EMPLOYMENT TRIBUNALS

Claimant: Miss K Mabhena

Respondent: Rodor Housing and Support Ltd

Heard at: **Birmingham** **On:** 2, 3, 4, 5 & 6 December 2019 and 3 January 2020 (panel only)

Before: Employment Judge Miller
Mr N Howard
Mrs I Fox

Representation
Claimant: Mr E Komeng – lay representative
Respondent: Ms P Hall - consultant

JUDGMENT

The Judgment of the tribunal is as follows:

1. The claimant's claim that she was subject to detriments on the ground that she made protected disclosures succeeds
2. The claimant's claim that she was automatically unfairly dismissed because she made protected disclosures succeeds
3. The claimant's claim that she was subject to direct discrimination on the grounds of her sex succeeds
4. The claimant's claim that she was subject to harassment related to her sex succeeds
5. The claimant's claim that she was denied rest periods between shifts succeeds
6. That claimant's claims that she was denied breaks during her working day succeeds
7. The claimant's claim of victimisation is dismissed

REASONS

Introduction

1. This is a claim by Karen Mabhena against her former employers Rodor Housing and Support Ltd. The respondent has between 10 and 14 properties in the Birmingham and the surrounding area. The respondent provides accommodation and support to young people aged between

16 and 21 including children who are looked after by local authorities and placed with the respondent.

2. The claimant was employed as a support worker by the respondent from 12 March 2018. She was engaged on a zero hours contract but there was no issues before the tribunal as to the claimant's employment status. The claimant worked at a number of sites which included Church Road, Chester Road, Cramlington and Westbury. The owner and managing director of the respondent is Marven Gabula who attended and gave evidence.

3. The claimant's claims are those set out in the list of issues at pages 32 to 36 of the bundle. They are in summary that the claimant was subject to detriments on the grounds that she had made protected disclosures; that the claimant was constructively automatically unfairly dismissed because she had made protected disclosures; that the claimant had been discriminated against on the grounds of sex under section 13 of the Equality Act 2010; that the claimant had been subject to harassment related to sex under section 26 of the Equality Act; that the claimant had been subject to victimisation under section 27 Equality Act; that the claimant had not received all the payments for annual leave to which she was entitled on the termination of employment; that the respondent had made unauthorised deductions from her wages and finally that the claimant had been denied rest breaks and between her shifts contrary to regulations 10 and 12 the Working Time Regulations 1998.

4. At the beginning of the hearing, the tribunal sought to clarify the matters in issue and the claimant confirmed that she was no longer pursuing claims of victimisation. Employment Judge Findlay had made an unless order in relation to this claim which the claimant conceded was not complied with because she did not intend to pursue this claim. That claim is therefore dismissed.

5. In respect of the claims relating to holiday pay and unauthorised deductions from wages the parties were able to agree an amount which is £933.20 which the parties agreed included the amounts of unpaid holiday pay and deductions from wages in respect of shifts that the claimant worked but did not get paid for and deductions for training that the claimant attended. The claimant accepted that she was liable to repay the training costs having left the respondent's employ within the first year but considered that the respondent had sought double recovery thereof. The £933.20 referred to above includes all of these payments and judgement will be issued accordingly to that effect.

Issues

6. The list of issues agreed at the Case Management hearing on 5 February 2019 are appended to this judgement.

The hearing

7. The claimant was represented by Mr Komeng, the respondent was represented by Ms Hall, we had witness statements and heard evidence from the claimant, Mr Cholwe, a team leader; Ms Sibanda, a unit manager; Ms Roberts Cameron a unit manager and Ms Sibanda's line manager; and Mr Gabula the owner and managing director . There was also a witness statement from Sean Hove, a team leader, but he

did not attend to give evidence. There was an agreed bundle of 235 numbered pages and additional documents were produced during the hearing which were admitted by agreement. No additional adjustments or breaks were required for the hearing.

Findings of fact

8. We heard and read a great deal of evidence. We have only made such findings of fact as are necessary to determine the issues and where matters are disputed we have come to a conclusion on the balance of probabilities.

Training and induction

9. The claimant started working for the respondent in March 2018. Both the claimant and the respondent produced a list of the shifts that they said the claimant had worked. We were not taken through a comparison of those lists. It appears from the respondent's list that the first time the claimant attended to work for them was 12 March 2018 and this accords with the claimant's witness statement. That day's work is recorded as WS INDU which was a two-hour induction period at Westbury House. There was then a further two-hour induction shift on 15 March 2018 which is recorded as CR INDU and which we concluded was at Cramlington. Ms Roberts Cameron said, however, in evidence that in fact this second 'shadow shift' was at Church Road. It was not disputed that these were induction shifts. Neither of these shifts are included on the claimant's list of shifts.

10. The claimant described the induction shadow shifts as being shown around the unit, during another worker's shift, and it appeared from the respondent's witnesses that it included a specific introduction to the young people and their needs. We were not shown anything that suggested the induction shifts included any substantive training on issues relating to safeguarding, de-escalation or dealing with particular issues. Ms Sibanda described the induction shadow shifts as the claimant being shown around unit, reading the care and pathway plan, being told the missing protocol, how to report missing young people and the claimant being shown how to log information in the logbook.

11. We find that the shadow induction shifts were effectively what the name suggests – a two hour introduction to the specific unit in which the claimant was working, the young people, their needs and an introduction to some of the more relevant protocols. Ms Sibanda confirmed that a lot more is covered in the induction training in June than was on the shadow shifts.

12. The first substantive shift was on 17 March 2018 and was a 15-hour shift from 8 AM until 11 PM at Westbury House. Thereafter the claimant worked on a reasonably regular basis. Subsequent shifts were all substantial shifts of between seven and 15 hours in length. There are no more records of induction shifts.

13. The respondent referred to the claimant having an induction at the start of her employment and they talked specifically about the shadow shifts. Ms Roberts Cameron also said that she was on hand to supervise the claimant at Church Road. She said that she would brief the claimant for about half an hour every day that she was there, and this would entail

discussions about handing over from the previous shift. We note that when Ms Roberts Cameron initially mentioned debriefs, she referred to them as happening every week.

14. Ms Cameron said that when she worked at Church Road, she was there Monday, Tuesday, Thursday, and Friday. Initially she said that she would be on the site from 8am until about 5pm but subsequently she said she would leave around 4pm or possibly earlier as she was responsible for managing a number of sites and had to also visit them. She also visited the Respondent's Head Office.

15. We accept that the claimant did have regular conversations with Ms Roberts Cameron when she was working at Church Road in the form of debriefs.

16. We find that in terms of initial induction training, this comprised of two two-hour shadow shifts on 12 and 15 March 2018. We do not find that any additional training was provided in the debriefs. It was very clear from Ms Roberts Cameron's evidence that her focus was on the behaviour and well-being of the young people rather than on the claimant's development.

17. We also heard about an induction booklet, although none was provided to us to look at. Ms Roberts Cameron said that the claimant had been required to complete an induction booklet. She said that the claimant was supposed to bring it in every two weeks for managers to check but that she had not done so. This was not disputed by the claimant in cross examination of the respondent's witnesses. Rather, it was put that the respondent had a responsibility for ensuring that the claimant completed her induction booklet.

18. We find that the claimant did not complete her induction book. We note, however, that the claimant had a number of different managers depending on which unit she worked at. Ms Roberts Cameron confirmed that there was no procedure in place between any of the claimant's managers for checking whether the induction booklet had been completed and in fact it appears that none of the claimant's managers had asked her about the induction booklet.

Probationary period

19. The claimant was employed initially subject to a probation period. Mr Gabula and Ms Roberts Cameron were both unclear as to how long the probationary period was, saying between 3 and 6 months. The claimant's written Summary of Employment Terms (the Summary) is, however, clear and says, "The first three months of your employment are probationary". Paragraph 2 of the Summary says "Your initial employment with the Company is subject to the probationary period (if any) stated at paragraph 6 of the Summary. During that period the Company will assess and review your work performance and can terminate your employment on short notice as stated at paragraph 6 of the summary".

20. It is clear, therefore, that the claimant's employment was subject to a probationary period of three months. Although there was some dispute as to the start date of the claimant's employment, the latest that could

have been was 12 March 2018 when the claimant first attended for work.

21. The first formal meeting that the claimant had with any of her managers was what the parties referred to as a supervision on 13 July 2018. We will deal with that below, but it is clear that there were no formal meetings regarding the claimant's progress throughout her probationary period. Ms Roberts Cameron said that she met regularly with the claimant for handovers, but we heard nothing about those meetings that could reasonably be said to amount to a review of claimant's probationary period.

22. There was no evidence or anything to suggest that the claimant's probationary period had been extended. Ms Roberts Cameron said that the induction book and probationary period would be reviewed at a supervision meeting. It is apparent that this was not done at the meeting on 13 July 2018 (see below). We find that by 13 June 2018 the claimant had completed her probationary period, that being three months after the start date of her employment. There was no evidence of any formal meetings about her probationary period, no suggestion of any criticism at the time for failing to complete her induction booklet and no suggestion that the probationary period had been or could be extended. It is clear that the respondent expected the claimant to continue working for it had she not resigned.

Claimant unwell at Cramlington on 6 June

23. The claimant said in her witness statement that not long after returning from holiday in Africa she felt ill while lone working at Cramlington. She said that she asked to be relieved, but Ms Sibanda refused, saying it would be a criminal offence to leave the unit without cover. Mr Gabula said that this incident was on 6 June 2018 and that is consistent with the claimant's evidence that she was still feeling unwell the next day when she attended Team Teach training on 7 June 2018.

24. The claimant's evidence is that she contacted Ms Sibanda. It is clear from the WhatsApp messages in the bundle that the claimant also contacted Ms Roberts Cameron. The claimant said in those messages that she could not do the shift as she was feeling unwell. She had arranged for someone to pick her up and she would tell Mr Gabula. Ms Roberts Cameron's reply was "Unfortunately I'm not at home to cover the shift and you cannot leave young person on site... Feel free to speak to Marven". Mr Gabula also confirmed that he was contacted by Ms Roberts Cameron about the claimant feeling ill.

25. Ms Roberts Cameron explained in cross examination that when a support worker reported sick the duty manager would seek to find cover. When pressed she conceded that in the event that the manager could not find cover, the support worker would have to remain on site and that is what happened to the claimant. She also confirmed that the claimant was then working alone. When Mr Gabula was informed that the claimant was too ill to continue her shift, rather than finding cover or providing cover himself he attended the premises and provided the claimant with some paracetamol.

26. To this extent, we accept the claimant's account. We also find that the respondent was unable or unwilling to provide cover to enable the claimant to leave work when she was sick and, in effect, apply pressure to her so that she felt obliged to remain at work even though she felt unwell.

27. The claimant said in her witness statement and in cross examination that she was prevented from leaving the unit by Ms Sibanda, but this was not put to Ms Sibanda and is inconsistent with all the other evidence referred to above. We therefore find that it was Ms Roberts Cameron and Mr Gabula who prevented the claimant from leaving work when she was unwell.

