race.

141. For those reasons we are satisfied that each element of a claim of harassment contrary to Sections 26 and 40 of the Equality Act 2010 is made out and the claim succeeds.

Direct discrimination

142. It follows from our conclusions above that it is not open to the Tribunal to find that the same detriments amount to direct discrimination contrary to sections 13 and 39 of the Equality Act 2010. It should be obvious from our findings above that had it been open to us we would have concluded that the way the conclusions of the investigation report completed by Charlie Lebatt were expressed did amount to a detriment. We would have found for the same reasons as set out above that the Claimant had proven facts from which we could have inferred that the treatment was because of race. For the same reasons as set out above we do not find that the Respondent has discharged the burden of showing that race was in no sense whatsoever part in the reasons for reaching the conclusions set out in the investigatory report.

143. It follows that the only reason why we must dismiss this claim is the effect of Section 212 of the Equality Act. If we have made any error in our reasoning in respect of the claim brought under Section 26 of the Equality Act 2020 then we would have upheld this claim under Section 13.

That there was no proper investigation or investigatory meeting in relation to [the incident on 18 August 2020] or the Claimant's part in it (paragraph 1((b))

144. We have understood this allegation to be a procedural complaint. We have dealt with the Claimant's complaint about the conclusions reached in the investigation report above.

145. If it is not clear from our findings of fact we find that following the incident there were good reasons why the incident of 18 August 2018 was investigated by the Claimant's managers. A very elderly resident had been injured. That had been recorded by the Claimant on the incident report and he had brought that to the attention of Charlie Lebatt. The incident report accurately described the injury. It is difficult to see what further detail could have been given other than perhaps the dimensions of the bruise. What the incident report lacked was detail about who rolled the resident. When it became known on the morning of 18 August 2020 that Fanica Dragustin had rolled the resident alone we find it was inevitable that there would have been an investigation.

146. There was an investigation meeting with the Claimant. We do not find that any of the questions asked of the Claimant were, of themselves, improper.

147. We find that the Claimant has failed to establish any 'unwanted conduct' for the purposes of a claim under Section 26 of the Equality Act 2010 or any detriment for the purposes of Section 13 of the Equality Act 2010 which would surpass the threshold of an 'unjustified sense of grievance' in respect of the process that was followed in investigating the incident. Those factual findings are sufficient to dispose of these two claims. We have dealt with the conclusions reached in the investigation above. Whilst we find that the Claimant has good grounds to complain about the conclusions reached there he has not established the facts necessary to support any claim relating to the process that was followed.

That the Claimant was suspended without pay without being told what the allegations against him were (paragraph 1(c))

148. This is not a well worded allegation. The Claimant was suspended without pay. However by the time he was suspended without pay he was aware of the allegations against him. The broad nature of the allegations against the Claimant were set out in the letter of 18 August 2020 notifying him of his suspension. By the time that the Claimant was told that his suspension was without pay he had been invited to a disciplinary meeting by letter which included disciplinary charges which were at least tolerably clear.

149. We shall assume in favour of the Claimant that he is complaining of the decision to suspend him without pay when he sought a postponement of the date of the disciplinary hearing to accommodate his trade union representative.

150. We shall deal with the claims brought under Section 26 and Section 13 together.

151. The decision to suspend the Claimant without pay was completely unjustified. The Claimant had a statutory right to be accompanied to a disciplinary hearing and he wished to exercise the right to be accompanied by a trade union representative. That was unsurprising. The Claimant recognised that he was fighting for his job and there may be serious professional consequences following any dismissal. The timescales set for the disciplinary hearing were tight. The Claimant made an entirely reasonable request to postpone a disciplinary hearing fixed on a bank holiday as his trade union representative could not attend.

152. We were told, and accept that the Respondent had a policy of not paying wages where an employee sought a postponement of a disciplinary hearing outside of the 5 day timescale in its disciplinary policy. We can understand why an employer might want to introduce a policy of that nature. We do not need to decide whether such a policy, to be effective, would need to displace the contractual right to be paid when an employee was willing and able to work. What we find in this case was that there was no reasonable basis for suspending the Claimant without pay – as Pauline Manning acknowledged.

153. We find that the suspension of the Claimant without pay was unwanted conduct and a detriment. For the purposes of the harassment claim we shall assume in the Claimant's favour that the decision had the effect of creating a humiliating environment.

154. A suspension without pay does not inherently relate to race. It might do if the conscious or sub-conscious motivation included considerations of race. It is sensible for us

to consider that question because it is decisive both for the claim under Section 26 and for the claim under section 13.

155. The first issue is whether the Claimant has proved facts from which we could, absent any explanation from the Respondent, infer harassment or discrimination. We find that he has. The Claimant is a black African. He has established that he was suspended without pay. As we have set out above that of itself is not enough. There needs to be something more. We find that the following matters, individually and in particular cumulatively provide that 'something more'.

155.1. We consider that the decision to suspend the Claimant without pay was manifestly harsh in the circumstances. Whilst we can understand an employer adopting terms and conditions permitting a suspension of pay to discourage employees from avoiding or string out disciplinary proceedings there was no suggestion that that was the intention of the Claimant. The Claimant was simply trying to secure representation at the hearing. As was conceded by Pauline Manning.

