



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Deyomka Shirley

**Respondent:** T L Care (Havering) Limited

**Heard at:** East London Hearing Centre

**On:** 23, 24 and 25 September 2020; 17 December 2020  
(in chambers)

**Before:** Employment Judge Gardiner  
**Members:** Mr L O'Callaghan  
Ms S Harwood

## Representation

**Claimant:** In person  
**Respondent:** Mr D Flood, counsel

# JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant's direct race discrimination claims contrary to Section 13 Equality Act 2010 are not well founded and are therefore dismissed.
2. The Claimant's victimisation claim contrary to Section 27 Equality Act 2010 is not well founded and is accordingly dismissed.

# REASONS

1. The Claimant, Ms Deyomka Shirley, is black and of Jamaican national origin. She was employed by the Respondent, TL Care (Havering) Limited as a Senior Care Assistant from 10 March 2017 until her summary dismissal by letter on 15 January 2019. Her case is that her dismissal was an act of race discrimination, based on her colour. She alleges it

was the culmination of a course of conduct in which she was treated unfavourably in comparison with how white care staff were treated, or would have been treated. She also argues that her dismissal was an act of victimisation. She alleges, although this is disputed, that she had previously complained about race discrimination in team meetings involving the night staff.

2. The Respondent disputes all allegations. It argues that those allegations which occurred more than three months before Early Conciliation was instigated are out of time. The Claimant argues that pre-dismissal acts alleged to amount to discrimination form part of conduct extending over a period culminating in her dismissal. Alternatively, it would be just and equitable to extend time to enable those matters to be considered on their merits.

3. The employment tribunal claim was issued on 8 May 2019 following Early Conciliation between 19 March 2019 and 19 April 2019. It was originally scheduled to be determined at a Final Hearing on 25, 26 and 27 August 2020. On that occasion, the Respondent's main witness was unwell and unable to attend. The hearing was postponed for that reason, although the Tribunal took the opportunity to draw up a final list of issues to assist the parties and the Tribunal Panel at the rescheduled Final Hearing.

4. The case was then listed to be heard over three days on 23, 24 and 25 September 2020. Unfortunately, because of illness, one member was unable to continue sitting midway through the first day. At that point, no evidence had yet been heard. The parties were given the option of continuing with a two-member panel but asked for a full panel to be provided. This meant that the case re-started on the second day by which time a replacement member had been sourced. It was heard within 2 days but there was insufficient time for the Tribunal to deliberate.

5. Due to existing diary commitments, the Tribunal was unable to reconvene to discuss the case until 17 December 2020.

6. The evidence in the case was contained in a lever arch file of documents running to over 300 pages. Witness evidence was given by the Claimant herself, and by two witnesses on behalf of the Respondent. These were Laura Hummerston, Registered Home Manager, and Teresa Quinn, Director and the Respondent's owner. It was Ms Hummerston and Ms Quinn who jointly decided to dismiss the Claimant from her position. All witnesses were cross examined and answered questions from the Tribunal. At the conclusion of the evidence both sides made oral written submissions. Neither side had prepared any written opening or closing submissions or a chronology of key events.

### **Issues to be determined**

7. The following issues were recorded in the case management order on 25 August 2020 as matters for the Tribunal to determine:

Race discrimination (Section 13 Equality Act 2010)

The Claimant is black Caribbean and worked as a Senior Carer for the Respondent. The night Senior Carers were all black (African or Caribbean). She claims she has suffered direct race discrimination in the following respects:

1. Throughout the Claimant's employment, the Claimant worked both day (overtime) and night shifts doing the same work as the daytime seniors but was still paid at a lower rate. From March 2017 to April 2018, she was paid £7.75 per hour and thereafter she was paid £8 per hour until the end of her employment on 18 January 2019. By contrast, she claims that senior daytime carers were paid £8.50 per hour. It was only, on her case, after her dismissal that all Senior Carers were paid £9.50 per hour regardless of whether they worked on the day shift or the night shift. Her case is that this was done in order to cover up the race discrimination inherent in the differential rates paid to day and to night staff.
2. Throughout her employment, Ms Hummerton excluded the Claimant from sharing in gifts provided by the residents' families by way of thankyou gifts and Christmas gifts. The Claimant contends that white British staff were entitled to share the gifts but black staff were only entitled to what was left over or received nothing.
3. The Claimant was not permitted to participate in Secret Santa both in 2017 and in 2018. This was the case for all of the night staff, all of whom were black.
4. Night staff were treated less favourably than day staff in the following respects:
  - a. Day shift staff were permitted to take a break during their shift. By contrast night shift staff could not take a break. This was due to the fact that more staff were put on the day shift than the night shift.
  - b. Night shift staff had to work harder during their shift because the night shift had less staff numbers than the day shift.
  - c. Night senior carers like the Claimant had to work the full 12 hour shift but whenever a white British carer worked the night shift they were permitted to work a 10 hour shift.
  - d. The Claimant was unfairly blamed for an issue which was the fault of the day staff, when a bedbound resident was found to be covered in urine.
5. The Claimant was treated unfavourably when it came to allocation of annual leave:
  - a. On 12 February 2018, Ms Hummerston would not authorise the Claimant's request for leave, even though the Claimant had leave available and there was not a good reason for refusing the leave.



warning on the Claimant's personnel record, although this warning was not brought to the Claimant's attention at any time before the end of the Claimant's employment.

- d. Yvonne Bergin (white British) apparently raised a grievance against the Claimant on 15 January 2019. This grievance was never discussed with the Claimant at the time and no disciplinary process was followed by the Respondent. The allegation was deemed to be true and the Claimant was dismissed.
8. The Claimant's dismissal and the circumstances in which that dismissal was carried out, namely without providing the Claimant with any reason for dismissal or right of appeal.

### Jurisdiction

The Respondent alleges that the Tribunal lacks jurisdiction to decide all the alleged acts of discrimination which predate the Claimant's dismissal, other than the allegation in relation to the hourly pay rate. The Claimant contends that all or almost all of the allegations relate to the conduct of Ms Hummerston, and that this was conduct extending over a period which culminated in the Claimant's dismissal. In any event, she contends that it would be just and equitable to extend time to enable the allegations to be determined on their merits.

### Victimisation (Section 27 Equality Act 2010)

The Claimant contends that she made complaints of race discrimination in meetings with Ms Hummerston on 18 August 2017, 21 March 2018 and 14 November 2018. This is disputed by the Respondent. If the Claimant is correct then this would amount to a protected act under Section 27(2)(d).

The Claimant alleges that the decision to dismiss her taken on 18 January 2019 was a detriment because the Claimant had done a protected act.

