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EMPLOYMENT TRIBUNALS

Claimant: Mr S Kisitu

Respondent: Inclusive Care Support Limited

Heard at: East London Hearing Centre **On:** 28 November 2018 -
(morning only)
29 & 30 November 2018
Reserved Judgement -
29 January 2019

Before: Employment Judge Elgot

Members: Mr G Twomey
Mr L O'Callaghan

Representation

Claimant: Ms G Cheng (Counsel)

Respondent: Mr R Clement (Counsel)

RESERVED JUDGMENT

The Tribunal having reserved its decision now gives judgment as follows: -

- 1 The claims of age discrimination and race discrimination **SUCCEED.**
- 2 The complaint that the Claimant was not provided with a copy of written employment particulars **SUCCEEDS.**
- 3 The claim for unpaid wages is **DISMISSED** upon withdrawal by the Claimant.
- 4 The claim for breach of contract in relation to an alleged failure to pay agreed compensation does not succeed and is **DISMISSED.**
- 5 The remedy to which the Claimant is entitled shall be determined at a Remedy Hearing on 13 May 2019 at 10 am at East London Hearing Centre.

REASONS

1. The Claimant worked for the Respondent as a support worker from 15 August 2016 until 28 December 2017. This was his first job and when he commenced the employment he was 19 years old. The Claimant worked shifts including night duties at the Respondent's unit for adolescent men in Crow Lane, Romford and carried out welfare and caring support for client service users who have a variety of mental health and learning disabilities. He enjoyed the work itself and there were no complaints during the initial period of his employment up to 3 August 2017 about his capability, commitment or conduct. When he was dismissed on 28 December 2017 he had a clean disciplinary record. The Claimant identifies as Black African.

2. The Tribunal heard oral evidence from the Claimant himself. His mother Mrs Evalyn Ksitu produced a signed witness statement, attended at the Hearing and was sworn in but the Respondent indicated that it did not wish to cross-examine her and we had no questions for her. Her evidence is therefore uncontested. The Respondent's witnesses were Mr Justin Gardner, Unit Manager at Crow Lane together with Ms Joanne Gordon, then the Senior Support Worker at Crow Lane. We also heard evidence on behalf of the Respondent from Ms Marina Chorbadziskya the Human Resources Manager and from Mr Rashid Kamara a colleague of the Claimant when he also worked at Crow Lane. In accordance with the usual practice of the Tribunal we only read those documents in the agreed bundle to which our attention was specifically directed by the parties, their representatives or the witnesses. We had the benefit of oral submissions from both representatives and a Skeleton Argument submitted by Ms Cheng.

3. It is helpful to summarise the content of the Preliminary Hearings in this case at which both parties had the benefit of the Judgment and the Case Management Orders and Directions given by the Employment Judge on each occasion: -

3.1. On 3 May 2018 Employment Judge Barrowclough permitted the Respondent to extend time for presentation of its ET3 response which had been due on 2 April 2018. Time was extended and service confirmed as 1 May 2018.

3.2. On 31 May 2018 Employment Judge Speker gave judgment at a Preliminary Hearing and decided that the Claimant's discrimination claims had been presented out of time but that it was just and equitable to extend time and allow those claims to proceed. The Employment Judge also decided that the Claimant did not have the period of two years continuous service in the Respondent's employment which is required in order to present a claim for unfair dismissal and accordingly the unfair dismissal claim was dismissed. Employment Judge Speker found that the effective date of termination of the Claimant's employment was 28 December 2017. That date is important in relation to our findings below in respect of the claims of harassment and victimisation and will be relevant to our determination of the remedy awarded.

3.3. Finally, at a telephone Preliminary Hearing on 31 August 2018 Employment Judge Russell in her Case Management Summary sets out clearly the final list of issues in this case of which the parties were reminded at the commencement of this Hearing on 28 November 2018. In respect of those issues the claim for unpaid wages is hereby dismissed upon withdrawal by the Claimant as confirmed by the Claimant's representative on the second day of the Hearing, 29 November 2018.