155.2. Torie Pollard spent some time in her witness statement setting out her perception of the Claimant's behaviour. Amongst the faults she attributed to the Claimant was being aggressive in his communications. Categorising the behaviour of black people, and in particular, black men as aggressive on account of their stature or the volume or speed they speak is, absent an explanation, capable of supporting an inference of discrimination. It potentially demonstrates the application of a stereotype and/or a discomfort with people with different cultural norms. We expand on this further below and our conclusions need to be read together with this paragraph.

155.3. We find that some of the matters which we have taken into account in examining whether the burden shifted in respect of the suspension itself are also relevant in respect of this decision. We shall not repeat them here in full. We did not consider that the actions of Charles Lebatt provided any support for an inference of unlawful treatment by Torie Pollard or perhaps Paula Manning. However we do find that the decision to suspend the Claimant (taken by Torie Pollard and known to Paula Manning) is a matter we could take into account. In particular we have had regard to the stark difference in the treatment of the Claimant and the treatment of Fanica Dragustin.

156. Having found that the burden has shifted to the Respondent to show that the decision was not discriminatory we need to examine the explanation we were given for the treatment. The Respondent's explanation (in fact that of Torie Pollard) was that she believed that she was following an established policy.

157. It is necessary that we expand slightly on our findings of fact set out above. We have found that the decision to suspend the Claimant without pay was communicated by Torie Pollard. We accept that she reached her decision in that respect having had a discussion with Pauline Manning. We reach that conclusion because it is clear from the terms of the letter sent to the Claimant and from the evidence of Pauline Manning that there was a policy, whether written or not, of not paying wages to people suspended from work beyond the ordinary timescales of the disciplinary policy. In other words this was not the first instance of a person not being paid in these circumstances.

158. It was clear to us that from the evidence of Pauline Manning, and the fact that the Claimant was eventually paid. That any policy that was in place was not intended to cover the requests for a convenient date for the disciplinary hearing made by the Claimant.

159. We have criticised Torie Pollard elsewhere in this judgment. We have found that her decision to suspend and dismiss the Claimant was materially influenced by race. These are matters that we need to take into account in examining this decision.

160. We have had regard to the approach of Torie Pollard to the Claimant's first grievance. We have said that it was poorly investigated. We find that Torie Pollard, for all her experience as a nurse, had little concept of what might be required when taking decisions in disciplinary and grievance matters. We have regard for Torie Pollard's explanation for the treatment. She appeared to believe that the decision to cut of the Claimant's wages was automatic. We find that she had genuinely thought that that was the case based on her discussions with Pauline Manning. We do not believe that Pauline Manning actually told her that but, as in any communications, there is a possibility of miscommunication.

161. Having regard to all of the evidence we are satisfied that the reason that the Claimant was suspended without pay was that Torie Pollard believed, incorrectly, that that was an automatic consequence of the Claimant asking for a postponement of the disciplinary hearing. We do not find that she exercised any independent judgement whatsoever. It follows that the Respondent has satisfied us that the reason for the treatment was essentially incompetence. There is no room for any finding that the Claimant's race played any part in the decision or that the reason for the treatment related to race.

That when he resigned he received an email threatening to report him to the Nursing and Midwifery Council and to send information to the Disclosure and Barring Service so that he felt forced to withdraw his resignation (paragraph 1(d))

162. It was not disputed that Torie Pollard wrote to the Claimant in response to his suggestion he would resign by informing him that whether he resigned or not a report would be made to the Nursing and Midwifery Council and the Disclosure and Barring Service.

163. The incident in the early hours of 18 August 2020 resulted in the resident being injured. At her age this was a serious matter. For good reasons the nursing and the care sector are highly regulated. Where there are mistakes we would expect them to be properly investigated. Where there were reasonable grounds for believing that there had been a shortfall in professional standards there would be proper cause for making a reference to the regulators identified in this allegation. The resignation of an individual suspected of any failure would not lessen the need to make a referral. We are aware and take judicial notice of the fact that the two bodies referred to place a duty on employers to refer matters whether there is a resignation or not. Such a duty avoids the potential for a rogue employee resigning and moving from employer to employer without any regulatory action.

164. We shall deal first with the allegation as one of harassment pursuant to Section 26 of the Equality Act 2010.

165. We find that Torie Pollard's purpose on suggesting that she would make a reference to the two regulators identified was because she believed that where a nurse resigned pending disciplinary proceedings instigated after a serious incident it was necessary to do so. We find that she did not act with the purpose of violating the Claimant's dignity or to create the proscribed environment.

166. We look to the effect of the treatment. We would accept that in the circumstances, and particularly the circumstances where the Claimant believed (correctly) that he had been treated very differently to Fanica Dragustin the letter informing the Claimant that he would not be permitted to simply walk away on the basis that he was blameless made him feel humiliated.

167. We need to assess whether, in all of the circumstances, it was reasonable for the Claimant to view the conduct of the Respondent as creating a humiliating environment. If it was not that is determinative of the question of whether we should treat that conduct as having that effect - **Pemberton v Inwood**.

