Case Number: 3346912/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mrs J Businge	**v**	**1. Children and Family Services Limited** **2. Mrs Ruth Kirchner**

Heard at: Watford **On**: 16 & 17 August 2017

Before: Employment Judge R Lewis
Mr R Jewell
Mrs R Watts-Davies

Appearances

For the Claimant: Dr P Businge, Claimant's Husband
For the Respondents: Ms L Hatch, Counsel

JUDGMENT

1. The claimant was not discriminated against on grounds of race, and her claim of racial discrimination fails.

2. The claimant's claim for damages for breach of contract fails.

REASONS

1. These reasons were requested by Dr Businge after judgment had been given.

2. This was the hearing of a claim presented on 3 October 2016, which had been the subject of case management hearings on 14 December 2016 (Employment Judge Henry) and 17 April 2017 (Employment Judge Smail).

3. The judgment of Judge Smail defined the continuing claims as (1) direct race discrimination in respect of dismissal, and (2) breach of contract in respect of dismissal without notice. There were no other issues before the tribunal.

4. At the start of this hearing there was a bundle in excess of 450 pages. The parties had exchanged witness statements. The claimant attended as the only live witness on her own behalf, and tendered a witness statement from a former colleague, Mr Dexter Gwavava, which was read in the absence of the witness. The second respondent, Mrs Ruth Kirchner, was the only witness on behalf of the respondents.

5. It was agreed at the start of the hearing that the claimant's case would be heard first, and that the tribunal would read the witness statements in the absence of the parties, as well as key documents from the bundle. It was agreed also that that stage of the hearing would deal with liability only. The tribunal set a timetable, such that it envisaged giving judgment on the third morning, and dealing with remedy for the remainder of that day. In the event, judgment was given at the end of the second day, and no further hearing was required.

6. At the start of the hearing, Mr Jewell advised the parties of a professional commitment in North London. There was no objection to the composition of the tribunal. The tribunal noted that the evidence contained references to vulnerable young people, and directed that no such person was at any stage in the public hearing to be referred to by his or her name or actual initials. In the event, we heard only about one such young person, referred to in these reasons as A.

7. The timetabling of the case was such that the claimant's evidence lasted about three hours, as did that of Mrs Kirchner. We took breaks in the middle of the evidence of each witness. After Ms Hatch's closing submissions we offered Dr Businge a short adjournment in which to finalise preparation of his reply, which he accepted. We were grateful to parties and representatives on both sides equally for a hearing which was conducted concisely, and for their professionalism in containing the emotions which underpinned parts of this hearing.

8. We preface our findings of fact with general observations. As is not uncommon in the work of the tribunal, we heard about a wide range of matters, some of them in some depth. Where we make no finding at all about such a matter, or do so, but not to the depth to which the parties went, that should not be taken to be oversight or omission, but as a true reflection of the extent to which the point was of assistance to the tribunal.

9. We considered that the issues for the case were stated definitively by Judge Smail. The material before us at the start of the hearing suggested that the claimant had amplified her allegations in her witness statement, to which Mrs Kirchner had replied with a supplementary statement. It did not seem to us productive to have a satellite argument about the admissibility of this material, and to the extent that it was evidence, we have heard it and made some findings based on it.

10. However, in evidence, cross-examination and submission, the claimant and Dr Businge sought to introduce fresh allegations of discrimination, some of

them opportunistically. Where we have addressed such matters, we have done so because we consider it in the interests of justice to deal with them as potentially relevant background. We did not permit any extension of the issues beyond those identified by Judge Smail.

11. We now give our findings of fact.

11.1 The first respondent can fairly be summarised in the witness evidence of Mrs Kirchner:

> "It is a private commercial company that provides residential care for up to seven children with learning disabilities who may also have physical disabilities. The service is run from two adjacent houses with up to four children in no. 1 and three children in no. 4. We offer long term care to children and young children placed with us through local authorities and the NHS. The company's published aim is to provide a safe nurturing environment where children and young people … can achieve their potential and as much independence as their disability allows."

11.2 The resident of whom we heard, A, was 17 years of age at time of the events in question and had been resident for about three years. We accept Mrs Kirchner's summary from her witness statement:

> "[He] suffered from severe autism, had little verbal understanding and was unable to reason… would become easily upset and was likely to grab anything that he did not like. His behaviour was so erratic that it was not possible to have a cup of tea around him as he was likely to reach for it, grab it and risk injuring himself… A should never be left alone unsupervised."

