EMPLOYMENT TRIBUNALS

Claimant: Mr D M Dikuyi

Respondent: Brothers of Charity Services

HELD AT: Liverpool **ON:** 18, 19 and 20 October 2017
15 November 2017

BEFORE: Employment Judge Batten

Members: Mr R Tyndall
Mr A Wells

REPRESENTATION:

Claimant: In person
Respondent: Ms J Duane, Advocate

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claims of detriment and dismissal for whistle-blowing are not well-founded and are dismissal; and

2. The claimant's claim of race discrimination fails and is dismissed.

3. Pursuant to rule 39(5) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the deposits paid by the claimant in the total sum of £500 shall be paid to the respondent.

REASONS

1. Judgment was given orally at the hearing on 15 November 2017 and a short Judgment was sent to the parties on 22 November 2017. This Judgment is given with reasons because the claimant requested written reasons, by an e-mail received at the Tribunal on 22 November 2017.

2. The claimant claimed unfair dismissal, race discrimination, breach of contract, whistle-blowing and harassment in his ET1 and also indicated in the narrative

of his claim form that he wanted to complain about breaches of the Working Time Regulations.

Background

3. A preliminary hearing for case management was conducted on 30 March 2017, at which the claimant was ordered to serve further and better particulars to clarify the bases for his claims and to set out any application to amend his claims which he had intimated was his intention at the preliminary hearing.

4. On 12 April 2017, the claimant filed further and better particulars of his claims, through solicitors who were instructed by him at the time.

5. The claimant's further particulars confirmed that the claimant relied on a single protected disclosure made by him on 14 October 2016, when he informed the respondent, in 2 text messages, that boxes of medication had been thrown away into a bin when those boxes still displayed the name of the service user and their personal details. The claimant said to the respondent that he considered that matter to constitute a gross breach of confidentiality and breach of data protection.

6. The claimant also set out, in the further particulars, 3 incidents of race discrimination upon which he relied. Those three incidents were:

   (1) A conversation with a fellow employee on 8 October 2016, during which the claimant contended that the employee had made derogatory comments about immigrants which were directed at him;

   (2) Later in October 2016, the claimant contended that he was subjected to a 3 or 4 hour interrogation by a manager of the respondent in the course of which the claimant said he was subjected to an onslaught of accusations and defamatory remarks in such a way that he considered a white employee would not have been so treated; and

   (3) Over a period of time, the claimant contended that he had been racially abused by service users of the respondent and that nothing was done to protect him from such.

7. In addition, the claimant's further particulars included particulars of his breach of contract claim and of the breaches of the Working Time Regulations 1998 that he contended for.

8. In response to the claimant's further particulars, on 8 May 2017 the respondent sent a "costs warning letter" to the claimant which was copied to the Tribunal.

9. On 19 May 2017, a second preliminary hearing took place at which Employment Judge Robinson struck out the claimant's claims of breach of contract and breaches of the Working Time Regulations 1998 for having no reasonable prospects of success. Employment Judge Robinson allowed the claims of direct race discrimination and harassment to proceed together with

the claim of detriment and/or dismissal for whistle-blowing, subject to the payment of 2 deposit orders, being of £250 per claim.

10. The claimant deposited the sum of £500 in compliance with the deposit orders, so that he shall proceed with his claims.

11. The final hearing took place on 18, 19 and 20 October 2017 but the evidence and submissions were only completed very late on the third day. There was no time available for the Tribunal to consider its decision and pronounce judgment; hence, the hearing was adjourned to 15 November 2017, with the parties attending at 1.00pm. The Tribunal used the morning of 15 November 2017 to deliberate and produce its decision.

Evidence

12. The parties co-operated to compile an agreed bundle of documents which was presented at the commencement of the hearing in accordance with the Case Management Orders. The Tribunal raised with the parties that the bundle was not in a good order. It was not in chronological order and was instead arranged thematically. This made events as documented very difficult to follow and the Tribunal regularly found themselves flipping backwards and forwards between pages in order to work out the true chronology of events and to link contemporaneous documentation.

