CG

EMPLOYMENT TRIBUNALS

Claimant: **Mr Jerry Ogbonna**

Respondent: **Partnership of East London Cooperatives (PELC)**

Heard at: **East London Hearing Centre**

On: **6 & 7 September 2018**
Chambers Day: **11 October 2018**

Before: **Employment Judge G Tobin**
Members: **Mr S Dugmore**
Mr M L Wood

Representation
Claimant: In person
Respondent: Ms C Bell (Counsel)

RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal is that the respondent discriminated against the claimant on the grounds of his race in breach of section 13 of the Equality Act 2010.

REASONS

The case

1. The claimant issued proceedings on 21 December 2017. He claimed race discrimination. His Claim Form said that his employment started on 2 August 2017 and ended on 13 September 2017; he was employed as a 911 Call Operator Trainee with the respondent. The details of complaint say

that the claimant was suspended with a colleague on 14 August 2017. He was suspended for 4 weeks and 3 days without pay. The claimant contended that he had been falsely accused of: (a) consuming and distributing illegal drugs to his fellow trainees; (b) taking a photograph of a senior member of staff without his permission and posting it to a WhatsApp group against company policies; and (c) giving an illegal substance to another member of staff (Ms Nehida Begum) causing her to collapse, which required an ambulance. The claimant said that he had several documents from the respondent proving that all of these allegations were false. The claimant contended that at an investigation meeting on 13 September 2017 Mr Jonathan Davis, Head of Human Resources, refused to investigate the claims, despite having had a month or so, but instead deliberately misconstrued some details so as to create a false narrative and then when on to recommend the claimant's dismissal.

2. The claimant said that Mr Paul Barratt, Head of Operations, instructed Mr Davis to reinvestigate. Mr Ian Lain, the Head Trainer, deliberately falsified information in order to protect a staff member that had supplied the tablet to Ms Begum. The claimant resigned on 13 September 2017 as he was reluctant to return to work with his 'detractors' or senior members of staff who had deliberately omitted and falsified information to harm his career. The claimant contended that it was on the grounds of his race, as a black male, that the allegations were given any credence in the first place.

3. Under additional information the claimant raised issues in respect of his inaccurate wage slip and loss of income during his suspension. The Employment Tribunal took this to be a claim in respect of non-payment of wages.

4. The Response was received on 7 February 2018. The respondent denied the claimant's claims of race discrimination and said that the respondent had followed their disciplinary policies and procedures by undertaking an investigation and investigation meetings as part of the allegation that the claimant had taken and distributed to others a chemical compound called Modanafil, which is a performance enhancing drug. The respondent contended that the claimant provided a statement on the day of suspension, and he was invited to a follow-up formal investigation meeting where he resigned. The effect of the claimant's resignation ended the investigation and any associated disciplinary action. The claimant had only worked for the respondent for 5 days prior to the day he was suspended. During these 5 days the claimant attended a full-time 111 pathways training course, which was an intensive 10-day course.

5. The grounds of resistance went on to say that concerns were raised at the end of day 5 (i.e. the Friday) by other attendees that the claimant had been taking performance enhancing pharmaceuticals during the course. The claimant and one other person had been discussing a performance enhancing compound called Modanafil, which was not illegal to consume but incompatible with the respondent's service and risk profile, as they were health advisers frequently dealing with life and death situations on the telephone. Others on the course believed, or were of the opinion, that the claimant had been consuming Modanafil. The investigation had determined that this had not happened but that he had been consuming another

product called Pro Plus which the respondent considered to be incompatible with their service standards and risk profile. The respondent contended that the issues relating to social media were investigated and it was determined through the investigation that the claimant had no input or responsibility for this breach of the respondent's policy that personal mobile phones should be switched off during working hours.

6. The investigator took statements from all parties available and following the first draft of the investigation [report] was able to meet and take statements from another trainee who had to leave the course due to being unwell. Only at this point did it come to light that this trainee had taken a pain-relieving pill from another trainee on the morning of her being unwell, and that she had to leave the 111 pathway training course due her underlying condition.

7. The respondent said that managers were concerned over the sharing of medication and pills within the workforce and the trainee that supplied the pain-relieving pill [to Ms Begum] had later undergone an investigation. He or she was subsequently given a written warning for sharing medication at work.

8. The respondent said that despite a multi-page complaint in relation to the content and process of the investigation, the claimant did not raise the question of race discrimination at the time. The basis of his complaint was that he was unhappy with the contents of the investigation and, the respondent said, he wanted to discredit the process.

9. The respondent denied race discrimination. The respondent also contended that the claimant resigned from his role prior to the completion of the investigation process citing a lack in confidence in the process and execution. No formal outcome had been reached in terms of the disciplinary process, so, the respondent contended, the claimant's complaint of race discrimination was disingenuous in that the claimant had no idea of the outcome decision of the chair of the disciplinary or any appeal that he would have been offered.

The relevant law

10. Section 13(1) Equality Act 2010 ("EqA") precludes direct discrimination:

> *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.*

11. Under section 4 EqA a protected characteristic for a claimant includes race, which includes: (a) colour; (b) nationality; and (c) ethnic or national origin. The claimant described himself as a black male, so this protected characteristic is met on the grounds of race. S4 EqA also provides that someone's sex is a protected characteristic.

12. Proving unlawful discrimination presents particular evidential problems as it is unusual to find explicit evidence of unlawful discrimination. As Lord Browne-Wilkinson put it in *Glasgow City Council v Zafar [1998] ICR 120* "those who discriminate on grounds of race or gender do not in general advertised their prejudices: indeed, they may not even be aware of them."

13. The examination of *less favourable treatment because of the protected characteristic* involves the search for a comparator and a causal link. When assessing an appropriate comparator, "there must be no material difference between the circumstances relating to each case": s23(1) EqA.

