EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms C Donaldson	v	Cassiobury Court Limited

Heard at: Watford

On: 1 & 2 February 2018

Before: Employment Judge Hyams **Members:** Ms C Baggs
Ms B Osborne

Appearances:

For the Claimant: Mr L Jegede, Solicitor

For the Respondent: Mr D S Bansal, Solicitor

UNANIMOUS RESERVED JUDGMENT

The claimant was not discriminated against because of her race.

REASONS

Introduction; the claims and the evidence

1 The claimant was dismissed by the respondent by a letter dated 14 December 2016 (pages 105-106 of the hearing bundle; any reference below to a page is to a page of that bundle). She originally made claims of unfair dismissal, unlawful deduction of wages and/or breach of contract and race discrimination. At a preliminary hearing held on 20 September 2017, it was

determined by Employment Judge Manley that only the claim of race discrimination could proceed, since the tribunal did not have jurisdiction to hear the other claims, because they were made out of time. In addition, Employment Judge Manley ruled, the claimant did not sufficient continuous employment to be able to make a claim of unfair dismissal.

2 The claim of race discrimination was based on the difference in the manner in which the claimant was treated in regard to the conduct for which she was dismissed as compared with the respondent's treatment of a fellow employee by the name of Mr Matthew McGregor. The claimant did not rely on a hypothetical comparator.

3 The respondent is a provider of drug and alcohol rehabilitation services on a private, residential basis. As such, the respondent is subject to regulation by the Care Quality Commission ("CQC").

4 We heard oral evidence from the claimant on her own behalf and, on behalf of the respondent, from (1) Mr Matthew Penn, who was at the time of the claimant's dismissal her line manager and the Registered Manager (i.e. for the purposes of the legislation under which the CQC regulates the respondent's services) of the residential facility, Cassiobury Court, in Watford, at which the claimant worked, (2) Mr James Kinsella, the Responsible Individual (for the same purposes) for that service, and (3) Mr Stephen Jones, Director of Purple Choices Ltd, a consultancy.

<u>The issues</u>

5 The issues were clarified at the preliminary hearing to which we refer above, namely as follows:

> "(1) Are there facts from which the tribunal could conclude that the claimant has been less favourably treated than Matthew McGregor in relation to disciplinary process and dismissal? The claimant's stated case is that Mr McGregor who is white, whilst she is black, was also found to have slept at work and was not disciplined or dismissed.
>
> (2) If so, can the respondent show the treatment was without discrimination because of the claimant's race?"

6 However, by the end of the hearing, during submissions, Mr Bansal, on behalf of the respondent, accepted that the burden of proof had shifted by reason of the difference in treatment of Mr McGregor, and therefore the issue was whether the respondent was able to show that the claimant's dismissal was not to any extent because of her race.

<u>Our findings of fact</u>

The sequence of relevant events

7 The claimant is qualified to NVQ level 3 in health and social care. She started to work for the respondent as an agency worker in 2014. The document which she accepted at least contained the terms of her contract of employment, at page 37-43, stated that her employment with the respondent started on 1 April 2015. Her job title was "Support Worker".

8 The respondent's parent company has two residential facilities: the one at Watford and one at Blackpool. The respondent employs 25 people at Cassiobury Court. The service users are vulnerable and it is necessary for there to be two waking night staff if there are more than 8 service users sleeping there.

9 The claimant's evidence (which we accepted in this respect) was that her relationship with the owners of the respondent was initially good.

10 When Mr Penn was first appointed to work at Cassiobury Court, he was not the claimant's line manager, or its Registered Manager. By the time of the claimant's dismissal, he was both her line manager and the Court's Registered Manager. Mr Penn is qualified to NVQ level 5 in health and social care. He is also qualified to NVQ level 4 in counselling. Before Mr Penn became the claimant's line manager, Mr Derek Corrigan was the claimant's line manager. The claimant got on well with Mr Corrigan. She also got on well for at least the first period of her employment with the respondent with Ms Voice. The claimant's oral evidence was that she had a "lovely" (she also used the word "beautiful") relationship with Ms Voice for the period up to the time when Mr Corrigan left the respondent's employment and Mr Penn became the claimant's line manager.