168. We find that the Claimant ought reasonably to have recognised the importance of investigating incidents in a care home setting. He ought reasonably have had regard to the fact that resigning in the face of allegations of a serious nature would not negate the need to refer serious matters to the two regulators identified. Indeed on any reasonable basis he ought to have recognised that a refusal to give a full explanation made a reference more rather than less likely.

169. Having regard to all of the surrounding circumstances we find that it was not reasonable for the Claimant to regard the proposal to refer matters to the two regulators identified as having the effect of violating his dignity or creating the proscribed environment.

170. It follows that the claim for harassment must fail.

171. If we are wrong in our analysis we shall go on to decide whether the unwanted conduct related to race. As the conduct did not inherently involve any considerations of race it is sensible for us to deal at the same time with the claim for direct discrimination where the question is whether the conduct was because of race.

172. We do not find that this is a borderline case. It is a claim where we are in a position to make clear findings as to the reasons for any treatment. We shall assume that the Respondent bears the burden of proof. For the avoidance of doubt had we considered whether the Claimant had made out a prima facie case, absent any explanation from the Respondent, then we would have found that he had for the same reasons we have set out in relation to the decisions to suspend and dismiss the Claimant.

173. Whilst our overall findings, and in particular our findings in the wrongful dismissal case, are that the Claimant was not responsible for the injury to the resident we agree with the Respondent that there was a basis for criticising the Claimant for the lack of detail in the incident report that he completed. We find that that did not justify a summary dismissal but that is our objective view. We take those findings into account when assessing the reason for the treatment.

174. The explanation that was given by Torie Pollard was essentially that the respondent was heavily regulated and was obliged to consider reporting any professional who might have fallen below professional standards to the two regulators. The fact that an employee resigned having been invited to a disciplinary hearing did not reduce that duty.

175. Whilst Torie Pollard, and the Respondent, has failed to discharge the burden of proof to show that the suspension and dismissal were not related to/because of race it does not follow that this decision is tainted by considerations of race.

176. We find that where there had been a serious incident, as here, and an employee resigned before any disciplinary meeting, Torie Pollard would always have written a letter in the same terms as she did. We find that she would have done so whatever her conscious or sub-conscious views about the employee. We find that this was an 'as night follows day' decision with no room for any considerations of the Claimant's protected characteristics.

177. It follows that the claims both for harassment and for direct discrimination must fail as we find that the decision was not/did not in any sense whatsoever relate to or was because of race.

That he was accused by Mrs Manning of 'shouting' in the appeal meeting with her but that this was recorded in the relevant notes as him 'raising his voice' and this was to cover up the racial overtones of her remark (paragraph 1(e))

178. The Claimant recalls that Pauline Manning referred to him 'shouting'. The minutes we were provided with record that Pauline Manning commented on the Claimant 'raising his voice'. Pauline Manning says that the minutes are correct. The Claimant says that they are not. We need to expend our findings of fact to resolve that. Given the narrow difference between the two phrases we find that there is no obvious reason why the minutes would have been changed. The minutes accurately record the Claimant protesting and suggesting that as a black African he was being criticised for the manner of his speech. We accept that both the Claimant and Pauline Manning were giving their recollection of what was said. We have only their accounts, the minutes and the Claimant's later assertions in the appeal process.

179. We must make findings on the balance of probabilities. The Claimant bears the burden of showing the minutes are inaccurate. We find that he has not satisfied that burden and that Pauline Manning suggested that the Claimant refrain from raising his voice.

180. In her submissions Ms Wood was initially dismissive of the suggestion that telling a person not to raise their voice might be discriminatory/harassment. We did not find the decision as easy as she suggests.

181. The manner in which people behave varies across cultures. In some cultures raising voices, speaking quickly and becoming 'excited' particularly in dealings with authority is not unusual. Regarding such cultural behaviour as aggressive or improper might flow from a stereotypical assumption or the imposition of differing cultural values. We take notice of black people (and those of other races) reporting the need to conform to white British cultural values as a means of 'passing'. Plurality requires tolerance of the cultural norms of others.

182. We find that the Claimant did take offence at being told not to raise his voice. We find that he did not recognise that his voice was raised although it was. We find that the Claimant did not help himself by conducting a serious meeting from a vehicle.

183. Having regard to those additional findings of fact we reach the following conclusions.

184. We deal first with the facts as a claim of harassment.

185. We are satisfied that when Pauline Manning told the Claimant that he was raising his voice she did so not with the purpose of violating the Claimant's dignity or with the purpose of creating the proscribed environment but with the intention of calming the situation. We find that Pauline Manning genuinely felt that the Claimant was talking more loudly than was

appropriate in the context of the meeting. She perceived the Claimant as being upset. Hew comments were intended to address that situation and were not intended to cause offence.

186. We then need to turn to the question of whether Pauline Manning's words had the effect of violating the Claimant's dignity or creating the proscribed environment. We are satisfied that, subjectively, the Claimant found the instruction to speak in a quieter voice offensive and humiliating. He told us, and we accept, that he had frequently been subjected to stereotypical assumptions about being aggressive or angry when for him he was speaking normally. He perceived Pauline Manning as making a similar assumption.