Team teach training on 7 June

28. The claimant attended Team Teach training on 7 June 2018. This is not disputed, and the claimant accepted that the training covered the matters set out in certificate. This included training on restraint and de-escalation as well as other relevant matters. This was the first substantive training that the claimant received.

29. The claimant accepted in evidence that this training was equivalent to the PMVA training she referred to in her claim. She also accepted that PMVA training was specific to the care of vulnerable adults whereas Team Teach related to the care of vulnerable children.

Induction day on 14 June

30. The claimant attended further training on 14 June 2018. This is described on the respondent's attendance list as "induction day". However, this training was described by Ms Roberts Cameron as being needed so that all the staff could come together as a group and understand teamwork, child sexual exploitation, GDPR and other similar related matters. This was training for all of the respondent's employees.

31. The claimant describes this training as inadequate: she said they didn't learn about HIV and AIDS, didn't receive any certificate and it was just introduction on documenting and writing care plans and logging information.

32. If this was induction training, we are surprised that it didn't happen until three months after the claimant had started her employment during which period she had been working alone with vulnerable and demanding young people. However, we accept Ms Roberts Cameron's explanation that she felt that this updated training/provision of information was useful and necessary for all employees.

33. The respondent has failed to provide any supervision records, and its witnesses were at times evasive, and at other times obviously unaware of the respondent's policies and procedures. We find, on balance, that the reason this training was provided only three months after the claimant started work was because of the respondent's general disorganisation (as shown by the inconsistencies between the ET3 and witness statements and missing documents before the tribunal) and/or lack of procedures. We do not consider that the decision was personal to the claimant.

18 June – Altercation with Weapons at Chester Road

34. On 18 June 2018, the claimant was working at Chester Road. The claimant said she was working by herself and that was not challenged. A young person arrived at Chester Road from Holly Lane with the intention of having a fight with the young person then living at Chester Road. The young person was armed with a knife. The claimant's evidence was that there was a social worker there. The claimant called Ms Sibanda initially and then she called police. The claimant says that she called the police on the social worker's advice.

35. The young person who went to Chester Road was at that time being supported by Mr Cholwe who also attended to try to take that young person back to Holly Lane. The young people then went off site to continue fighting elsewhere.

36. The claimant said she told SS about this who said that it is part of the job and thereafter referred to the claimant as a coward. The claimant restated this in cross examination. Ms Sibanda does not address this incident or issue in her witness statement.

37. There were no copies of any incident reports in the bundle and no evidence that this incident was discussed with the claimant afterwards in the context of considering her welfare. We find, on the balance of probabilities, that Ms Sibanda did make comments to the effect stated by the claimant. We prefer the claimant's evidence and the alleged comments are consistent with the evidence of the respondent's attitude to the claimant – the lack of concern for her wellbeing and the absence of supervision, records and training.

DF arrives at Church Road – early July

38. In early July 2018, a young person referred to as DF arrived at Church Road where the claimant was working. It was apparent from the documents in the bundle, and was agreed by Mr Gabula, that DF required one to one support and that the respondent was paid by Lewisham Council to provide 24 hour one to one support until the end of July 2018.

39. However, Mr Gabula said in evidence that one to one support was not provided 24 hours per day. There was a particular occasion, in July, when the claimant was asked to cook for DF, highlighting the fact that there was no other person on site to look after DF. Mr Gabula said that this was because the claimant was the person providing one to one support although the Lewisham report (following a visit on 27 July 2018) identified that someone called Justin was providing 24 hour one to one support. Mr Gabula also confirmed in evidence that the claimant had not, in fact, ever been assigned to provide one to one support to DF. The claimant said in evidence that Justin only attended during the day and Mr Gabula accepted this in cross examination. He also accepted that the level of support provided to DF was "contrary to the wording" of the Lewisham report.

40. Mr Gabula also explained that the reason that DF had been assessed as requiring one to one support was because of the high risk of him absconding, although Mr Gabula also said that having one on one

support would have made no difference – DF would have absconded even with one to one support.

41. We were also shown a document that recorded the young people staying at Church Road and it is clear that throughout DF's stay, there were occasions when there were at least an additional 3 young people at Church Road at the same time as DF during July 2018.

42. We find that DF was not provided with the one to one support he was assessed as requiring and that the claimant was required to support DF during periods when she was also responsible for the care of other young people. Mr Gabula's evidence about this was evasive and unconvincing. He was unable to provide any explanation as to how the respondent was meeting its obligations to DF that it was required to meet by Lewisham Council.

Emergency placements

43. The claimant said that she raised a concern with the respondent that it was accepting placements of vulnerable young people without care plans or risk assessments.

44. Mr Gabula agreed that the respondent did on occasion accept young people into its care without care plans or risk assessments. However, he said that this was because the "Southwark ruling" places a burden on the respondent to take young people with little information. The local authority provides such information as they have at the relevant time.

45. The claimant's case was that the absence of any information about the young people she was being asked to look after presented a risk to her health and safety and that of the young people.

46. Mr Gabula conceded in cross examination that he had not communicated the impact of the Southwark ruling to the claimant, and Ms Sibanda agreed that the claimant had informed her of her concerns about accepting young people without care plans or risk assessments by telephone before 13 July 2018.

47. We find, therefore, that the claimant knew that the respondent accepted placements of young people without care plans or risk assessments and that she had not been told that this was permissible. We have also found that the claimant often worked alone and that some of the young people placed with the respondent who the claimant was required to look after were vulnerable and presented potential risks to themselves and other people. We have referred to the incident when a young person attended Church Road armed and looking for a fight, and we were told, without needing to provide any detail, of other young people who clearly had intentions to harm themselves or to commit suicide.

48. We therefore find that the claimant believed that the placement of young people without care plans or risk assessments presented a risk to her health and safety and the health and safety of other young people in the respondent's care for the reason that it obviously did present such a risk. We also find that this concern was communicated to the respondent in a telephone conversation between the claimant and Ms Sibanda sometime before 13 July 2018. The claimant said in her witness statement that "The respondent would sometimes accept emergency placements without any information on what their care

needs were. The upshot of this was that there was no risk assessment in place to guide staff on how best to support them, often posing inadequate support gaps, and safety issues to both staff and other young persons in the unit". We accept that this is what the claimant told the respondent.

49. While we accept the obvious need to take placements at short notice to enable local authorities to comply with their duties under the Children Act 1989, we have heard no evidence of any procedures the respondent had to minimise the risk to and from such young people. The combination of absence of information and lone working presented a significant risk to the claimant and the young people in the respondent's care.

Supervision meeting – 13 July

50. This was the claimant's first supervision. Initially the respondent seemed to say that this was not the first time the claimant had been supervised. In the respondent's ET3 it says that the meeting on 13 July 2018 was not the claimant's first supervision, but that the claimant had attended previous supervisions and signed the note of such supervisions accordingly. In questioning, however, the respondent did agree that 13 July supervision was the first supervision meeting the claimant had had. It was part of the claimant's complaint that the respondent had forged claimant's signature on previous supervision notes. The claimant said in her claim form that Ms Sibanda told her that she had had a previous supervision with Ms Roberts Cameron and further that Ms Sibanda said the claimant had signed supervision notes. Ms Sibanda confirms in her witness statement that the meeting on 13 July 2018 was her first supervision meeting with the claimant. Ms Roberts Cameron, however, says that to her knowledge, the claimant did not request a copy of her supervision notes and was told she could request a copy from head office. Ms Roberts Cameron said that she could not believe that anyone would have any reason to forge the claimant's signature. She also says that the claimant had missed supervisions previously although was unable to provide any evidence of this.

51. The brevity of evidence about this key issue, and the inconsistency between the respondent's pleaded case and its witness evidence is a consistent feature of this case. It may be that there was poor communication between Ms Sibanda and Ms Roberts Cameron about the claimant's supervision record, or a lack of care taken over the drafting of the pleadings. In any event, however, it is clear that this was the claimant's first supervision and we find, on the balance of probabilities, that there were no notes of previous meetings – forged or otherwise.

52. We find that the conflict between the respondent's position in its ET3 – that there had been previous supervisions – and its evidence before the tribunal that in fact there had not been any previous supervisions with no explanation as to the change in position demonstrates the unreliability of the evidence of Ms Sibanda, Ms Cameron Roberts and Mr Gabula, all of whom had responsibility for an aspect of this issue.

53. In respect of the conversation about the notes, the claimant was unable to provide any clarity or context for the conversation. It is unclear whether the conversation happened at the start of the meeting before the claimant made any disclosures or later on following an alleged disclosure.

54. The reasons for arranging the supervision are unclear. The claimant says she raised the issue of supervision as she had been working for 3 or 4 months without one and Ms Sibanda then arranged it as a result of the claimant raising these concerns. The claimant expected to be able to raise her concerns at supervision and discuss her issues. By this time the claimant's three-month probationary period had finished.

55. Ms Roberts Cameron says that the supervision was arranged because both unit managers (her and Ms Sibanda) had been experiencing similar issues with the claimant, in particular her lateness. Ms Sibanda does not provide any reason for arranging the supervision. Although Ms Roberts Cameron said that the purpose of supervision was, amongst other things, to provide support in reality the supervision meeting appeared to be intended to address concerns the respondent said it had about the claimant. An agenda was set out at the beginning of the meeting. It did include lateness and shift cancellations amongst other things. It also has items called "attitude, support from management, and emergency placement concerns".

56. Two managers attended that meeting, Ms Sibanda and Ms Roberts Cameron. Again, the respondent's witnesses were inconsistent in their stated reasons for having two managers at this meeting. It was said variously that the reason was because the claimant worked for two different line managers at different units, because both managers had experienced similar issues in respect of lateness, and also that Ms Roberts Cameron as Ms Sibanda's line manager was in fact supervising her supervision of the claimant to ensure that she was doing it correctly.

57. The respondent was unable to provide any written procedure for conducting supervisions, and the only other witness to attend in a similar position to Ms Sibanda and Ms Roberts Cameron was Mr Cholwe. Mr Cholwe said that Ms Roberts Cameron, his line manager, did sit in with him when he was supervising his staff but in those circumstances, he said, the purpose of her attending was to take notes.

58. The claimant said that she found the presence of two managers intimidating and that it made her feel like she had done something wrong. We are not surprised, and we accept the claimant's evidence on this. The respondent has not shown a good reason for having two managers at this meeting. We note that although it is not disputed that Miss Roberts Cameron was there, her name is not recorded on the supervision record and neither has she signed it. It was unclear which manager was responsible for which part of the supervision meeting. We find that it was reasonable for the claimant to feel intimidated by the presence of two managers at her first supervision meeting. It appears from the agenda that the main purpose of the meeting was to criticise the claimant, and there is no good reason why both managers should have been present.

59. Nonetheless, the claimant *was* able to raise a number of issues and we find that at that meeting she disclosed the following information.