### Failure to follow ACAS Code of Practice on Disciplinary and Grievance Procedures

The Claimant requests a 25% uplift for failure to follow the ACAS Code of Practice in the following instances:

- a. The Claimant lodged a grievance on 20 May 2018, but there was no grievance process followed in response to this grievance.
- b. The Claimant was told subsequently that a verbal warning had been placed on the Claimant's personnel file on 22 July 2018 but this was done without her knowledge at the time and without any prior disciplinary process being followed.
- c. The Claimant was dismissed on 18 January 2019 without any prior

disciplinary process and without any communication of the reason why she was dismissed. She was not given the right to appeal against the dismissal.

### **Factual findings**

8. The Respondent operated two care homes, one of which was named Faringdon Lodge. This was divided into two areas. One area was called Sandringham and the other Balmoral. Ms Hummerston was the registered care home manager for Faringdon Lodge. Ms Quinn based herself in an office at the other care home, although visited Faringdon Lodge once or twice a week.

9. The Claimant was interviewed for the role of Senior Care Assistant by Ms Hummerston and by Bethany Collison, Deputy Manager. Her interview was a success and she was offered employment at Faringdon Lodge, starting on 10 March 2017. Her contract of employment described her weekly working hours as 36 hours a week. As is clear from the notes of interview, she was recruited to work night shifts where the standard length of shift is 12 hours, from 8pm until 8am. Her contractual terms therefore entitled her to pay for working three night shifts each week. In practice, until June 2018, the Claimant worked four nights a week generally on Saturday, Sunday, Monday and Tuesday nights. It is unnecessary to decide whether working for an additional night shift evidenced an amendment to her written terms and conditions to increase her contractual hours to 48 hours per week. She reverted to working 36 hours per week as standard from June 2018.

10. As each shift was 12 hours long, she was working as standard a 48-hour week. Her contractual rate of pay at the start was £7.75 per hour. This rose to £8 per hour in April 2018. As at April 2018, Senior Care Assistants employed to work the day shift as standard were paid £8.50 per hour.

11. The Respondent's case is that day staff had always been paid more than night staff. This had been the case since the home started in 1997. Ms Quinn's explanation was that day staff had to assume more responsibility than day staff were more onerous than the night staff. Although we have not seen records dating back significantly earlier than the start of the Claimant's employment, the Claimant is unable to dispute this evidence which was given by Ms Quinn. We accept it is accurate.

12. So far as is relevant, the other Terms and Conditions stated as follows [47]

"Your normal duties are detailed in the Job description attached.

If you are unable to attend your rostered shift you are obliged to advise a member of management (ie manager or person in charge) at least two hours prior to the time your shift is due to commence.

4. In addition to your normal duties you may be required to undertake other duties from time to time, and to carry out extra shifts to cover for sickness/holidays.

11. Sick pay: Other than statutory sick pay no other payment will be made. Staff must keep the company informed on a daily basis if they are absent from work and must produce a Doctors certificate if they are absent from work for more than seven days.

14. In there is any situation where your performance is considered to have fallen short of that expected by the company management, your conduct and action taken by management will be subject to the company disciplinary procedure.

15. If there is any situation where you consider you have been unfairly treated, you have the right to use the company grievance procedure.

17. Holiday pay: The home's holiday year runs from 1st April to 31st March in the following year after you have worked for 13 weeks you are entitled to the statutory minimum paid holiday ... Unless specifically agreed with your manager, you may only take paid holiday that has accrued to you. You may not carry unused holiday entitlement forward to a subsequent year and you are not entitled to be paid in lieu which is not taken in the relevant year.

21. You have an obligation to inform the Manager in writing of any concerns you may have regarding your employment at Faringdon Lodge in relation to the care of the residents, staff employed or working hours.

22. You are obliged to remain in the home until you have been relieved by the next shift. The Manager must be informed immediately by the senior member of staff if staff have not arrived for their shift. The home must not be understaffed at any time."

13. There was no evidence that the Claimant was ever provided with a Job Description and no Job Descriptions for the Claimant's role and for other roles were included in the Final Hearing bundle.

14. The Respondent had a staff handbook which included a grievance procedure and an Anti-Harassment Policy. So far as is relevant to these proceedings, it included the following words:

"Harassment, whether racial or sexual in nature, can interfere with an individual's work performance and create a hostile work environment.

Harassment may also occur between the Employees outside working hours.

The Home recognises the problems that racial and sexual harassment can have upon health, confidence and morale. Employees have the responsibility to comply with this policy to ensure that its terms are put into effect."

15. There was a further eight-page document which also dealt with disciplinary and grievance procedures.

16. The disciplinary process stated [65]:

“4.0 The manager is responsible for ensuring that the disciplinary process is used when required and is applied fairly, honestly and equitably in all cases.

4.1 In general terms, no member of staff should be dismissed without first having received a prior warning except in cases of gross misconduct.

There will always be cases which are exceptions to the rule, which is why each case must be judged in isolation.

4.4 All staff should be aware that they have a right of appeal in any disciplinary action brought against them.

4.7 The informal disciplinary process is used in relatively minor instances such as trying to improve conduct, performance or attendance.

4.9 Where the manager issues a Verbal Warning to a member of staff, a written record of the verbal warning should be placed in the staff members Personal File and a copy given to the staff member.

4.10 Verbal warnings should normally expire after 3 months and all records of them removed from the staff members Personal File.

4.11 Each member of staff is responsible for the safe keeping of any record of a Verbal Warning issued to them.

No responsibility can be accepted by the home for breaches of confidentiality caused by the staff member not keeping a Verbal Warning record safe.”

17. The Respondent gave its staff equal opportunities training, although there were no records confirming the extent or the frequency of this training.

18. Staffing levels were different on the two shifts. The night shift was staffed by two Senior Care Assistants, one assigned to each of two areas within Faringdon Lodge. On the day shift there were two Senior Care Assistants, one for each area, two Care Assistants, the Team Leader (Rebecca Ferrier), the Manager (Ms Hummerston), the Deputy Manager (Beth Collison), a cleaner, a chef and someone with responsibility for the laundry.

19. For the majority of the time that the Claimant was working at Faringdon Lodge, there were four Senior Care Assistants assigned to the night shift. These staff were Black Caribbean/African. By contrast, day staff were predominantly white.



20. The Claimant spent the first week working on the day shift as part of her induction. Thereafter she was regularly rostered on the night shift, which was the shift to which she had been recruited. On occasions, the Claimant worked overtime on the day shift. When she did so, she was paid the same hourly rate as she received on the night shift, which from April 2018 was £8 per hour. Of the three other night staff, two others were on £8 per hour from April 2018. The other member of staff, who was also black, was paid at a higher rate, albeit that the Claimant did not know this at the time. Senior Care Assistants who were also working on the day shift received their contractual pay of £8.50 per hour.

21. The Claimant accepted that there were some duties performed on the day shift which were not performed on the night shift. These were reviews with social workers, care plan reviews, signing in of medication, dealing with District Nurses, and serving meals at scheduled meal times. By contrast, night staff would have to provide snacks when these were requested by residents.