4. The claim for unpaid holiday has been the subject of an Order, by consent, for payment and a Judgment dated 30 November 2018 was issued to the effect that the sum of £905.22 be paid to the Claimant. The remaining issues and claims are determined as below: -

5. Breach of Contract

5.1 The Claimant pursues a claim for £250 which relies on a promise made on 23 November 2017 by one of the Respondent's Group Managers, Mr Idriss Kamagate (Group Manager-Leaving Care) to pay "*compensation for the delay in addressing your complaint*". The Claimant says that it was agreed to pay that amount to him in instalments. No such monies were paid even in part to the Claimant.

5.2 We find however that the Claimant never accepted the offer of £250 compensation because he considered it to be an insufficient recompense and because it did not take into account what he calls "*the loss of earnings had I been working from August 3rd*". The offer of compensation was therefore never accepted by the Claimant and there was insufficient certainty to form an enforceable contract. The Claimant, despite being told in an email to him dated 29 November 2017 (at page 89 of the bundle) that the sum was ready for collection at the Respondent's Head Office, did not go to the office to collect the money.

5.3 In the absence of an enforceable contract the Claimant cannot sue for breach and his claim does not succeed. Ms Cheng conceded in her oral submissions on behalf of the Claimant that he had not unconditionally accepted the offer of compensation made by Mr Kamagate in November 2017.

6. Direct Race and Age Discrimination

6.1. These claims are made under section 13 Equality Act 2010: 'person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others'. The Claimant relies on the protected characteristics of race and age.

6.2. First it is said by the Claimant that during an altercation on 3 August 2017 between him and his line manager, Mr Justin Gardner, the Supported Living Unit Manager at the Respondent's Unit at Crow Lane, Romford Mr Gardner became angry and aggressive and called the Claimant the

abusive and offensive names which are set out in paragraph 17 of Ms Cheng's written submissions and also referred to at paragraphs 14, 40 and 41 of the Claimant's witness statement. None of those insults refer to the Claimant's racial identity as Black African but they do refer to his age. On 3 August 2017 the Claimant was just 21 having had his birthday on 2 August. Mr Gardner was aged 37 at the time.

- 6.3. At page 47 of the bundle is the Claimant's emailed complaint/grievance timed at 10:12am on Thursday 3 August 2017 and addressed to Mr Wayne Gardner, the Group Manager- Supported Living. Mr Wayne Gardner is Mr Justin Gardner's brother; he was at the time more senior in the Respondent's structure than Justin Gardner. There is a copy of the Respondent's structure chart at page 128. The Claimant's email reports and repeats the content of the verbal abuse the Claimant alleges he received from Justin Gardner, which he describes therein as "*verbally abusive and ageist*".
- 6.4. Mr Justin Gardner denies at paragraph 32 of his witness statement that he has ever '*insulted, sworn at or called Salvyn the names he has accused me of*'. Mr Gardner alleges on the contrary that on 3 August 2017, when he arrived at work at approximately 8:45am, he discovered that Mr Kisitu had failed to follow his instructions to write a monthly report for one of the Respondent's service users at Crow Lane and that when this failure was queried the Claimant himself became so aggressive and angry that the Claimant was told to leave the premises. Mr Justin Gardner says that foul language was used by the Claimant towards him. There is therefore a direct conflict of fact between the Respondent's witness Mr Justin Gardner and the Claimant as to whether the words of alleged direct age discrimination "*fucking stupid kid*" "*fucking kid*" "*little boy*", "*you are a little kid in fact a boy, I am the adult so shut your fucking mouth, I have the power to get you fired so keep your mouth quiet little boy*" were used on that morning by Mr Gardner or not.
- 6.5. We are satisfied that the language used by Mr Gardner towards the Claimant on 3 August 2017 by reference to his relatively young age was direct age discrimination and that because of the protected characteristic of age the Claimant was treated by the Respondent less favourably than the Respondent treated or would have treated others not in the Claimant's age group.