Issues discussed at first supervision

60. The claimant raised concerns about the respondent taking emergency placements without risk assessments or care plans. The supervision notes at page 114 record that the claimant raised "emergency placement concerns". It was accepted by Ms Sibanda and Mr Gabula that this referred to the practice of accepting young people with little or no information from the referring local authority. Ms Sibanda also accepted that the claimant referred to the incident of 18 June 2018 in this meeting. We accept the claimant's evidence about this meeting set out in her witness statement and find that the claimant disclosed information to the effect that young people were arriving at the respondent's premises with little or no supporting information and this was creating a risk. The claimant says, and we accept, that she referred to the incident of 18 June 2018. This incident was sufficient to provide context for the risk arising, were any needed.

61. The claimant's lateness was also discussed at that meeting. We were taken to records of the claimant's working hours and, despite Mr Komeng's best efforts to minimise this, it is clear that the claimant was late on a number of occasions. It is not necessary to set them out in detail but there were three "types" of lateness discussed. Sometimes the claimant would work consecutive shifts at different establishments in different places. If one shift finished at 8am and the next started at 8am, for example, the claimant would inevitably be late. We accept the respondent's evidence that it did not take issue with the claimant in these circumstances and that it paid for the claimant's travelling time.

62. Secondly, the claimant had informed the respondent that she would struggle to get to work on time on Sundays due to public transport. The respondent says that it did not take issue with that, and we accept that. This is reflected in the notes of the meeting at page 115.

63. Thirdly, the claimant was late on other occasions. We accept the respondent's evidence to the effect that this caused it problems because it meant that the previous shift's worker had to stay on site until the claimant arrived. In fact, the claimant herself had had cause to complain when her replacement had been late on one occasion. We agree that the respondent was entitled to take issue with this. However, it is clear that the respondent had no policy, procedure or consistent approach to dealing with lateness. It is recorded in the notes of the supervision meeting next to the conversation about lateness that "KM to continue to advise staff on shift if running late".

64. The respondent says this was in reference to Sundays only. We do not accept that. Given the respondent said that it called the meeting to discuss lateness and this is the only outcome of that discussion, we find that it must have referred to occasions when the claimant was running late generally. There is no other record of any discussion about the claimant being late in the notes of the next supervision or in any of the WhatsApp messages. We find, therefore, that although the claimant was sometimes late, the respondent had indicated that provided the

claimant notified staff on shift that she was running late, as at 13 July 2018, no further action was necessary.

Subsequent cancellation of shifts/sickness

65. On 15 July 2018 at 11.31am the claimant sent a message to Mr Cholwe explaining that she would not be able to go to work because of her stress levels. Mr Cholwe communicated this to Mr Gabula who then suspended the claimant's shifts. Mr Gabula told the claimant to make herself available between Tuesday and Wednesday.

66. The suspension was recorded in a WhatsApp message of 15 July 2018 at 2.08pm and we find that Mr Gabula did, on 15 July 2018, suspend the claimant's shifts pending her attendance at a supervision meeting with him. There was no dispute that this was for the purposes of a supervision meeting between the claimant and Mr Gabula.

Meeting of 18 July with Mr Gabula

67. It was the claimant's case that she met with Mr Gabula and Les Easie (another of the respondent's managers) on 18 July 2018. Mr Gabula says that that meeting did not happen – he did not meet with the claimant until 8 August 2018. There was no contemporaneous evidence of this meeting – no formal invitations or follow up letters, no notes of the meeting and Mr Easie did not attend to give evidence.

68. Although there is a dispute about the date of the meeting and what was said in the meeting, it was agreed in the broadest terms that the meeting was about the claimant's relationship with Ms Sibanda.

69. The claimant's evidence is that Ms Sibanda had been spreading rumours about the claimant. Particularly, the claimant had been told by Sean Hove (another team leader) that Ms Sibanda was spreading rumours that the claimant had AIDS and she was having a sexual relationship with three male employees of the respondent. The meeting had been called, the claimant said, after she had confronted Ms Sibanda about the rumours. Ms Sibanda agreed that there had been a confrontation but strongly denied that the claimant had mentioned AIDS in any way at all. Mr Gabula said in cross examination, however, that Ms Sibanda had reported the allegations about rumours to him and that those included reference to the claimant being ill on her return from Africa.

70. Mr Gabula says that he arranged the meeting to address concerns that had been raised as to whether the claimant was in a relationship with one of her colleagues. He said the reason for this was to ensure that shift allocation did not create conflicts of interest for the claimant. In cross examination, Mr Gabula said that he wanted to mediate between the staff.

71. Mr Gabula said that the meeting was an informal meeting in accordance with the respondent's procedure following concerns raised. He said that he also spoke to Mr Hove and Brian Nyathi (another support worker/team leader), two of the people implicated in the alleged rumours. There are no notes of any of these meetings and no procedure to refer to. Mr Hove presented a witness statement but did not attend to give evidence to the tribunal and the witness statement contained no detail or even reference to any meeting with Mr Gabula.

There is nothing from Mr Nyathi. This is a key part of the claimant's case, and we therefore infer that the reason the respondent did not call either of these people to give evidence about these meetings was because the evidence they would give would be damaging to the respondent's case. Mr Gabula did not provide any convincing explanation as to why these two people did not attend to give evidence.

72. We do not accept that Mr Gabula spoke to Mr Hove or Mr Nyathi about these allegations in the same way that he spoke to the claimant, if he spoke to them at all. There is no evidence that he called them into a supervision meeting attended by another senior manager and no evidence that their shifts were suspended pending the outcome of such investigations. Mr Gabula did say in cross examination that he suspended Mr Hove's and Mr Nyathi's shifts pending his investigation, but there is no contemporaneous evidence of this. Again, it would have been simple for the respondent to show how Mr Hove and Mr Nyathi had been dealt with by the production of messages or evidence from Mr Hove who had already provided a statement. We infer from the absence of contemporaneous documentary and witness evidence that the reason for the absence of this evidence is that it would support the claimant's case. On balance, therefore, we find that Mr Hove's and Mr Nyathi's shifts were not suspended. Mr Gabula's evidence was inconsistent and cannot be relied on by itself. Consequently, we find that the claimant was treated unfavourably compared to Mr Hove and Mr Nyathi.

73. We also find that Mr Gabula had made up his mind about the outcome of the claimant's complaints about Ms Sibanda before that meeting. He said that he had spoken to Ms Sibanda before he met with the claimant and he accepted her version of events. He did not go and speak to Ms Sibanda again after meeting the claimant and nor did he make any further enquiries.

74. Mr Gabula gave very little consideration to the claimant's concerns that she was subject to the spreading of malicious rumours by Ms Sibanda and did not adequately investigate the allegations against Ms Sibanda.

75. Mr Gabula denies in his witness statement that the tone of the meeting was designed to or could have caused claimant to feel that she had no morals, but he does not say what did happen at the meeting.

76. The claimant's case is that at this meeting she was accused of having sexual relationships with male colleagues and that Mr Gabula said it was against his Christian morals and that the claimant should not be talking to her male colleagues, some of whom were married. The claimant also said that Mr Gabula instructed her to apologise to Ms Sibanda.

77. In respect of the content of the meeting, we prefer the claimant's evidence. Mr Gabula provided no clear evidence of what he says happened at that meeting. It would have been a simple matter for Mr Easie to attend and give corroborative evidence to either the claimant or Mr Gabula. When asked why Mr Easie was not in attendance none of the respondent's witnesses could provide any explanation.

78. Similarly, there is no evidence from Mr Hove or Mr Nyathi who could also provide a degree of corroboration. Mr Hove did provide a witness statement which the tribunal has seen comprising of four very short paragraphs. It does not deal with any of these matters and again the respondent was able to provide no explanation as to why Mr Hove did not attend to give evidence. We infer that the reason for the absence of any notes of the meeting and the lack of attendance of Mr Easie and Mr Hove is that they would corroborate the claimant's version of events. Conversely, the claimant's evidence is detailed and consistent.

79. For similar reasons, we find that this meeting did take place on or around 18 July 2018. Again, it would have been simple for Mr Easie to attend and corroborate Mr Gabula's evidence. We have had regard to the email exchange between Mr Gabula and the claimant dated 1 August 2018 in which Mr Gabula says in respect of the meeting of 8 August 2018 (see below) "I have called for another supervision following the conversation I had with you on Friday" (our emphasis). This wording tends to support the claimant's case, insofar as it suggests that by 1 August 2018 the claimant had already had a supervision with Mr Gabula.

80. We considered some doctors notes that were provided to us during the hearing. These record consultation between the claimant and her GP on 16 July 2018. She says, amongst other things, "Saying derogatory comments to other staff" (referring to her manager) and "Having a workplace meeting among managers tomorrow". These comments are consistent with the claimant having a meeting with more than one manager about the allegations relating to Ms Sibanda.

81. We have also had regard to the notes of a supervision meeting between the claimant and Ms Sibanda held on 1 August 2018. In the meeting it was recorded that "KM called SS and clarified the misunderstanding that was directed to SS. KM apologised for not taking time to understand the situation and the anger towards SS". Mr Gabula said that the purpose of his meeting with the claimant was to "mediate" between the claimant and Ms Sibanda. That the claimant then apologised in the meeting of 1 August 2018 to Ms Sibanda is consistent with the meeting being on 18 July 2018.

82. In respect of the allegation that Ms Sibanda suggested that the claimant was having relationships with male colleagues, we have heard no direct evidence that Ms Sibanda made any such statements. The claimant's evidence was that she had been told that Ms Sibanda had spread these rumours, but did not say that she herself had heard them. None of the people who told the claimant this gave evidence and Ms Sibanda denies it. In the absence of any direct evidence at all, even from the claimant, we are unable to find that Ms Sibanda made any such comments.

Conversation of 27 July 2018

83. Mr Gabula agreed that the claimant had a conversation with him while she was working at Church Road on 27 July 2018 about staffing levels and that he thereafter wanted to arrange another supervision with her. The claimant said that in response to her concerns, Mr Gabula told her to just get on with it. This is consistent with the contemporaneous text

messages. At that time the claimant was supporting a number of young people including DF who should have had one to one support but did not consistently have that support. Mr Gabula did not say that additional staffing had been provided in response to the claimant's concerns. We find that Mr Gabula was dismissive of the claimant's concerns as reflected in the WhatsApp message of 27 July about understaffing and that he did not take any steps to address them.

Fire extinguisher incident on 30 July

84. On 30 July 2018 the claimant was working alone at Church Road. At that time DF was there as well as another young person, JD, who, according to Ms Roberts Cameron, had Asperger's, ADHD and attachment disorder. There was no one-to-one support worker there for DF at that time. The claimant said that JD was experiencing anxiety and was threatening to burn the building down. He came downstairs picked up a fire extinguisher and threw it at the claimant. DF, who was also there at the time, was acquainted with JD and intervened to help calm the situation.

85. The claimant said that she called Ms Sibanda who told her to call the police. Ms Sibanda says that she was not aware of this incident at the time and did not in fact find out about it until the claimant's supervision the next day on 1 August 2018. We saw a transcript of some WhatsApp messages between the claimant and her friend dated 30 July 2018 in which she indicates that she had told Skhu (Ms Sibanda) about the incident and asking whether she should tell Mr Gabula as well. We therefore find that the claimant did notify Ms Sibanda about this incident at or shortly after the time that it occurred and in any event on 30 July 2018.

