EMPLOYMENT TRIBUNALS

Claimant: Mr B Samuel

Respondent: St Christopher's Fellowship

Heard at: London South (Croydon**)**

On: 29-31 January, 1 February, 4 & 5 March and in chambers on 6 March, 15 and 16 May 2019

Before:

Employment Judge Tsamados
With members:
Ms S Campbell
Ms M Foster-Norman

Representation
Claimant: In person
Respondent: Mr R Golin of Counsel

JUDGMENT

The unanimous Judgment of the Employment Tribunal is as follows:

1) The Claimant was unfairly dismissed but contributed to his dismissal to the extent of 25%;
2) The Claimant was not unlawfully discrimination against on grounds of race and this complaint is dismissed;
3) The Claimant was not victimised and this complaint is dismissed.

REASONS

Claims and issue

1. By a claim form received by the Employment Tribunal on 20 November 2017, the Claimant brought a complaint of unfair dismissal against his ex-employer, St Christopher's Fellowship (the Respondent). In its response received on 2 February 2018, the Respondent denied the complaint in its entirety.

2. The Claimant then presented a second claim form, which was received by the Employment Tribunal on 12 April 2018, making a complaint of post-termination victimisation against the Respondent with regard to the alleged provision and/or non-provision of references. In its response received on 2 July 2018, the Respondent denied this complaint in its entirety.

3. By Order dated 20 July 2018, I ordered that the two claims be heard together.

4. A preliminary hearing dealing with case management was held by Employment Judge Morton on 20 February 2018 (dealing with the first claim) at which the she identified complaints of unfair dismissal and racially motived dismissal. The Claimant also wished to bring a complaint of dismissal for making a protected disclosure. He was invited to formally apply for leave to amend and to provide written details in support of that complaint. The full hearing of the case was listed for 4 days commencing 29 January 2019. EJ Morton indicated that the issues were identified as set out in a draft list prepared by the Respondent and substantially agreed by the Claimant, but to be finalised between the parties in time for the final hearing. This is annexed to our Judgment. It deals with the complaints of unfair dismissal, direct discrimination and victimisation. It also goes on to deal with a complaint of harassment. However, this is not a complaint which the Claimant has brought.

5. At a further preliminary hearing held by Employment Judge Baron on 6 August 2018 (dealing with both the first and second claims), the Claimant's application to amend to include a complaint dismissal as a result of making a protected interest disclosure was rejected. EJ Baron identified that the complaints in the first claim were of unfair dismissal and of direct race discrimination. The less favourable treatment was said to be the dismissal and for the purposes of "race" under section 9 of the Equality Act 2010, the Claimant relied on "colour" (the Claimant being black). With regard to the second claim, EJ Baron identified that the complaint was one of victimisation. He further identified that the protected act for the purposes of section 27(2) EQA was the bringing of the first claim. The detriments which the Claimant relied upon caused by the protected act were identified as (a) the contents of a reference (or references) supplied by the Respondent and (b) the failure to supply a reference on request. EJ Baron set a number of case management orders for preparation of the full hearing of the case.

The hearing

6. We heard the case over a number of days: from 29 to 31 January 2019, 1st February 2019 and 4 and 5 March 2019. We sat privately to reach our decision on 5 March 2019 and again on 15 and 16 May 2019. On the first day of the hearing, the Claimant indicated that he had to attend a job interview in Twickenham at 3 pm and requested to leave by 1 pm. We used the time available that day to agree the issues, to deal with documentation, to discuss timetabling and also to discuss the Tribunal procedure. The Claimant made an opening statement which was essentially a character

reference. In the afternoon we read the witness statements and referenced documents.

7. The four days originally fixed for the hearing proved insufficient to hear the evidence. We listed a further three days and heard the case from 4 to 6 March 2019, the latter day being a day in sitting privately without the parties. This again proved insufficient and so we listed a further two days in private which to complete our deliberations and judgment, on 15 and 16 May 2019.

Evidence

8. The Respondent provided a bundle of documents which ran from pages 1 to 298. We refer to this bundle as "R1" where necessary. Additional pages 288 and 139 were added to R1.

9. During the first day of the hearing, the Respondent's Counsel referred the Tribunal to pages 291 and 292 of R1 and stated that these related to ACAS discussions and as such were privileged, ie the Tribunal should not consider them. I responded that we would ignore them if they disclosed matters of privilege.

10. On the second day of the hearing, the Claimant asked to rely on additional documents relating to a final written warning which the Respondent had issued him with. The Respondent in turn wished to add the notes of the disciplinary meeting relating to that warning. We allowed the documents to be adduced as set out below.