7. The reasons for our decision to accept the evidence of the Claimant rather than the evidence of the Respondent are as follows: -

- 7.1 The Claimant, within an hour of leaving the unit at Crow Lane, wrote a grievance emailed to Wayne Gardner. He states how upset he was about the experience of conflict with Justin Gardner and writes, "*I am going to seek legal advice about this unfair treatment, abusive conduct, being bullied and victimised at the hands of your brother because of my age as I kept on being referred to as a "fucking disrespectful kid"*". He therefore made a detailed contemporaneous complaint about the treatment he had received at the hands of Mr Justin Gardner.

- 7.2 Mr Justin Gardner also sent an email to his brother Wayne copied to Joanne Gordon who was then the Senior Support Worker at Crow Lane. It is timed an hour earlier than the Claimant's email and gives Justin Gardner's account of the events on the early morning of 3 August 2017, referring to the Claimant's rudeness, insubordination and verbal abuse. Thus, the contemporaneous email accounts of Mr Justin Gardner and the Claimant are also in direct contradiction.
- 7.3 We should first repeat the fact that, despite the serious allegations made by Mr Justin Gardner against the Claimant Mr Kisitu has never been investigated, disciplined or sanctioned in respect of any alleged misconduct even though, as found by Employment Judge Speker, he remained in the Respondent's employment until 28 December 2017.
- 7.4 Secondly, as emerged only from Mr Justin Gardner's oral evidence in the Tribunal, the altercation between him and the Claimant on 3 August 2017 was in fact overheard in its totality by Mr Wayne Gardner who did not give evidence at the Hearing. Justin Gardner told us that when he rang his brother, a telephone call which is referred to in the Claimant's email at page 46 and in Mr Gardner's witness statement at paragraph 23 and the Claimant's witness statement at paragraphs 40 and 41, the loud speaker on Justin Gardner's mobile phone was turned on. Mr Justin Gardner confirmed in his oral evidence "*yes, Wayne could hear us and we could hear him*". We conclude that there was therefore a direct witness to this incident who could have provided us with detailed accurate evidence of what was said and who might have assisted us to resolve the contradictory evidence between the parties.
- 7.5 In fact, Mr Wayne Gardner has provided no witness statement in these proceedings but has sent a letter addressed "to whom it may concern" at page 103 of the bundle written on 12 October 2018, some fourteen months after the 3 August 2017 incident. That letter refers to the Claimant "*raising his voice and continuing to shout abusive language ... as Salvyn left the Unit ... instructing Justin to come outside*". The allegation that the Claimant invited Justin Gardner to 'come outside'[and fight] is not an allegation made by any of the Respondent's other witnesses including Justin Gardner himself. It is therefore not credible. The final paragraph at page 103 contains allegations against the Claimant which are also not made by any other witness regarding previous confrontational behaviour by the Claimant. On the contrary the Claimant has never been admonished or disciplined for any confrontational behaviour and Ms Gordon confirmed in her evidence that he was a competent, conscientious and well regarded worker. It eventually transpired in late November 2017 that the Claimant was asked by Mr Kamagate to return and work again at Crow Lane as appears from page 68 of the bundle.
- 7.6 We find the letter at page 103 to be an unreliable source of information which was composed retrospectively to support Mr Justin Gardner's account. Thirdly, Mr Justin Gardner also told us that CCTV film of the argument between him and the Claimant on 3 August 2017 would have been available if it had been requested promptly. The Respondent keeps CCTV tapes for one month. Despite an alleged telephone conversation

with the CCTV Manager (who did not give evidence on behalf of the Respondent) Mr Justin Gardner failed to give any instructions that the tapes be preserved or stored in order to provide evidence of what had occurred, even though there were directly opposed factual accounts. Mr Wayne Gardner similarly failed to give any such instruction despite the fact that he overheard the altercation. It is to be expected that where the Respondent alleges abuse, insubordination and misconduct by an employee it would keep the CCTV evidence for use in future disciplinary procedures. On page 111 the Respondent has certainly used CCTV footage as part of the evidence leading it to dismiss another employee.