187. The issue we then turn to is whether it was reasonable for the Claimant to regard Pauline Manning's comment as having that effect. We consider that the context is important. This was a grievance meeting. As such it was formal. There was a need to maintain a respectful dialog. On our findings the Claimant was raising his voice. He was not told that he was being aggressive. He is simply told that he should not talk in a raised voice.

188. We find that the Claimant could not reasonably regard being asked not to talk in a raised voice as having the effect of violating his dignity or creating the proscribed environment. Whilst a comment on an innate cultural characteristic might have the potential for causing objective offence something more would be required than the circumstances that existed here.

189. In case we are wrong about that we shall deal with the issue of whether the comment made related to race. At the same time it is convenient to deal with the alternative claim of direct discrimination. In respect of that claim we are satisfied that the Claimant has established that being told not to raise his voice was a detriment. We need to deal with the issue of whether the detriment was because of race. As before we shall assume that the burden passed to Pauline Manning to explain her reasons were in no sense whatsoever influenced by race.

190. We are satisfied that Pauline Manning asked the Claimant not to raise his voice because he was raising his voice beyond the level appropriate for the grievance meeting. We find that she would have said the same to any other person regardless of their background. She did not fall into any trap of assuming that the Claimant was being aggressive. We find that her reasons did not/were not in no sense whatsoever relate to race and/or because of race. It follows that we must dismiss the claims for harassment and for direct discrimination.

The Claimant's grievances in May 2020 against the then Clinical Lead Rebekah Allen alleging racism, bullying and harassment were not properly investigated and the outcome was to take no further action (paragraph 1(f))

191. In our findings of fact set out above we have held that the investigation of the Claimant's grievances by Torie Pollard in May 2020 was perfunctory. After talking with Rebekah Allen the Claimant's complaints were dismissed. Torie Pollard accepted the ostensible reasons for any treatment apparently without question. We are satisfied that this amounted to unwanted conduct for the purposes of a claim of harassment and a detriment for the purposes of any direct discrimination claim.

192. Dealing with the harassment claim first we have considered whether this failure was with the purpose of violating the Claimant's dignity or creating the proscribed environment. We conclude that it was not. We have had regard to our other findings in reaching that

conclusion. Whilst we have found that later in time Torie Pollard did discriminate against the Claimant we do not make a finding of conscious discrimination. In our view this makes it less likely that Torie Pollard acted with the necessary 'purpose'. We find that, however flawed, Torie Pollard genuinely thought that she had taken the Claimant's grievances as far as she could in the circumstances. We expand on this below.

193. We must then consider whether the unwanted conduct had the effect of violating the Claimant's dignity or creating the proscribed environment. Whilst we have no doubt that the Claimant recognised at the time that his grievances had been dealt with in a somewhat superficial way he would have been aware that by the time he received an outcome Rebekah Allen had left the organisation. There is no evidence that the Claimant felt sufficiently strongly about the outcome that he pursued any appeal. We find that the Claimant's response to the outcome of his grievances did not go beyond being annoyed.

194. Whilst the context is very different we have regard to the warning in ***Richmond Pharmacology v Dhaliwal*** to guard against hypersensitivity. Internal grievances are not always conducted well. Torie Pollard faced a particular difficulty in that Rebekah Allen was resigning. Whilst she could have done better she did speak to the two protagonists before reaching her conclusions. We must assess whether it was reasonable for the Claimant to regard the unwanted conduct as violating his dignity or creating the proscribed environment. We have concluded that, in these circumstances, viewed objectively the failures did not reach the level of gravity sufficient to violate the Claimant's dignity or to create the proscribed environment.

195. On that basis the claim of harassment fails and falls to be dismissed.

196. We then turn to address the same allegation as a claim of direct discrimination. We have said above that we are satisfied that the failures that we have identified would qualify as a detriment. The threshold for establishing a detriment is in our view lower than that needed to establish harassment.

197. We do not need to deal in any great depth with the question of whether the Claimant has made out a prima facie case. We are satisfied that he has. We have found that Torie Pollard directly discriminated against the Claimant when she dismissed him. That together with her superficial approach to the grievance would of themselves be sufficient to establish facts from which we could infer discrimination.

198. We turn to the question of whether the Respondent has proved that the treatment was in no sense whatsoever because of race. Had we not dismissed the harassment claim the same considerations would apply to the question of whether the unwanted conduct related to race.

199. The explanation given by the Respondent, through Torie Pollard, was that she investigated the grievances as best as she could in the circumstances and came to her reasoned conclusions. We have described the reasoning as perfunctory and criticised the decision not to have a formal meeting with Rebekah Allen. We would accept that Torie Pollard was faced with little more than an assertion that some of Rebekah Allen's conduct was discriminatory and, had the matter been properly explored the outcome may well have been the same. We would also accept that with Rebekah Allen leaving there was no real possibility of any disciplinary action against her.

200. It is useful to have regard to the way a hypothetical comparator would have been treated. The relevant material circumstances of such a comparator would include the fact that they had made a complaint about their manager. The manager would have been on the point of leaving. The nature of the complaint would be serious and include an allegation of improper motives for managerial actions. There would be e-mails making allegations and counter allegations.