11. The Claimant provided documents relating to his final written warning, namely his suspension letter dated 3 March 2017 (which we refer to as "C2" where necessary) and the Respondent provided the notes of the final warning disciplinary hearing dated 6 April 2017 and 25 April 2017 (which we refer to as "R2" and "R3" where necessary).

12. During the course of the hearing, the Claimant provided a Daily Summary relating to a child referred to for reasons of confidentiality as "DP", dated 18 August 2017 and a handwritten diary for 18 August 2017 (both of which we refer to as "C3" where necessary). The Respondent also provided a blank Hays reference request form (which we refer to as "R4" where necessary).

13. We were also provided with a schedule of loss by the Claimant.

14. Also on the second day of the hearing, the Claimant stated that he wanted to call Mr Beren Stephenson as a witness. He had applied for a witness order, but this had been refused by the Tribunal. He had only been able to contact Mr Stephenson on 30 January 2019. He explained that Mr Stephenson worked at the Respondent's home for vulnerable children at Allen House and could give relevant evidence because he worked directly with DP. The Respondent objected and stated that this was unnecessary, pointing to the evidence already provided by Mr Stephenson at the disciplinary hearing at R1 236-238. After a short adjournment to consider this application, we decided to allow the Claimant to call Mr Stephenson to

give evidence and a hand-written witness statement was subsequently provided by him to the Respondent and to the Tribunal.

15. We heard evidence from the Claimant and Mr Stephenson, and on behalf of the Respondent, from Ms Doris Afreh, the Respondent's Director of HR, Ms Chardelle Margerison, the Registered Manager of the Respondent's home for vulnerable children at 66 Shoot Up Hill, Mr Philip Townsend, Director of Operations and Ms Angela Harris, the Regional Manager for West London. Evidence was by way of written statements and in oral testimony.

16. The Claimant provided a typed statement from Ms Adetola Oyediran, an agency worker who worked for the Respondent at the time of the incident with DP. This was headed "My statement regarding incident of 18 August 2017" and was unsigned and undated. Ms Oyediran did not attend the hearing to give her evidence. We explained to the Claimant that this would of course affect how much weight we could give her statement, if any.

Findings

17. I set out below the findings of fact the Tribunal considered relevant and necessary to determine the issues we are required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. The Tribunal have, however, considered all the evidence provided to us and we have borne it all in mind.

Background

18. The Claimant is black African and is originally from Nigeria. He was employed by the Respondent from 18 May 2015 originally as a Waking Night Children's Residential Worker based at Allen House, one of its homes for vulnerable children.

19. The Respondent is a charity limited by guarantee and has been providing housing, support and guidance and looked after children and young people in care since 1870. It has four children's homes in London and eight homes for those over the age of 16. It also has 5 children's homes in the Midlands and 9 in the Isle of Man. The Respondent employs 324 staff, 16 of whom were based at 66 Shoot Up Hill. The Claimant has an internal HR department.

20. At the time of the events leading to the Claimant's dismissal he was working as Children's Residential Worker based the Respondent's residential home for vulnerable children known as No.66.

21. We were referred to the Claimant's particulars of employment at R1 34- 39. We note that his probationary period was 6 months but subject to extension. We were also referred to the Respondent's Probation Policy and Procedure at R1 55-56, its Disciplinary Policy at R1 42-54 and its Safeguarding Policy at R1 570-60. We were not provided with a copy of the Claimant's job description.

22. The Claimant originally worked nights at the Respondent's home known as Allen House. There were 15 staff there at that time. When he started the Manager was Ms Cindy Willis and the Deputy Manager was Ms Graham McCall.

Probation

23. The Claimant's probationary period was due to end in November 2015. However, it was extended. The Claimant alleges that it was extended without the Respondent setting him any targets to achieve.

24. We can see from R1, although were not taken to these documents in evidence, that the Claimant had a monthly probation review meeting with Mr McCall on 17 July 2015 (at R1 62) and also a supervision meeting with Mr McCall on that same date (at R1 65). There is a form headed Record of Supervision and Targets relating to a meeting which took place on 17 November 2015 (at R1 69). This is signed by the Claimant at R1 72. A further supervision meeting took place with Ms Angela Harris on 15 January 2016 (at R1 79). At the time Ms Harris was temporarily responsible for the Respondent's East London area.