7.7 We find that Mr Justin Gardner was angry on 3 August 2017 and for this reason used discriminatory language against the Claimant. It is not necessary for us to make any finding as to whether he was justifiably angry since provocation is no defence to discrimination. Mr Justin Gardner believed that the Claimant had “lied” about being sick when he was absent from work on 31 July – 1 August 2017, had in fact played, in his capacity as a semi-professional player, in a football match on 1 August and was insubordinate in refusing to write a report about a service user relating to a period when the Claimant had been absent on holiday. All of these factors conspired to make him feel frustrated and annoyed with the Claimant, whether justifiably or not, and we are satisfied that it is more likely than not that in those circumstances he used age discriminatory language. We infer that the failure to call Wayne Gardner as a potentially decisive witness and/or to keep the CCTV footage arose from the fact that neither piece of evidence supported Mr Justin Gardner’s denials.

7.8 Mr Justin Gardner repeatedly told us that he had video evidence on his mobile phone that the Claimant had been playing football whilst allegedly absent through sickness. He did not however show that video to any other person in the Respondent organisation or to the Tribunal. No disciplinary action was taken against the Claimant in this respect. Finally, we observed that Mr Justin Gardner’s demeanour when giving evidence at the Hearing was to become easily agitated and frustrated, pointing his finger at counsel for the Claimant and angrily resisting any challenge to him. He found it hard to control his emotions. This was in contrast to the Claimant’s demeanour which, although he demonstrated some degree of distress, was to remain calm. This observation is one additional minor factor which leads us to prefer the evidence of the Claimant about the events of 3 August 2017. It demonstrates that Mr Justin Gardner was the one more likely to have lost his temper and abused the Claimant in ‘ageist’ terms.

8. **Alleged incidents of age/race discrimination before 3 August 2017**

8.1. The Claimant alleges that prior to 3 August 2017, for a period commencing in January 2017 when, he says, Justin Gardner first arrived as Unit Manager at the Crow Lane Unit, he experienced what is described in paragraph 18 of Ms Cheng’s written submissions as “many occasions” when Justin Gardner “would call the Claimant names and treat him in a derisive and dismissive manner on account of his age and race. Those

allegations are set out at paragraph 17 – 28 of the Claimant's witness statement.

- 8.2. The Claimant had been at Crow Lane since August 2016. His allegation is that when Justin Gardner first arrived they had a friendly and "bantering" relationship particularly since both of them were involved in football and football coaching. However the Claimant increasingly came to dislike the expressions used by Mr Gardner towards him using terms such as "you are a little kid" "hey, small African boy" "hey kid, come and give us the handover", "hey African boy who speaks with an English accent". The Claimant says this was no longer 'banter' but began to make him feel extremely uncomfortable. He took offence at being spoken to by his manager in this way. It is the Claimant's allegation that this terminology, which he describes as demeaning, was used inappropriately by Mr Justin Gardner at shift handovers and at other points of interaction during the occasional day shift which they both worked. Mr Gardner concedes that they probably did do eight or nine handovers with each other and met on the same shift at Crow Lane maybe two to five times.
- 8.3. The Claimant is certain and we accept his evidence that in May 2017 he 'had a word' with Mr Justin Gardner and asked him not to treat him in this disrespectful and unprofessional manner but that the demeaning behaviour towards him continued.
- 8.4. The uncontested evidence of the Claimant's mother Mrs Evelyn Kisitu corroborates the Claimant's evidence. The Claimant lives with his parents. Mrs Kisitu said that when her son was at home with her he made numerous complaints that he felt discouraged, demoralised and annoyed by this name calling which referred to his Black African identity and his youth. She describes eloquently at paragraph 7, 8 and 9 of her witness statement that she encouraged her son to persist in pursuing his career, his first ever job, and to try to ignore/put up with the treatment he regarded as degrading. In fact, in paragraph 9, she says that by April 2017 she and the family even began discussing with the Claimant whether he should choose another career and give up his job with the Respondent. The unchallenged evidence of the Claimant's mother supports the Claimant's account of his treatment by Mr Justin Gardner in the period leading up to 3 August 2017 which we find to amount to direct race and age discrimination and to harassment by reference to section 25 Equality Act 2010:-

'A person(A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B'.

