EMPLOYMENT TRIBUNALS

Claimant: Khanyile Mhlanga

Respondent: (1) Kelli Kendrick & (2) Toddle On Inn Limited

Heard at: London South (Croydon) On: 3 & 4 August 2017

Before: Employment Judge John Crosfill
Ms L Grayson
Dr P Fernando

Representation

Claimant: In person with the assistance of Ms L Jamous

Respondent: Mr R Rees, a consultant.

JUDGMENT having been sent to the parties on 24 August 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Second Respondent is a company that is owned and directed by the First Respondent Kelli Kendrick. The Second Respondent runs a nursery for pre-school age children. The nursery is divided into various age groups who are accommodated in separate rooms within the building. We are concerned with events surrounding the baby room that was used to accommodate children up to one year of age.

2. The Claimant was employed by the Second Respondent from 22 January 2016 until her resignation on 28 November 2016. In her ET1 she complains that an investigation into her conduct, which led to her resignation, amounted to direct discrimination both because of her age and because of her race contrary to sections 13 and 39 of the Equality Act 2010.

3. We were provided with an agreed bundle. We heard evidence from the Claimant and Lorna Jamous and from the First Respondent on her own behalf

and on behalf of the Second Respondent. Throughout the hearing the Claimant was assisted by Lorna Jamous who, when the Claimant felt unwell, stepped up to make submissions at the conclusion of the evidence. We are grateful to her and to Mr Rees for their submissions which in both cases focused on the facts of the case. As such we shall not repeat them here but have taken them into account in reaching our conclusions.

4. The issues had been agreed at a case management discussion that took place on 13 March 2016. We shall not repeat those issues herein.

Findings of Fact

5. The Claimant has worked in childcare generally since 2011 and in nurseries since August 2012. Prior to her employment with the First Respondent the Claimant had been a room-leader in nursery where she was in charge of toddlers. On 22 January 2016, the Claimant accepted a job with the First Respondent in the capacity of a nursery nurse. Throughout her employment she worked in the baby room. Initially her immediate superior was Sandra. She held the position of "room-leader". Essentially that role was that of a team leader with responsibility for the management of the baby room.

6. The nursery sector is highly regulated by Ofsted and, in accordance with those requirements, the Respondent needs to have in place a suite of policies in relation to the operation of its' business. Amongst these are was a "medicines policy". A copy of that policy was in the agreed bundle of documents. It contains the following material provisions relevant to the issues in this case:

    6.1. Under a heading *"Policy Statement"* it says: *" Whilst is not our policy to care for sick children, who should be at home until they are well enough to return to the setting, we will agree to administer medication as part of maintaining their health and well-being or when they are recovering from an illness. We ensure that where medicines are necessary to maintain health of the child, they are given correctly, and in accordance with legal requirements*".

    6.2. Under the heading procedures it says: *"Non-prescription medication, such as pain or fever relief (e.g. Calpol) and teething gel maybe administered, but only with the prior written consent of the parent and only when there is a health reason to do so, such as high temperature"*.

    6.3. . Under the heading *"Children who have long-term medical conditions and who may require ongoing medication"* is written: *"We carry out a risk assessment for each child with a long-term medical condition that requires ongoing medication. This is the responsibility of our manager alongside the key person. Other medical or social care personnel may need to be involved in the risk assessment".*

7. Unsurprisingly the Respondent maintained a First Aid Kit and, in addition, non-prescription prescription medication that was kept in various places including in a cupboard in the baby room for use of the staff in that room. There is nothing in the medicines policy that informs the reader who it is envisaged bears the responsibility of ensuring sufficient stocks of medicine such as Calpol are maintained in each room. None of the documentation we

have seen casts any light on that matter. However, it was the Respondent's case, and we accept that evidence, that it would have expected the Room-Leader to be the person who would check on the level of stock and replenish the medicines as and when necessary.