Witness Evidence

13. The claimant gave evidence from a written witness statement and, in addition, through a supplemental witness statement in the form of an email which he sent to the Tribunal on the evening of 18 October 2017. The email was accepted by the Tribunal on 19 October 2017, with the respondent's agreement. The claimant was cross examined on his evidence by the respondent.

14. The respondent called three witnesses: Christine Kinsey, Julie Harding and Susan Quayle. Each gave evidence from witness statements and were subject to cross examination by the claimant.

15. At the start of the first day of the hearing, 18 October 2017, the claimant confirmed to the Tribunal that he relied on the single whistle-blowing incident, as that set out in his further and better particulars, together with the 3 incidents of race discrimination set out in his further and better particulars. Upon that confirmation, the case proceeded.

The Issues

16. The issues which the Tribunal identified as being relevant to the claims were as follows:

    (1) In relation to <u>whistle-blowing</u> the claimant contended that, on 14 October 2016, he made a disclosure to the respondent, his employer, about the disposal of boxes in which medicines had been placed when those boxes displayed the name of the service user concerned and

their personal details. The Tribunal had to decide whether that disclosure was a qualifying disclosure, specifically:

(a) Did the claimant reasonably believe that it showed a breach of a legal obligation?

(b) Was the disclosure made in the public interest and not for personal gain and therefore was the disclosure protected?

(c) If the disclosure is a protected disclosure, what conduct was the claimant subject to as a result of that protected disclosure?; and/or

(d) Did the protected disclosure materially influence the respondent's actions to the claimant's detriment; and

(e) Was the protected disclosure the reason or the principal reason for the claimant's dismissal?

(2) In relation to the race discrimination claim, the issues to be determined in relation to each of the 3 acts relied upon by the claimant, namely, the conversation with the employer on 8 October; the 3-4 hour interrogation and the abuse of him by service users which the claimant had identified in his further and better particulars, the issues were:

(a) Has the claimant proved facts, in respect of any or all of the 3 acts, from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act or acts of unlawful discrimination against the claimant;

(b) Where the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on the proscribed ground of race, has the respondent proved, on the balance of probabilities, that the treatment complained of was in no sense whatsoever on the proscribed ground of race;

(c) To consider whether the 3 acts, together or individually, constitute a continuing course of conduct amounting to harassment;

(d) Has the respondent, or any of its personnel, engaged in unwanted conduct;

(e) Did the conduct in question have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant;

(f) was the unwanted conduct related to the protected characteristic of race;

(g) In relation to direct discrimination, has the respondent treated the claimant less favourably than it treated or would have treated an actual or hypothetical comparator in any or all of the above ways;

(h) Was the less favourable treatment because of the protected characteristic of race?

Findings of Fact

17. Having considered all the evidence, the Tribunal made the following findings of fact on the basis of the material before it, we taking into account contemporaneous documents where they existed and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities taking into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts and contemporaneous documents.

18. Having made findings of primary fact, the Tribunal considered what inferences it should draw from them for the purpose of making any further findings of fact. The Tribunal has not simply considered each particular allegation but has also stood back to look at the totality of the circumstances of the case, to consider whether, taken together, such might represent an ongoing regime of discrimination.

19. The findings of fact relevant to the issues which have to be determined are as follows.

20. The claimant started working for the respondent on 1 February 2016 as a support worker.

21. The respondent operates a number of supported living projects for vulnerable adults. It has a disciplinary policy which includes a provision that unauthorised sleeping on duty shall be considered to be gross misconduct.

22. On 21 July 2016, the respondent produced a file note, which appears in the bundle, about performance issues which were discussed with the claimant. The claimant signed the document, which constituted constructive criticism of the claimant's performance at work.

23. The following day, 22 June 2016, the claimant emailed Ms Kinsey to complain about the matters raised in the discussion. The claimant implied that the discussion might amount to bullying; however, the claimant did not seek to appeal or raise any grievance about the nature of the discussion.