- 8.5. There was considerable dispute in evidence between the parties as to whether Mr Justin Gardner commenced work at Crow Lane in January 2017 or in April 2017. The Claimant is clear that he arrived in January and that this is when the discriminatory conduct began to occur. The Respondent has failed to provide any documentary evidence in the form of rotas, contracts, correspondence etc. which would show the exact date

when Mr Justin Gardner took on what he described as a new 'project' at Crow Lane. We noted that all the Respondent's witnesses were able to recall the exact date in April 2017 when Mr Justin Gardner began working with them at Crow Lane. Ms Gordon and Mr Kumara (at paragraph 8 of his statement) were unable to recall any other dates with such exactitude. Ms Gordon for example could not recall the date on which she herself commenced employment with the Respondent. When Mr Kumara was asked how he had known the exact date of Mr Justin Gardner's arrival he hesitated for a considerable time and said "*I know when I was given this statement. I didn't know when Justin started it's an estimated period*".

We conclude that the Respondent's witnesses did not remember these dates from their own recollection or records but have been supplied with the information and asked to give evidence which is consistent with each other.

- 8.6. We therefore prefer the evidence of the Claimant and his mother, Mrs Evalyn Kisitu, that Mr Justin Gardner and the Claimant were interacting and working together at Crow Lane from January 2017 and that by May 2017 the Claimant had made it clear to Mr Gardner that the persistent use of discriminatory language towards him was 'unwanted conduct' by reference to Section 25 Equality Act 2010 as set out above.
- 8.7. Both the protected characteristics of race and age are relevant. We are satisfied that during the period from January 2017 to 3 August 2017 Mr Gardner directly discriminated against the Claimant by treating him less favourably than he would have treated others who were not of black African descent and less favourably than he would have treated others who were not in the age group 18 – 23. That less favourable treatment consisted of using demeaning and insulting language towards the Claimant as set out in paragraph 8.2 above and described in the Claimant's witness statement at paragraphs 17-25. We have identified the age group of 18-23 as being the age at which employees have left school or college and are in their first permanent job.
- 8.8. We are also satisfied that this conduct amounted to harassment. It was unwanted conduct related to the Claimant's age and race which had the purpose or effect of violating the Claimant's dignity and creating a degrading, humiliating and offensive environment for him at work. The perception of the Claimant that he was being routinely humiliated is described eloquently, in his mother's witness statement at paragraphs 3-9 and by him. Mr Kisitu said, "*he was mocking my accent calling me a little kid or a stupid little kid if I made mistakes*". Strong obscene language was not used during this period as it was on 3 August 2017 but we are satisfied that the Claimant felt belittled, upset and embarrassed by Mr Justin Gardner's conduct towards him particularly in front of vulnerable service users who are approximately the same age as him and who he felt he was working hard to assist and support. It did not occur at every interaction but it was no longer 'banter' because it had gone too far. We are satisfied that the Claimant reached what he called 'boiling point' and told Mr Justin Gardner in May 2017 to stop this conduct because he could not take it anymore. The 'quiet word' which the Claimant describes in

paragraphs 24 and 25 of his witness statement, although ineffective in stopping Justin Gardner's behaviour, is sufficient evidence of the fact that the Claimant made it clear that the conduct towards him was unwanted. To thereafter persist in that unwanted conduct with the effect of distressing the Claimant and maintaining a degrading work environment was harassment related to the Claimant's relevant protected characteristics of age and race.