14. S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which an Employment Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

15. The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA Civ. 142, [2005] ICR 931* provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence, this can be distilled into a 2-strage approach:

    a. Has the claimant proved facts from which, in the absence of an adequate explanation, the Tribunal could conclude that the respondent had committed unlawful discrimination?

    b. If the claimant satisfies (a), but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

16. The Court of Appeal in *Igen* emphasised the importance of *could* in (a). The claimant is nevertheless required to produce evidence from which the Tribunal could conclude that discrimination has occurred. The Tribunal must establish that there is prime facie evidence of a link between less favourable treatment and, say, the difference of race and that these are not merely two unrelated factors: see *University of Huddersfield v Wolff [2004] IRLR 534*. It is usually essential to have concrete evidence of less favourable treatment. It is essential that the Employment Tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford [2001] EWCA Civ. 405, [2001] ICR 847*.

17. In *Madarassy v Nomura International plc [2007] EWCA Civ. 33* the Court of Appeal emphasised the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: they are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

18. Evidence supporting a prima facie case could include breaches of a Code of Practice (although the Tribunal must consider the reason for the failure – see *Tera (UK) Ltd v Goubatchev UKEAT 0490/2008* – or an evasive reply to questions asked or a witness' lack of veracity – *Solicitors Regulation Authority v Mitchell UKEAT 0369/2010*. Evidence against drawing a prima facie case might be, for example, evidence of how the respondent treats (or mistreats) others and not just the complainant.

19. In *DKW Ltd v Adebayo [2005] IRLR 514* the Employment Appeals Tribunal confirmed that a Tribunal was correct to accept that A (a black African man) had established a prima facie case, not only because other white employees had not been disciplined for the same offence, but also because there had apparently been a number of procedural failings in the way that the employer dealt with the case. The employer had failed to put forward an adequate explanation, and the fact that they had a genuine belief in A's misconduct was not sufficient. In *Komeng v Sandwell Metropolitan Borough Council UKEAT 0592/2010* the EAT said that Tribunal's should take care before accepting an employer's explanation that the treatment was meted out by reason of poor administration. In all circumstances, the Tribunal must consider carefully why the claimant was treated the way he was: see also *Eagle Place Services Limited v Rudd UKEAT 0497/2008*.

List of Issues

20. At the hearing of 19 March 2018 before Employment Judge Hyde the respondent accepted that it had suspended the claimant without pay and resolved to pay the claimant £964 gross in settlement of the unlawful deduction of wages claim. At the outset of this liability hearing, the parties confirmed that this payment had been made.

21. Ms Bell for the respondent prepared a draft list of issues, which was discussed at the outset of the hearing. The claimant had not prepared a list of issues, although he had prepared a list of his concerns/allegations about the respondent's behaviour. The respondents' list of issues was not helpful in that it identified many factual issues that were not in dispute. Furthermore, it identified claims of sex discrimination, which upon discussion was neither raised nor pursued by the claimant. The claimant clarified his case during the initial discussions: he said there had been some silly gossip on his training course in respect of taking inappropriate stimulants. Somehow, this had been magnified to be purported drug dealing. He said that inappropriate credence had been given to such gossip and that he had been subjected to various detriments (see below) because he was a young black male. He alleged that various managers at the respondent relied upon negative stereotypes in both accepting that the gossip was true, and then failing in their duty to undertake a full, impartial and fair investigation. The claimant said that his claim was about his race (in accordance with section 8.1 of his Claim Form) for which his sex and his age were prominent features, i.e. he said that he was treated the way he was because he was a young *black* male. He said that he did not want to pursue a freestanding claim of sex discrimination.

22. We went through the issues for determination by this Tribunal. The issues arising from the claimant's specific complaints were as follows:

    22.1 Was the claimant subject to the following treatment by the respondent:

        22.1.1 Allegations were made against the claimant which were accepted by the respondent as facts.

22.1.2 The investigation made conclusions without following a fair process.

22.1.3 The conclusions were wrong. Strong language was used in the investigation i.e. “supplied” “admitted” etc. The conclusion also made criminal assertions.

22.1.4 Overall the investigation was not sufficiently thorough.

22.2 Does this treatment amount to direct race discrimination under section 13 EqA? In particular:

22.3 Was the treatment identified above less favourable treatment than the respondents treated or would have treated an appropriate comparator?

22.4 Are Rachelle Labazzi and/or Rochelle Culling (the claimant’s chosen female comparators) appropriate comparators for the claimant? (s23 EqA).

22.5 Is the claimant required to rely upon a hypothetical comparator?

22.6 Has the claimant established facts from which a Tribunal could decide in the absence of any other explanation that the respondent contravened section 13 EqA?

22.7 Has the respondent established that the treatment of the claimant was in no sense whatsoever on the grounds of his race?

The hearing

23. The hearing bundle was in excess of 140 pages. At the outset of the hearing, the Employment Judge emphasised to the parties that, as a matter of course, we (i.e. the Employment Tribunal) would not read all of the documents contained in a hearing bundle. He stated we would read documents referred to us and we may read additional documents that have not been cross-referenced in any statement; however, if a party thought that a document was relevant and important, then he or she needed to bring that document to our attention.

24. We heard evidence from the claimant. The claimant confirmed his witness statement and he was cross-examined by Ms Bell. We asked questions for clarity. The respondent’s witnesses were Mr Jonathan Davis, the Head of Human Resources, and Mr Ian Lain, a Pathways Trainer. The claimant asked questions of both and again, we asked some questions to help clarify the case before us. Ms Bell was afforded the opportunity to re-examine the respondent’s witnesses before the evidence of the respondent’s witnesses were concluded.

25. We found the claimant to be a convincing witness. We felt that his evidence was truthful and that he did not "over-egg" any aspect of his version of events. The claimant readily accepted, and made no complaint of, the

decision to suspend him. He accepted that a serious matter had been raise in respect of drug use and possible drug dealing on the respondent's premises, so there was a need to suspend those alleged to have been transgressing to allow a prompt and thorough investigation. The claimant contended that the investigation was neither speedy nor thorough. The claimant's issues were in respect of the investigation and a leap to unstainable conclusions by the respondent's managers.