11.3 In the course of this hearing, we were briefly invited to consider some of the documentation issued by the first respondent. We noted in particular its safeguarding policy and statement of purpose (129-161). Those documents were clear, well written, and focussed heavily on the health, safety and welfare of the young people in its care.

11.4 We noted that despite the conflict before us, the claimant and Mrs Kirchner plainly shared a commitment to the welfare of the young people. When in evidence the claimant said "We are only there for the children" we are confident that she spoke sincerely, and for all parties on both sides.

11.5 Mrs Kirchner was the founder, sole shareholder, proprietor and managing director of the first respondent. Before its establishment she had worked in the same field in the public sector. The first respondent employed 26 employees, and had a handful of bank staff. We accept the accuracy of its ethnic monitoring data (126) which showed that exactly half (13 staff out of 26) were white British, with the largest ethnic minority group six black Africans. The breakdown by ethnicity of different categories of staff indicated that each staff group (eg full time day staff, night waking staff, etc.)

was ethnically diverse. There was no evidence for Dr Businge to allege, apparently for the first time in cross-examination, that the workforce was racially segregated.

11.6 The claimant is of black African origin. She was born in 1981. She agreed in cross-examination that she is involved in a number of home based working activities. She began employment with the respondent on 27 November 2015, and was issued with terms and conditions of employment (73) with that date. The terms and conditions included the following:

> "You must also follow Policies and Procedures when transporting children and young people in your car" ..
> "**Disciplinary and Grievance Procedures** The Company follows ACAS disciplinary and grievance procedures, full details of which can be found on their website." (78)

11.7 The claimant joined as a weekend night support worker. That meant that she worked the Friday and Saturday night shifts, starting at 10pm each night and finishing at 6am the following morning. She was required to attend at 9.45pm for handover from the previous shift.

11.8 The waking night staff were required to carry out the tasks set out in a document called "CFS Daily Chores Waking Night" (70). That set out 11 chores and 7 days of the week. We noted that while some chores were on a rota (eg the general cleaning items under paragraph 3) some chores were to be conducted every night (eg Empty bins). In particular we noted the item at paragraph 2: "Iron clothes and leave in pile for each young person." That chore was to be conducted every working night.

11.9 We accept that the working basis was that once the young people were settled for the night, and asleep, the night staff were expected to carry out the chores, such that they had been completed by 6am. Mrs Kirchner accepted that the chores did not take anything like eight hours, and that the overnight staff might sleep during their shifts, provided the chores were done, and the residents were safely looked after. An individual night worker therefore might choose to empty the bins and do the ironing at 11pm or 5am.

11.10 The claimant's line manager was Mr Darren Lewis. He did not give evidence. The bundle contained a number of extracts from his notes of one-to-one supervision meetings with the claimant, in which she was recorded as expressing general satisfaction with work, and we accept that the supervision system operated on a regular recorded basis. We noted also that the claimant was provided with considerable training in her employment, (117-118), which we take to indicate commitment to the company's standards,

and the development of staff, particularly in relation to any matter affecting safety.

11.11 We note that on 6 January 2016 (80) the claimant emailed to Mrs Kirchner to thank her for a Christmas present. It was an unusually warm letter, which, after the formality of thanks, stated this:

> "Just like how all trees need water to grow and all humans need air to live, companies need bosses like you to survive and prosper. You are simply the best. Thanks for being our lifeline. I have never been part of such an open and motivated team before and I am thankful to be part of it." (80)

11.12 One final matter of scene setting was that there was evidence of tension between staff on successive shifts, in the sense that certainly in May 2016, as evidenced by minutes of a staff meeting (115-116) there was an undercurrent of resentment between night staff who felt that their colleagues in the previous day shift were leaving them too much work to clear up; and early morning staff, who felt that they came on shift to find that their expectations of what had been done by night staff had not been met. These tensions are in this tribunal's experience commonplace in workplaces with continuous shifts. Mrs Kirchner acknowledged in evidence that these issues had been undermanaged, and told us that the issues had been resolved by the appointment of an additional waking night manager. We understood these tensions to be particularly noticeable in relation to the weekend night shifts, for which at the time in question there was no management presence during the shift.