24. On 24 July 2016, Ms Kinsey spoke to the claimant at work about his email but the respondent took no further action in relation to the matter, and neither did the claimant.

25. On 3 August 2016, the claimant came to work early. He was told he was too early by at least an hour, if not more, and he was turned away. The claimant was not happy to be turned away and he complained there and then. His behaviour resulted in a complaint by a member of staff and an incident report was filed. The context of the claimant's behaviour was that it took place in a vulnerable client's home, and such was recorded by the respondent but it took no other action at that time in relation to the claimant's behaviour.

26. On 9 October 2016, the respondent received a complaint of sexual harassment relating to the claimant from a female employee.

27. On 10 October 2016, the respondent commenced an investigation in that Ms Kinsey asked questions which the claimant answered and she made a handwritten record of the questions posed and the answers given.

28. Later, on 13 October 2016, the respondent commenced a formal investigation which a view to possible disciplinary action. This investigation was conducted by another manager, Mr McClure, who concluded on the balance of probabilities that the complaint was validated. However, the respondent did not take any action in relation to the sexual harassment complaint against the claimant at that time.

29. On 14 October 2016, the claimant reported another employee for having disposed of boxes in which medication had been stored, when those boxes still had the labels on them displaying the service user's name and personal details about them. The claimant sent 2 texts to the respondent about the matter: the first was sent that day, 14 October 2016, and the second was sent the following day. [This is the incident which the claimant relies on as his protected disclosure.] The respondent investigated the matter immediately. The employee responsible was spoken to by the respondent's management and was found to be contrite. She and the respondent both recognised the errors made and, as a result, the respondent changed its procedures.

30. Also on 14 October 2016, the claimant completed an incident report about racial abuse which he had suffered from a service user who called him a "gorilla". The incident report appears in the Tribunal bundle. The claimant had not previously mentioned such racial abuse to the respondent nor did he mention it during the investigatory interview on 13 October 2016, the day beforehand.

31. On 23 October 2016, one of the respondent's managers raised a complaint about the claimant's behaviour and attitude. Once that complaint had been raised, the respondent investigated and a telephone interview took place with the claimant on 23 October 2016, in which it was confirmed that the statement in the complaint referred to August 2016 and the behaviour of the claimant when he arrived for work early and was turned away. The respondent did not find the claimant to be contrite when asked about the incident nor did he accept that he may have behaved inappropriately.

32. Also that day, the respondent interviewed an employee (who had been the subject of the claimant's protected disclosure) concerning the claimant's

behaviour on 3 August 2016, because that employee had been present on the premises at the time and was independent of the complainant.

33. On 24 October 2016, an incident occurred at the Hetherlow Centre at which several employees of the respondent noticed that the claimant had fallen asleep at work whilst accompanying and being responsible for a vulnerable service user.

34. On 28 October 2016, the respondent was informed by a member of the Hetherlow Centre staff that they had overheard employees talking about the claimant having been asleep whilst on duty. This was the first that the respondent's management knew of the allegation of the claimant sleeping at work. An investigation was commenced by the respondent on 31 October 2016 into the allegation that the claimant had been sleeping on duty.

35. In the meantime and whilst that investigation was ongoing, on 2 November 2016, the claimant was invited to a disciplinary hearing on 7 November 2016 in relation to two allegations: namely that he had used his own personal laptop to record and store clients' medication information, and that he had spoken to staff in an inappropriate manner. The Tribunal considered that the respondent had delayed in bringing these matters to a formal hearing. The claimant had been asked on 13 October 2016 about his laptop. The incident regarding his behaviour that was relied on took place on 3 August 2016. The Tribunal noted the delay in dealing with the August incident - the respondent did not fully explain why there was such a delay. However, the Tribunal was satisfied on a balance of probabilities, taking into account the evidence before it that the investigation which took place was not commenced as a result of to the whistle-blowing complaint on which the claimant relies.