26. In its Response, the respondent criticised the claimant for not complaining of race discrimination at the time of the investigation nor in his 'multi-page complaint' prior to his resignation. This criticism was repeated again at the hearing by Ms Bell. Rather than discredit the claimant, in our view, his reluctance to attribute the respondent's behaviour to discriminatory motives enhanced the claimant's credibility. He was reluctant to raise discrimination at any early stage because, as the claimant put it, he was unwilling to 'play the race card'. The claimant came from a respectable and conservative background. The realisation that such treatment could be attributed to his race or colour shook the claimant to the core, which accounted for his resolution in pursuing these proceedings. We do not regard the claimant as disingenuous as contended by the respondent. We regarded the claimant's account as credible. He made concessions where appropriate. We found the claimant to be an honest and reliable witness.

27. We found Mr Lain to be an unimpressive witness. He gave what we regarded to be 'stock answers' in respect of many questions. We pressed him on how the allegation of drug misuse came to his attention and he was surprising unforthcoming. He said that he could not remember. Mr Lain was a former police officer with 27-years' experience. He had considerable investigation experience. He was the allocated Trainer for the course in question. The allegations of illegal drug use and illegal drug dealing were serious and had far-ranging consequences, so Mr Lain's initial involvement in these matters and the events that lead to this were, or should have been, memorable. We determine that Mr Lain was often evasive in answer to questions. The initially allegation was in connection with 'smart drugs', yet Mr Lain could not explain what he took 'smart drugs' to mean at this time. Nor did he bother to clarify what was the precise alleged wrongdoing made against the claimant's in respect of 'smart drugs'. He pursued Ms Begum to surprising lengths, refusing to accept her initial answers and explanation, in order to cobble together some form of supposed corroboration to his speculation that the claimant and another course member (Mr Fahim Ahmed) had been involved in drug dealing. In the contemporaneous documents and at the hearing, Mr Lain used language like "supplied" and "admitted", which was accusatory and inappropriate language to describe the claimant's purported wrongdoing. Mr Lain displayed an unreceptive or dismissive attitude towards the claimant. We conclude that Mr Lain was convinced that the claimant was up to no good even if the evidence would not support this.

28. Mr Davis presented as a somewhat disorganised HR manager. He was relatively new in his job and he said that effectively he had undertaken a full-time job for part-time hours. He said that he was extremely busy and could not deal with all the issues that had arisen in his new job within the

time allocated, which is why he worked considerably longer hours than his duties entailed. We did not find that there was any animosity between Mr Davis and the claimant. Crucially, in response to a number of questions about the investigation, Mr Davis emphasised he could not remember what exactly occurred. His memory was surprisingly blurred. This is particularly noteworthy in respect of Mr Barratt's rejection of the Mr Davis' initial investigation report. He was vague in explaining Mr Barratt's objections and how he went about addressing those objections. It took some time to obtain even the partial account given. Consequently, the Tribunal was aware that Mr Barratt had some significant input into the investigation process, but no clear indication as to what that was. We did not hear evidence from Mr Barratt and this was very unsatisfactory. The Tribunal expected the respondent to present a full picture and managers to be able to justify managerial decisions and the parameters of any investigation in a clear and considered manner. On such crucial issues Mr Davis' evidence was unsatisfactory.

29. Mr Davis' account of events was rendered more unreliable by Ms Bell questions which were aimed at pursuing other lines of disciplinary enquiry than those that were patently not pursued at the time of these events. The Employment Judge went to some lengths during the hearing to remind witnesses that they should confine themselves to the events and timeline under scrutiny. The respondent's counsel was insistent on attempting to re-run a disciplinary investigation based on following leads that were not explored at the relevant time. Such steps or leads were not documented in circumstances where they ought to have been and were inconsistent with the contemporaneous documents and correspondence. The insistence of Mr Davis that as the investigation proceeded, his focus shifted to concerns about the claimant's well-being, and his, and others' health and fitness to participate in the course does not accord with the facts and is misleading in the circumstances.

30. In all conflicts of evidence, we believed the account of the claimant as opposed to Mr Davis and Mr Lain's version of events.

Our findings of fact

31. We made the following findings of fact. We did not resolve all of the disputes between the claimant and the respondent. We merely concentrated on those disputes that would assist us in determining the issues as identified above. We have set out how we have arrived at such findings of fact where this is not obvious or where, we determine, this requires further explanation. When resolving disputes about contested facts, we placed most reliance upon contemporaneous documents and correspondence, unless there were especially strong reasons not to do so. Contemporaneous sources tend to provide a more accurate picture of what occurred rather than after-the-event justifications, or the re-casting or re-interpretation of events following professional advice.

32. The respondent company is a not-for-profit social enterprise. It provides NHS healthcare services, such as out of hours health care, emergency and urgent care, GP answering service, surgery closure cover and an out of

hours dental direction service. The respondent employs about 350 staff which equates to 96 full-time equivalent members of staff. It operates at 8 or 9 centres in the North East London area on a 24-hour, 7-day a week service. New call operator employees undertake an intensive initial training course which lasts for 10 days.

33. The claimant commenced work with the respondent on 2 August 2017 as a 911 Call Operator Trainee.

34. On Friday 11 August 2017, which was the fifth day of the claimant's course, 2 trainees – Ms Rochelle Culling and Ms Rachelle Labazzi - complained to Mr Paul Barratt (Head of Operation) about the use of "smart drugs" on the course. Mr Barratt subsequently took a joint statement from both Ms Culling and Ms Labazzi. The complaint or allegation against the claimant was as follows:

> "Smart drug" was given by Fahim Ahmed to Jerry Ogbonna [the Claimant] on Wednesday 9th. Jerry said to Rochelle that he gave him one and he said it was illegal in the UK. We believe it has also been offered to Nahida [Begum] but she refused to take it. I know this because she told [redacted] ….

35. The complaint also featured an allegation that a photograph was taken of Mr Ian Lain and was displayed on WhatsApp.

36. On Monday 14 August 2017 the claimant arrived at work and was led into an office by Mr Lain. Also present were Mr Jonathan Davis (Head of Human Resource and Communications) and Ms Sheryl Saunders (a Training Manager). The claimant wrote a written statement at this interview. He said that he was tired earlier in the week and Mr Ahmed told him that Pro Plus was a good way of being energized so the claimant bought some. The claimant said that Mr Ahmed also told him about a drug called Mordafil and said it was not legal in the UK. The claimant's statement said that during the course some other colleagues had asked him for some Pro Plus and he offered it to them. The claimant concluded his statement by stating that occasionally Mr Ahmed did ask him for some of his Pro Plus "so if anything, I was the one who gave him a Pro Plus pill".