25. None of the supervision records contain anything about the Claimant's probationary period save for an oblique mention in the document relating to the meeting held on 17 November 2015 (at R1 81). At this date the Claimant should have reached the end of his 6-month probationary period.

26. A further supervision meeting took place on 20 April 2016 between the Claimant and Ms Chardelle Margerison, the then Acting Deputy Manager at Allen House (at R1 81). At paragraph 4 of that document, the Claimant states that his probationary period should have ended on 18 March 2016, but he had not received any notification about this. Ms Margerison agreed to email the Claimant with confirmation of the position.

27. At R1 84 there is a letter from Ms Karen Edwards, a Human Resources Advisor, to the Claimant, dated 26 April 2016 in which she states that the Claimant's probationary period has been extended until 30 June 2016: *"as your performance in the role has yet to reach the required standards"* and that to assist with this the Claimant will be moved to work day shifts. A final probation review meeting was scheduled to take place on 28 June 2018.

28. The Claimant's evidence is that he returned from annual leave 3 days late, having missed his return flight from Nigeria. He had gone to Nigeria to get married. The Claimant further states that he informed Mr McCall that he was not able to return on time and that he would fly back to the UK as soon as possible. On his return, which we are aware from R1 71 was on 17 October 2015, he was called to a probationary review meeting and his probation was extended for a period of 3 months. We note that at the meeting on 17 November 2015, it was recorded that the Claimant's probationary was extended to March 2016 in a recent meeting (at R1 81). However, there are no documents relating to that meeting itself.

29. The Claimant's evidence is that he attended another supervision meeting at which no target was set other than for him not to take any unauthorised leave without his manager's consent. However, we were not told when this meeting took place and there were no documents in the bundle relating to it.

30. The Claimant attended a further meeting at the Respondent's head office in Putney set for 9 am on 25 April 2016. He was 10 minutes late for the meeting, having worked over night until 8 am and then having to travel for over an hour to the Respondent's head office. This meeting was held by Ms Edwards and Ms Renate Alexander, the Claimant's then Supervisor.

31. The Claimant states that at the meeting he was taken to task for being late despite explaining and apologising, he was told that he would be moved to work days, so as to monitor his progress, and that his probationary period was extended by a further 2 months. The document in the bundle that relates to this is at R1 84. The Claimant made the point in oral evidence that at the supervision meeting with Mr McCall on 20 April 2016 no concerns were raised.

32. The next supervision meeting that we have records for was with Ms Alexander on 6 May 2016, who was by then the Home Manager (at R1 107).

33. The evidence is unclear, but it would appear that the Claimant was moved back to work nights by Mr Amaka Williams.

34. The Claimant attended a supervision meeting with Mr Williams on 29 July 2017. By this time Mr Williams had taken over as the Home Manager. There is a Single Subject Supervision Recording Form at R1 107 which states that the single subject for discussion is the *"end of the probation review meeting re targets"*. The document goes through 5 targets which were identified to the Claimant in an internal email at R1 106. The Claimant stated in evidence that he had not seen this email and was unaware of these 5 targets until he attended this meeting. However, we would comment that he must have been aware of those issues regarding his time keeping and as to his relationship with Mr McCall.

35. It was very difficult for use to determine exactly what happened as to the Claimant's probationary period extension because of the limited evidence presented. We can only assume, as we were not provided with any specific evidence beyond R1 107, that the Claimant's probationary period ended on 29 July 2017.

36. It is clear that the Claimant's probation was extended on more than one occasion, but it is not clear exactly what caused each extension. We are aware that one of the issues related to the relationship between the Claimant and Mr McCall. This appears to have arisen because the Claimant alleged that Mr McCall had formed what he called an *"unhealthy relationship"* with one of the residents and because of Mr McCall's refusal to authorise his holiday that had been agreed before the Claimant had come under his supervision, the Claimant alleging that Mr McCall objected because he wanted to take leave at that same time. Another of the issues

was an email that the Claimant sent to Mr McCall (which we were not provided with a copy of) but was said to have been written in inappropriate terms. Reference is made as to cultural differences and use of language and why this could affect interpretation or misinterpretation at R1 87.

37. The extension of the probationary period is inadequately documented. We cannot reach any firm conclusions as to why exactly it was extended or even when the probationary ended without making assumptions. However, we can well understand the Claimant's concerns and frustrations at being on probation for 14 months and why he might see it as discrimination.