Supervision on 1 August

86. The claimant had a second supervision with Ms Sibanda on 1 August 2018. Ms Sibanda does not in her witness statement provide any reasons for calling this second supervision. However, in cross examination Ms Sibanda said that she had called the supervision to deal with an angry telephone conversation she had had with the claimant. This related to the claimant complaining that the next person was late attending to take over from her shift.

87. It was very difficult to give any credence to any of the evidence that Ms Sibanda provided about this. She had provided very little evidence in the witness statement about any of the relevant matters and her evidence was contradicted by documentary evidence and other witnesses on occasions. Ms Sibanda's evidence about the alleged angry telephone conversation from the claimant was confused and difficult to understand.

88. Whatever the motivation for calling the meeting, an agenda was set at the outset as is the respondent's practice. That included the following matters: Church Road, clarity of communication, meeting at head office.

89. In respect of Church Road, it is recorded in the minutes as follows "KM states that she is not comfortable working at Church Road without another staff would like to cancel her shifts as of 3 August 2018. SS explained to KM about lone working which she says she understands."

90. It was agreed that this referred to and included a report of the fire extinguisher incident referred to above and the concerns the claimant had about lone working arising from that. We therefore find that the claimant made a disclosure of information in this meeting to the effect that she was being required to work alone with vulnerable and volatile young people and this presented a risk to her and the young people's health and safety. This is clear from the context of the conversation and in light of the incident the previous day.

91. We note that Ms Sibanda said in evidence that the staff were often alone without any young people during the day when the young people attended work or training. This is inconsistent with the record of young people staying in the units but, in any event, even if at times there were no young people in the units, it does not mean that there were no times when the claimant was working alone with young people. On balance, we find that on many occasions, the claimant did work alone with young people as evidenced by the list of people staying in the units provided by the respondent.

92. We find that the claimant's report of the fire extinguisher incident also necessarily included a disclosure by the claimant of information to the effect that DF was not receiving the one-to-one support that was required and funded by Lewisham Council.

93. Ms Sibanda and Ms Roberts Cameron were asked what support had been offered or provided to the claimant following this incident with the fire extinguisher. Ms Roberts Cameron said that she discussed the matter with the young people and took steps to ensure they were ok, but it was perfectly clear that no support whatsoever was offered to the claimant.

94. The claimant also said that she raised an issue in that meeting about what she considered to be the improper sanctioning of the young people. Ms Sibanda agreed that the sanction to which the claimant referred happened and that it happened prior to this supervision meeting. The incident was that a vulnerable young person had been required by Ms Sibanda to go out with her in Ms Sibanda's car. This young person's anxiety manifested itself by him having "accidents". While in Ms Sibanda's car the young person is said to have told Ms Sibanda that he needed to stop and go to the toilet. Ms Sibanda said that he could go by the side of the road, but he did not want to and consequently had an accident in her car. The sanction was that part of the young person's money was withheld by the respondent to cover the costs of cleaning the car.

95. Mr Gabula, Ms Sibanda and Ms Roberts Cameron all gave evidence that the sanction regime was approved by the local authority social workers. They said that when a young person caused damage amounting to criminal damage the money would be taken from them and withheld to cover the cost of that damage but in every other case where the sanction was used as a punishment the money would be taken from the young person but then returned as savings at the end of their stay. The claimant's concerns were that this particular young person was not using their money to buy food for themselves because they were so concerned about sanctions.

96. Despite the fact that there was no suggestion that this young person had committed criminal damage by having an accident in Ms Sibanda's car, Ms Sibanda confirmed that she did withhold the money to clean her car. Mr Gabula, however, gave evidence that he had in fact paid for Ms Sibanda to have her car cleaned.

97. The respondent did not bring any evidence of the agreements that they said they had with social worker and the young people indicating that the sanctions were authorised by the local authority and agreed by the young people. We accept the claimant's evidence that she was genuinely concerned for the well-being of the young people who were being sanctioned in this way. The claimant's oral evidence is supported by contemporaneous WhatsApp messages with her friend. However, we find on the balance of probabilities that this disclosure of information was not made at this supervision meeting but shortly afterwards. The WhatsApp message dated 2 August 2018 says "JJ isn't happy about all the sanctions esp Skhu's car. I'm scared if I do something about it he would receive backlash from Skhu. If I don't then I'm not doing my job". In our view, this shows that by 2 August 2018, the claimant had not yet raised her concerns about this matter. We do accept, however, that she did raise concerns. Ms Sibanda accepted in cross examination that the issue had been raised, but was unable to say when.

98. The claimant also said in her evidence that in that meeting she raised concerns about health and safety and PPE. In evidence the claimant said that she was not provided with gloves for the purposes of cleaning using hazardous chemicals when she was working on a shift and that she raised this issue before the supervision meeting. We accept the claimant's evidence. The respondent did not bring any evidence of the provision of PPE - the tribunal would expect that records of the provision of such matters would be commonplace in an environment such as supported accommodation and the failure to provide PPE such as protective gloves is consistent with the respondent's insistence that the claimant remain at work when unwell in that it demonstrates a disregard for the welfare of its employees.

99. At the conclusion of the meeting the claimant was told to attend a further supervision with Mr Gabula. Ms Sibanda says she does not know what the purpose of the meeting was, just that she was instructed to tell the claimant to attend. The claimant asserted that the reason Ms Sibanda directed the claimant to attend another meeting with Mr Gabula was because she had raised issues about her concerns about working alone at Church Road. In cross examination, the claimant said she told Ms Sibanda that she was not comfortable working at Church Road and when asked why, she told Ms Sibanda it was because there were not enough staff. The claimant said that Ms Sibanda replied that Mr Gabula could not provide more staff as the Local Authorities would not pay and that she then said the claimant needed to have another supervision with Mr Gabula.

100. The claimant informed the respondent at that meeting that as she was no longer willing to work alone at Church Road, she had to cancel those shifts from 3 August 2018.This is recorded in the notes of that meeting.

Supervision 8 August 2018

101. The claimant's case is that the meeting she was asked in the supervision of 1 August to attend with Mr Gabula did not take place. The claimant says that she was told to attend the meeting with Mr Gabula in response to the concern that she had raised at the meeting with Ms Sibanda. Ms Sibanda, conversely, says that she had previously been asked by Mr Gabula to tell the claimant to attend that meeting.

102. The agenda for the supervision meeting on 1 August 2018 includes reference to "meeting at head office". It was common ground that the agendas for these meetings were set out at the start of the meetings. It is clear, then, that Ms Sibanda already knew at the outset of the meeting that she was going to inform the claimant about the need to attend a meeting at head office, with Mr Gabula, on 7 August 2018.

103. We therefore find that this meeting on 7 August 2018 was not called in response to anything the claimant said at the meeting with Ms Sibanda on 1 August 2018 as the decision to hold that meeting had been made before or at the start of the supervision meeting.

104. The email of 1 August from Mr Gabula says "I've called for another supervision following the conversation I had with you on Friday". Friday was 27 July 2018. It is clear, from the WhatsApp exchanges of 27 July 2018 that the conversation the claimant had with Mr Gabula on 27 July 2018 related to the inadequate staffing levels at Church Road.

105. Mr Gabula's evidence about the reasons for calling this meeting in cross examination were unclear. He said that he had already addressed the staffing levels in his conversation on 27 July 2018. This is clearly inconsistent with the email of 1 August 2018. Mr Gabula maintains that the meeting arranged for 7 August (which he subsequently said in fact happened on 8 August) was in fact to address the relationship breakdown issues between the claimant and Ms Sibanda relating to the allegations of the claimant having a sexual relationship with male members of staff and the allegations that Ms Sibanda had been spreading rumours about her. In cross examination, Mr Gabula conceded that the claimant would not have known that this was what he intended the meeting to be about because he had not told her.

106. We have already found that the meeting addressing the issues between the claimant and Ms Sibanda happened on 18 July 2018.We therefore find that Mr Gabula called the meeting for 7 August 2018 because the claimant had raised issues about staffing levels at Church Road.

107. For the reasons set out below, however, we find that there was no meeting between the claimant and Mr Gabula on either 7 or 8 August 2018.

Resignation

108. Following the meeting on 1 August 2018 the claimant had no further shifts working for the respondent. The claimant had cancelled her shift at Church Road. Ms Sibanda said that at that time all the claimant's shifts were at Church Road, from which we conclude there were no further shifts to offer the claimant. The claimant did not work for the respondent after 1 August 2018.

109. On 6 August the claimant emailed Mr Gabula to cancel the meeting on 7 August 2018 because of her childcare difficulties. Mr Gabula says that

the meeting was rearranged for 8 August. The claimant says that Mr Gabula did not respond. In his witness statement, Mr Gabula says at paragraph 24 "on 7 August I invited the claimant into an informal meeting to discuss concerns which had been raised surrounding whether the claimant was in a relationship with one of her colleagues at work". Mr Gabula confirmed that in fact this should say 8 August.

110. This is put in a rather confusing way. It reads as if the invitation to the claimant was sent on 8 August 2018. This cannot be right and Mr Gabula did confirm in cross examination that the claimant had been invited on 1 August 2018.

111. There was no evidence before the tribunal of the alleged email exchange of 6 August 2018. Had the email chain existed, either party could have provided it. Unfortunately, it is a feature of this case that significant documents that would have assisted the tribunal to come to a decision were not provided.

112. The provision of this email chain by the claimant would have significantly assisted her case and the fact that it is not provided suggests that it did not happen. Conversely, the provision of this email trail by the respondent would have significantly undermined the respondent's case, but if such an email trail does not exist the respondent would not be able to provide it. Regrettably, the tribunal cannot in this case conclude that just because the email trail is not before it, it did not exist. Similarly, however, notes of the meeting and the attendance of Les Easie would have gone a very significant way to enabling the tribunal to resolve this question. This evidence was in the control of the respondent.

113. On balance, we have decided that the meeting took place on 18 July rather than 8 August. The respondent's evidence has been inconsistent and marked by an absence of documentary evidence that the tribunal would expect any employer to have and provide. The claimant, conversely, was a plausible and consistent witness. We prefer the claimant's evidence on this point and find that the claimant emailed Mr Gabula on 6 August 2018 to rearrange the meeting scheduled for 8 August and that Mr Gabula did not reply. In fact, Mr Gabula accepted that the meeting arranged for 7 August was cancelled so there must have been some communication.

114. On 7 August, Ms Sibanda confirmed that, at Mr Gabula's instructions she had told the claimant that her shifts had been put on hold until her next meeting with Mr Gabula.

115. The claimant said that having cancelled the meeting arranged for 8 August, she reflected and decided that she could not continue to work for the respondent. She then submitted her resignation by email on 9 August 2018.

116. In her email resignation the claimant said

> "Dear Marven Gabula
>
> Please accept this letter as formal notification of my resignation from support worker at Rodor housing and support with immediate effect due to unforeseen circumstances.