11 The claimant gave some oral evidence about the way in which her relationship with the respondent developed after Mr Penn became her line manager, and there were in the bundle documents written by the claimant which showed that the relationship between her and Mr Penn and Ms Voice became somewhat strained and difficult during the summer of 2016.

12 The claimant stated a grievance on 21 August 2016 (page 157). It was entitled "Grievance failing to safe guard client / staff/ racial discrimination/ unfairly treated under the Equal Opportunities Act 2010". That grievance was dismissed (by a letter of which there was no copy in the bundle).

13 The claimant went on holiday in September 2016 and returned to work on 11 October 2016. It appears that the letter stating the rejection of her grievance was written during that period. In any event, the claimant appealed that

rejection by a letter dated 13 October 2016, at pages 158-159. In that letter, addressed to "Darren", who, we were told, is a director of the respondent, among other things, the claimant wrote (all textual errors in the following and further extracts being original):

> "3 It appears as if I am to be blame in regards to one of the incident which related to the group and them ordering pizza, which resulted to a client leaving the establishment as she was not feeling safe which at the time broke the treatment plans. What Cassiobury Court have now done is adjust the treatment contract to accommodate this behaviour that I endure. This I find insulting. Change the policy by all means. But except at the time it was broken by management and clients. especially as the organisation also discipline a member of staff for buying pizza for his meal.
>
> You have accepted that at the lime it was a challenging Group. No support from manager or colleagues. I disagree that Mr Matt Penn try to offer me support on the morning set out in your letter dated 6th October 2016. He stated in the hand over that the client which left was, confrontational, challenging, etc, I pass the comment that I remember you saying those same things about someone that is not sitting to far from you. Namely myself. He told us that he would be have words with the clients they are beginning to treat this place as a holiday camp.
>
> 4. I took time to explain all I have been experiencing from a Organisational point of view, colleagues and clients. Under the Equal Opportunities Act 2010, is direct discrimination. Organisation and Racial. Particularly around the recruitment policy. Employees been fast tract into position, such as Project Worker namely Gary Cook, Senior Support Worker Johnny Barnett. I supported both of these employee, help to train both them and others. Repeatly ask for my position at Cassiobury to be review. Was told we did not have the funds at time. I have shift lead numerous shift without any recognition. Presently still shift leading. Not my employees administered medication or even no what to do on night shift from time to time."

14 In the week beginning with 24 October 2016, Mr McGregor returned from holiday, having been in Florida. During that week, some residents reported to a project worker by the name of Rachel Alloway that Mr McGregor and Gordon Hume, a colleague of both Mr McGregor and the claimant, were sleeping while on duty: Mr McGregor in a room (number 14) and Mr Hume in the lounge. Ms Alloway then reported that to Mr Kinsella, who spoke to the residents, none of whom wanted to make a statement to substantiate the allegations. As a result, Mr Kinsella decided that he could not take the allegations forward.

15 Mr Penn, however, spoke to Mr McGregor. Whatever he said then, he did not tell us about it, as Mr Penn said (in cross-examination) that he spoke to Mr McGregor only once, after he had had sight of the claimant's email dated 23 November 2016 of which there was a copy at pages 80-81, the relevant text of which is set out in paragraph 24 below. We concluded that Mr Penn had before seeing that email spoken to Mr McGregor about sleeping while on duty for these reasons: (1) we accepted that the claimant was telling the truth in this respect, (2) her email at pages 80-81 and her letter at pages 83-89 were written without knowing that Mr Penn would deny having previously had a conversation with Mr McGregor about the latter sleeping on duty, and (3) Mr Penn's evidence on this point was unconvincing, for the reasons stated below. We concluded that Mr McGregor said that he was jet-lagged, did not feel well, and had slept for an hour, the first half an hour being his break time. Mr Penn then decided to take no action against Mr McGregor.