8. At the end of September 2016 Sandra resigned and the Respondents needed to employ a new room leader. Having regard to the requirements of Ofsted, and in line with good practice, the Respondent would habitually have advertised posts to both internal and external candidates. However, pending any such final decision, a discussion took place with the Claimant about whether she would wish to take on the Room Leader role. She expressed an interest in the role pending the recruitment process. The Respondents decided that the Claimant should take the role on interim basis and her pay was increased accordingly in line with the rate paid for the new role. At the same time the Claimant was also sent an application form to apply for substantive post. The Claimant has endeavored to suggest that she was not "truly" appointed to the role as no formal induction had taken place and she did not fill in the application form. That obscures the reality. In fact, we find that she assumed the duties of Room Leader and she was broadly familiar with what that roll entailed having worked at that level in her previous employment (albeit not with babies). The Claimant was provided KPIs for the role and a job description although the latter document was not included in the agreed bundle. It is of note that the KPIs make no mention of the responsibility of checking medicine stocks. Ms Kendrick tells us, and we accept, she did not believe the job description descended into that level of detail.

9. Between the Claimant assuming the role of Room Leader and her resignation there were 3 incidents which caused the Respondent to commence disciplinary action against her. These were as follows:

    9.1. On 8 October 2016, a mother brought a child to the nursery who had been ill the previous day. The mother was anxious to get to work but the child was not fully recovered. It fell to the Claimant to tell the mother that the Respondent would not accept the child until he was well enough to attend. We consider it highly likely that, the fact that parents are having to juggle with responsibilities arranging childcare with work commitments, is very likely to give rise to tension. In the course of the disciplinary investigation that followed the Claimant said that, on this occasion she politely informed the mother that the child should not be in the nursery if it was unwell. However, the mother viewed the matter differently and sent in a complaint by e-mail. That e-mail asked: *"Please let me know whether or not we are welcome?"*. Whilst that e-mail was sent to the Claimant's line manager he took no action at the time.

    9.2. On 1 November 2016, the parents of a child made a complaint alleging that, despite their express instructions that their 8-month-old child be provided with a dummy, her dummy was removed from her causing distress. They said that their concerns were brushed aside by the Claimant. They explained that the Claimant had expressed her view that to use the dummy would impede language development and other development issues. They maintained that they had observed the child being distressed. Whilst this might objectively be considered to be a minor disagreement about the best way of caring for the very young care

we recognise that when it comes to handing over a young baby into the care of others feelings and opinions can run very high. As in the incident above this can give rise to somewhat volatile situation. In the subsequent investigation, the Claimant had expressed the view that a dummy might impede development but had not withdrawn his dummy and, when the child was upset, it was provided with dummy. Nevertheless, it was certainly the case that the parents perceived that their wishes were being ignored and in fact withdrew their child from the nursery.

9.3. The Claimant had booked leave to undertake a training course the week commencing Monday, 7 November 2016. On the first day of that week a child in the baby room had an allergic reaction following his lunchtime meal. The Claimant's Manager Guy Hanscombe was covering for the Claimant. When the allergic reaction was brought to his attention he decided to administer Piriton. This was amongst the non-prescription medicines that were commonly used in the Nursery and he expected to find stock in the baby room. When he searched for the medicine he only found a very small quantity and, even then, it was not the correct age range for a baby. He therefore had to go and try and find replacement medicine at local pharmacies but was unable to locate any swiftly. Fortunately, the nursery had alerted the child's mother who was able to swiftly attend and administer Piriton that she had and the child recovered well. The parents were understanding in respect of the fact that the meal had contained an allergen but were concerned at the failure to maintain a supply of a basic medicine.

10. The third and most serious of the three incidents above prompted the Respondent to consider disciplinary action. On 15 November 2016, the Claimant was required to attend a meeting with Kelly Kendrick and Guy Hanscombe. This was introduced as an investigatory meeting to investigate three incidents with referred to above. At quite an early stage of the meeting, and certainly before matters at all the matters referred to above have been raised or discussed, Kelly Kendrick expressed a view that the Claimant was not competent to carry out the role of Room Leader. The notes of the meeting and the Claimant's evidence show that she was very hurt by the suggestion. As a consequence, the meeting, and we find the entire relationship deteriorated.

11. During the meeting when the Claimant was asked about the matters above she took a somewhat defensive stance. However, in respect of the final incident the Claimant did ultimately accept that she had made a mistake and had not checked the stocks of medicine. She said that she had noted the existence of a box containing the medicine but had not opened the box to see how much there was. At the conclusion of the meeting Kelli Kendrick informed the Claimant that she would not permit her to continue in the role of Room Leader until the investigations were complete.