> I would like to thank you for the opportunity to work at Rodor. During this time I have thoroughly enjoyed the atmosphere within the team and I will miss our interactions. I will always remember my time at Rodor with affection. Please do not hesitate to contact me if you need further information after I leave, and I would be delighted if you stay in touch.
>
> Kind regards,
>
> Karen Mabhena"

117. This email contains no reference to any of the reasons the claimant now says she resigned. The claimant says that she resigned in response to the treatment she had received from the respondent because she had made protected disclosures. In her witness statement the claimant says "I was subjected to several detriments to the point where I had to resign my post." The claimant says at paragraph 31 of her witness statement "due to the concerns I raised, I became a target for most of the management, which ultimately prompted me to resign. Although the resignation did not reflect the above listed concerns, that was in the hope that I would not be penalised if I was to ask for a reference in the future".

118. The respondent, unsurprisingly, put it to the claimant that in fact the email of 9 August set out the real reasons for the claimant's resignation. The claimant said that the email was truthful to some extent, but that the claims she's made to the tribunal did affect her decision to resign.

119. Again, we prefer the evidence of the claimant on this point. As set out below, it transpired that the claimant's concerns about the provision of a reference were justified. We have found that the claimant did make a number of disclosures as set out above and we also found that the claimant was called to a further supervision meeting with Mr Gabula because she raised concerns about staffing levels at Church Road.

120. We have found that the claimant believed she was the subject of rumours spread by Ms Sibanda and we have found that Ms Sibanda's evidence about this issue is unreliable. We have also found that the claimant was subjected to two supervisions held by two managers the second one of which included the claimant being accused of, effectively, immoral conduct.

121. For these reasons, we find that on the balance of probabilities the reasons for the claimant's resignation were the detriments that the claimant believed she had been subjected to including being required to attend another shift and the suspension of her shifts pending that meeting. We accept the claimant's explanation that she did not set these concerns out in an email because she wanted to move on and did not want to prejudice her chances of obtaining a reference from the respondent in respect of future employment.

References

122. Following her resignation, the claimant applied for work with another provider, Pulse. On 29 August 2018, Pulse wrote to the respondent requesting a reference. On 4 September 2018 Pulses reference form was completed by Cora Pearce of the respondent. She was described by Mr Gabula as an office manager, inexperienced in such matters. The

tribunal notes that in the form Ms Pearce describes herself as “office manager/HR”.

123. The reference provided is not favourable. Although it says that there is nothing that the respondent knows about that would prevent them from offering work within an adult or children’s care role, it does say that the respondent would not re-employ the claimant. The reasons for this are given as “reliability and punctuality”. It also says, in respect of timekeeping and reliability that the respondent is unable to comment and that the claimant was “still on probation not completed induction”.

124. We find that the respondent had no reasonable basis for providing this reference in this way. We have found that the respondent was not concerned about the claimant’s reliability and timekeeping because they merely requested her to inform other workers if she was going to be late. We have also found that the claimant was not still on her probation period. The probationary period was for three months which had come and gone without comment from the respondent. The possibility of extending probationary period was not mentioned in any of the three meetings the claimant had with her managers. We find that this reference was disingenuous.

125. Mr Gabula said that Ms Pearce completed this reference. We find it extremely unlikely that Ms Pearce completed a reference without discussion with any manager or Mr Gabula himself. It is clear that Mr Gabula was personally aware of the claimant, and is equally clear that Ms Pearce worked in the same office as Mr Gabula. Again, this question could easily have been resolved with evidence from Ms Pearce. It need not have been lengthy evidence - her involvement was minimal - but she could have set out in a witness statement whether she wrote the reference of her own volition or on instruction from Mr Gabula or somebody else. We infer that the reason Ms Pearce was not called, as with Mr Easie and Mr Hove, is that her evidence would have been adverse to the respondent and on balance we find that Mr Gabula instructed Ms Pearce to complete the reference form in the way that she did.

126. Pulse then requested a further reference from Mr Nyathi on 11 September 2018 which was completed. We only have a redacted copy of this reference in the bundle, so we are unable to comment on what it said. However, on 14 September 2018, someone at the respondent contacted Pulse to inform them that Mr Nyathi was not the claimant’s team leader and that the reference he had provided was therefore invalid. The claimant’s application to Pulse was therefore stopped. This is set out in an email on behalf Pulse that was obtained on 30 October 2019 presumably in preparation for these proceedings. We accept this version of events as there is no reason not to do so.

127. The claimant said that she only contacted Mr Nyathi following the unfavourable original reference from Ms Pearce. We accept the claimant’s evidence on this point – it makes perfect sense. Mr Gabula said in evidence that the original reference request was sent to Mr Nyathi. We simply do not accept this; it is clear from the correspondence set out in the bundle that the chronology reflects the claimant’s evidence.

128. On 25 October 2019 Ms Pearce sent a further reference to Pulse about the claimant. This was a neutral reference with no adverse information setting out the dates of employment and details for a job role. It says “in terms of current performance and personal qualities, we not able to comment on this”.

129. Mr Gabula confirmed that this reference had been produced following liaison with ACAS. Mr Gabula was unable to provide any good explanation as to why a reference in this form was not provided earlier and, in our judgment, there was no good reason for providing the disingenuous unfavourable reference on 4 September 2019.

130. The claimant did not commence these proceedings until after provision of the unfavourable reference by the respondent. This is entirely consistent with the claimant’s explanation for the reasons for her resignation that was set out in her email of 9 August 2018. We accept that the claimant did not intend to bring proceedings until she felt, effectively, forced to do so by the provision of the unfavourable reference by the respondent. We find that this adds a great deal of weight to the claimant’s case. Contrary to what was put to her by the respondent’s representative, we do not accept that she has fabricated or embellished her case for the purpose of bringing tribunal proceedings. Rather, we consider that the claimant had genuine concerns, that she raised them, that she was subject to the treatment that she says she was subjected to and that she was no longer prepared to put up with this and left the respondent’s employment with a view to moving on. It was only the respondent’s actions in providing an unfavourable disingenuous reference that led to the claimant commencing these proceedings.

Breaks between shifts

131. Finally, we consider here matters relating to breaks between the claimant’s shifts. Here we have considered the shift rotas and Ms Cameron’s agreement that, in hindsight, the claimant was not afforded adequate rest periods between shifts. Having regard to the timesheets in the bundle, there were 10 occasions between 12 March 2018 and 31 July 2018 when the claimant had a break of less than 11 hours between shifts. They typically finished at 11pm and recommenced at 8am the next morning.

132. Specifically, those dates were between shifts on the following consecutive dates:

    a. 1 and 2 April (11pm finish, 9 am start)

    b. 28 and 29 April (11pm finish, 8am start)

    c. 30 April and 1 May (wrongly recorded as 31 April 11pm finish and 8 am start)

    d. 14 and 15 May (11pm finish, 8 am start)

    e. 27 and 28 May (11pm finish, 8am start)

    f. 17 and 18 June (11pm finish, 8am start)

    g. 1 and 2 July (11pm finish, 8am start)

    h. 23 and 24 July (11pm finish, 8am start)

i. 27 and 28 July (1pm finish, 8 am start)

j. 29 and 30 July (1pm finish, 8am start)

The law

Protected disclosures

133. The law relating to protected disclosures is set out in Part IVA of the Employment Rights Act 1996.

134. Section 43A (Meaning of "protected disclosure") provides:

> In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

135. Section 43B (Disclosures qualifying for protection) says, as far as is relevant:

> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> …
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> …
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,

136. Section 43C (Disclosure to employer or other responsible person) provides:

> (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure . . .—
>
> (a) to his employer..

137. This means that in order to be protected, the relevant disclosure must satisfy all of the following requirements:

a. It must be the disclosure of information

b. The worker disclosing the information must reasonably believe both:

   i. That the information tends to show one of the listed matters; and

   ii. That the disclosure is in the public interest.

c. The disclosure must also be made to an appropriate person – namely the worker's employer or, where the conduct relates to someone other than his employer, that person or, in respect of any other matter for which someone other than his employer has responsibility, that person. It is not disputed that the alleged disclosures were made or the claimant's employer, and that the claimant was a worker.

138. The tribunal considered *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening)* 2018 ICR 731, CA in respect of the question of what it means to say that the worker has a reasonable belief that the disclosure is made in the public interest. There is, in effect, a two-stage test for the tribunal in determining this question:

    a. At the time of making the disclosure, did the worker actually believe that the disclosure was in the public interest; and

    b. If so, was that belief reasonable.

139. It was also explained in *Chesterton* that "while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it".

140. Finally, in respect of protected disclosures, it was held in *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436 at paragraphs 35 and 36 that

> *"35. The question in each case in relation to s 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a 'disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]'. Grammatically, the word 'information' has to be read with the qualifying phrase, 'which tends to show [etc]' (as, for example, in the present case, information which tends to show 'that a person has failed or is likely to fail to comply with any legal obligation to which he is subject'). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in sub-s (1). The statements in the solicitors' letter in Cavendish Munro did not meet that standard.*
>
> *36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in s 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief".*

141. In respect of each of the disclosures, therefore, the claimant must have actually disclosed sufficient factual information to be capable of showing that that the health or safety of any individual has been, is being or is

likely to be endangered or that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

142. We have considered also section 43L (3) ERA which provides "Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention" and it was confirmed in *Parsons v Airplus International Ltd* UKEAT/0023/16/JOJ that a disclosure of information is not prevented form being a qualifying disclosure solely because the disclose is already aware of the information.

Detriments

143. The law relating to detriments is set out in Part V of the Employment Rights Act 1996

144. Section 47B (Protected disclosures) provides:

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

145. Detriment is not defined in the statute. However, it has a wide meaning and includes being put at a disadvantage. It does not necessarily have to be an economic disadvantage and should be considered from the worker's perspective.

146. In respect of bringing a claim of detriment on the grounds of making a protected disclosure

147. Section 48 (Complaints to employment tribunals) provides

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

(3) An [employment tribunal] shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected do the failed act if it was to be done.

(4A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (3)(a).

148. This means that it is for the employer to show the ground on which any act or deliberate failure to act was done. This is explained in Volume 14 of the IDS handbook as follows:

> "it means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure".

149. However, in *Ibekwe v Sussex Partnership NHS Foundation Trust* UKEAT/0072/14/MC, HHJ Clarke held

> "*I do not accept that a failure by the Respondent to show positively why no action was taken on the letter of 5 April before the form ET1 was lodged on 12 June means that the section 47B complaint succeeds by default (cf. the position under the ordinary discrimination legislation, considered by Elias LJ in Fecitt). Ultimately it was a question of fact for the Employment Tribunal as to whether or not the 'managerial failure' to deal with the Claimant's letter of 5 April was on the ground that she there made a protected disclosure*".

150. In *Abernethy v Mott Hay and Anderson* [1974] IRLR 213, it was held that *'A reason for [an act or omission] is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to [act or refrain from acting]'*

151. In *Fecitt v NHS Manchester* [2012] IRLR 64 Lord Justce Elias held *"In my judgment, the better view is that s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. If Parliament had wanted the test for the standard of proof in s.47B to be the same as for unfair dismissal, it could have used precisely the same language, but it did not do so"*.