201. We find that despite her experience of nursing Torie Pollard had little experience or expertise in conducting investigations of this nature. This was at a very early stage of her dealings with the Claimant. We find that her view of his character was formative at this stage. Having had regard to all of the evidence we are satisfied that Torie Pollard investigated the grievance doing her flawed best in slightly difficult circumstances. We find that she genuinely believed that there was insufficient evidence of any discrimination or any other matter of complaint. We find that any comparator would have been treated in the same way. We are satisfied that at that stage the Claimant's race was in no sense whatsoever a reason for the treatment complained of.

202. It follows that the direct discrimination claim fails. Had we not dismissed the harassment claim for other reasons that too would have failed as the unwanted conduct did not relate to race. The fact that the grievance was about race discrimination does not alter that conclusion. That was only the background against which the unwanted conduct occurred.

That the Claimant's third (and possibly fourth) grievance involving 'organisational racism' and a complaint about Miss Manning's conduct was dealt with by biased managers who were not impartial and there was no outcome which supported his grievances.(paragraph 1(g))

203. We have understood the Claimant's third grievance to be the grievance he brought on 3 September 2020. In that grievance he complained about his previous suspension by Rebekah Allen, he said that he had been singled out because of his race following the incident on 18 August 2020, he 'had to resign' and, he had been suspended without pay. That grievance was heard initially by Pauline Manning. Within the Grievance the Claimant complained that Charlie Lebatt had failed to inform him that his interview on 19 August 2020 was an investigation. As we found above Pauline Manning declined to deal with the grievance arising from the incident of 18 August 2020 as these were the subject of disciplinary proceedings. She did not uphold the grievance relating to the suspension by Rebekah Allen stating that as the allegations concerned the administration of medicines suspension was in accordance with the Respondent's policies. She did not deal with the complaint about suspension without pay.

204. The Claimant appealed that decision and added to his grievances. Many of his grievances concerned the disciplinary action that was taken against him. In addition he complained that Pauline Manning had told him to stop shouting and alleged that that was discriminatory. As we have said above the Claimant suggested that much of his treatment following the incident on 18 August 2020 had been discriminatory. The appeal was heard by Mark McDonald.

205. We have no doubt that the Claimant was disappointed at the outcome of his grievances.

206. Because of the way the Claimant has put his case we need to consider whether the Claimant's treatment by either Pauline Manning or Mark McDonald amounted to harassment.

207. We have already dealt with the separate allegation against Pauline Manning relating to the Claimant raising his voice. We have found that that treatment was not discriminatory or harassment. We are therefore concerned only with the conclusions that were reached by these two individuals.

208. In the interests of brevity we shall move straight to the question of whether the conclusions that Pauline Manning and Mark McDonald reached related to (for the purposes of the harassment claim) or were because of (for the direct discrimination claim) race.

209. The Claimant bears the initial burden of showing that there are facts from which we could infer unlawful conduct. We find that neither Pauline Manning nor Mark McDonald had any working relationship with the Claimant. We find that they had no part in the decisions that led to the Claimant being suspended and later dismissed. We consider that we could not rely on our findings that some of those actions by others were discriminatory in order to support an inference that these two individuals had acted unlawfully.

210. We do not regard the decision by Pauline Manning to exclude from her consideration any grievance that could properly be dealt with within the disciplinary process as in any way calling for an explanation. We find that Pauline Manning quite understandably took the stance that the grievance process should not be used to circumvent the disciplinary process.

211. Pauline Manning did deal with the Claimant's allegations about Rebekah Allen. She did so very briefly. She has accepted that a suspension was inevitable when there was an issue about medication. She noted that it had been swiftly lifted. Other than the Claimant's assertions Pauline Manning had very little evidence about the circumstances that existed at the time. Rebekah Allen had left the organisation by that time.

212. Pauline Manning failed to deal with the Claimant's suggestion that he had been unfairly suspended without pay. However whilst he mentioned that in his grievance letter he did not raise it during his meeting with Pauline Manning.

213. The minutes of the meeting with Mark McDonald disclose that Mark MacDonald asked the Claimant a number of questions. We find that those were intended to elicit information from the Claimant and in particular why the Claimant felt he had been the victim of discrimination. We have said that the Claimant did not explain himself well during that meeting.

214. We have come to different conclusions to Mark McDonald about the existence of discrimination. We have done so with the benefit of our knowledge of the law and our experience of hearing such cases. We do not find the contrary conclusions of Pauline Manning or Mark McDonald to call for any particular explanation. The case put by the Claimant before us was more focused.

215. We the only matters that might point towards an inference of discrimination are:

215.1. That the Claimant is a black African whose grievances were not upheld; and

215.2. That Pauline Manning overlooked one point raised by the Claimant.

216. We do not find that these matters together or against the background of the evidence as a whole are sufficient that we could draw an inference of harassment/discrimination in the absence of an explanation from the Respondent.

217. Applying the law relating to the burden of proof we find that there is no basis for a finding that the treatment complained of related to race or that it was because of race. In those circumstances the claims of harassment and direct discrimination must fail.