12. The Claimant, had initially been permitted to return to work but, by letter dated 16 November 2016 she was suspended from work and invited to attend a disciplinary meeting as to take place on 23 November 2016. Kelli Kendrick told us that the reasons for the suspension were what was said to be challenging behavior both during, and immediately after, the meeting that took place on 15 November 2016. The fact that the Claimant was not suspended until the following day might support that suggestion but Kelly Kendrick did not

raise this in her witness statement and the letter of 16 November 2016 is silent as to the reasons for the suspension other than mentioning the three incidents form part of the disciplinary process. We are unable to make any findings as to whether the Claimant did or did not behave in the manner suggested by Kelli Kendrick.

13. The Respondents then carried out a more formal investigation in preparation for the disciplinary hearing. They contacted the parents of the children concerned in the latter two incidents and formally interviewed other staff members. The record of these interviews suggests that it was the Claimant who insisted upon formal statements being taken. The record of these interviews shows:

    13.1. Jeanette Odueken, had witnessed all three incidents. She described the Claimant as having been abrupt to the mother of the sick child. She was supportive of the parent's position in respect of the dummy issue. In that regard, she said that the Claimant had not approved of the use of the dummy and had withheld it on some but not all occasions. She simply confirmed what had happened in respect of the child with the allergy. She did go on to be critical of the Claimant's abilities as Room Leader.

    13.2. Ester Akinrinade had no information to give about the first incident. She gave a nuanced account of the dummy issue. She suggested that the Claimant had politely expressed a view that dummy use could delay speech development. The child had been allowed to use the dummy when upset but other than that its use was carefully restricted. She said that it was a shame that the parents had not been aware that the child had been generally very happy. She too went on to make some mild criticisms of the Claimant's management of the Baby Room.

    13.3. Sam James could not remember the first incident. In respect of the dummy issue she said that the use of the dummy had been restricted in accordance with the Claimant's expressed views about child development. Again, she confirmed the facts of the third incident. She also went on to criticise the Claimant's management of the Baby Room comparing her unfavourably to Sandra.

14. On the day of the disciplinary hearing itself, 23 November 2016, the Claimant was unsurprisingly nervous and unwell to the extent that she was being physically sick. In advance of that meeting she met with a family friend, Ms L Jamous, who offered to support her during the meeting. During the journey to the meeting Ms Jamous rang ahead to inform the Respondent that she was attending. We find that, in the context of that telephone call, a misunderstanding arose as to her capacity to represent the Claimant. Whatever was said the Respondent erroneously believed that Ms Jamous held herself out as being a trade union representative. We find that she did not do so in those terms although there may have been reference to the Claimant joining a union. We find that Ms Jamous did not actually assert that she was a trade union representative as, at the outset of the meeting when asked for any trade union accreditation, she promptly responded that she was just a family friend.

15. Regrettably, the misunderstanding, and that is what we conclude that it was, lead to an unpleasant confrontation. The Respondents were anxious to

proceed with the meeting but were unwilling to permit Ms Jamous to act as a representative. That was construed by Ms Jamous as bullying and it is plain from the notes of the meeting that it became heated with Ms Jamous making threats of legal action. The Claimant left the room as she was physically unwell. The meeting then effectively broke up when Kelli Kendrick telephoned the Police when Ms Jamous refused to leave before the Claimant returned. The disciplinary issues were in those circumstances scarcely touched upon.

16. The disciplinary meeting was then rescheduled, ambitiously in our view, for 24 November 2016. The Claimant sent the Respondents an e-mail saying that she was not well enough to attend. In response, the Respondents agreed to adjourn the meeting to 28 December 2016. Upon receipt of that invitation the Claimant sent an e-mail resigning from her employment. She cited the lack of sympathy she claimed to have received at the hearing on 23 November 2016 and said that there had been no evidence worthy of consideration at a disciplinary hearing. Her e-mail is headed "constructive dismissal".

17. On 29 November 2016 Kelli Kendrick wrote to the Claimant asking her to reflect on her decision to resign and giving her a period of grace to withdraw that decision. The Claimant did not do so but sent further communication suggesting that she had unrelated grievances relating to her hours of work. The Respondents offered to hold a grievance hearing but that offer was not taken up.