152. This means that if the claimant is able to show that she made protected disclosures, and that she was subject to a detriment the burden moves

to the respondent to show the reason that caused the respondent to subject the claimant to the detriment and that the reason for the detriment was not materially influenced by any protected disclosures made by the claimant. However, a failure to show the reason for the detrimental act does not automatically mean that the clamant succeeds by default. There must still be some evidence from which the Tribunal could conclude that the detrimental act was materially influenced by a protected disclosure.

Automatically unfair constructive dismissal

153. The ERA 1996 s 103A provides that:

> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

154. In respect of the claimant's claim for unfair dismissal, the questions are whether the claimant was dismissed within the meaning of s 95(1) Employment rights Act 1996 (ERA) in that she resigned in response to a repudiatory breach of contract; and if she did resign in response to a repudiatory breach of contract was the reason for the repudiatory breach of contract that the claimant made protected disclosures?

155. Section 95 ERA sets out the circumstances in which an employee is dismissed, and s 95(1)(c) says that this includes circumstances where "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

156. In *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 the Court of Appeal confirmed that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer'.

157. In *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462, [1997] ICR 606 it was held that contracts of employment include the following implied term:

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

158. The question for the tribunal to determine is therefore whether the respondent without reasonable and proper cause conducted itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, thereby breaching its contract of employment with the claimant and, if so, did it so conduct itself for the reason that the claimant had made protected disclosures. In *Eiger Securities LLP v Korshunova* [2017] IRLR 115 the EAT held at paragraph 61 that

> *"Different tests are to be applied to claims under ERA ss.103A and 47B(1). Thus for a claim under ERA s.103A to succeed the ET must be satisfied that the reason or the principal reason for the dismissal is the protected disclosure whereas for a claim under ERAs.47B(1)*

> *to be made out the ET must be satisfied that the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's detrimental treatment of the claimant".*

159. The question for the tribunal is therefore whether the reason or principal reason that the respondent "without reasonable and proper cause conducted itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee" (if it did so) was that the claimant made protected disclosures.

160. If the respondent is in breach of the implied term of trust and confidence set out above, the tribunal must then determine if that breach was repudiatory – if it was sufficiently serious so as to allow the claimant to treat the contract of employment as discharged.

161. Finally, the tribunal must decide whether, if there was such a breach, the claimant resigned in response to that breach.

162. Finally, we note that in *El-Megrisi v Azad University (IR) in Oxford* UKEAT/0448/08 the EAT held

> *"But in a case where a claimant has made multiple disclosures section 103A does not require the contributions of each of them to the reason for the dismissal to be considered separately and in isolation. Where the Tribunal finds that they operated cumulatively, the question must be whether that cumulative impact was the principal reason for the dismissal".*

Direct sex discrimination

163. Section 13 of the Equality Act 2010 provides:

> (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.

164. By virtue of section 11 of the Equality Act 2010, sex is a protected characteristic.

165. Section 23 (1) provides

> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

166. Section 136 provides

> (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.

167. We refer to the case of *Igen Ltd v Wong* [2005] IRLR 258. That case says that the tribunal must consider all the evidence before us to

determine whether the claimant has proved facts from which we could conclude that the respondent has committed the discriminatory acts complained of. We are entitled at that stage to take account of all the evidence but must initially disregard the respondent's explanation. We have also considered *Madarassy v Nomura International plc* [2007] ICR 867 in which it was held that the claimant "…only has to prove facts from which the tribunal 'could' conclude that there had been unlawful discrimination by Nomura, in other words she has to set up a 'prima facie' case". This means there must be more than just a dfference in sex and a difference in treatment - there must be something else. The claimant must provide evidence form which we could conclude that the reason for the difference in treatment was the claimant's sex.

168. If we are satisfied that the claimant has proven such facts, it is then for the respondent to prove that the treatment suffered by the claimant was in no sense whatsoever on the grounds of her sex.

Harassment related to sex

169. Section 26 of the Equality Act 2010 provides:

(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.…

(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.

170. The question of whether conduct is unwanted is to be assessed subjectively (*Thomas Sanderson Blinds Ltd v English* EAT 0316/10).

171. As to whether the conduct had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, there is a two part test. This is explained in *Pemberton v Inwood* [2018] EWCA Civ 564, citing

Richmond Pharmacology v Dhaliwal *[2009] ICR 724* – the conduct must actually have had the effect on the claimant (a subjective test) and it must, having regard to all the relevant circumstances, have been reasonable for the conduct to have had that effect. This is a matter of factual assessment for the tribunal.

172. In so far as is relevant, the provisions relating to the burden of proof set out above in relation to direct discrimination also apply to harassment.

The right to rest breaks during and between shifts

173. The relevant provisions are those in regulations 10 and 12 of the Working Time Regulations 1998. They provide, respectively:

> 10 Daily rest
>
> (1) A worker is entitled to a rest period of not less than eleven consecutive hours in each 24-hour period during which he works for his employer.
>
> (2) Subject to paragraph (3), a young worker is entitled to a rest period of not less than twelve consecutive hours in each 24-hour period during which he works for his employer.
>
> (3) The minimum rest period provided for in paragraph (2) may be interrupted in the case of activities involving periods of work that are split up over the day or of short duration.

174. And

> 12 Rest breaks
>
> (1) Where a worker's daily working time is more than six hours, he is entitled to a rest break.
>
> (2) The details of the rest break to which a worker is entitled under paragraph (1), including its duration and the terms on which it is granted, shall be in accordance with any provisions for the purposes of this regulation which are contained in a collective agreement or a workforce agreement.
>
> (3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one.

175. Regulation 30(1) of those regulations says:

> (1) A worker may present a complaint to an employment tribunal that his employer—
>
> (a) has refused to permit him to exercise any right he has under—
>
> (i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4), 13 or 13A;

176. In *Grange (appellant) v Abellio London Ltd (respondent)* [2017] IRLR 108 the EAT clarified that

> "*Adopting an approach that both allows for a common sense construction of reg. 30(1), read together with reg. 12(1), and still meets the purpose of the WTD, I consider the answer is thus to be*

found in the EAT's judgment in Truslove: the employer has an obligation ('duty') to afford the worker the entitlement to take a rest break (paragraph 32 Truslove). That entitlement will be 'refused' by the employer if it puts into place working arrangements that fail to allow the taking of 20 minute rest breaks (MacCartney). If, however, the employer has taken active steps to ensure working arrangements that enable the worker to take the requisite rest break, it will have met the obligation upon it: workers cannot be forced to take the rest breaks but they are to be positively enabled to do so".

177. In our judgment, this is equally applicable to the right afforded under regulation 10 as it is to that under regulation 12. Regulation 30 clearly applies to both provisions.

178. This means that the tribunal is required to consider whether the respondent has put into place working arrangements that fail to allow the taking of 20 minute rest breaks during each shift lasting more than 6 hours, or that fail to allow a rest break of 11 hours between shifts.

Unpaid holiday pay and unlawful deductions from wages

179. It was agreed between the parties that the claimant had been underpaid a total of £933.20 so that it is not necessary for us to set out the law on those matters.

Conclusions

180. We refer to the list of issues and deal with the claims in the order they are set out there.

Time limits

181. As identified at the preliminary hearing, any issues occurring before 8 July 2018 are potentially out of time. We have identified that all of the detriments that we find (below) were because the claimant made a protected disclosure happened after 8 July 2018. Similarly, all the incidents relied on as harassment and direct discrimination happened after 8 July 2018.

Protected disclosures

182. The alleged disclosure that the claimant needed PMVA training in or about July 2018.

    a. We have found that the PMVA training was equivalent to the team teach training that the claimant received on 7 June 2018. We heard that the claimant acknowledges that this training was equivalent to PMVA training. The claimant did not identify what the disclosure of information relating to PM V8 training tended to show, but in any event the claimant could not have had a reasonable belief that PMVA training was necessary. By the time she is said to have raised this issue she had already had the team teach training. In respect of this alleged disclosure therefore we find that the claimant had no reasonable belief that telling her employer that she needed PM 38 training tended to show one of the matters set out in section 43B (1) of the Employment Rights Act 1996.

183. The alleged disclosure in about July 2018 to Ms Roberts Cameron and Ms Sibanda that a client required one-to-one support.

    a. We have found that the claimant raised specific issues about DF in her supervision meeting with Ms Sibanda on 1 August 2018. We have found that this included the disclosure of information and that that information tended to show that the health and safety of DF was being put at risk. This was because DF was at high risk of absconding and funding had been specifically required for one-to-one supervision by Lewisham Council for DF. That was not provided.

    b. In our judgement this disclosure was, in the reasonable belief of the claimant, also made in the public interest. The claimant gave evidence that she was concerned for the welfare of the young people as well as for herself. The concern for the young people was sufficient to discharge the first limb of the test namely that she actually believed that the information she was disclosing was in the interest of members of the public mainly young people in the care of the respondent. This was objectively speaking self-evidently reasonable. Local authorities are charged with the care of vulnerable people and they in turn have delegated responsibility for that care to the respondent. This is paid for at great expense from public money and, aside from the financial issues, all right-thinking members of the public should be concerned to ensure that vulnerable young people in society are given the best standard of care that is reasonably possible. This disclosure was therefore a qualifying disclosure.

    c. We also find that this disclosure was made to Ms Sibanda who was the claimant's line manager. The qualifying disclosure was therefore also a protected disclosure.

184. The alleged disclosure in July 2018 to Ms Sibanda to the effect that the claimant was concerned that the respondent was accepting young people without care plans or risk assessments.

    a. We have found that a disclosure of information was made to Ms Sibanda and Ms Roberts Cameron at the supervision meeting on 13 July 2018. The claimant was unaware that the respondent was permitted at law, in its view, to accept young people without risk assessments and care plans. The claimant was genuinely concerned for the well-being of the young people - she gave evidence to the effect that she was unable to identify what particular risks they posed and to provide care accordingly in the absence of this relevant paperwork. It was reasonable therefore for the claimant to believe the disclosure of this information to her managers tended to show that the health and safety of the young people in her care without care plans and risk assessments was being put at risk.

    b. We also find that in the reasonable belief of the claimant this disclosure was in the public interest for the reasons set out under paragraph 185(b) above. Similarly, this qualifying disclosure is also protected disclosure as it was made to her line manager is acting as her employer.

185. The alleged disclosure that in July 2018 the claimant told Ms Sibanda, Ms Cameron, Mr Hove and Mr Cholwe that she was concerned for her own safety and that of the young people because she was required to work alone.

    a. We have found that the claimant disclosed her concerns about lone working to Ms Sibanda in the supervision meeting of 1 August 2018. In our judgement the claimant did reasonably believe that the disclosure of this information tended to show that the health and safety of her and the young people was being put at risk. We found that the claimant was required to work alone on numerous occasions. It is perfectly clear that the health and safety of the claimant and the young people was put at risk - we refer to the "fire extinguisher" incident and the attendance of the young person in June for purposes of engaging in a knife fight. We also find that the claimant disclosed information relating to the altercation on 18 June 2018 to Ms Sibanda on or around 18 June 2018.

    b. For the reasons set out above in respect of the previous two disclosures, we also find that this disclosure was in the reasonable belief of the claimant made in the public interest. Similarly, we also find that this qualifying disclosure was a protected disclosure because it was made to her managers.