- 8.9. The Respondent submits that if the interaction between the Claimant and Justin Gardner has been as difficult as the Claimant describes, he should have complained or raised a grievance and in particular had the opportunity to talk to Ms Gordon. We do not agree that the failure to take such steps undermines the Claimant's account of events; he was in his first job, he did not want to lose that job, his parents initially encouraged him to stick it out. He legitimately felt that he could not complain to Wayne Gardner about his brother Justin. He felt that he could not complain to Ms Gordon who was junior to both Wayne and Justin Gardner because she would have no power to intervene.

9. Continuation of harassment on 3 August 2017

- 9.1. By reference to the list of issues at page 27Q of the bundle we are also satisfied that on 3 August 2017 Mr Justin Gardner engaged in the unwanted conduct set out at 2.2.1, 2.2.2 and 2.2.3. He shouted at the Claimant and dealt with him in an intimidating and threatening manner and that unwanted conduct also amounted to harassment related to the Claimant's relevant protected characteristics of age. It was part of the same incident and course of conduct described in paragraphs 6 and 7 above in respect of which we have accepted the Claimant's account of what occurred on that morning.
- 9.2. We are not satisfied that the conduct described in paragraph 2.2.4 and 2.2.5 of the list of issues relates to any relevant protected characteristic of the Claimant and consequently make no detailed findings of fact in relation to these matters. The Claimant was left on his own for a short period in the Crow Road Unit on the morning of 3 August 2017 because Mr Justin Gardner was late arriving for work and the Claimant's co-worker had taken a service user to college that morning. The Claimant was asked to write a monthly report as Mr Justin Gardner expected him to do it as part of his usual work. The Claimant was reluctant to write a report covering a period when he had been on annual leave and had no knowledge of the service users' requirements but Mr Justin Gardner's insistence that he should do so was not harassment by reference to the Claimant's age or race. The conflict which arose did appear to be a cause of Mr Gardner's anger but it does not excuse or justify discrimination.

10. Victimisation

- 10.1 We are satisfied that on 3 August 2017 the Claimant did a 'protected act' as defined by Section 27 Equality Act 2010 because he wrote the grievance which is at page 46 of the bundle which refers to allegations

that the Respondent has contravened the Equality Act 2010 by 'ageist' verbal abuse and harassment. Victimisation occurs where:-

'A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done or may do a protected act'.

- 10.2 As a result of his email of complaint and because his queries were not immediately answered, including a request for a written confirmation of his apparent dismissal, the Claimant did not work his pre-arranged shift on 6 August 2017 and was thereafter offered no other shifts at Crow Lane or any other unit run by the Respondent. Despite various reminders addressed to the Respondent, some of which were acknowledged but not actioned, he heard nothing substantive until 21 September 2017 in a letter which appears at page 51. We were told this letter was written by the Respondent's Service Manager Aitzi Ugalde although there is no signature or indication of the author on the letter itself. The Service Manager's post sits just below Director level on the structure chart at page 128. The Respondent's witness Ms Marina Chorbadyiska confirmed in her oral evidence that she gave Human Resources advice in relation to its content. The letter, despite confirming that the Claimant is still employed, still does not allocate any shifts to him or refer to future work and income but invites him to participate in a mediation *"to speak with all parties concerned so that we may review the matter and find a suitable resolution"*. There is also reference to a continuing investigation into the Claimant's complaint which will be *"fair and unbiased"*.
- 10.3 No results or report of any investigation emerged. The proposed mediation meeting did not take place for almost another month until 18 October 2017 and was conducted by an *"independent mediator"* named Leona Brown not employed by the Respondent but said by Ms Chorbadyiska as being *"from a solicitor's firm"*.
- 10.4 When the Claimant arrived at that meeting accompanied by his mother Mr Justin Gardner was not in attendance. We are satisfied therefore that this was not in the nature of a mediation where both parties meet together with a trained and independent mediator and attempt to resolve their differences. The notes of the meeting at page 61 of the bundle are wrongly dated 15 October 2017 and fail to record the attendance of Mrs Kisitu. The meeting began at 4pm and Mrs Kisitu says she did leave early before the meeting finished because *"it appears from the start that the Chair was not impartial. I left at 4.30pm before the meeting finished because [she] was putting words in his mouth as I was distressed"*.
- 10.5 At the meeting Ms Brown had some notes, which appear at page 60, of an interview with Justin Gardner on 15 October 2017. The Claimant was not at that interview and did not see the notes of it in advance of his meeting with Ms Brown. Ms Chorbadyiska confirmed to us that it was a 'telephone conference' with Mr Gardner. In his evidence Mr Justin Gardner did not recall being interviewed at all, whether by telephone or otherwise, and so the content of page 60 was not familiar to him. He said in response to the Employment Judge's question *"it's my account of what happened I think. I think I did it by email. I cannot remember it"*.