22. Night staff would be expected to clean the windows, as is recorded in a note of a staff meeting on 18 November 2018. The same document notes that every month, the day staff and the night staff would have responsibility for carrying out a deep clean of one of the two areas at Faringdon Lodge. They would not generally be expected to administer medication, deal with social workers, carry out care plan reviews or deal with District Nurses.

23. If the Claimant was working overtime on a day shift, there would be times when she might be required to carry out the full range of tasks expected of Senior Care Assistants. The extent to which she would perform these daytime specific duties would depend on the other staffing levels in the Home, the nature and urgency of the tasks and the extent to which permanent daytime staff were able to carry out these roles either then or at a future point. Her involvement in these daytime specific duties when working overtime would therefore be occasional rather than frequent.

24. When day staff were working overtime on the night shift, they were permitted to work only a 10 hour shift rather than working the full 12 hours. The converse was not the case – when night staff, including the Claimant, worked overtime on the day shift, they were expected to work a full 12 hour shift.

25. Whilst staffing was lower and therefore staff/patient ratios were lower during the night shift, this did not mean that staff working the night shift necessarily had to work harder than the day shift. Some night shifts may have been hard work. Equally some of the day shifts may have been hard work. It would depend on the particular needs of the residents on a particular shift.

26. Night staff were still permitted to take a break during their shift in the same way as day staff. Because there was only one member of staff in each area of Faringdon Lodge at night time, this may have made it more difficult on particular shifts for the night staff to take an hour-long break because no other staff member was potentially available to cover for them during this time. We do not accept that this was a problem on most or all shifts. It is noticeable that there is no document in the bundle recording any complaint she was

unable to take breaks during the night shift. No such complaint is recorded in the minutes of the meeting on 18 November 2018, and the Claimant's evidence does not allege she ever complained about this.

27. A senior meeting had been scheduled to take place on Friday 18 August 2017, to which all the night staff were invited. In advance of that meeting, the Claimant discovered that she and the other night staff were being paid less than the Senior Care Assistants who were assigned to the day shift. As a result, she raised this issue at the meeting and was told that this was because they had additional responsibilities. She did not allege during this meeting that the pay disparity was an act of race discrimination, nor was this alleged at any point during the meeting. Nor did she complain about the difficulty of taking breaks during the night shift.

28. The Claimant hoped that in raising this issue during this meeting that steps may be taken to equalise the pay rates, but no change was made at this point.

29. Although the Claimant complains about the way that the work Secret Santa was organised in 2017, there is no evidence in the Claimant's witness statement to indicate that this was a particular problem in 2017. Accordingly, we do not accept that there was any differential treatment between the Claimant and other members of staff in relation to Secret Santa in 2017.

30. On 12 February 2018, the Claimant requested three periods of four days of annual leave, in April, May and June. Ms Hummerston responded as follows:

"Dear Deyomka

I am unable to authorise all of these as you only accrue 16.75 hrs per month annual leave so if I authorise all 3 it would mean you've used 144 hrs annual leave in 3 months. I don't mind authorising April + June,

thanks,

Laura"

31. If by this point, the Claimant was working 48-hour weeks as her standard contractual hours, then the Respondent had miscalculated the rate at which the Claimant accrued annual leave. It appears that the calculation was based on the Claimant's terms of employment which recorded her standard hours as 36 hours per week. In any event the Claimant was still seeking to book as holiday more holiday during the period from April to June than she would have accrued by that point. In her response, Ms Hummerston was seeking to apply the contractual provision that holiday could only be booked when it had accrued. The contract provided that additional holiday could be specifically agreed with a manager. In authorising eight days leave in a three-month period (which is 32 days leave per annum pro rata), Ms Hummerston was exercising her discretion to authorise more than the Claimant would have accrued by that point. She would have been entitled to

refuse to authorise a further day of annual leave, given that the Claimant had only accrued 7 days in the three-month period.

32. The Claimant complains about events following her shift on 26 February 2018, when she says she was feeling ill at the point when she handed over to the day staff. She says that she told Yvonne Bergin that she would not be able to come in for the night shift in 12 hours' time given her state of health. She did not attend and Yvonne Bergin telephoned her to ask her where she was. The Claimant's case is that she made a complaint about Yvonne Bergin to Ms Hummerston, but Ms Hummerston refused to investigate. This alleged incident was not referred to in the Claimant's witness statement, and was only covered briefly in cross examination. We do not feel that there is enough convincing evidence from the Claimant in order for us to make positive findings in her favour about this incident.

33. There was another group meeting, with the night staff which we find was held on 20 March 2018 not 21 March 2018. This is the date indicated by the text message sent to the Claimant on 14 March 2018 [271]. We find this was a meeting to discuss matters in general rather than a specific issue. The Claimant again raised the issue of the pay differential between night staff and day staff, but did not make a formal complaint about this issue, nor did she allege it was an act of race discrimination. Again, on the balance of probabilities, we find that the Respondent repeated the position taken at the earlier meeting, namely that they pay differential was explained because more was expected of day staff than of night staff, given that they had additional responsibilities.

34. In the list of issues, the Claimant alleges that in this meeting she also raised concerns about Yvonne Bergin and Laura Hummerston's unsympathetic attitude to her inability to cover the night shift on 26 February 2018 as a result of sickness; about the unsympathetic attitude displayed by Ms Hummerston to her refusal to allow her to miss her night shift given the sudden news of her grandmother's illness; and about Ms Hummerston's failure to respond to her request of 14 March 2018 for an investigation into the incident on 26 February 2018. Although, the Claimant deals with this meeting in her witness statement, the Claimant does not state there that these further concerns were raised. As a result, there is no evidence supporting the Claimant's contentions and we therefore reject them. We do not accept that any allegations of race discrimination were made during this meeting.

35. On 23 March 2018, the Claimant's grandmother died. The Claimant requested additional annual leave so she could travel to Jamaica to attend the funeral which was being held on 23 April 2018. This additional leave was granted. She was out of the country from 21 April 2018 to 4 May 2018. She then had further time off work after her return because she was feeling unwell. She complains that Ms Hummerston was unsympathetic to her request for time off at the start of May 2018. She contrasts her treatment with the treatment given to day staff. The Tribunal has read the text exchanges over this period. We do not consider that Ms Hummerston's attitude was unsympathetic or unreasonable in asking the Claimant for clarity as to whether she would be attending work at the start of her shift, given the very short notice. If the Claimant was unable to work the Respondent

would need to find replacement cover. We do not consider there is less favourable treatment.

36. On 13 May 2018 Lyn Mason (white British), who was employed by the Respondent as a cleaner, reported the Claimant to Rebecca Ferrier for leaving work 15 minutes before the end of the shift. As a result, on 15 May 2018, the Claimant had a scheduled supervision with Rebecca Ferrier, at which Ms Ferrier mentioned she had been reported by Lyn Mason for leaving the shift early, presumably on 13 May 2018. The Claimant's criticism is that Ms Mason's account was accepted by the Respondent without hearing any explanation from the Claimant. This is not correct. The issue was raised by Ms Ferrier during the supervision to establish the Claimant's account of her timekeeping on this date. She had an opportunity during that supervision to put the record straight and confirm the extent to which she left early, if at all.