18. It is the alleged "constructive dismissal" that the Claimant says was an act of direct discrimination on the grounds of race and age.

The law

The burden and standard of proof

19. Generally, the standard of proof that we must apply is the civil standard. That is the balance of probabilities. In other words, we must decide whether it is more likely than not that any fact is established. The burden of proof in claims brought under the Equality Act 2010 is governed by section 136 of that act and provides that where there are facts from which discrimination could be inferred (a prima facia case) then the burden of proving that the treatment was, in no sense whatsoever, discriminatory (or otherwise unlawful) passes to the Respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**.

20. The burden of proof provisions should not be applied in a mechanistic manner ***Khan and another v Home Office*** **[2008] EWCA Civ 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said *"the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race""*. Such an

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

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

> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
>
> *(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*

22. In order to establish less favourable treatment, section 23 of the Equality Act 2010 requires that it is necessary to show that the Claimant has been treated less favourably than a comparator who was in the same, or not materially different, circumstances. What is meant by "circumstances" for the purpose of identifying a comparator it is those matters, other than the protected characteristic of the Claimant, which the employer took into account when deciding on the act or omission complained of see - ***MacDonald v Advocate-General for Scotland; Pearce v Governing Body of Mayfield Secondary School*** **[2003] IRLR 512, HL**. Where no actual comparator can be identified the tribunal must consider the treatment of a hypothetical comparator in the same circumstances.

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

Discussion and Conclusions

24. We do not record the submissions made by Ms Jamous and Mr Rees in full but deal with the competing arguments that were advanced below.

25. The first matter that we needed to consider was whether, as the Claimant invited us to find, Guy Hanscombe was an appropriate comparator. The argument that was presented was that as he had been in charge when the child with an allergy had been fed food that caused a reaction he was in the same circumstances as the Claimant.

26. We do not accept that Guy Hanscombe is an appropriate comparator. On the evidence before us there was no basis for finding that anybody within the Respondent's organization believed that Mr Hanscombe was responsible for the allergic reaction. We consider that the proper comparator would have to be a person suspected of making errors the same as those alleged against the Claimant or sufficiently similar to amount to the same circumstances. There is simply no evidence that Mr Hanscombe had made an error or that anybody knew or believed he had. In contrast, two complaints had been made

specifically naming the Claimant and, upon her own admission, the Claimant had not checked the medicine stocks. There was at least a prima facie case that required an explanation.

27. We therefore conclude that the appropriate comparator is a hypothetical Room Leader who had been subjected to the same complaints as the Claimant had in the first 2 incidents and who had the same responsibilities, if any, to check up on the medicine stocks as the Claimant. That comparator would of course not share the Claimant's race or age. It is not inappropriate that the comparator should be older as suggested by the Claimant by her reference to Mr Hanscombe. We remind ourselves that rather than getting bogged down with the characteristics of the hypothetical comparator we can avoid the difficulty by focusing on the reason for the impugned treatment and ask why it was that the treatment was inflicted. If the answer is that the protected characteristic was a material cause then the claim will succeed.

28. Having identified a comparator it is necessary for the Tribunal to examine whether there are facts from which it could be inferred that the Claimant had been treated less favorably than the proper comparator. Mr Rees in his short submissions asserted that at that there was no no evidence in this case other than the possession of protected characteristics and the fact that the Claimant complained of the conduct of the Respondent. He was referring obliquely to the case of ***Madarassy v Nomura International plc*** **[2007] IRLR 246** in which it was said either burden of proof does not, without more, shift to the employer simply on the basis of establishing a difference in status i.e. sex and a difference in treatment. As was explained in ***M Hussain V. (1) Vision Security Group Ltd (2) Mitie Security Group Ltd*** **[2011] EQ LR 699**, there is a risk of elevating the statements in ***Madarassy v Nomura*** into a rule of law. What amounts to the "something more" will vary from case to case. A difference in treatment that is unusual, shocking or surprising may shift the burden of proof the "something more" need not be much ***Deman v Commission for Equality and Human Rights*** **[2010] EWCA Civ 1279**. The question remains whether an inference of discrimination can be fairly and properly inferred ***Laing v Manchester City Council***.