36. On 7 November 2016, the claimant attended a disciplinary hearing about the allegations of his use of his laptop and his behaviour. The disciplinary hearing was chaired by a manager, Paul Jones, who had had nothing to do with the claimant previously. In the course of the hearing, the claimant admitted he had used his laptop at work to record notes of clients' medication but he denied the witness accounts of an altercation and shouting at colleagues in August. The claimant contended in the course of the Tribunal hearing that the matters were being raised because he was black. The Tribunal consider that to be his subjective view; the claimant provided no supporting evidence and, at the time of the disciplinary hearing it is recorded that he had said that the treatment was not to do with his race but rather because he had refused to work a shift.

37. On 9 November 2016, the claimant was given a written warning for using his own personal laptop to record and store clients' medication information in breach of confidentiality and for speaking to staff in an inappropriate manner. The Tribunal found that the warning itself was appropriate given that the claimant had been recording confidential information on his laptop even though he had not named service users in his notes. The Tribunal accepted the respondent's assertion that there was a potential for serious mistakes to be made with medication where records were not updated consistently and/or held centrally. The Tribunal also accepted that the respondent's requirement

was appropriate to ensure service user safety and that the objective of having one reference point for information on medication was a reasonable and sensible requirement. In the circumstances, the Tribunal considered that a written warning was a very lenient sanction, given the gravity of the conduct in issue.

38. On the afternoon of 9 November 2016, the claimant was interviewed about an allegation that he had fallen asleep while supporting a vulnerable client; that separate investigation having reached the stage where the claimant was to be interviewed. Following his interview the claimant was suspended from work, the investigation was concluded and a report was compiled which contained interviews with two employee witnesses. In addition, an independent student nurse, not employed by the respondent, had also signed the original complaint outlining what had taken place.

39. On 14 November 2016, the claimant was invited to a disciplinary hearing on 18 November 2016 in relation to the allegation that he fell asleep while supporting a vulnerable client. He attended the disciplinary hearing and he asked about CCTV footage but footage was no longer available by then. At the end of the hearing, the claimant was told he was to be summarily dismissed for gross misconduct, and the claimant responded by saying that the three witnesses that the respondent had produced were all lying.

40. The respondent confirmed the claimant's dismissal in a letter of 18 November 2016 and offered him the right of appeal, which he took up.

41. On 21 November 2016 the claimant attended for his appeal against his written warning. As the claimant had been dismissed in the intervening period, the respondent decided to postpone the appeal against the warning until 29 November 2016 and it decided to consider both appeals at the same time.

42. On 29 November 2016, the claimant attended for both appeals. In the course of the hearing, the claimant again stated that the staff witnesses were lying. He was asked why he thought this and he said he did not know. The claimant did not say that they were lying because he had whistle-blown or that they were lying because of his race. Instead, the claimant denied he fell asleep and said that it was only 1 or 2 staff who had complained about him and therefore the allegation did not warrant his dismissal. At the end of his appeal the claimant said that the staff should have treated him with respect.

43. The claimant’s appeal was unsuccessful and that outcome was confirmed in a letter from the respondent to the claimant on 30 November 2016.

The Law

44. A concise statement of the applicable law is as follows.

Whistle blowing detriment/dismissal

45. Section 47B(1) of the Employment Rights Act 1996 (“ERA”) provides that a worker has the right not to be subjected to a detriment by any act “done on the ground that he or she has made a protected disclosure”.

46. Section 103A ERA makes a dismissal automatically unfair where the reason or the principal reason for dismissal is that the employee has made a protected disclosure.

47. Disclosures qualifying for protection are defined in section 43B ERA as:

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following –*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *(e) that the environment has been, is being or is likely to be damaged, or*
>
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.*

48. The protected disclosure regime came under valuable scrutiny by the EAT in Cavendish Munro Professional Risks Management Ltd-v-Geduld [2010] ICR 325. Giving judgment, Slade J stressed that the protection extends to disclosures of information, but not to mere allegations. Disclosing information means conveying facts.

49. Qualifying disclosures are protected where the disclosure is made in circumstances covered by sections 43C-43H ERA and section 43B(1) ERA provides that for any disclosure to qualify for protection, the person making the disclosure must have a reasonable belief that the disclosure is made in the public interest.