37. The Claimant's evidence is that on 20 May 2018 she wrote to Ms Hummerston in what she described as a 'grievance letter'. The Claimant wanted the Respondent to dismiss Ms Mason's allegation that she had left early, and in order to establish this she asked them to consult the CCTV footage to check the precise time of her departure. She ended her letter stating she would welcome the chance to talk this through with you at a convenient time and place, and would like to make her own recording of the meeting. The Claimant said that she placed this grievance letter on Ms Hummerston's desk.

38. Whether or not it was placed on Ms Hummerston's desk or was overlooked by the Claimant before she attempted to deliver it to the Respondent, we find it probable that it never came to Ms Hummerston's attention. If it had been left on Ms Hummerston's desk, we would have expected the Claimant to have referred to it in text messages sent around this time – but there is no such reference to this document. Had she had received it, it is likely that Ms Hummerston would have dealt with it in accordance with the Respondent's grievance policy, by convening a grievance hearing. The Claimant chose not to check whether the letter had been received by the Respondent and made no further reference to it. There is no basis here for us to uphold any criticism of the Respondent in relation to the Claimant's intended grievance.

39. On 5 June 2018, the District Nurse visited Faringdon Lodge at about 8.20am. She noticed that a resident was soaked in urine from her hair to her feet and urine was dripping off the bed. The District Nurse was so concerned about the state of this resident she raised a safeguarding incident. The Claimant had been on duty the previous night and her shift had finished at 8am. She was spoken to as part of the investigation. The investigation record states she said she had not changed the resident's pad since 4am. She sought to explain the delay in dealing with this resident by reference to the fact that six other residents had needed personal care. In her witness statement, the Claimant gives two potentially inconsistent explanations for her actions on that night, suggesting at paragraph 37 she had checked on the resident just before 8am but at paragraph 39 suggesting that she had not visited this resident since 4am.

40. Given the time at which the incident was noted, 8.20am, we reject the Claimant's criticism that the state of the resident was the fault of the day staff. The shift had barely

started by that point. If the true explanation was as given by the Claimant during the course of the incident investigation, namely that she had not attended to the resident for four hours, then there are potential grounds for criticising the Claimant. To the extent that there was a criticism made of the Claimant during the internal investigation, this criticism was justified given the Claimant's explanation.

41. In June 2018, the Claimant asked if she could drop working Tuesdays and go down to working three days a week [239].

42. On 8 July 2018, the Claimant contacted the senior member of staff on duty, Mrs Williams, to warn her that she was likely to be late in arriving for her night shift. It is accepted that the Claimant was late, but there is a dispute about the extent to which the Claimant was actually late. The Claimant says she was only five minutes late, but Mrs Williams recorded her as being 15 minutes late. When the Claimant queried the accuracy of the timesheet, Ms Hummerston chose to accept the Claimant's explanation that she was only five minutes late. As a result, she amended the record to note that the Claimant was only five minutes late. We accept Ms Hummerston's evidence about this disputed incident.

43. It is agreed that on 21 July 2018, the Claimant was late for her shift. The Claimant says that she rang to explain she would be marginally late and was only late by 5 minutes. Initially the Respondent recorded that the Claimant had arrived 20 minutes late but when the Claimant complained about this, the record was amended to note that the Claimant had been only five minutes late. Therefore, there was no financial detriment in terms of the pay she received.

44. During the shift on 21 July 2018, the Claimant decided to speak to Lyn Mason to challenge her for reporting the Claimant for leaving early two months earlier, on 13 May 2018. The Claimant accused Lyn Mason of lying to get her into trouble about her timekeeping.

45. On 22 July 2018, a file note was put on the Claimant's file by her Team Leader, Rebecca Ferrier. This noted that the Claimant had been given a verbal warning for "verbal abuse and intimidation" given the way she had spoken to another member of staff on the previous day. It noted that a complaint had been made regarding the way that the Claimant had spoken to Lyn Mason, in which the Claimant had accused Lyn Mason of lying to get her in trouble. The note recorded she had been told that any further incidents would be dealt with under the disciplinary procedure [172].

46. It is difficult for us to establish exactly what happened in this incident, given the lack of proper investigation or procedure into this alleged incident, the lack of written communication about the verbal warning to the Claimant as is required by the disciplinary process, and the lack of any evidence to the Tribunal from Ms Ferrier who is alleged to have placed the verbal warning on the Claimant's file. In any event, retaining this verbal warning on the Claimant's file after three months had elapsed would appear to be a further breach of the Respondent's own policy.

47. The night staff held a further meeting with the Respondent's manager, Laura Hummerston and the Respondent's Deputy Manager, Beth Collison, on 14 November 2018. This meeting appears to have been minuted although there is no evidence that the minutes were ever shown to the Claimant or the other members of the night staff in the days after the meeting took place. According to the minutes, it was a wide-ranging meeting, which covered a range of different care issues. It is agreed that there was a discussion in the meeting about the Respondent's Secret Santa. The Claimant asked if it was okay for the night staff to do their own Secret Santa as the day staff were organising their own. The Claimant in cross-examination did not dispute the accuracy of the minutes of the meeting on this point.

48. The Tribunal finds that the Activities Co-ordinator, Carly, had taken the initiative to organise a Secret Santa event for the day staff. She worked during the day and had not included the night staff in this event. As a result, the Claimant took the initiative to organise an equivalent event for the night staff. During the meeting, the Claimant did not allege that the decision to organise a Secret Santa without involving the night staff was an act of race discrimination.

49. Given the accuracy of the minutes on the Secret Santa issue, which was of less importance than the other issues discussed, we find that the minutes are a reasonably accurate record of each of the topics that was discussed during this meeting. We reject the Claimant's contention that these minutes have been fabricated to support the Respondent's stance in these proceedings. The minutes do not record there was any discussion at this meeting of differences in pay rates between the day staff and the night staff. As a result, on the balance of probabilities, we reject the Claimant's contention that she complained at this meeting about less favourable treatment of night staff in comparison to day staff, and specifically that she complained about the difference in pay rates.

50. Families of residents often brought presents for the staff into Faringdon Lodge in the period leading up to the Christmas holiday and occasionally at other times of the year as well. In addition, at Christmastime Ms Quinn would buy a gift for each member of staff. The Respondent's evidence was that gifts from family members which were donated for the staff in general, without being given to a specific member of staff, were distributed in a way that ensured staff were treated equally. The Tribunal accepts this evidence. It may be that if a box of chocolates was brought in by a family member during the day time the contents might have been consumed by the day staff before the start of the night shift. We do not find that there was a deliberate attempt to disadvantage the night staff in relation to the distribution of gifts.