218. Had we needed to go on to consider the Respondent's explanations for the treatment we would have come to the same conclusion. We find that both Pauline Manning and Mark McDonald approached the Claimant's grievances without bias racial or otherwise. The grievances were not always well presented or explained. Pauline Manning was asked to look into matters that had already been explored and after Rebekah Allen had left. We find that the reason why these two individuals did not uphold the Claimant's grievance was that they did not believe there was a factual basis to do so on the evidence presented. We do not say either did a thorough job. The process was rough and ready. However we are satisfied that none of the decisions had anything to do with race.

That the Respondent persisted in pursuing disciplinary allegations against him and he was dismissed (paragraph 1(h))

That the Health Care Assistant with whom he was working on 18 August 2020 was not disciplined or dismissed. She is not Black African. She still works the Respondent (paragraph 1(i))

219. We shall take these two allegations together as they are essentially the same. The complaint here is dismissal and the same facts may be relied upon to support a claim of harassment or direct discrimination. The claim for harassment adds little or nothing to the claim of direct discrimination brought on the same facts. The key question is whether race played any part in the decision to dismiss the Claimant and we deal with that below. We shall deal with the direct discrimination claim first before returning to the harassment claim.

220. The Claimant bears the burden of establishing facts from which we could properly infer discrimination. We are entitled to look at all of the facts at this stage other than any explanation from the Respondent. We have had regard to all of the evidence but consider the following matters the most important:

220.1. We find that there was a marked difference in treatment between the Claimant and Fanica Dragustin. We have accepted that there were differences in their circumstances that mean that we should not regard her as a direct comparator. However, we find that we can, and should, regard her as an evidential comparator. On her own early account Fanica Dragustin had accepted that she had turned the resident alone having waited for the Claimant. It was that decision which directly led to the injury. Had the

Respondent's own policy been followed the person primarily responsible for completing the incident and body map was Fanica Dragustin. The Claimant was dismissed for his part in the incident. No disciplinary action was taken against Fanica Dragustin.

- 220.2. Whilst the Claimant's account was tested and questioned both in the investigation and in his disciplinary interview. In contrast it does not appear that Fanica Dragustin was asked any searching questions either in the investigation or at all.
 - 220.3. Torrie Pollard failed to draw attention to the fact that she had not received any amendments from the Claimant's to the record of the disciplinary meeting when it was or ought to have been obvious to her that the Claimant was seeking to suggest amendments.
 - 220.4. We have regard to the evidence from Torie Pollard contained in her witness statement which in summary showed that she was uncomfortable working with the Claimant and having regard to his voice and stature regarded him as aggressive. Such views are, without explanation, potentially stereotypical. We find that, in her evidence Torie Pollard's suggestion that, whilst these matters were included in her witness statement for background purposes only they had no bearing on the decision to dismiss, called for an explanation as to why these matters had been included at all.
 - 220.5. The conclusions in the dismissal letter that '*The incident form completed by you was not factually correct and stated an injury of 'bruise'. An injury of 'skin tear' had further been identified and documented by you within the daily notes from the same incident.*' Is just wrong. The incident form did include a description of a skin tear.
 - 220.6. Torie Pollard said '*You did not however undertake or document the clinical assessment of the wound (size and depth of the wound, location and presentation, dressing requirement) and did not photograph the wound. Furthermore you have confirmed that you asked the carer to complete the body map.*' Under the Respondent's policy Fanica Dragustin was primarily responsible for completing the incident form (assisted by the Claimant). The nature and location of the wound are clear from the description that the Claimant included on the incident form. He explained what treatment had been given. We accept he did not measure or photograph the wound. We regard the criticisms of the description of the wound and treatment included on the incident form to be harsh.
221. We have regard to the following facts, which to some extent rebut any inference of discrimination:
- 221.1. We accept that incidents in care homes are taken seriously for very good reasons. We accept that the sector is highly regulated and that dismissal for making mistakes is not unusual.
 - 221.2. We find that the Claimant did not include a complete explanation of why the incident occurred on the incident report itself. He could have been expected

to say that Fanica Dragustin turned the resident alone (in breach of her care plan) because she had not waited for the Claimant. We accept that details of the injury ought also have been entered on the skin integrity care plan.

221.3. We accept that in terms of taking steps to avoid any future incidents the Claimant accepted that he did not document any conversation he had with Fanica Dragustin. He stated on the incident form that the only steps taken was the completion of the form itself. Whilst he did draw the incident to the attention of Charlie Lebatt we accept that he ought to have specifically raised the decision of Fanica Dragustin not to await his assistance.

222. We are satisfied that taking all of these matters together the Claimant has established facts from which we could infer that his dismissal was discriminatory.

223. We have not needed to and did not rely upon our findings that Torie Pollard has not been straightforward about the body map.

224. The Claimant is a black African and was dismissed. That of itself is insufficient to shift the burden of proof. Only three of the allegations against the Claimant were upheld. In summary, he was found to be culpable for not assisting Fanica Dragustin sooner. He was found to have failed to properly document the incident and he was found not to have taken sufficient steps to document his conversation with Fanica Dragustin. He was dismissed whereas Fanica Dragustin, who is white, turned the resident alone when she knew she should not do that and was not subjected to any penalty at all. The evidence of Torie Pollard showed that she regarded the Claimant as aggressive. This calls out for an explanation. We find that the matters we have identified above taken together are sufficient that we could in the absence of an explanation from the Respondent infer discrimination.