186. The alleged disclosure that financial sanctions placed on a young person were abusive and a misappropriation of funds.

    a. We have found that information about this matter was disclosed to Ms Sibanda on or around 2 August 2018. In our judgment the information disclosed specifically in respect of the car incident does tend to show that the application of the sanctions regime was potentially abusive. Further, we have found that the money retained was not used for the purposes for which it was retained, namely cleaning Ms Sibanda's car, because Mr Gabula confirmed that he in fact paid for that. The claimant therefore reasonably believed that the disclosure of this information tended to show that a legal obligation was being breached, namely the respondent's duty of care to young people under the Children Act 1989.

    b. Clearly it is in the public interest that such matters are reported and for the reasons set out previously we find that the claimant did reasonably believe that disclosure of this information was made in the public interest. We refer to the content of the WhatsApp messages for further evidence of this.

187. The alleged disclosure concerning health and safety, safeguarding and the fact that staff are required to work without gloves.

    a. The claimant did not provide any evidence about safeguarding concerns that she had disclosed beyond those already set out above. We have found that the claimant did make the disclosure relating to the failure to provide PPE. We also find that in the reasonable belief of the claimant this tended to show that the health and safety of a person, namely the claimant, was being put at risk.

    b. We do not however find that the disclosure was in the reasonable belief of the claimant made in the public interest. Although it is

generally in the public interest for employers to comply with the health and safety obligations, we had no evidence to suggest that the claimant raised this issue for any reason other than her own reasonable concerns about her own well-being. This is not in the public interest and this disclosure does not amount to a qualifying disclosure.

Detriments

188. In July 2018 being told that the claimant was due for supervision

a. We do not accept that this is a detriment. The claimant gave evidence that she requested the supervision as she had not had one since the commencement of her employment. It was the respondent's policy, they said, to provide regular supervisions albeit that they failed to do so in respect of the claimant.

b. Further, even if it were a detriment the only disclosure prior to the calling of this meeting was that on or around 18 June referring to the knife fight at Church Road. We do not consider that this chronological relationship between that disclosure and the calling of the supervision meeting is sufficient to reverse the burden of proof, but in any event the respondent has provided a reason for calling the meeting namely that the claimant requested it.

c. We acknowledged that the respondent was inconsistent in its evidence about the reason for calling that supervision. However, we do not consider that the supervision was called because the claimant had made a protected disclosure before that date. The majority of the claimant's disclosures were made at that supervision order and subsequent supervision meeting on 1 August 2018.

189. Two managers attending the supervision on 13 July

a. We find that this was a detriment. The respondent's reasons for having two managers attend the claimant supervision were inconsistent. The claimant said that she found it intimidating and we accepted that evidence. Being subject to a supervision with two managers is therefore a detriment. We do not consider, however, that there is any evidence of a link between the claimant's disclosure of 18 June 2018 and the decision to have two managers at that supervision. The incidents are almost a month apart, and there is nothing to reverse the burden of proof. We therefore find that this detriment was not on the grounds of the claimant having made a protected disclosure.

190. Alleged forging of the claimant's signature on previous supervision notes

a. We have found that this did not happen. The claimant was not therefore subjected to this detriment.

191. Failure to address the claimant's allegations of threatening behaviour and bullying from management

a. We have found that Mr Gabula did not address the claimant's allegations of threatening behaviour and bullying by management. He had pre-determined the outcome of the claimant's complaints about Ms Sibanda before meeting with the claimant on 18 July 2018. He had spoken to Ms Sibanda about the claimant prior to that

meeting and made up his mind that the claimant was to apologise to Ms Sibanda without investigating the claimant's concerns at all. This was a detrimental outcome to the claimant – she was forced to apologise for something that was not her fault. The respondent has not been able to demonstrate any reason for subjecting the claimant to this detriment.

b. However, the meeting was solely about the relationship between Ms Sibanda and the claimant and the rumours allegedly spread by Ms Sibanda. There is no evidence that Mr Gabula even knew of the claimant's disclosure in relation to the acceptance of young people without care plans or in relation to the altercation at Church Road. Mr Gabula did not consider the claimant's concerns properly but in our view this was more likely to be because he did not want to take the trouble to investigate it properly. He was genuinely, but unreasonably, satisfied with Ms Sibanda's explanation and did not consider that he needed to take any further action.

c. In our judgment, and considering *Ibekwe*, the protected disclosures made before this date did not have a material influence on the way in which Mr Gabula dealt with the issues between Ms Sibanda and the claimant.

192. Unfairly accusing the claimant of being late to work on Sundays

a. We have found that the respondent did not unfairly accuse the claimant of being late – they reasonably raised the issue of the claimant's late attendance at work. This was a detriment, but we have found that the reason for raising this issue was because the claimant was late on occasions. The respondent's response was also reasonable – to ask the claimant to let her colleagues know if she would be late and there was no suggestion that any further action would be, or had been, taken.

193. Refusing to provide the claimant with notes she was said to have signed

a. We have found that there were no such notes – the first supervision the claimant attended was on 13 July 2018. In our judgment, any conversations about previous supervisions were borne out of poor communication between the respondent's managers, a lack of procedures and poor administration. We accept that the conversation the claimant had with Ms Sibanda and Ms Roberts Cameron would have caused confusion and potentially distress to the claimant. To this extent it was capable of being a detriment.

b. However, this conversation was not related to any protected disclosures. The claimant did not give any evidence of the context of this conversation or whether it happened before or after the disclosure she made in that meeting. We find on balance, that there is no evidence to show that this conversation was materially influenced by any protected disclosures made by the claimant.

194. Not offering the claimant any more shifts until she attended a meeting with Mr Gabula.

a. The suspension of the claimant's shifts after her meeting on 1 August 2018 was clearly a detriment. It meant the claimant could not work. In our judgment the decision to suspend the claimant's

shifts was materially influenced by the protected disclosures she made in and following the supervision meeting on 1 August 2018.

b. It is clear that Ms Sibanda had had conversations with Mr Gabula abut the claimant – it was at Mr Gabula's instruction that Ms Sibanda stopped the claimant's shifts on 7 August. Further, Mr Gabula had responded to the claimant's concerns about lone working that she raised with him on 27 July by saying that there was no funding for greater staffing provision and he had taken no steps to address the claimants concerns about that.

c. In our view, this conversation demonstrates that the claimant's disclosures were very much in Mr Gabula's mind when he arranged the second supervision and directed that her shifts be suspended. Mr Gabula provided no good explanation for stopping the claimant's shifts. The claimant has shown that she was subject to a detriment and that she made protected disclosures. We consider that the conversation of 27 July 2018 was sufficient to reverse the burden of proof and the respondent has not shown the reason for suspending the claimant's shifts. In our judgment, the decision to stop the claimant's shift was made on the grounds that the claimant made protected disclosures in the meeting of 1 August 2018 and shortly after in respect of the inappropriate sanctions.

195. Delay in providing a reference to Pulse community care and eventually providing a negative and inaccurate reference.

a. There was no significant delay in the respondent providing the first reference. It was requested in a letter date 28 August 2018 and the provided reference was dated 4 September 2018. However, this reference was inaccurate in material ways and derogatory. The decision to provide this reference was a detriment. The respondent has provided no credible reason for this reference. The claimant made a number of protected disclosures following which her shifts were suspended and then she resigned (as to which, see below). Thereafter, the respondent provided a negative and inaccurate reference. In our view, the conversation of 27 July 2018 combined with Mr Gabula's decision to suspend the claimant's shifts provides a sufficient causal link between the protected disclosures and the decision to provide an unfavourable and inaccurate reference for the burden of proof to be reversed.

b. There is simply no reason at all to provide this reference. The suggestion that Cora Pearce provided the reference without consulting any managers is completely lacking in credibility. In the absence of any credible explanation by the respondent, we find that the decision to provide an unfavourable and inaccurate reference was taken on the grounds that the claimant made protected disclosures.

Automatically unfair dismissal

196. We have found that the claimant resigned in response to the detriments to which she was subject including being required to attend a further meeting with Mr Gabula and her shifts being suspended pending that meeting. We have found that this was on the ground that the claimant had made protected disclosures.

197. The respondent had no reasonable and proper cause to conduct itself in this way and that conduct, combined with the other detriments experienced by the claimant, amounted to a fundamental breach of the implied term of trust and confidence. The reason, we have found, that the respondent conducted itself in this way was because the claimant had made protected disclosures.

198. There can, in our view, have been no other reason to invite the claimant to another supervision other than to subject her to further detriment about her disclosures. In the previous three meetings, the claimant had been criticised and subject to harassment. Mr Gabula had made it clear in his conversation of 27 July that the staffing situation would not change so nothing positive would come of the meeting in respect of the claimant's concerns about the way the respondent was running its business. It is not surprising, in our view, that the claimant could not face the prospect of another supervision meeting with Mr Gabula. This, in the common phraseology, was the final straw that lead to the claimants constructive dismissal

199. Consequently, in our judgment the claimant was dismissed within the meaning of s 95(1)(c) ERA and the reason or principal reason for this dismissal was that the claimant made protected disclosures

Direct discrimination

200. We have found that Mr Gabula accused the claimant of having sexual relationships with male colleagues and that the claimant had a humiliating supervision as a result. Further, there was no investigation into the allegations the claimant had made about the rumours Ms Sibanda had spread about her and Mr Gabula had no interest in conducting a proper investigation.

201. We have also found that this was less favourable treatment than was afforded to Mr Hove and Mr Nyathi. In our view these two men are appropriate comparators. The respondent's case was that the purpose of its interest on the claimant's personal life was to ensure that no conflict of interest arose in the allocation of shifts in respect of people who were in relationships with each other. Mr Nyathi and Mr Hove were each alleged to be in a sexual relationship with the claimant and worked on zero-hour contracts providing support services. The same concerns ought therefore to have applied in respect of Mr Nyathi and Mr Hove.

202. We have found that they were not subjected to the same unfavourable treatment as the claimant. The respondent had provided no justification for the differing treatment – Mr Gabula simply denied it. In light of our findings (below) in respect of the harassment allegation and particularly our findings in respect of Mr Gabula's gender specific derogatory comments towards the claimant, the claimant has shown facts from which the tribunal could conclude that the claimant has been subject to discrimination on the grounds of sex. Namely, unfavourable treatment specifically related to her sex in respect of the comments relating to the claimant's relationships and the discriminatory conduct and language of Mr Gabula in the supervision.

203. The burden of proof is consequently on the respondent to show that its

treatment of the claimant was in no sense whatsoever related to her sex. The respondent has offered no evidence in support of this and we therefore uphold the claimant's complaint of direct discrimination on the grounds of sex.

Harassment

204. We refer again to the list of issues:

    a. Ms Sibanda suggested that the claimant was having sexual relationships with male colleagues

    b. The claimant was required to attend her first supervision with Mr Gabula and Les Easie;

    c. The claimant was asked to apologise to Ms Sibanda;

    d. Mr Gabula stated that the claimant should not talk to her male work colleagues a lot because some of them were married;

    e. Two managers attended the supervision on 13 July 2018.