37. ProPlus is an over the counter stimulant/supplement available in several high street shops or on-line. It is a caffeine tablet which contains the same amount of caffeine as a strong cup of coffee. Pro Plus is not medication; it is not an illegal substance and its sale is not restricted in any way. In evidence the claimant said that he bought his Pro Plus tablets in a Sainsbury supermarket, where it was easily available on an open shop floor shelf.

38. At this meeting Mr Davis informed the claimant that he was to be suspended along with Mr Ahmed for discussing, consuming and distributing illegal smart drugs. Mr Davis subsequently sent the claimant written confirmation of his suspension:

> As you are aware there has been an allegation that you have supplied and/or consumed an *illegal* [our emphasis] performance enhancing pharmaceutical by others who are attending the 111 Pathway Training with you.

> When you were informed of the allegation you stated that the only thing you have taken was Pro Plus, a caffeine pill and that you have taken nothing else. You also discussed others on the course taking Pro Plus.
>
> You disclosed that there had been a conversation in relation to other *illegal* [our emphasis] drugs that you have known about with an active ingredient called Modafil.
>
> I am now waiting for signed statements from those who have shared their concerns and this will be followed up by an interview from the investigating officer. Once I have seen their report I will be able to share this with both PELC senior management and yourselves.
>
> The content of the statements and finding of the investigation will then determine the next steps in the process for PELC.
>
> On the basis of the above information it was decided by the Training Manager, Sheryl Saunders that you were to be suspended from the current 111 pathways training.
>
> Once the investigation has been concluded you will be invited to a meeting and a decision in relation to the next steps e.g. return to the next 111 pathway training course or termination will be decided by Paul Barratt the Head of Operations…

39. Modafil is not an illegal substance either. We heard, and accepted, that Modafil was a stronger stimulant than Pro Plus because it contained a higher concentration of caffeine. It was not a licensed product in the UK, so it could not be sold by chemists or other retail outlets, but it was available for purchase from overseas via the internet.

40. In the claimant's statement of 14 August 2017 he stated that Ms Labazzi asked him if he had taken anything and that he had not denied it, "so as to gage her response and she explained that it was a smart drug and that I had to be very careful so I explained that I had not told anyone that I had taken anything so I was surprised to hear that people were talking about me taking a substance…" The claimant went on to say, "I believe my mistake was not speaking out about substances like Modafil because I had no idea about what it is as I have never heard of it. I only became concerned when [Ms Labazzi] said it was a smart drug and it wasn't legal".

41. On Tuesday 15 August 2017 Mr Lain made a written statement. He identified 3 significant incidences:

    a. On Wednesday 9 August 2017 he noted the claimant describe symptoms of feeling dizzy and some abdominal pain. He said that he arranged for the claimant to see one of the respondent's doctors who after a brief examination declared, Mr Lain said, that he thought the claimant was suffering from some kind of "reaction". In his statement Mr Lain referred to this being put down "possibly" to a contaminated sandwich.

    b. On the Thursday he referred to Mr Ahmed making a comment about being a "street pharmacists" [which was nothing to do with the claimant].

    c. On the Friday Mr Lain said he was approached by 2 course members stating that Mr Ahmed had offered a "SMART" drug to fellow course members and had "supplied" the claimant with such a drug and that this drug had been consumed accordingly. Mr Lain referred to a change in the claimant's manner. Mr Lain also referred to Nahida Begum becoming unwell with abdominal pain and vomiting and complaining of

numb feet and legs. An ambulance was called. Mr Lain said that the doctor had told him that Ms Begum's condition was such that it was as if she may have taken something. Ms Begum had denied that she took anything at all. Mr Lain said that the ambulance paramedic had told him that Ms Begum had presented with flank and back pain, abdominal pain and painful urination. Mr Lain interpreted Ms Begum's painful urination as a symptom of possibly taking a smart drug. Ms Begum refused to go to hospital. The GP took a urine sample and Mr Lain reported that this was found to be clear. Mr Lain's statement read:

> Whilst taking Nahida to the reception area to await her cab, I again asked Nahida if she had taken anything. She told me she had. She stated that Jerry had *supplied* [our emphasis] her with a Pro Plus. I said, "Do you know it was a Pro Plus", she told me it came from a Pro Plus packet. I said, "But do you know it was a Pro Plus", she insisted it was a Pro Plus coming from a sealed packet. I again said, "But do you really know it was a Pro Plus". At this Nahida accepted she could not be certain. I then confirmed with her that it was Jerry who *supplied* [our emphasis] the tablet to which she gave a positive reply…

42. Mr Lain, in his statement, came to the following "CONCLUSION…"

> I cannot state for sure what is being taken by these named students. I believe Fahim started this trend by *supplying* [our emphasis] to Jerry, an individual who appears easily led. He has offered Nahida a tablet, but at this point appears to have been refused. Fahim's *dealings* [our emphasis] were well known within the group, he appears to be the main instigator.
>
> Nahida took a tablet of some kind, *supplied* [our emphasis] by Jerry on her own admission. She reacted badly to whatever she had taken, requiring an ambulance to be called.
>
> On the balance of probabilities, the above conclusion is the most likely, and hence Fahim and Jerry should under no circumstances be invited back on any future pathways course. I believe Nahida is easily led and misguided. I think she is very naive and has never encountered such individuals before. I believe she should be treated as a victim in this matter, re-educated and return to a future pathway course.

43. On 17 August 2017, Ms Culling and Ms Labazzi provided additional unattributed or unidentifiable statements to Mr Davis. These statements were fuller in their explanation of the events and speculated further. Ms Culling said that the claimant was usually quite loud and outspoken, but when she thought he had taken a performance enhancer his behaviour changed to that of being quiet and withdrawn. She stated:

> I was never offered a pill, I never saw anyone take anything but I did see them [Mr Ahmed and the claimant] offering Pro Plus from a box.