The Claimant's final written warning

38. There was an incident involving the Claimant and a resident of the home, who is referred to for reasons of confidentiality as "ER". The incident occurred on 16 February 2017, during which the Claimant states that ER kicked him in the scrotum and hit him over the head with a laundry basket. The Claimant completed a Physical Intervention Report by hand which is at R1 132-133. It is fair to say that the report is scant on details. However, the Claimant explained that he had just been assaulted and he wrote as much as he was able to at the time. There is a Clear Care Report (this being the Respondent's system in which staff had to report matters pertaining to each resident on a daily basis and update it during day if necessary). This report was originally created by the Claimant on 20 February 2017 and last edited by Mr Williams in which he sets out more detail (at R1 135-136).

39. The incident was referred to the Local Authority Designated Officer (the "LADO") by Mr Williams on 2 March 2017 following an allegation of physical assault by ER against the Claimant. By statute, the Respondent is required to inform the LADO of all allegations against adults who work with children or young persons.

40. The Claimant was suspended from work on 3 March 2017 pending investigation into the allegation of physical assault by ER. The letter of suspension is at C2.

41. The referral was discussed at a meeting between the Respondent and the LADO on 6 March 2017 (R1 137). It was concluded that the LADO would take no action and would await an update on the Respondent's investigation. It was also recorded that the Police had been notified but were not taking further action.

42. The Claimant's concern was that the matter had been referred to the LADO prematurely, so as to make him look bad, and that the Respondent should have investigated the matter first. However, we accept that the Respondent was under a statutory obligation to report such incidents to the LADO and as early as possible and was for the reason cited by the Claimant.

43. The Claimant was requested to attend a disciplinary meeting following suspension and investigation in a letter dated 20 March 2017 (at C2). The

letter stated that the hearing related to the alleged incident at Allen House on the night of 19 February 2017.

44. The disciplinary hearing was conducted by Mr Bill Roberts, Regional Manager– Midlands, on 6 and 25 April 2017. We refer to the notes of the hearing at R2 and R3. The outcome of the hearing was notified to the Claimant in a letter dated 2 May 2017, at R1 139-141. The Respondent found that whilst the Claimant was given the benefit of the doubt as to whether he knocked the young person to the floor following an altercation in which the young person assaulted him, the Claimant had not used the correct CALM techniques (the Respondent's physical intervention and restraint techniques), had failed to record the incident correctly and failed to follow the accident reporting procedure.

45. As a result the Claimant received a final written warning and was required to produce medical evidence as to memory lapses he said he had suffered as a result of the assault, he was relocated to 16+ (age) provision on days to minimise his lone working and a grievance he had raised would be dealt with separately (we heard no evidence as to this grievance beyond this reference to it).

46. The Claimant provided medical evidence in the form a letter from his GP dated 21 March 2017 at R1 138 and a CT Scan report dated 4 May 2017 at R1 142. Whilst the GP letter refers to the scrotal and head injuries it does not mention any issue relating to memory loss. The subsequent CT Scan reports that it is normal.

47. The Claimant appealed against the final written warning by letter dated 8 May 2017 at R1 143. His grounds of appeal were that his injuries were not taken into account, it was a known fact that head injuries and temporary memory loss are linked and this impaired his ability to report the incident on the night, he was in excruciating pain from the assault and so CALM restraint would have been less effective and more dangerous, he was dizzy and had blurred vision and this impaired his ability to find the accident book on the night and also made reference to his attendance at his GP and health scans.

48. The appeal hearing took place on 18 May 2017 and was conducted by Mr Phil Townsend, the Director of Operations. The Claimant was accompanied by a workplace colleague, Mr Beren Stephenson. The notes of the meeting are at R1 144-151.

49. The Claimant was notified of the outcome of his appeal by a letter from Mr Townsend dated 19 May 2017, at R1 152 -153. In essence, the letter told the Claimant that his final written warning was upheld. This was on the following basis. The Claimant had not supplied any mitigating evidence to support his grounds of appeal and his statements at the appeal hearing lacked credibility because his account of events changed over the course of both hearings, as did his description of the severity of his injuries. In addition, the Claimant had not provided any medical evidence in support of his claim that his injuries affected his capability on the night of the incident to the extent claimed. The letter ended that if the Claimant was still suffering

the effects of the injury to the level he claims and his memory is that impaired, then he presented a real safeguarding risk and will be referred to the Respondent's occupational health provider to assess his capability to fulfil his duties.

50. The Claimant asserted at our hearing that the final written warning was manifestly inappropriate because of the following: he had been seriously assaulted and was not in a position to fully record the incident at the time; he realised subsequently that his memory had been impaired by the head injury and this had affected his recollection of events; given the force of the attack, the extent of his injuries and ensuing pain, it was simply not possible to employ CALM techniques to restrain ER as required.