50. The Employment Tribunal has jurisdiction to consider complaints of public interest disclosure detriment under section 48(1A) ERA. Subsection 2 stipulates that on such a complaint it is for the employer to show the ground on which any act, or any deliberate failure to act, was done.

51. A 'detriment' arises in the context of employment law where, by reason of the act(s) complained of a reasonable worker would or might take the view that he or she has been disadvantaged in the workplace. An unjustified sense of

grievance cannot amount to a detriment: see for example, Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL.

52. In Fecitt v NHS Manchester [2012] IRLR 64 the Court of Appeal held that for the purposes of a detriment claim, a claimant is entitled to succeed if the Tribunal finds that the protected disclosure materially influenced the employer's action. The test is the same as that in discrimination law and separates detriment claims from complaints of unfair dismissal.

53. Under section 103A ERA, where the question is whether the making of the protected disclosure is the reason, or at least the principal reason, for dismissal. The claimant must establish a causal link between the protected act and his dismissal and must establish, on a balance of probabilities, that the protected act, or acts, was/were the reason or principal reason for his dismissal.

Race discrimination

54. The Equality Act 2010 ("EqA") provides that to present a claim of discrimination, a claimant has to show that they have or can point to a protected characteristic within the categories set out in the EqA. Section 9 of the EqA defines race as a protected characteristic including colour, nationality and ethnic or national origin, or racial group.

55. The EqA defines various forms of prohibited conduct which will be unlawful if they take place in the context of employment. Direct discrimination is contained in section 13, of which subsection (1) states that "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."

56. Harassment is contained in section 26 of the EqA which provides that:

(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to the relevant protected characteristic, and

(b) the conduct has the purpose or effect of -
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

…

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

(a) the perception of B
(b) the other circumstances of the case
(c) whether it is reasonable for the conduct to have that effect.

57. The concept of harassment under the previous equality legislation was the subject of guidance given in Richmond Pharmacology and Dhaliwal 2009 IRLR 336. The tribunal has applied that guidance, namely:

58. *"There are three elements of liability (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was on the grounds of the claimant's race (or ethnic or national origins)."*

59. The burden of proof is found in section 136 EqA and provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision.

60. In Igen Ltd v Wong [2005] EWCA Civ 142 the Court of Appeal gave guidance on how to apply the previous similar provisions concerning the burden of proof under the previous equality legislation, namely that it is for the claimant who complains of discrimination to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful. If so, the burden shifts to the respondent to prove, on the balance of probabilities that the treatment complained of was in no sense whatsoever on the proscribed ground.

61. In relation to the question of whether there was a series of continuing acts of discrimination over time, the case of Hendricks v The Commissioner of Police of the Metropolis [2000] ICR 530 guides a Tribunal to focus on the substance of the claimant's allegations, namely that the respondent was responsible for an ongoing situation or a continuing state of affairs in which employees of one race were treated less favourably than those of other races employees; or whether in fact what is alleged is a succession of unconnected or isolated specific events.

62. Section 40(2) EqA provides that an employer may be liable for harassment of its employees by a third party if the employer fails to take "such steps as would have been reasonably practicable" to prevent the third party from harassing the employee. However, such liability only arises if the employee has been subjected to third party harassment on at least 2 occasions and the employer is aware that harassment of its employee by a third party has taken place: s40(3) EqA.

Conclusions (including where appropriate any additional findings of fact)

63. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

64. The whistle-blowing complaints – detriment and/or unfair dismissal. The Tribunal considered the nature of the claimant's disclosure on 14 October 2016 about medication boxes being disposed of in such a way as to breach confidentiality and data protection. The Tribunal found that this was a qualifying disclosure. The claimant reported matters to his employer. He reasonably believed there was a breach of a legal obligation and the disclosure was made about a matter that is in the public interest. Thus, it was a disclosure that qualifies for protection.