16 On 24 October 2016, there was a hearing of the appeal of the claimant against the rejection of her grievance. That was apparent from the letter dated 25 October 2016 of which there was only the first page in the bundle, at page 160. The appeal was unsuccessful, although it was not clear on what basis, since we had only the first page of that letter before us.

17 The claimant evidently wrote to Ms Voice about the grievance outcome, as Ms Voice wrote back in a letter dated 7 November 2016 of which there was a complete copy in the bundle, at pages 161-162.

18 On 18 November 2016, the claimant wrote to Ms Voice (page 164):

> "I would like to advise you that I am going to take out a tribunal claim against Cassiobury Court for Organisations /
>
> Racial Discrimination. I also feel I am being vistimise by you all unfairly."

19 At that time, the claimant was employed to work three 12-hours shifts per week. She worked from 8pm until 8am, as a waking night support worker. She worked the night of 21-22 November 2016. At about 11.30pm, she went to the room called the Serenity Lounge, which she called the Serenity Room. It had in it a bed called a massage bed and a chair called a massage chair. Mr McGregor was the other member of staff on duty that night, and at about 12 midnight, he asked her for the premises' hands-free telephones (of which there were two in her possession), and she gave them to him.

20 The claimant remained in that room until shortly after about 2.45am, when Ms Voice and Mr Donald Johnson, the respondent's Chief Executive Officer, arrived at the premises. They found Mr McGregor at the reception area. They asked him who was on duty with him, and he said that the claimant was. They

asked him where the claimant was, and he said that she was in the Serenity Lounge. A statement made by Mr Johnson at the time (at page 78) said that Mr McGregor became flustered when he was asked where the claimant was. While we did not hear from Mr McGregor, Ms Voice or Mr Johnson, we concluded on the balance of probabilities that that was what happened. We concluded after hearing all of the evidence that on the balance of probabilities, the claimant told Mr McGregor where she was going to be, and he knew that she might be asleep when Ms Voice and Mr Johnson went to see her in the Serenity Lounge. In any event, Ms Voice and Mr Johnson went straight to the Serenity Lounge.

21 Ms Voice had made a handwritten statement of the events (page 76) and her and Mr Johnson's statement were to this combined effect:

21.1 Mr Johnson knocked on the door loudly, but there was no response.

21.2 Mr Johnson opened the door a little and sought to find the light switch, but could not do so. He then pushed the door firmly, and heard something move. As he pushed the door open further, he could see that a large bamboo plant had fallen so that the plant was on the bed.

21.3 The claimant then stirred, apparently waking from a sleep. She said: "What's going on?"

21.4 Mr Johnson had by then found the light switch and switched the light on. He saw the claimant on the bed, fully clothed but covered by a blanket, and with her shoes on the floor. She sat up. Ms Voice said that she was not going to ask for an explanation, and then asked how the claimant had got to work: was it by car or by public transport? The claimant said that she had come by car, and Ms Voice asked her to leave the premises.

22 The claimant denied in cross-examination that she was asleep at the time. She also denied that there was a plant pot blocking the door. She said that she had her eyes closed but that she was not asleep when Mr Johnson and Ms Voice knocked on the door. We did not need to resolve that conflict of evidence. We were, however, satisfied that there was objectively good evidence that she was asleep when Ms Voice and Mr Johnson arrived at the premises and went to the Serenity Lounge.

23 The claimant later on thought that she had left her mobile telephone at work, and returned to the premises. However, Mr McGregor said that he had been told by Ms Voice and Mr Johnson that the claimant was not to be allowed back onto the premises.