51. The difficulty that the Claimant had is at the time is that he did not provide medical evidence to support the view that his memory could was impaired at the time of the incident or afterwards. Indeed, as at the date of this hearing, he has still not provided such medical evidence. Further, the medical evidence as to his testicular injury indicates no ongoing issue as of 5 June 2017 (at R1 161). From the notes of the meeting, he was not required to simply restrain ER but to take flight if in danger at paragraph 3.2 on R1 147. The Claimant exercised the right of appeal but on appeal Mr Townsend did not accept his evidence as credible. However, Mr Townsend did state that he would ask Ms Edward to refer the Claimant to the Respondent's occupational health provider, although as we understand it, this never happened. Ms Edwards is no longer in the Respondent's employment and was not called as a witness.

52. We thought it best to deal with this issue of the written warning at this stage I our judgment although we only reached these conclusions after hearing all the evidence and submissions.

53. Whilst the Claimant has concerns about the appropriateness of the sanction, we do not find that there is evidence of any oblique motive for the action taken or that the sanction is manifestly inappropriate. We therefore conclude that the fact of the final written warning was not a matter that it is right for us to reopen as guided by case law.

54. We relied on the following authority to reach our decision in this regard. In **Davies v Sandwell Metropolitan Borough Council** [2013] IRLR 374, the Court of Appeal stated that the starting point should always be section 98(4) of the Employment Rights Act 1996, the question being whether it was reasonable for the employer to treat the conduct reason, taken together with the circumstances of the final written warning, as sufficient to dismiss the Claimant. Secondly, it is not for the Tribunal to reopen the final warning and consider whether it was legally valid or a nullity. And thirdly, the questions of whether the warning was issued in good faith, whether there were prima facie grounds for imposing it and whether it was *"manifestly inappropriate"* were all relevant to the question of whether dismissal was reasonable, having regard, among other things, to the circumstances of the warning. Lord Justice Beatson confirmed that only rarely would it be legitimate for a Tribunal to *"go behind"* a final written warning given before dismissal. Where there has been no appeal against a final warning, or where an appeal has

been launched but not pursued, there would need to be exceptional circumstances for a tribunal to, in effect, reopen the earlier disciplinary process.

55. In the case before us, the Respondent is not relying on the final warning as grounds on which to justify the subsequent dismissal. It is noting as a concern that the Claimant had failed to report an incident (and as we will see later on, also in the matter that led to the Claimant's dismissal). But in any event, we do not find that the final warning was manifestly inappropriate.

56. We note that the Claimant's position in evidence that he was not given adequate training on restraint technics. However, we note at the supervision record at R1 113 he was booked onto a CALMS training refresher course on 6 December 2017 (indicating that he had already attend one before) and in the supervision record at R1 120 that he missed the training and the system for booking training was clarified with him.

<u>The incident leading to the Claimant's dismissal</u>

57. The Claimant was moved to work days at No.66. This was intended to be on a temporary basis. However, in the light of the way in which he had settled into the team at No.66 he was notified that he was to be moved there permanently in a letter dated 6 July 2017 (at R1 166).

58. On 18 August 2017, he was on his way to No 66 to start his shift but on route he received a text message from the Respondent requiring him to go to University College London Hospital to take over from a colleague called Wendy, who was about to go off shift. She had attended the hospital with a 15 year old resident of No 66, who for reasons of confidentiality is referred to as "DP", who had then gone missing.

59. We were referred to DP's risk assessment which indicates that he posed a high risk in every area of assessment (at R1 167-182). This is a very dense document and would take some time to read and some further time to absorb and assimilate.

60. The Claimant's evidence is that he had not read the document prior to having dealings with DP. The Respondent's evidence was that as DP was one of the residents at No. 66, that he had moved there on 23 July 2017, that all risk assessments were available to all members of staff in the home and they were expected to have read them. Ms Chardelle Margerison, the Registered Manager of No 66, gave evidence that the Claimant had met DP, he knew the risks and had access to the risk assessment.

61. At this stage the Claimant had worked at No. 66 for a number of months, DP had been at the home for three weeks and was one of 5 residents. The Claimant had been undertaking his duties with his allocated residents during that period. DP was not one of his allocated residents (DP was allocated to Mr Stephenson). The Claimant was asked to work with DP at very short notice. Mr Stephenson gave evidence that one would need half an hour to read a risk assessment, but more time to fully absorb the information if

working with the resident on a longer-term basis and would need to meet with them.