44. Ms Labazzi speculated about the claimant's apparent change of behaviour. She said:

> He actually said, "I have taken a smart drug the other day". I then asked him what it was and he said, "it is a drug that enables better brain activity", I then asked him if it was legal and he replied, "that it was legal in the US but not in the UK so it cannot be that bad". This led me to believe that he had taken a smart drug, by his own admission.
>
> During the duration of the training course, smart drugs were discussed and another of the trainees even went as far as to say "we have a backstreet pharmacist on the course"…

45. Ms Labazzi said that Mr Ahmed had offered her pills outside the training room: "I don't believe that I was being offered a Pro Plus as these are legal where as what Fahim was offering me was illegal". The illegal drug that Mr Ahmed was supposed to have offered Ms Labazzi was never clarified in the investigation nor, so far as to Tribunal can ascertain, were further

enquiries ever made. Furthermore, how this was supposed to have been related to the claimant was equally unclarified or unexplored.

46. On 30 August 2017, some 16 days after the claimant's suspension, Mr Davis looked on the internet in respect of Modafinil. There is no apparent research in respect of Modafil, so it appears the respondent took the reference to "Modafil" to be "Modafinil". Modafinial was available for retail from United Pharmacists – UK for a price of £5.59 for 10 tablets. The description provided that Modorlar [the brand name for Modafinil] is a central stimulant chemically related to Adrafinial. It is used in the treatment of excessive daytime sleepiness associated with Nocololiptic syndrome, obstructive sleep apnoea and shift work sleep disorder. It is very popular as a study drug (Nootropic). Mr Davis also searched drugs.com which provided more information about Modafinil.

47. That amounted to the totality of the respondent's investigation and Mr Davis thereafter prepared an investigatory report which he shared with Mr Barratt (although the Tribunal was not been provided with a copy of this original report).

48. According to Mr Davis' account at the hearing, Mr Barratt said his investigation report was sloppy, and conflated 2 investigations, i.e. the investigation of the claimant with that of Mr Ahmed. Mr Davis reported at the hearing that Mr Barratt was also unhappy with a lack of corroboration in respect of the original complaints and the fact that Ms Begum was not interviewed.

49. The disciplinary procedures provided for an Operational Manager to investigate concerns with human resources support. The disciplinary procedure did not envisage a HR practitioner leading such an investigation. So it was clear that the respondent was confused with the application of their own procedures even at this early stage and did not follow their own contractual process.

50. Mr Davis said that his response to Mr Barratt's criticisms of his original investigation report was to review the report and remove the matters of contention that related to Mr Ahmed, notably: (i) the allegation that Mr Ahmed used his mobile phone to upload a photograph of Mr Lain to a social media account; and (ii) the reference to Mr Ahmed being a "street pharmacist". He said that the report thereafter related solely to the allegations against the claimant.

51. On 5 September 2017 Mr Davis wrote to the claimant enclosing a copy of his investigation report. The letter was headed "investigation meeting" however, the narrative included:

> We will be conducting this meeting in the same way as a disciplinary meeting and you will be given an opportunity to challenge the findings of the report and present your own case and mitigation.

52. The claimant was notified that he could be accompanied by a trade union representative or work colleague. The claimant was informed that the meeting would be chaired by Mr Barratt whom the suspension letter said

would determine whether the claimant would return to the next course or terminate his employment. Mr Davis also informed claimant that he would present the investigation report on behalf of management. Despite the title of "investigation meeting" this letter had the appearance and the substance of an invitation to a disciplinary hearing.

53. The disciplinary report annexed to this letter was clear in the disciplinary issues that the "Disciplinary Investigation Report" addressed:

> Allegation:
> That illegal performance-enhancing drugs were being supplied and consumed within the PELC 111 pathway training group of August 2017.
>
> Terms of Reference:
> As a result of concerns/allegations being raised by some members of the 111 Pathways training that they had been offered illegal performance-enhancing drugs during the training.
>
> Concerns relating to behaviour within the group of those who may have taken drugs where two trainees had to leave the training due to being unwell.
>
> The concerns were great enough that both of them were seen by the PELC on duty GP. On both occasions the GP's opinion was that they were having a reaction to something they had taken.

54. The report referred to the statements we have referred to in this decision above but made separate findings and conclusions. These were as follows:

> It becomes clear that, in this cohort of the 111 pathway training course, pills were being offered and taking during the duration of the course. The origins and locus of events are definitively Fahim Ahmed and Jerry Ogbonna who have both admitted to *sharing and supplying* [our emphasis] Pro Plus.
>
> There are doubts about the contents of the Pro Plus packets...
>
> During the course we have had two incidents of trainees being unwell with symptoms that would appear to be a reaction to a pharmaceutical compound taken ….

55. The reference to the purportedly 2 ill trainees included the claimant – who attributed his illness to eating a chicken sandwich, which was accepted by the respondent, until these later events. The respondent did not challenge that the claimant was made ill by the chicken sandwich at the hearing. It was not true that the claimant had to leave the course because of his upset tummy.

> Despite the issues that this caused to the individuals themselves, their behaviour and manner caused alarm and concern within the Pathways training cohort and to the trainers, which has had a negative impact on the training delivery and experience.
>
> On investigation it [sic] the compound Modafinal is not illegal in the UK and can be bought on the internet (appendix 9) and as such issues around illegal drug use need to be disregarded within the investigation report and the focus of the issue for PELC is the use of performance enhancers within training and the workplace.
>
> Recommendations
>
> The use of Pro Plus whilst not illegal is not acceptable to PELC or to the call centre management, although it is legally and widely available… the use of such performance enhancer should be considered as gross misconduct as would coming to work under the influence of alcohol.

Mr Davis did not say why Pro Plus was not acceptable to the respondent and why tasking Pro Plus could now be construed as a gross misconduct offense.

> Ultimately substance of use will be considered as an illness or addiction and in the first instance would be supported for treatment and rehabilitation provided that the person would not work on PELC business whilst they were in rehabilitation due to the clinical risk.