51. On 7 January 2019 the Claimant submitted a request to be able to take three days holiday between 16 and 18 March 2019. These dates were initially approved but then it was noted that these were not dates when she was rostered to work. As a result, Ms Hummerston revoked the entitlement to leave on these dates but offered additional dates as an alternative. In cross examination, the Claimant conceded that Ms Hummerston was genuinely trying to give her the days off that she wanted.

52. On 13 January 2019, the Claimant was unwell. Her partner called to tell the Respondent she would be unable to attend the night shift that evening. He spoke to Yvonne Bergin, one of the care staff.

53. On 15 January 2019, there was an incident between the Claimant Ms Bergin. The Claimant accepts she did speak to Ms Bergin on this date. Ms Bergin complained to the Claimant that it was the Claimant's partner, rather than the Claimant, that had called in to explain that the Claimant had been unable to work her night shift on 13 January 2019. There is a dispute as to what was said in the conversation and whether the Claimant behaved in an appropriate manner. It is unnecessary for us to resolve that dispute in these proceedings.

54. Following this conversation, Ms Bergin complained about the Claimants' conduct in the conversation to Ms Hummerston. Ms Hummerston asked her to put the complaint in writing. This is what she wrote:

"Dear Laura,

As per our conversation, I am putting in writing about a 2<sup>nd</sup> incident between Deyomka and myself.

It started when Deyomka got her partner to phone in to say she was not well enough to do her shift that night (January 13<sup>th</sup>). Deyomka never phones in sick herself, always getting her partner to speak on her behalf. I repeatedly said to him in the call that Deyomka must call in personally as per company policy. She never did, though we manage to get the shift covered.

The next night, Deyomka attended for her night shift and asked to see me on my own after other staff left. She then started having a go at me saying that I am nasty, a liar, and have it in for her, and that it was not company policy for her to phone in personally. Although she gave one of the reasons of being off as not being able to speak her voice was back and clear enough to shout at me. I went to the filing cabinet and got my own personal file out only, and found where the contract said "if you are unable to attend you must phone in" and read this out to her. The next day a handbook found which confirmed this with added words that you should not get someone to do it on your behalf. After at least ½ hr after my 20:15 finish I wished Deyomka a good night and walked out.

I am apprehensive whenever I am around Deyomka as due to various actions from her, present and past, I feel she is being vindictive towards me and intent on trying to discredit my character.

I sincerely apologise for the trouble this may cause and have every faith in you resolving this situation fairly.

Thanking you,

Yvonne Bergin”

55. On receipt of this letter, Ms Hummerston spoke to Ms Bergin [146]. On being asked to elaborate, Ms Bergin said she had always felt extremely intimidated by the Claimant, but she had tried to push her feelings to the back of her mind because she did not want to cause trouble. When it was explained to her that the matter may result in disciplinary action being taken against the Claimant, and that Ms Hummerston could not guarantee that Ms Bergin’s complaint would remain confidential, Ms Bergin became upset and said she may have to withdraw the complaint as she was scared of the repercussions. Ms Hummerston said that if the statement was retracted, she would be unable to investigate the matter fully.

56. Ms Hummerston also chose to speak to Rebecca Ferrier [145], even though she was not a witness to the disputed conversation. The purpose of this interview, as deduced from the written record, was to find out more about the incident in July 2018 resulting in the Claimant receiving a verbal warning, by way of general background, given that the nature of the incident appeared to be similar. It was also to find out about Ms Ferrier’s current working relationship with the Claimant. On the latter point, in answer to the question “How do you feel your relationship with Deyomka is now?” Ms Ferrier gave the following answer:

“Ok. I am her team leader so it is always professional, however I feel that she is a very intimidating person particularly in the way she speaks”

57. Ms Hummerston then prepared an investigation report:

“Following my investigation, it was found that despite receiving a verbal warning on 22<sup>nd</sup> July 2018 for verbal abuse towards a staff member and intimidation, [the Claimant] was then involved in a second altercation in which she verbally abused and intimidated a second staff member. It was therefore decided that [the Claimant] would be paid 2 weeks pay in lieu of her 1 weeks’ notice period and that she would not return to the building to ensure the safety of the residents and the staff”

58. It was in breach of the Respondent’s own procedures to take into account a verbal warning relating to an incident more than three months’ earlier.

59. Ms Hummerston’s evidence was that she had spoken to ACAS to seek advice on how to deal with Ms Bergin’s complaint. She had apparently been told that it was not necessary for the Respondent to follow a disciplinary procedure given that the Claimant had less than two years’ service. As a gesture of goodwill, the Respondent decided to pay her two weeks’ notice pay, notwithstanding that her statutory entitlement was to one weeks’ notice pay.

60. On 15 January 2019, the Claimant received the following letter [46]:

“Dear Deyomka.



Please accept this letter as confirmation that your contract has been terminated, and you will receive two weeks pay in lieu of notice. On the 28<sup>th</sup> January 2019 you will be paid for any hours worked this period, plus 29.5 hours annual leave that has been accrued to date, as well as 72 hours pay in lieu of notice.

I wish you every success in the future and will provide a basic reference as per company policy.”

61. As is clear from the wording, the dismissal letter did not specify the reason for the dismissal nor did it offer her the right to appeal. The Claimant had received no prior warning that the Respondent was conducting a disciplinary investigation, nor had she been invited to attend a disciplinary hearing.

62. In her evidence to the Tribunal, Ms Quinn gave several reasons to explain why she and Ms Hummerston decided to dismiss the Claimant. She referred to the incident where the District Nurse had raised a safeguarding issue, given the extent to which a resident had been found covered in urine; she referred to the separate incidents involving Lyn Mason and Yvonne Bergin; and she spoke of the Claimant’s poor timekeeping. In summary she said that she and Ms Hummerston wanted to ensure that the home was a calm stable environment and they felt that this was not the case if the Claimant continued to be employed there. She said that if all these reasons had been listed in the dismissal letter, then they would have had to be provided to a prospective employer approaching the Respondent for a reference. Given this, in Ms Quinn’s view, it was fairer not to specify the reasons in the dismissal letter.

63. The Claimant’s contention is that dismissal was the culmination of a course of conduct over many months which amounted to a continuing act of direct race discrimination on grounds of her colour.

64. On 25 March 2019 adjustments were made to the pay for both day staff and night staff. It was decided to equalise the pay rates for Senior Care Assistants. All Senior Care Assistants were paid at least £9 per hour. This decision was taken because the minimum wage increased to £8.21 per hour, so they increased all of the Senior Care Assistant staff to £9.00. Those with greater experience were paid either £9.25 or £9.50.