24 The respondent, via Mr Penn, on 22 November 2016 sent the claimant the

letter at page 79, inviting her to a "disciplinary hearing" on 25 November 2016, at 12 noon, one of the outcomes of which might be her dismissal. On the next day, the claimant sent Mr Penn the letter dated 23 November 2016 at pages 80-81. In it, among other things, she said that she would not be attending as a member of her family was going to be buried on 26 November. One of the things which she wrote was that she was on her break at the time that she was found in the Serenity Lounge by Ms Voice and Mr Johnson. Another relevant thing that she wrote, was this:

> Thirdly, my colleague slept in room 11, i was told. When I had supervision, before I had a telephone call from yourself Matt Penn accusing me of sleeping in the Gold Room: To which I inform you, that I had not been sleeping in the Gold Room. you then came in the next day and spoke to Matt Mcgressor about sleeping in room 11 while at work. To date he have had no disciplinary or been threaten of dissmissle. No suspension and he is still working at Cassiobury Court to this day. i mention in previous letters. that I would not be so lucky, if the same thing had happen to me. Shay told me during my supervision that Rachel took a reflection group and the clients reported to her that they were sure that Matt M was sleeping in room 11 and Gordon on the lounge sofa. No mention of myself. Again they don't seem to be treated in the way that you would like to try and treat me. Is this not racial discrimination and victimisation. What then makes me any different from others. Is it not my colour?"

25 Mr Penn then sent the letter dated 23 November 2016 at page 82, stating that the disciplinary hearing was now going to take place instead on 28 November, at 12 noon. The claimant then sent the letter dated 24 November at pages 83-89 to which we refer in paragraph 15 above. That contained a detailed and extensive complaint of discrimination because of race by reason of a difference in treatment. However, after pointing out the difference in the treatment of Mr McGregor, the claimant wrote (at the bottom of page 86):

> "Unfair Recruitment,
> I belief that this is probably the reason, and motive to why all of what took place on the 21 st November 2016 shift. And why I was not treated the same.
>
> I had made it known that the unfair recruitment, was not going to be accepted by myself and I will not be push out or shut up about this."

26 That was a reference back to the grievance to which we refer in paragraph 13 above.

27 On the following day, 25 November 2016, the respondent, via Ms Dolly Torkilsden, sent the letter at page 90 in which the claimant was invited to an

investigatory meeting at 8.00pm on 28 November 2016, concerning the allegation that she was "sleeping during [her] working hours". For the first time, it was said that the claimant was suspended with pay.

28 The claimant attended that meeting. There was a note of it at pages 94-95. That note recorded this exchange at the start of the meeting:

> "MP - At approx. 2.30am 22nd November 2016, Christine Voice Quality Assurance Manager and Donald Johnson CEO visited Cassiobury Court and asked co-worker Matt Mc Gregor where you were? He said in Serenity Lounge.
> CD - Not true but not saying anymore
> MP - what time did you go in Serenity Lounge?
> CD - I can't answer that now
> MP - How long were you in there for?
> CD - 20 to 25 minutes
> MP - What did you do prior to going in there?
> CD - Kitchen work, medications, ensured that Room 1 needs were met after 2am
> MP - Why was the large plant behind the door?
> CD - That's not true"

29 On the following day, there was an email exchange between the claimant and Mr Penn, at pages 96-97. Mr Penn wrote that the claimant was now going to be invited to a disciplinary hearing to consider the matter, and the claimant wrote this:

> "You was not the appriopriate person to conduct the meeting in the first place, as I pointed out to you for the get go of the meeting. As I had just taken out a grievance not to long ago. And the trust is gone on my behalf.
>
> Plus you had just treated another colleague who was sleeping in room 14 completed different from me. He was not suspended, his name was not removed from the rota. So I am not willing to commuicate with you all any further. From now on please send the information by post and I will ask my legal representative to deal with the matter.
>
> My email address will no longer be available to you or any member of the company. I am sorry that it as come to this. I will also not be taking any calls from you all as it will be hard to evidence it.
>
> I ask for my taking a break/ lunch policy it still have not be provided. I asked if there was any specific guidelines to where and how we can use our break still nothing provided.