205. We have found that the respondent engaged in the following conduct set out in (b) – (e). We have found that there was no evidence of Ms Sibanda suggesting that the claimant was having sexual relationships with colleagues: We accept that the conduct set out in (b) – (e) was unwanted by the claimant.

206. We find that all of the conduct referred to above, with the exception of (e) was related to the claimant's sex. (b) and (c) both relate to the meeting on 18 July 2018. The purpose of the meeting was to discuss the allegations relating to the claimant being in sexual relationships with male colleagues. This was clearly a sensitive and personal issue inherently and necessarily related to the claimant's sex. The attendance of two senior male managers was oppressive and, in our view, emphasised the differential power relationship arising between two senior men and a junior woman employee. This created an oppressive environment in which the claimant felt compelled to comply with Mr Gabula's requirement that she apologise to Ms Sibanda. (d) is obviously related to the claimant's sex.

207. In respect of (e), there was nothing about this meeting from which the tribunal could conclude that the presence of two managers was related to the claimant's sex.

208. We find that this conduct on each occasion had the effect of creating an intimidating environment for the claimant. She gave evidence to that effect which we accept and, in the context, in our view it was reasonable for the claimant – or indeed anyone in the claimant's situation – to feel intimidated by these actions.

209. For these reasons, the claimant's claim of harassment is successful in respect of allegations (b) – (d).

Breaks between shifts

210. We have found that there were 10 occasions over the course of the claimant's employment with the respondent when she was unable to take a rest break of 11 hours between shifts. However, all but three of those incidents occurred before 8 July 2018. The claimant brought no

evidence to explain why claims in respect of the other claims were late and we therefore have no basis on which to extend time to hear those claims. Specifically, we have not heard why it would not have been reasonably practicable for the claimant to bring claims earlier.

211. We note Mr Komeng's submissions that the failure to allow for sufficient time between shifts is a continuing act persisting throughout the claimant's employment and all such breaches must therefore be in time. However, there is no provision in the WTR to allow us to adopt this approach – each breach must stand alone.

212. On those three remaining occasions, the claimant was required to work consecutive shifts and was not afforded the opportunity to take rest breaks between each shift. Although the claimant elected to take these shifts, having agreed to them, the claimant was unable to avail herself of the opportunity to take rest breaks. In accordance with *Grange*, above, the respondent failed to afford the claimant the right to take a rest break by assigning her to consecutive shifts.

213. The respondent is therefore in breach of regulation 10 of the Working Time Regulations 1998 and the claimant's claim succeeds.

Breaks during shifts

214. It is clear from our findings that on numerous occasions, the claimant worked alone in the respondent's units with the sole responsibility for the care of young people. While there were occasions when other people were also there – Ms Cameron Roberts for example - it is equally clear that there were many occasions when there were not. Further, we accept the claimant's evidence that even when ostensibly on her break, she was required to respond to any matters that arose – visitors, telephone calls and emergencies with the young people.

215. We note also the respondent's recognition in evidence and submissions that it did not get its duties in respect of the WTR right. Having regard to the following matters:

    a. There was no procedure explaining when and how lone workers could take a break

    b. Ms Cameron Roberts only worked four days and was frequently at other locations

    c. Support workers for other young people did not attend consistently

    we find that, on the balance of probabilities, because of the way the respondent organised its working arrangements in the units, the claimant was frequently unable to take breaks during shifts in accordance with regulation 12 of the Working time Regulations 1998.

216. Although we are unable to identify the specific days when the claimant did not have a break, in our judgment, the claimant was unable to take a 20-minute break without the risk or occurrence of interruptions on most days that she worked. We refer to the date identified in the case management order before which any claims are out of time, namely 8 July 2018. The claimant brought no evidence to explain why claims in respect of the other claims were late and we therefore have no basis on which to extend time to hear those claims. Specifically, we have not heard why it would not have been reasonably practicable for the

claimant to bring claims earlier. The breach we have identified is therefore in respect only of shifts worked on or after 8 July 2018.

217. As above, we note Mr Komeng's submissions that the failure to allow the claimant to take breaks during shifts is a continuing act persisting throughout the claimant's employment and all such breaches must therefore be in time. However, there is no provision in the WTR to allow us to adopt this approach – each breach must, as above, stand alone.

ACAS uplift

218. Finally, in our view and for the purposes of considering remedy, we find that the claimant did not raise any grievances during her employment with the respondent. She did raise concerns which the respondent sought to deal with informally, however, inadequately they did actually deal with them. The claimant did not then seek to raise any formal grievances although she agreed that she was aware that she could do. Consequently, the respondent has not failed to follow the Acas Code of Practice on disciplinary and grievance procedures.

Employment Judge **Miller**

10 February 2020

Appendix

List of issues

The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Time limits / limitation issues

(i) Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA") / sections 23(2) to (4), 48(3)(a) & (b) and 111(2)(a) & (b) of the Employment Rights Act 1996 ("ERA"), or under the Working Time Regulations? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc.

(ii) Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 8 July 2018 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

Public interest disclosure (PID)

(iii) Did the claimant make one or more protected disclosures (ERA sections 43B) as set out below. The claimant relies on subsection (d) of section 43B(1).

(iv) What was the principal reason the claimant was dismissed and was it that s/he had made a protected disclosure?

(v) Did the respondent subject the claimant to any detriments, as set out below? Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law.

(vi) If so was this done on the ground that s/he made one or more protected disclosures?

(vii) The alleged disclosures the claimant relies on are as follows:
   a. The claimant alleges that she informed Ms Cameron, one of her managers, that she needed PMVA training in or about July 2018 (paragraph 6 of the attachment to the claim refers);
   b. the claimant alleges that she informed Ms Cameron and her supervisor (Ms Sibanda) that a client required one-to-

one support, again in or about July 2018 – see paragraph 7 of the attachment to the claim;

c. the claimant says that she told Ms Sibanda, in July 2018, that she was concerned that the respondent was accepting young people without care plans or risk assessments (see paragraph 9 of the attachment to the claim);
d. the claimant says that in July 2018 she told Ms Sibanda, Ms Cameron, Mr Hove and Mr Cholwe that she was concerned for her own safety and that of the young people because she was required to work alone (see paragraph 10 (b) of the attachment to the claim)
e. *although Mr Komeng did not make it clear that this is an alleged public interest disclosure, invitations to the last sentence in paragraph 10(f), which suggests that the sentence immediately preceding it, but the claimant had told managers that she believed that financial sanctions placed on a teenager were abusive and a misappropriation of funds is also said to be a public interest disclosure.* ***If that is correct, the claimant must inform the tribunal and respondent of the date upon which it is alleged that the disclosure was made and to whom it is alleged to have been made by no later than 13 March 2019.***
f. the claimant says that in August 2018 during her last supervision with Ms Sibanda, she raised concerns about health and safety, safeguarding and the fact that staff are required to work without gloves.

(viii) The alleged detriments the claimant relies on are as follows:

a. in July 2018, being told that she was due for a "supervision", (see paragraph 10 (f) of the attachment to the claim);
b. the fact that two managers attended the supervision (see paragraph 20 of the attachment to the claim);
c. alleged forging of the claimant's signature on previous supervision notes (see paragraph 21 of the attachment);
d. failure to address the claimant's allegations of threatening behaviour and bullying from management;
e. unfairly accusing the claimant of being late to work on Sundays, when the claimant had told the respondent during her interview that she could not attend by 8 AM on Sundays (see paragraph 22 of the attachment);
f. refusing to provide the claimant with a copy of the notes that she was said to have signed a previous occasion (see paragraph 22 of the attachment);
g. not offering the claimant any more shifts until she attended a meeting with Marvin Gabula, the respondent's proprietor (see paragraph 24 of the attachment);
h. delay in providing a reference to Pulse Community Care, and eventually providing a negative and inaccurate reference (see paragraph 27 and 28 of the attachment)

EQA, section 13: direct discrimination because of sex

(ix) Has the respondent subjected the claimant to the following treatment:
   a. being accused of having sexual relationships with male colleagues,
   b. having a humiliating supervision as a result;
   see paragraph 15 of the attachment to the claim form.

(x) Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators: Brian Nyathi and Sean Hove and/or hypothetical comparators.

(xi) If so, was this because of the claimant's sex and/or because of the protected characteristic of sex more generally?

EQA, section 26: harassment related to sex

(xii) Did the respondent engage in conduct as follows:

   a. By Ms Sibanda suggesting that the claimant was having sexual relationships with male colleagues (in July 2018)?
   b. In July 2018 being Cole's first supervision with Mr Gabula and another manager (see paragraph 17 of the attachment);
   c. by the claimant being asked to apologise to Ms Sibanda (see paragraph 18 of the attachment to claim);
   d. Mr Gabula stating that the claimant should not talk to her male work colleagues a lot because some of them were married (see paragraph 18 of the attachment);
   e. due to 2 managers attending the supervision on 13 July 2018.

(xiii) If so was that conduct unwanted?

(xiv) If so, did it relate to the protected characteristic of sex?

(xv) Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Equality Act, section 27: victimisation

(xvi) Did the claimant do a protected act *and/or:* did the respondent believe that the claimant had done or might do a protected act? *Mr Komeng said that the claimant was relying on the same matters as she relies on for the*

purposes of her public interest disclosure claim. On reflection, I do not understand how it is said that those disclosures can amount to a protected act within section 27 of the Equality Act. Accordingly, I have made the "unless" order which accompanies this order.

Unpaid annual leave – Working Time Regulations

(xvii) When the claimant's employment came to an end, was s/he paid all of the compensation s/he was entitled to under regulation 14 of the Working Time Regulations 1998?

(xviii) The claimant is directed to inform the respondent **by 4:30 PM on 6 March 2019** as to how many hours of unpaid leave she believes she was entitled to when her employment finished, and hence how many hours remain unpaid (– see the response at paragraph 47).

Unauthorised deductions

(xix) Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 by
(a) failing to pay the claimant for 15 hours that she worked prior to ending her employment ;
(b) failing to pay contributions to the claimant's NEST pension [NB I asked the claimant consider how this claim is put, as it is not an amount that would be paid direct to her in any case];
(c) a deduction of £95 from the claimant's final pay, which the respondent says is an authorised deduction in respect of training;

and if so how much was deducted than s/he was entitled to be paid ?

Other claims

(xx) The claimant alleges that she was denied rest breaks during shifts between shifts contrary to regulations 10 and 12 of the Working Time regulations.

(xxi) The respondent is directed that, by 6 March 2019, it must either provide the claimant with copies of a printout of the dates and times during which she worked for it, or write to the tribunal and claimant explaining why it is unable to do so;

(xxii) by 20 March 2019, whether or not the respondent is able to provide the details set out above, the claimant will use her best endeavours to provide a table listing in the first column, the dates of the shifts during which she says she was denied a rest break, and in the second column, the date upon which she says there was a breach of the Working Time regulations between shifts.

Remedy

(xxiii) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. Specific remedy issues that may arise and that have not already been mentioned include:

a. if it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?
b. did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any [compensatory] award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?
c. did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any [compensatory] award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?