29. In the present case, there had been two incidents that had caused parents to complain about the Claimant specifically. The first mother had enquired whether her child was no longer welcomed and the second set of parents had taken the (for this respondent) highly unusual step of removing their child from the nursery. These incidents were in our view bound to cause Mr Hascombe and Kelli Kendrick to question whether the Claimant was doing a good job of performing her role as Room Leader. The third incident is altogether more serious as it could have had far reaching consequences. It would have been extraordinary if a nursery had not treated that incident very seriously indeed and carried out a full investigation.

30. We have considered very carefully whether, in the absence of a formal policy or clearly documented procedure setting out exactly who was responsible for checking stocks of medicine, there was anything surprising about the Claimant being challenged over this failure. We have concluded that there was not. Clearly the medicine stocks were kept adjacent or in the Baby room which, at the time, fell under the Claimant's remit. In addition, the Claimant is recorded as having admitted fault during the first investigatory meeting. Both

of those matters would suggest at least an informal expectation of responsibility.

31. A further matter where we have looked carefully at the actions of the Respondents and Kelli Kendrick in particular was the fact that, prior to asking the Claimant for an explanation, in the investigatory meeting a view was expressed that the Claimant was not up to the role of Room Leader. That is at face value unfair and might indicate an improper motivation. What must however be considered in the same factual matrix is that it was the same individuals involved in the decision to promote the Claimant in the first place. However, shortly after the promotion there had been 3 incidents in quick succession.

32. We had some small regard for the fact that the First Respondent's workforce is very diverse. We note that many of the Claimant's fellow employees, some of whom were critical of her, were black African of Caribbean. We fully accept that a diverse workplace can still harbor racism.

33. We have further had regard to the highly-regulated sector in which the First Respondent operates. In common with the care industry it is normal to see even fairly trivial complaints thoroughly investigated and robust action taken in the name of safeguarding. Here we do not suggest that the complaints, and in particularly the third complaint were trivial. Far from it being surprising that there was an investigation it would have been surprising if there had not been. We find that the product of the investigation provided at least reasonable grounds for contemplating disciplinary action.

34. We have found above that the disciplinary hearing itself was a complete disaster. There is however a clear and obvious reason for that. The Respondents were under a misapprehension about the status of Ms Jamous and when it was discovered that she was not an accredited representative that degenerated into an unseemly confrontation. The nature of that confrontation rather underlines why the statutory right to be accompanied is limited as it is.

35. In this case, there was no dismissal and so it is not possible for us to ask whether there was a surprising or exceptionally harsh sanction that called out for explanation. As a matter or record we would have been surprised had the Claimant been dismissed. We would not have been surprised had she been asked to step down as a Room Leader. As the Claimant resigned there is no real room for a finding as to what would have happened had she not done so but we consider it likely that had she accepted a proportion of the blame for the third incident the likelihood is that she would have kept her job.

36. Whilst we note that threats of litigation had already been made at the time of the Claimant's resignation (which might have made us question the bona fides of the position taken) the Respondents did not seize upon the resignation in a manner consistent with a discriminatory mindset but instead wrote asking the Claimant to reflect on her position. That is not consistent with anybody wanting the Claimant to leave the organization.

37. We take all of those matters and ask whether, in the absence of any explanation from the Respondent, it is open to us to draw an inference of discrimination because of age or race. We conclude that it is not. We

therefore find that the burden has not shifted to the Respondent to show that race and age did not form any part of the reasons for acting as they did. However, even on the assumption that it had, we accept entirely that the reasons why disciplinary action was contemplated was that there had been three incidents which individually and certainly cumulatively gave reasonable grounds to commence disciplinary proceedings. This was the true and exclusive reason for the treatment. We accept the Respondents explanation as to why they acted as they did both as to the instigation and unfortunately disrupted pursuit of those matters. That was a non-discriminatory explanation leaving no room whatsoever for a finding that the Respondents were influenced at all by the Claimant's race or age.

38. From the findings above it followed that the Tribunal dismissed the Claimant's claims and had no need to deal with the additional question of justification in respect of the claim of discrimination because of age.

Employment Judge John Crosfill

Date 19 November 2017