> I am sure you would agree, that had you not decided to treat me different than my white counter partner, then you would of suspended him and notify him also of a disciplinary meeting for sleeping in room 14 and on the lounge that it was allegde. His name would of been removed of the rota and replace with other member of staffs. And there would also be a gap for whatever reason, Please let me know if Chris Paine is going to be investisgated as per my previous email. Monday 28th November 2016.
>
> I understand that the investisgatory meeting is now over Monday 28th November 2016. I had not given my resignation or been dismissed so I believe until such time as mention in the the letter send to me and as enclosed in this attachment then my pay will be as usual."

30 In the meantime, after receiving the claimant's emails of 23 and 24 November 2016, on 25 November, Mr Penn spoke to Mr McGregor (i.e., on our factual findings, for a second time) and told him that he was getting a written warning for being found asleep on duty. Mr Penn's evidence to us was that the difference in treatment was the result of the fact that Mr McGregor acknowledged that he had been in the wrong, gave an explanation, and apologised for it. Mr Penn told Mr Kinsella that he had given Mr McGregor a written warning.

31 The respondent then arranged (via Mr Penn) a disciplinary hearing, to be held by Mr Kinsella on 5 December 2016, which the claimant said was too short notice. The respondent then put the date of the meeting back to 12 December, warning that it would go ahead without her if she did not attend it, and the claimant on 9 December wrote that she would attend the hearing. However, she did not attend the hearing. Mr Kinsella therefore decided what to do without having heard from her. He decided that she should be dismissed for gross misconduct with immediate effect. He stated his reasons in the letter dated 14 December 2016 at pages 105-106. In that letter, Mr Kinsella responded to the claimant's allegation of different treatment because of her race only tangentially, and, given that he had (as he told us) been told by Mr Penn that he (Mr Penn) had given Mr McGregor a written warning for being asleep on duty, in a misleading way. The letter was misleading, because it contained only this passage about different treatment because of race:

> "Your grievance re: organisational/racial discrimination was addressed in your grievance of 22nd August 2016 and in a letter dated 25th October you were advised that this was the final stage of the grievance procedure.
>
> You have suggested that 2 members of staff were reported as being asleep in the lounge. I have found no evidence to support this.

A member of staff did excuse himself from the workplace for a very short period after he heard some very distressing news. This was investigated at the time and the clear conclusion was that he was not sleeping and had been entitled to take a short period to compose himself."

32 However, the claimant herself had (see paragraph 25 above) referred back to the issue of recruitment, which was the subject of the grievance which was finally rejected on 25 October 2016, as the reason for the difference in her treatment as compared with the manner in which Mr McGregor was treated. Thus, Mr Kinsella's letter of dismissal at pages 105-106 was not misleading in so far as it referred to the rejection of that grievance.

33 Returning to the sequence of events, the claimant then wrote the letter dated 19 December 2016 of which there was a copy at pages 107-109. She wrote that she had been "unable to attend the disciplinary hearing on the 12th December 2016 due to medical grounds", and she enclosed a heavily redacted discharge letter written by the staff of North Middlesex University Hospital (pages 110-111). There was an unredacted copy of that document at pages 168-169. Given the conclusions which we state below, we do not need to refer further to that document. In her letter of 19 December, the claimant stated that she was appealing the decision to dismiss her.