11.13 The events with which this hearing was concerned took place within a short time span on the evening of Friday 15 July 2016. Before we deal with them, we summarise how things stood by that date. The claimant had been in the employment of the first respondent for about eight months. There was no evidence of relationship or professional difficulties. She was part of a shift where there were some issues with other colleagues from other shifts. She was committed to the care of the residents and to the ethos of the organisation. She had received ample professional training.

11.14 The claimant came on duty as usual at about 9.45 pm on the evening of 15 July. There was handover of the outgoing shift from three workers, Ms Wahid, Ms Akhtar and Ms McLaughlin.

11.15 We find that in or just after ordinary handover, Ms Wahid and/or Ms Akhtar asked the claimant to help hang up a banner and balloons for a party which was to be held the next day in celebration of Eid. (Dr Businge's attempts to cross-examine on the precise date of Eid did not assist us). It was common ground that the claimant initially expressed her resistance and refusal, but eventually did help to hang up the banners. We accept that in a short conversation, the claimant raised her voice above ordinary speaking volume, and that

her tone indicated anger. We also accept, although it is not strictly material, that the point of the claimant's objection was not the banners as such or Eid as such, but the sense of being tasked with something that she thought should have been done by the previous, outgoing shift.

11.16 It was common ground that A had not gone to bed, and that he was present in the lounge area during the conversation about the banners, and that he heard it. He therefore heard the claimant raise her voice and sound angry.

11.17 In the course of the conversation, the claimant, who wanted to say that she had plenty of other work, including the responsibility for A, who was not yet in bed, referred to A and used the word "babysit" in a sentence to the effect that she had work to do including having to babysit A. We accept that the word was used by and about A, and that it was belittling to him as a person aged 17.

11.18 The matters set out above constituted points 13.1 and 13.2 in the grounds of resistance as reasons for dismissal (22). At this hearing, Mrs Kirchner very fairly conceded that neither of them independently, nor the combination of the two, constituted gross misconduct such as to warrant summary dismissal.

11.19 After the short exchange just described, Ms Wahid and Ms Akhtar, who had by then finished shift, went to the kitchen. They were then off duty. They stayed behind in order to finish the preparation of food for the Eid party the next day. Ms McLaughlin went upstairs to collect her personal belongings from her locker, and came downstairs on the way out. Mr Gwavava had brought out the ironing table into the open lounge area, and then gone upstairs to the laundry room. A was still at large in the lounge area.

11.20 At that stage, according to statements given later by Ms McLaughlin (162) and Ms Akhtar (122) the claimant plugged in the iron. It was then not long after 10pm, and it was the claimant's responsibility to have completed the ironing by 6am the following morning.

11.21 Mrs Kirchner explained that it was the first respondent's expectation, custom and requirement that ironing should not be done until all the young people were settled and in bed. She explained that this was particularly so in relation to A, given the behaviour described above: unpredictable, erratic, with no sense of danger, and likely to grab. In evidence, Mrs Kirchner was not, we think, exaggerating when she said that the consequences of A grabbing the hot iron were potentially "unthinkable". We agree.

11.22 We heard no evidence about the remainder of the shift except the log completed by the claimant, which confirmed that A was not settled and in bed until 11pm (302).

11.23 The following day, Saturday 16 July, Ms McLaughlin attended the Eid party. She was a support worker who had joined the company relatively recently. She was sufficiently troubled by what she had seen of the handover to mention it to Ms Joanna Clarke, deputy manager. That seemed to us important. It indicated that Ms McLaughlin identified an untoward event which gave her concern, and which she wished to draw to the attention of management. Likewise, Ms Clarke (who did not give evidence) clearly thought the matter important enough to mention to Mrs Kirchner the following Monday, 18 July. That chain of communication is compelling evidence that the events of the handover were regarded as untoward, appropriate to report up the management line, and requiring further attention.

11.24 When the matter came to Mrs Kirchner's attention on 18 July, she arranged to meet Ms Akhtar and Ms Wahid. She interviewed them, and then asked them to write statements. We accept that each independently wrote the statements at (121) and (122) on or about 19 July. Mrs Kirchner understood that each should be asked to sign her statement, which each did, but she did not ask them to date the statements. Mrs Kirchner interviewed Ms McLaughlin, and asked her to write a statement, and the same procedure was followed, with one exception. Ms McLaughlin's statement was a few weeks later realised to have been lost. Mrs Kirchner asked Ms McLaughlin to re-write it so far as she could remember, and the version at (162) was therefore re-written some weeks after the event.