225. Turn to the Respondent's explanation. We remind ourselves that it is for the Respondent to show that the dismissal was in no sense whatsoever because of race. We remind ourselves that a person may well not realise that their actions are influenced by race.

226. Torie Pollard gave evidence about the reasons for her decision. She said that she had dismissed the Claimant for the reasons set out in her letter. She told us that she distinguished between the Claimant and Fanica Dragustin because Fanica Dragustin was open about making a mistake and showed remorse. She referred to the fact that the Claimant had a greater position of responsibility as a nurse. To a degree we would accept that there were differences between the errors made by the Claimant and those made by Fanica Dragustin. That said, the error made by Fanica Dragustin was clearly a serious error.

227. Torie Pollard did not uphold all of the allegations against the Claimant. That might point to an open (non discriminatory mind). However the letter does acknowledge that there was no evidential basis for those decisions.

228. Torie Pollard robustly criticised the Claimant for the quality of the incident report. We have identified some failures by the Claimant but also pointed out areas where the criticism was not justified. We find that Torie Pollard has in some respects been overly critical of the Claimant.

229. We accept that the Respondent has established that Torie Pollard genuinely believed that there were elements of the Claimant's conduct which would justify investigating the Claimant and taking disciplinary action. The question is whether in taking the decision to

dismiss the Claimant the Respondent has discharged the burden of proof in showing that the decision was in no sense whatsoever because of race.

230. We find that the Respondent has not discharged that burden. The existence of an ostensibly neutral reason for taking some disciplinary action is not in our view sufficient to explain the disparity in treatment between the Claimant and Fanica Dragustin (taken together with the other matters we have set out above). Put differently we are unpersuaded that the apparently lawful explanation put forward by Torrie Pollard included the entirety of her reasons for dismissing the Claimant. We would accept that Torie Pollard does not herself recognise the existence of any unconscious bias. Nevertheless we find that it exists.

231. It follows that we find that the decision to dismiss the Claimant was because of race.

232. We shall deal briefly with the same facts but put as a claim for harassment. The Claimant was dismissed. That was clearly unwanted conduct. We have found that that unwanted conduct was in part because of the Claimant's race. Being summarily dismissed would have been a blow to the Claimant's self-esteem. Added to the is was his feeling, which we find to have been correct, that race had played a part in his dismissal.

233. We do not find that Torie Pollard acted with the purpose of violating the Claimant's dignity or creating the proscribed environment. However we do find that the Claimant was humiliated by his dismissal. We find that he could reasonably have regarded his dismissal as creating a humiliating work environment. Our findings in respect of direct race discrimination lead us to the conclusion that the unwanted conduct did, in part at least, relate to race.

234. It follows that we uphold both the claim of direct discrimination and harassment in respect of the dismissal.

Victimisation

235. The victimisation claims identified in the list of issues prepared by either party were very unclear. What emerged was that the Claimant suggested that his first and second grievances were protected acts and that the decision to discipline him and dismiss him was because of those protected acts.

236. We have quoted above from Torie Pollard's outcome letter where she says '*you felt these may be racially or gender orientated*'. We find that in the course of his grievances the Claimant did expressly allege that there had been an infringement of the Equality Act 2010. His grievances in our view qualify as protected acts.

237. We heard no evidence that Charlie Lebutt was aware that the Claimant had done any protected act or acts. He had no part in the grievance process. As such we find that he could not have acted 'because of' any protected act.

238. Torie Pollard was aware of the Claimant's grievances as she had investigated these. She had not upheld the Claimant's grievances.

239. We shall assume that the burden passed to Torie Pollard to show that the decision to suspend and then dismiss the Claimant were in no sense because of the protected acts.

240. We are satisfied that, at the time of the incident on 18 August 2020, Torie Pollard was entirely unconcerned by the fact that the Claimant had raised a grievance against Rebekah Allen. We find that she regarded the incident as closed and had moved on.

241. We have regard to the entirety of the evidence. We find that Torie Pollard was not in any sense influenced by the protected acts. We accept that she regarded them as historic.

Wrongful dismissal

242. The Respondent accepts that the Claimant was summarily dismissed. The statement of the terms and conditions of the Claimant's contract of employment adopt the statutory minimum period of notice to be given by the employer. The contract adopts the common law position that the contract could be terminated without notice where there is gross-misconduct.