34 Mr Jones was asked by the respondent to hear that appeal. Mr Jones did so as an independent contractor. Mr Penn invited the claimant to an appeal hearing on 17 January 2017 (page115). The claimant responded (page 116) by saying that she wanted a colleague by the name of Jennifer Allen to accompany her and that she (the claimant) would not be able to attend until she had recovered from her illness. She enclosed a medical certificate, stating that she was suffering from "Low back pain" (page 117). Mr Jones responded by an email and a letter dated 16 January 2017 (pages 118 and 119-120). The claimant evidently responded on 19 January 2017, as Mr Jones sent a further letter (which was undated; it was at pages 121-122) stating that the appeal hearing would now take place on 21 February 2017, and that if the claimant did not attend the hearing then it would go ahead in her absence.

35 On 22 February 2017, the claimant wrote (page 123):

"Dear Dolly,

I understand from Jennifer Allen just minutes ago that Cassiobury Court had plan an appointment for my Appeal Hearing without informing me. I do not understand that."

36 Mr Jones dismissed the claimant's appeal, giving his reasons in a letter dated 23 February 2017 (pages 125-126). He did so primarily because he

concluded that the claimant was "unable to submit any sufficient evidence to demonstrate that Mr Kinsella's judgement at disciplinary was wrong". Mr Jones at no time met the claimant before rejecting her appeal against her dismissal.

Other relevant facts

37 Mr Penn did not give Mr McGregor a written warning before, on 19 April 2017, in a supervision meeting which Mr Penn held with Mr McGregor, Mr Penn recorded this (page 127):

> "MP has discussed with M McG – concern that Matt over-slept during break – up to 1 hour (utilised bedroom). This document supervision is is confirmation of '1st written warning' issued to Matt for breaching his contract. Matt however admitted oversleeping ½ an hour from his ½ hours designated break – due to 'jetlag', and agreed this would not happen again."

38 Mr Kinsella's evidence was that he had qualified and worked as a social worker, and that in every establishment that he had worked in (whether a company or a local authority), sleeping while on (waking) duty was gross misconduct. Mr Jones' evidence was to the same effect.

39 Mr Jones said that he was asked to deal with the claimant's appeal against her dismissal as an independent contractor, and that he was also asked to look at the respondent's general procedures and related matters. He said that he discussed with Mr Penn the situation of Mr McGregor in January 2017, and that as a result of doing so, he learnt that Mr Penn had given Mr McGregor a "written" warning without putting the warning in writing. When Mr Jones was asked in cross-examination "Did you not say to Mr Penn 'We need a document for this'?", Mr Jones said this:

> "Not in those words. I said something about it but I was pulling the organisation apart; it was a very small piece of a very large mess."

40 One of Mr Jones' recommendations was to bring Mr Corrigan back as the manager of Cassiobury Court, and for Mr Penn to become its assistant manager. Mr Penn said that the reason why he wrote the note of 17 April 2017 to which we refer in paragraph 36 above was that Mr Corrigan and he were "discussing various cases that had happened when I was in the registered manager's role and that was one that came up. We discussed it, and he said that I should have documented it. So I went back and did it."

The applicable law

41 Section 26 of the EqA 2010 provides:

> "(1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> ...
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect."

42 We were referred by Mr Jegede and Mr Bansal to several relevant authorities, including *Birmingham City Council v Millwood* (3 July 2012) UKEAT/0564/11/DMD and *Zafar v Glasgow City Council* [1998] ICR 120. We bore in mind fully the principles in the case law to which Mr Jegede and Mr Bansal (to whom we were grateful for their helpful submissions) referred us.

A discussion and our conclusion on the facts

43 As can be seen from what we say in paragraph 15 above, we came to the conclusion that Mr Penn had not told us the whole truth, since we concluded that he had seen and spoken to Mr McGregor about the latter's sleeping on duty before the claimant was sent home in the early hours of 22 November 2016, so that he had not told the truth when he told us that he had spoken to Mr McGregor about sleeping on duty only after reading the claimant's email of 23 November 2016 at pages 80-81. We also (as indicated in paragraphs 31 and 32 above) came to the conclusion that Mr Kinsella's letter at pages 105-106 was misleading in that it said only this about what he knew about other members of staff having been found to have been asleep on duty:

> "You have suggested that 2 members of staff were reported as being asleep in the lounge. I have found no evidence to support this."