65. The Respondent took disciplinary action against other members of staff, apart from the Claimant. On 16 February 2020, one white member of staff, SW, was invited to a disciplinary hearing to consider an allegation of verbal harassment of another employee and bullying of a further employee. She was warned that the allegations may amount to gross misconduct and the outcome could be dismissed. The Claimant told us that this person was dismissed but then subsequently got her job back when it was realised that the allegation was false. The fact that they had initially been dismissed shows that the Respondent was prepared to and did dismiss white staff for disciplinary matters, albeit that a conventional disciplinary procedure appears to have been followed in the case of SW, whereas it was not followed in the Claimant’s case. The Respondent’s explanation is that it had learnt from events involving the Claimant, and so decided to implement a disciplinary procedure in subsequent cases where disciplinary action was instigated. We accept that explanation.

66. In May and June 2019, there was a disciplinary investigation and subsequent disciplinary hearing to consider similar allegations against SY, who was accused of verbal harassment. SY was white. The Respondent's explanation for the procedure which was followed in this case, unlike the Claimant's, was again it had revised its practices in the light of the complaints that the Claimant was making. Again, we accept that explanation.

## Legal principles

### Direct race discrimination

67. Section 13 of the Equality Act 2010 is worded as follows:

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

68. The Claimant seeks to compare herself against the treatment of a white member of staff in the same hypothetical situation. Such a hypothetical comparator must in all other respects be in a comparable position to the Claimant apart from her colour.

69. In relation to each allegation of direct discrimination, the focus is on the mental processes of the person that took the decision said to amount to discrimination. In the present case, that is generally the mental processes of Ms Hummerston and (in relation to the dismissal decision) the mental processes of Ms Quinn as well. These two jointly took the decision to dismiss the Claimant.

70. The Tribunal should consider whether Ms Hummerston and Ms Quinn were consciously or unconsciously influenced to a significant (ie a non-trivial) extent by the Claimant's colour.

71. Section 136(2) of the Equality Act 2010 is worded as follows:

(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.

72. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. This guidance has subsequently been approved by the Court of Appeal in *Madarassay v Nomura International plc* [2007] ICR 867 and by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 (at paras 22-32).

73. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of a satisfactory explanation, that the treatment of the Claimant was at least in part the result of her colour.

74. In order for the burden of proof to transfer from the Claimant to the Respondent, it is well established that it is insufficient for the Claimant merely to show a difference in

status and detriment treatment (see *Madarassay* at paragraph 54). In *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865, Elias J at paragraph 15 said that the mere fact that an unsuccessful candidate was a black woman and successful candidates were white men would be insufficient to be capable of leading to an inference of discrimination in the absence of a satisfactory non-discriminatory explanation. To shift the burden of proof a claimant must also prove something more.

75. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the decision to reject the Claimant's application.

76. It is also permissible for the Tribunal to move straight to the second stage, and ask in relation to particular events whether the Respondent has shown, on the balance of probabilities, that the Claimant's colour played no part whatsoever in relation to the events of which the Claimant complains.

### Victimisation

77. Section 27 Equality Act 2010 is worded as follows:

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

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

(2) Each of the following is a protected act ...

- (d) Making an allegation (whether or not express) that A or another person has contravened this Act

78. In the present case, this requires the Claimant to produce evidence that she has complained of race discrimination, although it is not necessary for her to use those exact words.

### Time limits

79. Section 123 of the Equality Act 2010 is worded as follows:

(1) Proceedings on a complaint brought within Section 120 may not be brought after the end of –

- a. The period of 3 months starting with the date of the act to which the complaint relates; or
- b. Such other period as the employment tribunal thinks just and equitable

(2) ...

(3) For the purposes of this section –

- a. Conduct extending over a period is to be treated as done at the end of the period;
- b. Failure to do something is to be treated as occurring when the person in question decided on it.

80. Under Section 123 of the Equality Act 2010, proceedings on a complaint may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates. The three-month time for bringing Tribunal proceedings is paused during early conciliation such that the period starting with the day after early conciliation is initiated and ending with the day of the early conciliation certificate does not count (Section 140B(3), Equality Act 2010). If the time limit would have expired during early conciliation or within a month of its end, then the time limit is extended so that it expires one month after early conciliation ends (Section 140B(4), Equality Act 2010).

81. Conduct extending over a period is to be treated as done at the end of the period (Section 123(3) Equality Act 2010). There is conduct extending over a period if there is a continuing discriminatory state of affairs as opposed to a succession of unconnected or isolated specific acts. If so, then the three-month time period for bringing a claim only runs from the date on which the state of affairs ends (*Metropolitan Police Commissioner v Hendricks* [2003] ICR 530).

82. If the claim has been brought outside the primary limitation period, then the Tribunal has jurisdiction to consider the claim if it was brought within such other period as the Tribunal considers just and equitable. Considering a claim brought outside the three-month time limit (as extended by the early conciliation provisions) is the exception rather than the norm. Time limits are exercised strictly in employment and industrial cases. The onus is on the Claimant to establish that it is just and equitable for time to be extended (paragraph 25 of *Robertson v Bexley Community Centre (t/a Leisure Link)* [2003] IRLR 434, CA).

83. Factors which are almost always relevant to an exercise of the discretion are the length of and the reasons for the delay, and whether the delay has prejudiced the Respondent (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 at paragraph 19). However:

“There is no ... requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard” (*Abertawe* at para 25)

84. It is not necessary for a Tribunal to consider the checklist of factors set out in Section 33 of the Limitation Act 1980, given that that Section is worded differently from Section 123 of the Equality Act 2010, so long as it does not leave a significant factor out of account.

## Conclusions

*General*

85. The Claimant's case is that direct discrimination can be inferred from the combination of the Claimant's colour and from allegedly suffering detrimental treatment, coupled with the fact that all night staff were black.

86. There is no direct evidence that either Ms Hummerston or Ms Quinn had an antipathy to black staff, in what they had said or in the actions that they had taken. Ms Hummerston was one of the two interviewers who first considered the Claimant's job application and offered her the same night shift role she was still performing just under two years later when she was dismissed. The Tribunal heard evidence that black staff had been employed both on the night shift and (in smaller proportions) on the day shift as well. These features make it more difficult for the Claimant to persuade the Tribunal to draw an inference that at least part of the reason for her treatment was her colour.

*Allegation 1*

*Throughout the Claimant's employment, the Claimant worked both day (overtime) and night shifts doing the same work as the daytime seniors but was still paid at a lower rate. From March 2017 to April 2018, she was paid £7.75 per hour and thereafter she was paid £8 per hour until the end of her employment on 18 January 2019. By contrast, she claims that senior daytime carers were paid £8.50 per hour. It was only, on her case, after her dismissal that all Senior Carers were paid £9.50 per hour regardless of whether they worked on the day shift or the night shift. Her case is that this was done in order to cover up the race discrimination inherent in the differential rates paid to day and to night staff.*

87. The reason why the Claimant was paid a lower hourly rate than the equivalent day staff is because night staff had been paid less than day staff since the Respondent had started trading. This was as a result of a perception that working a day shift was more onerous than a night shift. We do not need to decide whether the perception was an accurate one. It had nothing to do with the fact that day staff were predominantly white and night staff were predominantly black. It had nothing to do with the Claimant's employment in March 2017.