Certainly, the Claimant had no opportunity to see the content of page 60 before he attended on 18 October 2017 for what he thought was a mediation meeting. Nor can the Claimant have seen the documents at page 58 and 59 headed "Review of Documents Provided" because two thirds down page 59 are some lines of redacted text which the Respondent says are privileged legal advice. We assume that the text at the foot of page 62 and all of page 63 are redacted for the same reason.

10.6 It is apparent from the notes of the 18 October 2017 meeting (taken by one of the Respondent's employees, Saberina) that, without notice that this would be the purpose or content of the meeting, Ms Brown intended to investigate what she refers to as "a counter allegation" made by Mr Gardner about the Claimant's conduct. This intention is consistent with the text under the heading "Initial Findings" at the top of page 60 which identifies potential 'Gross misconduct' by the Claimant consisting of aggressive behaviour and failure to follow management instruction, which *'may also give rise for further disciplinary'*. We repeat that the Claimant was not notified that when he attended on 18 October 2017 there would be any discussion of such allegations against him. It is hardly surprising therefore that he was unwilling to engage in such a process as is recorded at page 62 *"he feels that the process is not independent of ICS [Inclusive Care Support] and is bias (sic) and requests that the meeting concludes"*.

10.7 The conclusions of Ms Brown were that :-

- It has not been possible to mediate;
- That Justin Gardner has raised conduct issues against the Claimant which may amount to gross misconduct;
- That the Claimant has been given the opportunity to hear the counter allegation to his own complaint, but has refused to engage;
- That the Claimant needs to be invited into the office for disciplinary action regarding his conduct as alleged by Justin Gardner.
- That it may not be possible for the Claimant to return to work until the issues relating to his conduct have been addressed.

The Claimant has never been formally suspended from work and he had not been disciplined before the meeting on 18th October 2017.

11 We are satisfied that the conduct of this meeting by Ms Brown on behalf of the Respondent and its outcome, as recorded at page 62 but not communicated to the Claimant, was ill considered and confusing, it lacked clarity of purpose (it was neither a mediation nor an investigation as referred to in Aitzi Ugalde's letter at page 51) and there was a total failure of proper communication with the Claimant or disclosure of relevant information to him. As such it was conducted unfairly and contrary to principles of natural justice in such a way as to amount to an additional detriment caused to the

Claimant. He was left distressed and dispirited as he describes in his witness statement at paragraphs 78-80. We agree that he formed the reasonable view that *'there was no point of this meeting as she had already made up her mind that I was the aggressor'*. We are satisfied that this detriment, in addition to the substantial initial delay in responding to his grievance and the failure to provide any work in the interim period, was caused to the Claimant as a result of the protected act of lodging his grievance on 3 August 2017. Consequently, we find that the Claimant's complaint of victimisation succeeds.

12 No outcome of the 18 October 2017 meeting was notified to the Claimant. He sent several emails chasing a response, for example at page 66 in an email dated 13 November 2017 he writes to Andrea Osborne, a Business Support Officer at the Respondent's Head Office stating *"as you can imagine, I am at a total loss and confused as to what is going on"*. This further delay and lack of communication is an additional victimisation.