65. The Tribunal then considered what treatment the claimant was subjected to by the respondent as a result of that protected disclosure. The Tribunal did not find any link between the protected disclosure and the giving of a written warning to the claimant for improper use of his laptop or in relation to the claimant's behaviour in August 2016. The Tribunal found no basis to conclude that the claimant's protected disclosure either prompted or materially influenced the respondent's action in giving the claimant the written warning.

66. The Tribunal could not identify any other detrimental treatment of the claimant which originated after the claimant's protected disclosure from the evidence before it. Therefore the Tribunal concluded that the claimant did not suffer a detriment as a result of his whistle-blowing.

67. In respect of the dismissal of the claimant, the respondent provided clear and cogent evidence to explain that the claimant was dismissed for being asleep whilst at work and whilst caring for a vulnerable adult. That is conduct amounting to gross misconduct under the respondent's disciplinary policy.

68. The Tribunal considered that the respondent has shown it had a genuine belief that the claimant had been asleep and reasonable grounds to sustain its belief in the claimant's guilt. The respondent had the evidence of 3 witnesses, one of whom was independent of the respondent. Further, the respondent undertook a sufficient investigation. The Tribunal found that the respondent was entitled to conclude, from the evidence it had, that the claimant was guilty of sleeping at work. It follows that his dismissal fell within the band of reasonable responses. In all the circumstances, the Tribunal decided that the claimant was fairly dismissed and that his dismissal was not because of, or in any way connected to his whistle-blowing.

69. In relation to race discrimination, the Tribunal considered the 3 acts of race discrimination contended for by the claimant.

70. First, the claimant relied on a conversation on 8 October 2016 with an employee. The Tribunal did not find as a fact that this conversation happened either as described by the claimant or at all. There was no complaint about it by the claimant at the time the conversation was said to have taken place and, in particular, the alleged conversation was not brought up at the time by the claimant in response to the sexual harassment complaint, about which the claimant was interviewed the very next day. The Tribunal considered on a balance of probabilities that the claimant may well have done so, with the matter then fresh in his mind. The claimant did not say to the respondent at any time, until these proceedings were instituted, that the employee

concerned had said anything to him that was racist or that was racially motivated.

71. The Tribunal found that the second act relied upon by the claimant, the 3-4 hour interrogation probably happened on 13 October 2016, although the precise date remains unclear from the further and better particulars and the evidence. Nevertheless, the claimant was interviewed on 13 October 2016 about the sexual harassment complaint. In light of the allegation made, and its nature, the respondent was bound to investigate. The Tribunal found it to be proper and proportionate for the respondent to interview the claimant when it did, and in the manner it did, given the very serious nature of that complaint. The Tribunal noted that the investigation interview went on for a considerable period of time because, throughout the notes of that interview, the claimant was protesting his innocence, was introducing his own complaints to the respondent and, at times, appears to be going off at tangents. What is however significant is that the claimant made no complaint about the conduct of that investigation at the time, nor did he suggest it was racist or an act or race discrimination. Even if he had done so, the Tribunal did not take the view that a comparator of another race would have been treated any differently in response to such an allegation of sexual harassment. The Tribunal accepted that the claimant found the respondent's methods to be excessive and the interview lengthy but the Tribunal do not criticise the respondent for that, given the nature of the complaint.

72. Third, the Tribunal considered the allegation of racist abuse by a service user. The respondent has confirmed that a service user was racially abusive to the claimant. The service user in question was known to be abusive to staff and had exhibited challenging behaviour. However, the Tribunal noted that the claimant did not bring any abusive or racist behaviour to the respondent's attention until, at the earliest, 13 October 2016 when he mentioned it in his interview and, on 14 October 2016, when he completed an incident report which the respondent treated as a complaint.

73. The Tribunal considered that the respondent addressed the claimant's complaint promptly once received and the respondent made efforts to move the claimant as soon as logistically possible - by 29 October 2016, a period of approximately 2 weeks, the respondent had re-organised its rotas to ensure that the claimant no longer worked with the service user in question. It was noted by the Tribunal that, in the interim, the claimant did not object to working with the service user nor did the claimant at any time refuse to go to work. In evidence, the claimant suggested that he had repeated his complaint and he sought to rely on emails which he had sent to Mr Orme and Ms Quayle of the respondent but these were found to have been sent in November 2016, after the claimant had been transferred away from the service user's home.