11.25 Reading the material, Ms Kirchner formed the view that the claimant had committed gross misconduct, of which the outstanding instance was plugging in the iron while A was present. She tried to take legal advice, but her then solicitor (Ms Hatch stressed that this was not the firm of Messrs Taylor Walton, which represented the respondents at this hearing) was on leave. She was not able to speak to the solicitor until the morning of Monday 25 July.

11.26 Mrs Kirchner spoke to the solicitor by telephone that day (25 July). We do not know how she described the issue, nor do we know precisely what advice was given. Mrs Kirchner's evidence, which we accept, was that her understanding at the end of the telephone conversation was that as the claimant did not have two years' service, she had no right to a formal disciplinary procedure. She therefore understood that she was free to dismiss the claimant straightaway.

11.27 If that were indeed the burden of the advice, it was, in our view, badly wrong. It disregarded the principle that employees are entitled to fair process, irrespective of their length of service; the ACAS Code, which the first respondent was committed to following,

does not deal with a qualifying period; the advice, if accurately described, disregarded the risk of the host of jurisdictions for which a qualifying period is not required, as illustrated by this hearing.

11.28 Mrs Kirchner concluded that the claimant should be dismissed. She knew that the claimant was about to go on holiday and would not return until the end of August. She thought it would be fairer to make the clean break before she went (she seemed surprised by the counter-argument at this hearing, that it might have been fairer not to risk spoiling the claimant's holiday). She asked the claimant to call in to see her on a non-working day, Monday 25 July, and a short meeting took place. There was no note, minute or record, and only the two parties present.

11.29 The claimant understood that she had been asked to sepe Mrs Kirchner before she went away for a few weeks. She did not know what was the precise issue for discussion. She did not know that her employment was at risk. She had not been advised that she had a right to be accompanied. Mrs Kirchner told her what the allegations against her were, which the claimant denied. Mrs Kirchner dismissed her and told her that she should not return to work. The claimant said words to the effect: "Thank you for the opportunity" and left. The meeting lasted less than ten minutes.

11.30 Her husband, Dr Businge who represented her before us, was waiting outside. She told him that she had been dismissed and he asked what was the reason. They both then returned to see Mrs Kirchner, and we accept that the short meeting which followed was acrimonious.

11.31 Dr Businge and the claimant left. Mrs Kirchner did not know or think it appropriate to send a letter confirming what had taken place. Later that day the claimant wrote to allege a dismissal that was "unfair, wrongful and discriminatory". The claimant's letter appeared to raise a public interest disclosure issue (not pursued in this tribunal) and while it referred to discrimination it made no reference to any protected characteristic. The claimant asked for another meeting to be accompanied by her husband, whom she described in the letter as "an accredited case worker and a specialist in employment law" (124).

11.32 Mrs Kirchner replied on 8 August, dealing with some of the points in the claimant's letter, declining to meet, but not confirming what she had said or done on 25 July; not confirming the date of dismissal and not saying what her positive case was as to the reasons for dismissal. She did not offer the claimant a right of appeal.

11.33 In the course of September the claimant was paid one month's pay in lieu of notice and a calculation of holiday pay which we did not

have to consider, which may have been an overpayment. There was no issue before us about holiday pay.

11.34 There was some discussion before us as to whether the claimant had been dismissed for misconduct or gross misconduct. Dr Businge's point, that there was in this workplace no specific designation of examples of either, was well made. Mrs Kirchner's evidence was that as at 25 July 2016 she did not understand the distinction between misconduct and gross misconduct; that if asked on that day whether the claimant had been given notice she would have said that she had been dismissed with notice; but that her evidence to the tribunal in August 2017 was that the claimant was dismissed for the gross misconduct of switching on the iron while A was present.

12. This claim was brought as a claim of direct discrimination only. S.13 of the Equality Act 2010 states this:

> "A person discriminates against another if because of a protected characteristic A treats B less favourably than A treats or would treat others."

13. In this case the protected characteristic was race. When we come to consider comparison, we have regard to s.23, which provides as follows:

> "On a comparison of cases for the purposes of s.13… there must be no material difference between the circumstances relating to each case."

14. The claim for breach of contract was brought in accordance with the provisions of the Extension of Jurisdiction Order 1994 which at Article 3 provides as follows:

> "Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages.. if.. the claim arises or is outstanding on the termination of the employee's employment."