56. On 12 September 2017, the claimant sent a number of complaints to Ms Helen Mason (Director of Operation & Service Delivery) and a very detailed letter to Mr Brian Jones (the respondent's Chairman). In the claimant's letter to Mr Jones he said:

> I was thoroughly distressed and deeply shocked to read [Mr Lain's] report that I had to the effect basically endangered Nehida's personal health and safety, and that he went out of the way to conceal the truth… His false and libellous statements… are dishonest and extremely harmful to my character and reputation…
>
> I am of the belief that my right to a fair investigation had been deliberately sabotaged, and without the application of professional or moral; ethics I have been victimised, undermined and abjectly humiliated. It has been a deeply harrowing few weeks…
>
> Upon being unable to establish that illegal substances were being supplied by myself and Fahim [Mr Davis] and [Mr Lain] have both recommended that Fahim and I should never be invited back to another Pathways course. Jonathan Davis even suggested that my use of Pro Plus should be treated as gross misconduct and made references to substance abuse which comes across to me as a desperate attempt to clutch at straws having turned up empty in his attempts to prove illegal substance were supplied.
>
> I would like to state that at no point during our induction or afterwards were any of us attending the course informed that use of Pro Plus could be construed as gross misconduct.

The claimant then went on to explain his desire to clear his good name, he emphasised his youth work, Christian belief and his involvement in politics.

57. The disciplinary hearing was held on 13 September 2017. Mr Barratt chaired the meeting. Notwithstanding the respondent described this as "investigation meeting" in their subsequent notes of the meeting, it was nevertheless a disciplinary hearing. We say this because:

    a. the investigation had concluded with a Disciplinary Investigation Report;

    b. the invitation to the meeting was clearly an invitation to a disciplinary hearing in all but name;

    c. the claimant was afforded the right of representation or accompaniment consistent with a disciplinary hearing;

    d. the claimant was told that at the meeting he would be given the opportunity to see all of the evidence collected in relation to the investigation and to either provide mitigation or denied the allegations;

    e. the claimant was advised of possible outcomes, either to return to the next training course, or termination of employment;

    f. and the hearing was chaired by Mr Barratt, who had not undertaken the investigation and whom the claimant was previously informed would reinstate or dismiss him.

58. At the commencement of the hearing, according to the respondent's own notes, Mr Barratt set out the terms of the meeting "this investigation is happening due to the Drug consuming in the training course. PB has informed they would be given the opportunity to ask questions. JD will present the case". If the claimant was in any doubt that the hearing was not a disciplinary hearing, then this doubt was removed by Mr Barratt. This was clearly a disciplinary hearing.

59. Mr Davis referred to his report, which included the using of phones, which was nothing to do with the claimant. Mr Davis then went on to restate that the second issue of "using *illegal* [our emphasis] drugs in the training course". He referred to Mr Lain's statement that the claimant had "unusual behaviour" during the training course. Mr Davis referred to research on Modafil [sic] (which the claimant had never taken or given to a colleague). The respondent's notes refer to Mr Davis saying that Modafil was not illegal as a medicine, but a prescription is required. He referred to Mr Lain not being able to handle the behaviour on that day, the claimant putting a patient at risk, and a dispute at the respondent.

60. The claimant responded by explaining that he was tired on the course, which is why he bought Pro Plus from a supermarket. He said that he was really upset by Mr Davis' report and the serious allegations made. He referred to his correspondence with Ms Mason and Mr Jones and gave Mr Barratt, a copy of those grievances/complaints. The claimant said that he had checked with the police in respect of the Modafil drug purchased by his colleague and said that this could be purchased online and the claimant's involvement with Modafil involved no more than discussing this stronger caffeine drug with Mr Ahmed and Ms Labazzi.

61. The claimant thereupon informed Mr Barratt that he withdrew his position from the respondent's employment and that he had no intention of re-joining the pathway course.

62. On 27 September 2017. Ms Michealene Holder March, Director of Governance, Quality, Nursing and Estates wrote to the claimant to say that the respondent intended to investigate his complaint fully, but that as he had resigned from his training post, the respondent was not at liberty to share with him the findings or outcomes of the investigation. Ms Holder March went to promise that she would provide a general update when possible. In contrast to Ms Holder March's assurances, no investigatory documents or update have been evidence or made available to the Tribunal. At the hearing, Mr Davis said that following the claimant's resignation no further investigations were ever undertaken.

Determination

63. We are surprised that Mr Davis, who wrote the letter confirming suspension, and Ms Saunders, whom Mr Davis said made the decision to suspend, did not – prior to suspending – clarify the precise allegations against the claimant and whether the drugs in question were, in fact, illegal. That said, the first priority of the investigation ought to have been to ascertain what it

was alleged that the claimant had done wrong and whether the drugs referred to were actually illegal drugs. If the drugs were not illegal, then the investigation should have continued down a very different path.

64. If Mr Davis had applied himself in a diligent and proportionate manner, this investigation could have been concluded by 17 August 2017. At this stage he had taken statements from Mr Lain, Ms Culling and Ms Labazzi. Ms Begum had left the training programme and there is no evidence that Mr Davis was going to interview anyone else on or connected with the training course. Mr Davis looked on the internet on 30 August 2017 in respect of Modalert and Modafinial, which would not have taken much time and given the gravity of allegations of criminal behaviour should have been done on 11 August 2017 or 14 August 2017 or 15 August 2017 or 16 August 2017 or 17 August 2017.

65. We heard from Mr Davis that he was under "tremendous pressure" at work and that his paid hours were 2 or 3 days per week. That said, the claimant had been suspended without pay for, taking and supplying illegal drugs. Notwithstanding that at the hearing the claimant did not make an issue of the respondent's decision to suspend, the Tribunal regards suspension as justified only when there is some diligence and thoroughness in investigating such very serious allegations. It was not until approximately 3 weeks later that the claimant was invited to an investigation meeting. This delay indicates a rather dismissive attitude to the claimant, and was also in breach of the disciplinary procedures, which we understand was contractually binding:

> Suspension should be for the minimum time necessary to enable management to undertake any necessary investigations; the decision to suspend should be reviewed throughout the course of the formal process.