13 Thereafter, in late November 2017, it is not at all clear how and when he became involved, a Senior Manager, Idris Kamagate, Group Manager intervened. Mr Kamagate did not appear as a witness for the Respondent. Transcripts of the text messages between him and the Claimant are at pages 88 – 90.

14 The correspondence from Mr Kamagate demonstrates a completely different approach by the Respondent. Far from suspending the Claimant from work and/or commencing disciplinary action against him for alleged gross misconduct as recommended by Ms Brown the suggestion in a text at page 84 and in an email at page 68 is that the Claimant will now be given regular shifts at Crow Lane *"away from Justin who has been placed at another site"* and that compensation for the delay *'in addressing your complaint'* will be made, later confirmed to be an offer of £250 which the Claimant did not accept as enough. This correspondence with Mr Kamagate reveals a complete reversal of the Respondent's approach to the Claimant. We have no evidence before us as to why the change occurred. It appears that senior management within the Respondent's organisation took the view that the Claimant had been badly treated, that the conduct and result of the 18th October 2017 meeting had been unsatisfactory and unfair and that there should be an attempt to get the Claimant back to work in his original workplace but separated from Mr Justin Gardner who would work elsewhere. Mr Kamagate writes to the Claimant *'I got your back brother'*, implying that he will support him back in to work and there will be no disciplinary action against him. The correspondence is, in effect, an admission of victimisation and harassment by the Respondent against the Claimant. In fact, this initiative by Mr Kamagate did not succeed either.

15 The Claimant was left in limbo until he received the email dated 28 December 2017, which referred to a meeting to discuss his 'work prospects'. We refer to paragraphs 11-15 of Employment Judge Speker's judgment dated 31 May 2018 in which he finds that the reference in that email to 'work prospects' is to 'work in the future' on the basis of a new agreement. He concludes that it was only upon receipt of that email that the Claimant finally understood that his 'old' employment had come to an end.

16 The continuing failure up to and including 28 December 2017 to make the employment relationship clear caused the additional detriment of a continuing stressful situation for the Claimant and is, we find, part of the same pattern of victimisation.

17 Finally, we are satisfied that the Respondent has failed, by reference to Section 38 Employment Act 2002 to give the Claimant a written statement of employment particulars and we consider to be just and equitable in all the circumstances to award an amount equal to four weeks' pay. The amount of a week's pay will be calculated, if not agreed, at the Remedy Hearing. We are certain that the Claimant signed a copy of his employment contract but was not provided with a copy of his own to take away despite requesting a copy.

18 By reference to Section 207A Trade of Union Labour Relations (Consolidation) Act 1992 these proceedings concerns matters to which the ACAS Code of Practice on Disciplinary and Grievance applies. The Respondent failed, by reason of unconscionable delay and an unfair process carried out by Ms Brown on 18 October 2017, to comply with the Code in an unreasonable way when dealing with the Claimant's grievance. We will consider at the Remedy Hearing whether to increase any award we make to the Claimant by a percentage up to 25%.

19 The remedy to which the Claimant is entitled shall be determined at a one-day Remedy Hearing listed for 13 May 2019 at East London Hearing Centre commencing at 10 am. A Notice of Hearing will be sent out in due course. This date has been fixed without reference to the availability of the parties or their representatives and any witnesses. If either party wishes to make application to change the date of the Remedy Hearing it should contact the Tribunal as soon as possible.

20 In preparation for the Remedy Hearing the Claimant shall, 14 days before the date of the Remedy Hearing, serve an updated Schedule of Loss on the Respondent and the Respondent is, within 7 days thereafter, at liberty to serve a counter schedule if it so wishes. The parties shall agree and the Respondent will prepare six copies of an agreed bundle of relevant documents relating to the remedy issues only and bring four copies to the Tribunal on 13 May 2019 but not send it to the Tribunal office beforehand. Witness statements addressing the issues of remedy which are set out in the Case Management Summary of E J Russell at paragraph 2.17 on page 27R shall be exchanged simultaneously no later than 14 days before the date of the Remedy Hearing.

Employment Judge Elgot

Date: 22 February 2019