74. The Tribunal also considered whether such discrimination as was found, being the abuse by a service user, constituted a continuing course of conduct amounting to harassment pursuant to section 26 of the Equality Act 2010. An employer may be liable for the harassment of an employee by a third party if it fails to take such steps as are reasonably practicable to prevent the third party harassment. The Tribunal considered that the respondent acted promptly and

in a timely manner given the logistics of rearranging rotas in order that the claimant could move workplace.

75. The Tribunal also considered whether, in these circumstances, the claimant had been treated differently or less favourably than a white employee or other employee from another racial group, but the Tribunal not find that the claimant was treated any differently than any other employee would have been in the same position. It was apparent from the evidence given by the respondent's managers that, once the respondent knew that the claimant was suffering racial abuse by the service user, the respondent made a particular effort to remove the claimant away from that situation as soon as it was reasonably practicable to do so.

76. The Tribunal did not find that the claimant's dismissal was an act of race discrimination. The evidence confirmed that the claimant was dismissed because of sleeping at work which was a matter of gross misconduct. The Tribunal noted that, at that time, the claimant did not suggest that his race was a reason for his dismissal. What the Tribunal did find was that, when the claimant did alert the respondent to racism that he was suffering, from a service user, they took action in response to that complaint and they transferred the claimant as soon as they possibly could.

77. The Tribunal noted that at no time did the claimant raise matters, about which he has since complained to the Tribunal, through the grievance process in his contract, nor by filling out an incident report about discrimination save for the one report that he completed on 14 October 2014. The Tribunal considered that the claimant had been aware of the respondent's procedures for reporting adverse incidents because he brought in evidence other forms that he had completed to record other matters. The Tribunal further noted that the claimant did not pursue a formal grievance when he was invited to do so at the first disciplinary hearing on 9 November 2016, when he was asked to put matters in writing. The claimant did not raise a grievance about race discrimination or whistle-blowing during the course of his employment.

78. The Tribunal found the claimant's evidence to be inconsistent and it was concerned that, in cross examination the claimant put to witnesses that incidents never happened when, in fact, he had accepted that they did when giving his own evidence. In addition, when the claimant had been interviewed about them by the respondent, at the time he had not then suggested that the incidents had never happened; at best, for example in relation to the August incident, the claimant had disputed the timing but not disputed the fact of that incident occurring.

79. In all the circumstances of the case, the Tribunal's judgment is that the claimant's claims must fail and are dismissed.

Costs and the deposit Orders

80. Following the giving of judgment on liability, the respondent applied for costs and in so doing, it relied upon the contents of its 'costs warning' letter and its

view in May 2017 that the claims had no reasonable prospects of success. The letter appears in the bundle at pages 46-48.

81. The Tribunal heard submissions from the claimant that he had felt he had a good case and heard evidence on oath from the claimant as to his means. The claimant brought documents to show that he was now a student and was relying on student finance and loans to fund his fees and living expenses. The claimant's evidence was subject to cross examination by the respondent.

82. The Tribunal heard submissions from the parties on whether it was appropriate to make an award of costs and, if so, what level of award might be appropriate taking account of the claimant's means.

83. The Tribunal also took account of the Tribunal rules, rule 39(5) which requires that, where a paying party has paid a deposit order and the Tribunal decides the specific allegation or arguments against that paying party, then they are treated as having acted unreasonably and the deposit shall be paid to the other party.

84. In the circumstances the Tribunal decided to order that the £500 deposited by the claimant shall be paid to the respondent.

85. The Tribunal decided that the claimant should not be ordered to make any further contribution to the respondent's costs, in all the circumstances of the case and also because of his very limited means as a student depending on student finance and loans.

Employment Judge Batten
Dated 14 December 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
29 December 2017

FOR THE TRIBUNAL OFFICE