15. In her witness statement, and again in cross-examination, the claimant referred to a number of past employment events at the first respondent, which she considered to be comparable for the purposes of s.13 and s.23. Her point was that in other disciplinary circumstances, other employees who were not black African appear to have been treated more favourably and in any event had not been dismissed. In her supplementary statement, Mrs Kirchner explained the respondents' case on these individual events, from which it was apparent, and we find, that on the respondents' evidence the claimant had not fully understood the event, had not had the full facts about it, and the event was not truly comparable.

16. In tribunal, and in reply to questions from the tribunal, Mrs Kirchner said that she had dismissed a white male employee about five years ago, which was the only other instance of dismissal that she could think of. She said that in his case she had gone through the full process of a disciplinary procedure. The claimant had not previously known this, and it was opportunistic of Dr

Businge to suggest that it was this event, of which the claimant had learned for the first time in the tribunal, which had led her in July 2016 to think that she had been discriminated against.

17. We therefore now turn to the comparative events alleged by the claimant and deal with each of them very briefly. It was a curiosity of the claimant's evidence that when cross-examined about the supplementary statement in which, instance by instance, Mrs Kirchner had refuted the allegations about comparators, the claimant stated that she fully accepted what Mrs Kirchner said (she used the word "gospel" in one answer) and did not seek to challenge it. In addition, the tribunal, following a brief allusion by Dr Businge, pursued an issue of comparison in relation to the actual event.

18. The tribunal was concerned that there might be a comparison between the claimant's action in switching on the iron and the action of Ms Wahid and Ms Akhtar in cooking food in the kitchen, all while A was unsettled. Mrs Kirchner dealt with this. She explained that the kitchen is not directly accessible in the same way as the open plan lounge where the ironing was being done. We understand that cooking has to be done during every day, so that the first respondent has systems and protocols for ensuring the safety of young people while there is heat in the kitchen. We accept the distinction of principle between the two members of staff who in their own time were cooking in a less accessible space, while the claimant was at the material time using the hot iron in an open area, at a time when she was responsible for A's safety.

19. The claimant alleged (WS72) that Mr Lewis had on one occasion stormed out of the building after an argument with a colleague, "abandoned his shift and the children in his care" and "leaving a vulnerable child unattended". Mrs Kirchner replied that she knew about the event almost immediately because Mr Lewis had reported it. She had required Mr Lewis to apologise to the colleague and had advised him as to his conduct. However, on the critical allegation as to residents' safety, Mrs Kirchner said that there were eight other members of staff present and no child was left unattended or abandoned. She produced the appropriate staff rota (304-305). We accept Mrs Kirchner's evidence. There was no point of comparison between the two events.

20. The claimant referred to an issue involving a WhatsApp group. She alleged that there were no consequences for a white member of staff who "sent an image of the private male organ using a company phone and was chatting during working hours where phones were not allowed as a company policy" (WS10). Mrs Kirchner's evidence was that this referred to an image "of cup cakes with icing in the shape of penises". When she saw the image, she issued warnings to the three members of staff who had been on duty and taking part in the exchange at the time the image was sent. The issue was both the inappropriateness of the image, and the use of the phone during the shift time. We find that the event was not comparable with the claimant's dismissal, as no safety issue arose. We add, for the sake of

completeness, that we do not accept that the conduct in question could fairly be called (as Dr Businge did) 'viewing pornography.'

21. The claimant referred to an incident when A was given "an overdose of medication" by Mr Lewis. She then added to the allegation: "when advised to call the ambulance, Mrs Kirchner said NO and destroyed all evidence".

22. This was of course an utterly serious allegation, and potentially comparable, because it touched on the safety of a resident. Mrs Kirchner gave a detailed account of the event, which we accept. It was that a member of staff drew up mistakenly an excessive dose of A's prescribed medication. That member of staff could not persuade A to take the medication and therefore Mr Lewis was asked to do so, and without double checking the dosage, Mr Lewis administered it. Appropriate procedures were followed, and the documentary evidence was retained and was in the bundle (300, 301, 305). In evidence, Mrs Kirchner said that she accepted that the support worker and Mr Lewis had both made mistakes.