88. We have found that the pay for Senior Night Care Assistants increased to £9 per hour in April 2019 and became the same as the pay received by Senior Day Care Assistants. This was because increases in the national minimum wage required pay levels to increase to this around level if the Respondent wanted to pay Senior Care Assistants more than Care Assistants. The Tribunal rejects the Claimant's argument that this decision was taken in an attempt to cover up race discrimination.

*Allegation 2*

*Throughout her employment, Ms Hummerton excluded the Claimant from sharing in gifts provided by the residents' families by way of thankyou gifts and Christmas gifts. The Claimant contends that white British staff were entitled to share the gifts but black staff were only entitled to what was left over or received nothing.*

89. To the limited extent that there may have been a discrepancy in the gifts enjoyed by the Claimant in comparison with white staff working on the day shift, this was because she was generally working on the night shift rather than the day shift. If chocolates were

brought in by families during the day, they may well have been consumed before the handover time from the day shift to the night shift. It was not to any extent the result of the Claimant's colour. We have accepted evidence from Ms Quinn that she went out of her way to try to ensure that unallocated gifts were fairly distributed amongst the staff on both shifts. We reject this allegation of race discrimination. We do not find that the Claimant has established a prima facie case of race discrimination and in any event, we find that any discrepancies were not related to the Claimant's colour to any extent.

*Allegation 3*

*The Claimant was not permitted to participate in Secret Santa both in 2017 and in 2018. This was the case for all of the night staff, all of whom were black.*

90. On the evidence advanced by the Claimant, we have been unable to make any findings of fact as to how any Secret Santa event was organised in 2017, if indeed there was such an event at all.

91. We have found the 2018 Secret Santa was organised by the Activities Co-ordinator. It excluded the night staff because the Activities Co-ordinator had decided to involve only those working on the day shift, which was the shift she worked. The Claimant did not complain about this in the group meeting on 18 November 2018. Rather she asked if the night staff could organise their own Secret Santa event, and that request was granted. The fact that all four of the night staff were black does not provide a prima facie case that the reason for the decision to restrict the Secret Santa competition to day staff was taken on grounds of the Claimant's colour or the colour of night staff more generally. In any event, we accept the Respondent's non-discriminatory explanation, namely that this was an event for staff assigned to the day shift. We therefore reject this direct discrimination claim.

*Allegation 4*

*Night staff were treated less favourably than day staff in the following respects:*

- a. Day shift staff were permitted to take a break during their shift. By contrast night shift staff could not take a break. This was due to the fact that more staff were put on the day shift than the night shift.*
- b. Night shift staff had to work harder during their shift because the night shift had less staff numbers than the day shift.*
- c. Night senior carers like the Claimant had to work the full 12 hour shift but whenever a white British carer worked the night shift they were permitted to work a 10 hour shift.*
- d. The Claimant was unfairly blamed for an issue which was the fault of the day staff, when a bedbound resident was found to be covered in urine.*

92. In our findings of fact, we have rejected the Claimant's contentions on these points. On our findings of fact, there is no basis for any inference of race discrimination.

*Allegation 5*

*The Claimant was treated unfavourably when it came to allocation of annual leave:*

- a. *On 12 February 2018, Ms Hummerston would not authorise the Claimant's request for leave, even though the Claimant had leave available and there was not a good reason for refusing the leave.*
- b. *On 7 January 2019, the Claimant's annual leave request was initially approved by Ms Hummerston, but subsequently her approval was withdrawn. This was done so that annual leave approval could be given to Yvonne Bergin, a white British carer, even though Ms Bergin was rostered to work day shifts.*

93. In our findings of fact, we have rejected the Claimant's contentions on these points. On our findings of fact, there is no basis for any inference of race discrimination.

*Allegation 6*

*The Respondent did not satisfactorily address the Claimant's concerns when she raised them:*

- a. *At the Claimant's request (and with the agreement of other night staff) meetings took place with the Respondent on 18 August 2017, 21 March 2018 and 14 November 2018 to discuss the Claimant's concerns that black senior carers were being treated unfavourably. These concerns were not addressed satisfactorily in that the treatment did not change. The concerns raised on 21 March 2018 included:*
  - i. *The unsympathetic attitude displayed to the Claimant by Yvonne Bergin and by Ms Hummerston to the Claimant's inability to cover her night shift on 26 February 2018 due to sickness, and Ms Hummerston's failure to agree to investigate this incident following the Claimant's request on 14 March 2018;*
  - ii. *The unsympathetic attitude displayed to the Claimant by Ms Hummerston on 12 March 2018 in refusing to allow the Claimant to miss her night shift on the day she heard that her grandmother had been rushed to hospital with significant symptoms.*
- b. *The Claimant raised a grievance on 20 May 2018 in relation to a complaint made by Lyn Mason that the Claimant had left work early. The Respondent did not address this grievance.*

94. We have accepted that the Claimant raised concerns about the pay disparity between the day staff and the night staff at the meetings on 18 August 2017 and 21 March

2018. The concerns were raised informally and were responded to informally in that on both occasions, the Respondent explained that more was required of day staff than of night staff. The Claimant never chose to raise a formal grievance about this issue. As a result, it was never necessary for the Respondent to respond to the Claimant's concerns in a more formal way than it did. We do not consider that there is any basis for finding a prima facie case of race discrimination such that the burden transfers to the Respondent to show, on the balance of probabilities, that there was no race discrimination. Even if there was a prima facie case, then the Respondent has proved that the reason for its response to the Claimant's concerns was a non-discriminatory one, namely that it was defending a long-established pay differential by arguing that day staff had to carry out more responsibilities.

95. We have rejected the Claimant's contention that she raised concerns about different pay rates in the meeting of 18 November 2018.

96. We have rejected the Claimant's contention that she raised the particular concerns at the meeting on 21 March 2018 referred to in the list of issues. Therefore, the Claimant's allegations of race discrimination about the Respondent's failure to address these concerns fail on the facts.

97. We have found the Claimant's grievance on 20 May 2018 was never seen by Ms Hummerston or any other member of the Respondent's management. As a result, although it was never addressed, this was not the fault of the Respondent and not an act of race discrimination.