66. The suspension was clearly not "for the minimum time necessary" and Mr Davis accepted at the hearing the suspension was never reviewed.

67. The 2 people supposedly made ill by the drug misuse was the claimant and Ms Begum. The claimant ate a coronation chicken sandwich and complained that this made him feel ill. This was accepted at the time by Mr Lain. Ms Begum was the other individual who was ill on the course and she was not properly interviewed for 6 weeks. When Mr Davis spoke to her (a considerable time after the claimant's resignation) she attributed her illness to an entirely unrelated matter. Mr Davis confirmed in his evidence that even before this stage, he was not convinced that Ms Begum had taken illegal drugs, either deliberately or inadvertently.

68. Two trainees made allegations against the claimant and Mr Davis subsequently provided a copy of their redacted statements in his report. When asked why the claimant was sent a redacted report, Mr Davis said that the 2 individual complainants were worried about being identified. There was no evidence proffered at all to support any possible concerns that these 2 individuals might have about been identified. The claimant presented as an articulate, calm and thoroughly reasonable individual. He had a right to know who had accused him. There was no good reason why Mr Davis redacted this report and Mr Davis could not provide a satisfactory

answer to the Tribunal when the claimant put to him that he relied on stereotyped assumption that there must be some form of threats or coercion when a black man and drugs were involved.

69. The complaints of the claimant's involvement with drugtaking or illegal drug supply emanated from Ms Culling and Ms Labazzi. Ms Culling said that she did not see the claimant take any drug, nor offer colleagues anything other than Pro Plus. Ms Labazzi said she was *led to believe* that the claimant had taken smart drugs, although no one really knew what the term meant. Both complained about the claimant's change of behaviour, although neither knew the claimant before the course began a few days earlier. The statements of both were a series of speculation and innuendo devoid of real substance and containing surprisingly little facts. When asked by the Tribunal whether he should have undertaken further investigations, Mr Davis accepted that he should, but he said that he was allowed to speak to the trainees in their final week (i.e. week 2) as this was deemed by the course trainers as too disruptive. Mr Davis said he merely took the statements and wrote the report.

70. We are particularly troubled that neither the course trainer nor the suspending officer nor the investigating officer nor the disciplinary officer (who reviewed both investigation reports) actually identified what a 'smart drug' was. At the hearing, we were told a smart drug was a performance enhancing drug, like caffeine (and perhaps also like an energy tablet). We examined the respondent's disciplinary procedure, and this was silent about both "smart drugs" and performance enhancing supplements, medication or drugs. Ms Bell raised issues about the claimant being supposedly unfit for duty because of taking Pro Plus, but there was no contemporaneous evidence that this was ever investigated. The claimant's capacity to attend the course was never considered at the time so we do not regard this alternative avenue of possible wrongdoing as an accurate (or even honest) attempt to convey the circumstances which unfolded during August and September 2017.

71. The claimant's initial statement to Mr Davis of 14 August 2017 was clear and frank. He did not seek to obfuscate because he did not think he had done anything wrong. The allegations against the claimant from Ms Cullin and Ms Labazzi, when considered with the claimant's admissions amounted to:

    a. He talked about "smart drugs" and Modafin, none of which were illegal drugs.

    b. He took Pro Plus, which was like drinking strong coffee, and when asked by colleagues, he had offered to share his Pro Plus, although neither Mr Lain or Mr Davis made enquiries about who he had shared it with. This supposed infringement was equivalent to offering a colleague to buy him or her an espresso. That was not a disciplinary matter and the investigation should not have cast aspersions about this.

    c. 2 people the claimant met on the course, 4 or 5 days earlier, said that the claimant's behaviour or mood was supposed to have changed.

> Significantly these concerns were not shared by Mr Lain at the time, and given Mr Lain's rather tenacious involvement, surprisingly there was not one shred of evidence suggesting the claimant was unfit for duty or that his performance had become problematic.

72. Mr Lain was in a pivotal role so far as allegations of wrongdoing were levelled against claimant. He was a senior member of staff and the trainer on the course in question. He was also a former police officer, so his integrity and reliability would have been enhanced and valued. His forthright "CONCLUSIONS…" are extraordinary for a number of reasons:

- Mr Lain's persistence in refusing to accept that the content of a sealed Pro Plus packet could in fact be a Pro Plus caffeine tablet.

- The use of words such as "supplied", when the claimant and his colleague offered to share something that had the effect of a (strong) cup of coffee. His reference to "admitted" and other loaded and highly inappropriate language.

- His insistence that "Jerry should under no circumstances be invited back".

- We are also concerned how such a conclusion could be arrived "on the balance of probabilities". There was no rigorous investigation, little firm evidence and no clear evidence of wrongdoing. This was a mask for speculation and inuendo of which there was little or no evidential basis.

73. Other than the speculation and questionable assertions of Ms Culling and Ms Labazzi, and Mr Lain's acceptance or reliance upon them, there was no evidence that the claimant's behaviour had caused alarm and concern on the training course, or that this had a negative impact on the training delivery experience. In any event, the allegation arising from Mr Davis' Disciplinary Investigation Report of 5 September 2017 was confined to the following:

> That illegal performance-enhancing drugs were being supplied and consumed within the PELC 111 pathways training group of August 2017.

74. Mr Davis accepted during his evidence to the Tribunal that at the point that the claimant was invited to the disciplinary hearing, i.e. on 5 September 2017, there was no evidence that could support any other conclusion than the claimant had purchased and consumed a legal stimulant. So, the respondent knew that the allegation against the claimant was not true at the point that the investigation report was finished, and that he was invited to a disciplinary hearing. This left us asking the question: why the this hearing proceed on the basis of such unreliable allegations?

75. We were concerned about Mr Barratt's involvement. We did not hear from Mr Barratt, in circumstances that we expected to hear his version of events. Mr Davis said that he presented a report to him, which Mr Barratt previously instructed him to re-write because he said it was "sloppy". Mr Davis was reticent in explaining this fully and said that he could not remember in detail Mr Barratt 's objections.