243. In **Neary & Neary v Dean of Westminster Cathedral** [1999] IRLR 288 Lord Jauncy said at paragraph 22:

'What degree of misconduct justifies summary dismissal? I have already referred to the statement by Lord James of Hereford in Clouston & Co Ltd v Corry [1906] AC 122. That case was applied in Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698, where Lord Evershed MR, at p.700 said: 'It follows that the question must be - if summary dismissal is claimed to be justified - whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service'. In Sinclair v Neighbour [1967] 2 QB 279, Sellers LJ, at p.287F, said: 'The whole question is whether that conduct was of such a type that it was inconsistent, in a grave way - incompatible - with the employment in which he had been engaged as a manager'. Sachs LJ referred to the 'well established law that a servant can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master but is also inconsistent with the continuance of confidence between them'. In Lewis v Motorworld Garages Ltd [1985] IRLR 465, Glidewell LJ, at 469, 38, stated the question as whether the conduct of the employer 'constituted a breach of the implied obligation of trust and confidence of sufficient gravity to justify the employee in leaving his employment ... and claiming that he had been dismissed'. This test could equally be applied to a breach by an employee. There are no doubt many other cases which could be cited on the matter, but the above four cases demonstrate that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should not longer be required to retain the servant in his employment.'

244. Gross negligence can be sufficient to amount to gross misconduct justifying a summary dismissal - **Adesokan v Sainsbury's Supermarkets Ltd** [2017] EWCA Civ 22

245. The conduct amounting to gross misconduct can be a single act or several acts over a period of time - **Mbubaeqbu v Homerton University Hospital NHS Foundation Trust (UKEAT/0218/17/JOJ, UKEAT/0306/17/JOJ)**, unreported.

246. Unlike the claims we have dealt with above in this claim it falls to the Tribunal to make primary findings of fact for itself. The incident on 18 August 2020 was witnessed only by the Claimant and Fanica Dragustin. The Respondent had served a statement by Fanica Dragustin and had stated an intention to call her. It did not do so nor was there any application for a postponement so we could hear her evidence. Whilst reference was made to her general health we had inadequate evidence that this would have prevented her giving evidence by some means.

247. We accept the Claimant's account that:

- 247.1. He had assisted Fanica Dragustin giving personal care to three residents on 17/18 August 2020; and
- 247.2. That that it was the Claimant's practice to give personal care regardless of his view as to whether he should be expected to do so; and
- 247.3. That Fanica Dragustin asked him to assist with resident A; and
- 247.4. That he did not refuse to do so but said that he would help once he had completed what he was doing; and
- 247.5. Whilst we make no finding as to what the Claimant was doing at the time we accept his account that his work meant that he had a variety of things to do including medication; and
- 247.6. That the Claimant completed what he was doing and then attended the room resident A occupied; and
- 247.7. We find that that was a matter of minutes after the Claimant was asked to help; and
- 247.8. He arrived just after the injury occurred; and
- 247.9. He gave appropriate medical attention by cleaning the wound; and
- 247.10. He asked Fanica Dragustin to complete an incident report but she did not do but did complete a body map; and
- 247.11. We accept that the Claimant raised with Fanica Dragustin that her actions were not appropriate; and
- 247.12. The Claimant completed the incident report and made an entry into the diary; and
- 247.13. We find that the description of the injury and its location in the incident report was accurate but that the size of the injury was not noted; and
- 247.14. We find that the Claimant did not include in the incident report that Fanica Dragustin had turned the patient alone in breach of the care plan; and

- 247.15. We find on his own account the Claimant did not make any entry in the skin integrity plan or other clinical record; and
- 247.16. We find that when Fanica Dragustin refused to do so the Claimant called resident A's daughter and acknowledged that resident A had been turned by Fanica Dragustin alone; and
- 247.17. That the Claimant had to deal with the aftermath of the incident, complete the report and deal with his other duties before handing over to Charlie Lebatt at 8:00am; and
- 247.18. We find that the Claimant informed Charlie Lebatt about the incident; and
- 247.19. We find that the Claimant gave an honest account of what had occurred.
248. Our secondary conclusions drawn from those facts are that we do not find that the Claimant did anything blameworthy by suggesting that he finished one task before assisting Fanica Dragustin. It was not suggested in evidence that changing a dressing was an emergency to which the only reasonable response would have been immediate action.
249. We accept that the Claimant ought to have included on the incident report an express reference to the fact that Fanica Dragustin had turned resident A alone. We find he did not conceal this as he said this to Resident A's daughter but he ought to have fully documented this.
250. We would accept that the Claimant should have documented any discussion that he had with Fanica Dragustin.
251. We find that the description of the wound and the care that was given was adequate but it would have been better had the wound been photographed and measured. We find that the Claimant was entitled to ask Fanica Dragustin to fill in the incident report and body map. We have not seen the body map that she did complete (if we are wrong about that it is extraordinary that she was not reprimanded for the absence of any detail).
252. We stand back from those findings and ask whether the errors that we have identified individually or cumulatively meet the threshold of gross misconduct. We find that they do not. There were errors but they were not sufficient to justify a summary dismissal
253. Accordingly we find that the Claimant was dismissed in breach of contract.

An apology

254. The Tribunal concluded its deliberations and reduced its reasons to note form on the last day of the hearing shown above. It has taken me, the Employment judge, many months to find the time to complete the task of writing up these reasons. Whilst I have tried to inform the parties of progress I have indicated a few false dawns. I can only point to the pressure

of work in the tribunals as the reason for this. I had one extremely long and difficult decision to write up and have heard numerous cases since. I do understand how anxious the parties must have been. I am very sorry that they have had to wait.

**Employment Judge Crosfill
Dated: 31 January 2023**