#### *Allegation 7*

*The Respondent chose to accept allegations made by white staff against black staff without any investigation.*

- a. *Lyn Mason (white British) told the Respondent that the Claimant had left early. This allegation was first brought to the Claimant's attention on 15 May 2018, by which point it has already been accepted by the Respondent.*
- b. *Around 8 July 2018, Linda Williams (white British) alleged that the Claimant had arrived at work late. Due to the allegation, and without any further investigation, the Claimant's time sheet was adjusted to record that she had arrived for work late.*
- c. *Lyn Mason (white British) apparently alleged that the Claimant had been verbally abusive towards her. The Claimant does not accept that Lyn Mason made such an allegation at the time. If (as the Respondent states) such an allegation was made, then no disciplinary process was carried out as it should have been. The Respondent apparently placed a verbal warning on the Claimant's personnel record, although this warning was not brought to the Claimant's attention at any time before the end of the Claimant's employment.*
- d. *Yvonne Bergin (white British) apparently raised a grievance against the*



*Claimant on 15 January 2019. This grievance was never discussed with the Claimant at the time and no disciplinary process was followed by the Respondent. The allegation was deemed to be true and the Claimant was dismissed.*

98. We have found that Lyn Mason's allegation about the Claimant's timekeeping was discussed with the Claimant at a supervision on 15 May 2018. On this occasion, the Claimant had an opportunity to give her version of events. Therefore, we reject the suggestion that the Respondent chose to accept Ms Mason's allegation without investigation.

99. We have found that the Claimant's time sheet was amended in relation to the hours she was present on 8 July 2018 to record she was only five minutes late. This was done following representation from the Claimant. We therefore reject the Claimant's contention that the time originally recorded by Mrs Williams, which had specified she was 15 minutes late, was accepted without any investigation.

100. The Claimant did receive a verbal warning on about 22 July 2018 for the way she had spoken to Lyn Mason, and this was recorded on her employment file. On this occasion, the verbal warning was issued without discussing the incident with the Claimant first and without communicating the fact of the warning to the Claimant or recording this in writing. We find that this was highly inappropriate and obviously unreasonable. The Respondent's own disciplinary procedures anticipate (at paragraph 4.9) that even a verbal warning will be communicated to the employee in writing.

101. However, the mere fact of this unreasonable treatment does not raise a prima facie case that the Claimant was treated less favourably than a hypothetical white Senior Care Assistant would have been treated in equivalent circumstances in the absence of a non-discriminatory explanation. In any event, we find that the most probable explanation for the procedural failures here were the references in the disciplinary procedure (for example at paragraph 4.7) to a "verbal warning" being issued under an informal disciplinary process. The likelihood is that that the Respondent overlooked the particular requirements that still applied to verbal warnings, such as removing all records of verbal warnings after three months and not referring to expired verbal warnings in subsequent disciplinary matters (paragraph 4.10). Therefore, even if the burden of proof transfers to the Respondent, we find that the Respondent has discharged the burden. We reject the Claimant's contention that this was an act of direct race discrimination.

102. The allegation raised by Yvonne Bergin immediately preceded the decision to dismiss the Claimant. As a result, we deal with it when considering allegation 8.

#### *Allegation 8*

*The Claimant's dismissal and the circumstances in which that dismissal was carried out, namely without providing the Claimant with any reason for dismissal or right of appeal.*

103. The decision to dismiss the Claimant was taken jointly by Ms Hummerston and Ms Quinn. It was made in the aftermath of a formal complaint made about the Claimant by

Yvonne Bergin, and the subsequent investigation. We note that by this point three complaints had been made members of staff about the way the Claimant spoke to her colleagues (Lyn Mason, Yvonne Bergin and Rebecca Ferrier). In addition, the Claimant had made herself a spokesperson for the night staff and had chosen to be assertive in standing up for their rights and interests. This assertiveness, in the Tribunal's view, coupled with the various complaints, was wrongly perceived by management as her having a tendency to conduct herself in an intimidating manner in the workplace.

104. The Claimant was approaching the point at which she would have two years' service. She was therefore potentially the right to complain about unfair dismissal if she was dismissed. In our view the primary reason for her dismissal was a desire to remove her from the workplace before that point was reached, given the Respondent's view of the intimidating way she was conducting herself. The subsidiary reasons were those mentioned in evidence by Ms Quinn.

105. The decision to take this action at that point was confirmed by the conversation with ACAS. The conversation with ACAS also explains why the Respondent considered it did not need to follow a fair disciplinary procedure given the length of the Claimant's service, including asking her for her explanation, or to offer her a right of appeal. We accept that the decision not to specify the reason for the dismissal in the dismissal letter was taken to avoid having to specify the reason in a reference and so make it easier for her to obtain other work.

106. After the dismissal, the Claimant had engaged in protracted correspondence questioning the true reason for her dismissal; subsequently initiated early conciliation and then issued employment tribunal proceedings. This then led the Respondent to reconsider whether a disciplinary procedure should be followed in subsequent instances where disciplinary action was considered against members of staff. As a result, when disciplinary action was instigated against SW and SY, who are both white, a disciplinary procedure was followed. In their cases, we do not conclude that the reason why a disciplinary procedure was followed was in any part because they were white.

107. Mere difference in status (the Claimant being black) and unfavourable treatment (the Claimant's dismissal without following any fair process) is not a sufficient basis to raise a prima facie case that the reason for this treatment was at least in part because of her colour, so as to transfer the burden of proof to the Respondent to show that colour was no part of the reason for the treatment. We do not consider that the Claimant has established "something more" so as to establish a prima facie case of race discrimination.

108. In any event, for the reasons already given, we conclude that the main reason for the Claimant's dismissal was the perception that the Claimant did not have an appropriate style of communicating with colleagues in the workplace, which the Respondent regarded as intimidating. The ancillary reasons were those given by Ms Quinn in evidence. The Respondent has established that the Claimant's colour played no part in the reason for her dismissal.

109. The only reason why the Respondent did not follow any disciplinary procedure in the Claimant's case, including asking the Claimant for her explanation, was the Respondent's understanding of the advice it had received from ACAS that this was not necessary where an employee had less than 2 years' service. Therefore, even if the burden of proof had transferred to the Respondent to establish a non-discriminatory explanation, then we consider that this burden has been discharged. The Respondent has established that the Claimant's colour played no part in the reason for her dismissal.

#### Victimisation

110. We do not find that the Claimant's dismissal was an act of victimisation. At no point before she was dismissed had the Claimant alleged the Respondent was guilty of discrimination, whether expressly or implicitly. A complaint about the lower hourly rates of night staff in comparison with day staff was not an implicit allegation of race discrimination. As a result, there is no 'protected act' as that phrase is defined in Section 27(2) Equality Act 2010, which is essential precondition to a successful claim for victimisation.

111. In any event, we do not find that any part of the decision to dismiss the Claimant was taken because of the Claimant's complaints about pay discrepancies. It was taken exclusively because two complaints had now been made against the Claimant both alleging she had verbally abused another member of staff.

#### Jurisdiction

112. Because we have concluded there has been no act of direct discrimination or victimisation, it is not necessary for us to consider whether the Tribunal has jurisdiction to consider the Claimant's complaints given the applicable time limits.

#### ACAS Code of Practice

113. Because we are dismissing all of the Claimant's claims, it is not necessary for us to consider whether to make an adjustment under Section 207A Trade Union and Labour Relations Consolidation Act 1992 on the basis that the Respondent has failed to follow the ACAS Code of Practice on Disciplinary Procedures.

**Employment Judge Gardiner  
Date: 21 December 2020**