76. If Mr Davis' role was perplexing then Mr Barratt's role was disconcerting. Despite the confusing – and ineptly drafted – letter of 5 September 2017, Mr Barratt role was to determine whether the claimant's employment would be terminated according to the suspension letter. Mr Barratt had already read version 1 of Mr Davis' investigation report and had rejected this. According to Mr Davis' evidence, Mr Barratt had read version 2 as part of his preparation for this hearing.

77. Mr Davis contended that he exonerated the claimant about supplying drugs in his report, yet the claimant was called to a disciplinary hearing about "illegal-performance enhancing drugs" one month after his suspension. Mr Davis sent his second report to Mr Barratt prior to the disciplinary hearing, and neither Mr Davis nor Mr Barratt did anything to correct the allegations or terms of reference to be heard at this hearing. Indeed, at the disciplinary hearing, Mr Barratt commenced the hearing by referring to "the drug consuming in the training course" and Mr Davis referred to "using illegal drug in the training course".

78. Given the above, we accept that at no stage did the respondent write to the claimant to correct or amend the disciplinary allegations faced by him. The allegation that the claimant was involved in illegal performance dancing drugs being supplied and consumed within the course was simply not true. Consequently, in accordance with the list of issues identified at paragraph 18.1.1, we find that allegations were made against claimant, which were accepted by the respondent as facts.

79. The claimant contended at 18.1.2 that the investigation made conclusions without following a fair process. The disciplinary procedures set out what a fair process is at section 5.2.

> 5.2.1 All disciplinary issues should be dealt with in a thorough, fair and consistent manner.
>
> 5.2.2 At every stage in the procedure, the employee will be advised of the nature of the complaint against him or her and will be asked to stage [sic] his or her case before any decision is made.

80. We will deal with the thoroughness of the investigation is a separate issue below. So far as section 5.2.2 of the disciplinary procedure is concerned, the claimant was advised that the issue was the supply and consumption of *illegal* performance enhancing pharmaceuticals when he was suspended and that was the allegation made against him at the conclusion of the disciplinary investigation. It is surprising that a healthcare respondent is ignorant of what constitutes illegal drugs, but assuming that the cohort of Mr Lain, Ms Saunders, Mr Davis and Mr Barratt were so unknowledgeable, then 20 minutes of research on the internet would have put them right. Yet the claimant was suspended for over 3 weeks and called to a hearing to discuss the termination of his employment. A fair process could and should have revealed this to be a wholly misguided and unsubstantiated application of the disciplinary process. We are satisfied that Mr Lain and Mr Davis (from whom we heard) and Mr Barratt (based on both his involvement in the investigation and his opening at the disciplinary hearing) had made conclusions about the disciplinary allegation without following a fair process.

81. In view of our conclusions above, we find the claimant has proved his case in respect of 18.1.3.

82. In respect of issue 18.1.4, of course the investigation was not thorough. Mr Davis had conflated the allegations about Mr Ahmed and the claimant and investigated all of these issues as a single matter and produced a single report to Mr Barratt. Mr Barratt was confused and instructed the investigation officer to dissect the allegations and treat the two disciplinary cases separately. Mr Davis merely rewrote his report and undertook no further investigations. The investigation did not properly identify what drugs or substances were consumed and by whom. The investigation did not clarify who else was given such drugs or substances. Astonishingly the investigation did not ascertain the legality of such drugs or substances. 2 people had made complaints, yet no other course participant was interviewed other than the claimant. The investigation did not produce any cogent evidence other than speculation and innuendo. The conclusions of the investigation were wholly unsustainable. This was a deeply flawed investigation at every level.

83. We do not know Ms Labazzi and Ms Culling racial or ethnic origin or the colour of their skin. In any event, they are not appropriate comparators because their circumstances are significantly different from the claimant because they made a complaint about the claimant. Mr Davis said that the person who had offered Ms Begum a paracetamol had been disciplined, but this person was not identified, and we were not provided with any documentary material. Under such circumstances, we are not prepared to accept that this is an accurate account. In any event, there is not enough information to determine whether such circumstances lend themselves to the comparative exercise. Although at the hearing Ms Bell said that she was confused about the claimant's complaint, we regarded the claimant's complaint as surprisingly clear. He said that an issue had arisen about illegal drugtaking on the course and that the respondent's employees and managers had relied upon or ventilated a negative stereotype of a young black male been involved with drug taking and drug dealing.

84. A black man was subject to suspension, investigation and summoned to a unjustifiable disciplinary hearing in circumstances that we believe no actual or hypothetical white comparator would be so treated. The defects in the investigation were far-ranging and profound. Unlike *Adebayo*, we do not accept that Mr Lain, Mr Davis and Mr Barratt could have a genuine belief in the claimant's possible culpability for the crimes alleged.

85. Given our findings of fact and determination of less favourable treatment above, in the absence of an adequate explanation from the respondent, we do conclude that the respondent has committed unlawful race discrimination.

86. As the first part of the *Igen* and *Barton* tests have been met, the burden falls upon the respondent to prove that unlawful discrimination was not committed or was not to be treated as committed. We could accept that Mr Davis, at least, did not have any conscious prejudice against claimant,

applying *Zafar*. He presented this amiable, hard-working and out of his depth in terms of investigating this relatively straightforward matter. Although, the authorities suggest that we should be guarded before attributing the claimant's less favourable treatment to an alternative explanation around Mr Davis' shoddy or inept investigation, the involvement of Mr Lain, Ms Saunders and Mr Barratt at various stages preclude us from attributing the less favourable treatment to non-discriminatory matters. The investigation was so incompetent; Mr Lain's hostility to the claimant so tangible; Ms Saunders involvement in suspending the claimant and then failing to review this; and Mr Barratt's failure to challenge the basis of his disciplinary hearing: all mitigate against treating the respondent as proving that the unlawful discrimination as contended, was not to be treated as committed.

87. Under the circumstances, we are satisfied that the claimant has made out his case. The less favourable treatment identified above was the result of race discrimination which compelled the claimant's resignation.

88. This case will be listed for a remedy hearing. A notice of hearing and case management orders will be issued in due course.

Employment Judge Tobin

5 December 2018