44 That was misleading because he, Mr Kinsella, had by then been told by Mr Penn about Mr McGregor admitting to having slept on duty after he had returned from his holiday in Florida.

45 In those circumstances, Mr Bansal's acceptance that the burden of proof had (by reason of section 136 of the EqA 2010) shifted was amply justified. If he

had not accepted that the burden of proof had shifted, then we would have concluded that it had done so.

46 In addition, Mr Penn was not the decision-maker: Mr Kinsella made the decision that the claimant should be dismissed. Mr Jones did not at any stage meet the claimant, and his role was to review the correctness of Mr Kinsella's decision. Both Mr Kinsella and Mr Jones were of the clear view that sleeping on duty was gross misconduct, and would have been regarded by any other provider of similar services as gross misconduct. We ourselves could see that being asleep when you are employed to be on a waking duty is obviously what is commonly called gross misconduct (i.e. conduct which is sufficiently serious to warrant, in the law of contract, summary dismissal). Furthermore, the claimant's answers to the questions she was asked by Mr Penn about what had happened on 22 November 2016, as shown in the extract set out in paragraph 28 above, were evasive, which meant that there was objective justification for concluding that the claimant was well aware that she had done something which was seriously wrong.

47 In addition, we concluded on the evidence that the immediate trigger for the difference in treatment of the claimant as compared with that of Mr McGregor, i.e. the fact that Ms Voice sent her home in the middle of the night of 22 November 2016, was the fact that the relationship between the claimant and Ms Voice had become very strained by reason of the claimant's taking up of the cudgels about the manner in which she saw herself to have been treated by the respondent. We could, nevertheless, see that what the claimant complained about was by no means obviously unjustified: she had what might well have been objectively justifiable reasons for complaining. However, whether or not she did so was not a matter which we had to decide.

48 The co-incidence of the closeness, in terms of time, of the claimant sending the email of 18 November 2016 to which we refer in paragraph 18 above, to the claimant being sent home on 22 November 2016 supported the proposition that the claimant was treated in the manner in which she was because she had complained about the manner in which she had been treated.

49 However, the claimant and Ms Voice had in the first period of the claimant's employment with the respondent had a "lovely" relationship. Thus, even if Ms Voice's reaction to the claimant's complaints was an operative reason for the difference in the claimant's treatment as compared with that of Mr McGregor, that reason was not discrimination because of the claimant's race.

50 And, finally, we heard oral evidence from Mr Kinsella and Mr Jones. Mr Jones, we concluded without hesitation, was no in way motivated (in the sense used in the relevant case law) by the claimant's race: he did not dismiss the claimant's appeal to any extent because of her race.

51 Mr Kinsella's conduct in deciding that the claimant should be dismissed for gross misconduct was, however, the subject of concern, because of the factor to which we refer in paragraphs 42 and 43 above: if his dismissal letter was misleading in that it side-stepped by a half-truth the claimant's complaint of discrimination because of her race by comparison with the manner in which Mr McGregor had been treated, then that most certainly meant that Mr Kinsella might have been influenced by the claimant's race when deciding that she should be dismissed.

52 However, after long and careful thought, we concluded that Mr Kinsella's evasion in his dismissal letter was not the result of, or proof of less favourable treatment because of, the claimant's race. We concluded, having heard and seen Mr Kinsella give evidence, that whatever the real reason for his decision that the claimant should be dismissed was, it was not her race. Putting the matter another way, having weighed up everything that we had seen and heard, and having heard from him about his reasons for deciding that the claimant should be dismissed, we concluded that he was in no way influenced by her race when he made that decision.

53 For those reasons, the claim does not succeed.

___O Hyams____________________

Employment Judge

Date: …19 February 2018…………..

Sent to the parties on: ....

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For the Tribunal Office