23. The claimant made one allegation of a white support worker "she left a vulnerable child unattended." She did not identify the child, or give any details of the incident, and Mrs Kirchner was unable to answer it in evidence. We find that we had insufficient evidence of this allegation to reply upon.

24. The claimant also referred to a minority ethnic employee who she alleged "was dismissed without dismissal letter or formal warning or investigations concerning her allegations just like I was. This goes to show how this has been an ongoing bad practice where the people in the minority ethnic background are treated badly." Mrs Kirchner's evidence, which we accept, was that the named individual worker was in fact bank staff and therefore had no entitlement or expectation of procedure. The individual was dismissed for sleeping while on duty. The evidence of her having done so was a photograph of her asleep, taken by one of the resident children on his ipad. The bank engagement was terminated.

25. We now turn to our conclusions.

26. We find the useful way to consider our conclusions is to consider what would be the material characteristics of a hypothetical comparator. It seems to us that the material circumstances which applied to the claimant's treatment were the following matters, as they stood on 25 July 2016:-

    26.1 She was an employee in accordance with a contract of employment;

    26.2 She had less than two years' service;

    26.3 Mrs Kirchner's genuine, but wrong, belief was that she (the claimant) had no entitlement to any form of process or procedure in accordance with a disciplinary process, or good practice;

26.4 Mrs Kirchner understood on advice that she was entitled to dismiss the claimant summarily;

26.5 There was evidence that the claimant had carried out a deliberate act (ie switching on the iron) at a time when A was unsettled, and not in bed, and in an area to which A had access;

26.6 There was evidence that the act was a source of concern to at least one other worker;

26.7 There was reasonable belief that the claimant's deliberate act gave rise to a risk of very serious injury to a young person.

27. If the claimant alleges less favourable treatment than a hypothetical comparator of any race other than her own, our conclusion is that any hypothetical comparator to whom all the above material factors applied would have been dismissed, as was the claimant. We do not accept therefore that she has shown less favourable treatment than a hypothetical comparator.

28. Where we consider the actual comparators put forward by the claimant, having accepted Mrs Kirchner's evidence of fact about the reality of their circumstances, we find that each of the above seven matters constitutes a material circumstance for the purposes of the s.23 comparison. We find that none of the cases relied upon by the claimant comes close to making good a comparison which can be relied upon for the purposes of s.23 and therefore for the purposes of s.13.

29. While we adhere to that general finding, we deal briefly with the two strongest potential comparisons. The cookery comparison fails because we accept the evidence of Mrs Kirchner that the first respondent had systems and protocols in place which dealt with cookery at a time when children were present; we accept that the layout of the premises was that there was a form of island which impeded direct access into the kitchen, and there was nothing comparable in the open plan lounge area where the ironing board was set up; that Ms Wahid and Ms Akhtar were not at that moment tasked with responsibility for the care of A; and were not responsible for placing A at risk.

30. We accept that in relation to the drug matter, the action of both the support worker and Mr Lewis was accidental, that Mrs Kirchner dealt with it accordingly and in accordance with procedures.

31. We have finally asked ourselves the question what was the reason why the claimant was dismissed, and dismissed with complete absence of due process. We find that the sole reason for dismissal was the events of the handover on 15/16 July, notably the iron event; and the claimant's failure, in the meeting of 25 July, to say anything to give Mrs Kirchner the necessary reassurance to avoid dismissal. We find that the failure of due process was

for reasons already stated: Mrs Kirchner's genuine mistaken understanding of the claimant's rights, based on seemingly bad legal advice.

32. We deal briefly with the claim for breach of contract. Dr Businge argued that the claimant had a right to damages for the first respondent's failure to follow the ACAS Code, which he asserted was contractual.

33. It was not clear to us that Dr Businge understood that following discharge of the obligation to pay notice payment, the claim had little prospect of success, because he could not demonstrate any further damages which followed from any breach. However, we do not reject the claim on that basis. We find that the precise language of the contract of employment, quoted at paragraph 11.6 above, was such that the ACAS Code did not form part of the claimant's terms and conditions of employment. We therefore find that the claim must fail.

34. We conclude by recording that which was said at the opening of our oral judgment. It is a very rare case indeed in which a respondent which has been responsible for a complete failure of process (which would have led us to conclude that the dismissal was indefensibly unfair) can leave the tribunal as the successful party.

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Employment Judge R Lewis

Date: 13 September 2017……..

Sent to the parties on: .....

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For the Tribunal Office