62. We were divided as to whether it was reasonable to expect the Claimant to have read residents' notes and whether it was an express obligation expected of staff. However, we found that the point was that this was what the Respondent required of all staff. We were partly of the view that it was reasonable to expect all staff to read all the notes, given the need for all staff to know the risks involved with all residents. We were all of the view that it was reasonable to expect staff in the very least to have read the one-page risk assessment. We all felt it was reasonable to expect that the Claimant had done at least this much.

63. Mr Stephenson's evidence in his written statement was as to working with DP and being provided with information in advance. But this was in the context of someone working with DP and not the Claimant's role in collecting DP from hospital and taking him back to the care home. In oral evidence Mr Stephenson did state that there was a need to know the risk in advance and to read, or be afforded the time to read, the assessment. The Respondent had an expectation that all staff would familiarise themselves with all of the resident's notes. However, the Respondent did not ensure that this in fact happened.

64. In any event, as find later on, the Claimant was not dismissed for his failure to read DP's notes. Whilst the above might be taken as a criticism of the Respondent's process it is purely an observation.

65. When the Claimant arrived at the hospital, he met Wendy who told him that DP was not in the hospital ward, having left telling her that he was going for a cigarette downstairs within the hospital environment. However, by the time she was due to finish her shift at 3 pm, she had not been able to find him.

66. From what we understand, DP had gone to smoke a cigarette, it had started to rain, and he had got on a bus on which he had fallen asleep.

67. After DP returned to the hospital, the Claimant took him back to No. 66, but only after he had gone from calm to erratic behaviour, insisting on leaving the hospital again to smoke and having to be locked in the hospital.

68. On the way back to No. 66 the Claimant states that DP constantly asked strangers for cigarettes and the Claimant had to tell them to ignore DP because he was a minor.

69. Once back at No 66, Ms Adetola Oyedian, known as Tola, an agency worker, was there to take over DP from the Claimant. DP asked if the Claimant could take him to a local shop to spend his pocket money and the Claimant asked Tola to come with them, so as to achieve a smooth handover to Tola. Ms Barbara Lewis, a Children's Residential Worker and DP's Key Worker, gave the Claimant an envelope with DP's name written on it. This contained DP's pocket money (of £8). The Claimant states that this was not a supervised spend (ie it did not have to be overseen and

approved by a member of staff), it was DP's money to spend as he wished. The Respondent's position is that it was a supervised spent. However, we note that whilst this was Ms Lewis' position in a statement written in her name by Ms Margerison dated 31 August 2016 as part of the investigation process and unsigned (at R1 188), this was not her position in response to specific questions put to her by the Claimant during the appeal process on 8 December 2016 and answered in her own handwriting (at R1 248).

70. The Claimant, Tola and DP then set out for the shop. However, DP started complaining that he did not want Tola to come along and that he would spit in her face if she refused to leave. After attempting to dissuade DP and it had started to rain, the Claimant advised Tola to return to the home.

71. In his witness statement, the Claimant stated that when they got to the shop, he was engaged in keeping an eye on DP whilst he chose drinks, sweets and snacks, that they went to the counter to pay and the shopkeeper put DP's purchases in a bag and then they left the shop. In a statement that he made for the purposes of the later disciplinary hearing, the Claimant stated the following (at the bottom of R1 216). DP was asking him to get different snacks and drinks and kept changing his mind. As DP was on crutches and the Claimant was helping him and solely focused on his erratic behaviour so as to get him back home, he did not know that DP had asked for a packet of cigarettes. The Claimant just paid for his shopping and left the shop without knowing all of the shopping contents.

72. As to what happened once the Claimant and DP got outside the shop and how DP ended up with a packet of cigarettes, we have been presented with a number of explanations which have been attributed to the Claimant. In essence these are as follows (although we deal with in more detail later on in the Judgment):

    72.1 That he was unaware DP had the cigarettes and when he asked where he got them from, DP said *"you fool you paid for them"*;

    72.2 In a statement given to Ms Margerison during the subsequent investigation (which the Claimant maintained had been fabricated), that he paid for the cigarettes in order not to criminalise DP (R1 187);

    72.3 In his Staff Supervision Recording Form conducted by Ms Irene Odur dated 19 October 2017 (R1 202), that he never bought the cigarettes for DP, but had to pay for them because DP took them and left the store and so he had to pay for it otherwise it was theft;

    72.4 During the disciplinary hearing that subsequently took place, he said that DP told him *"you idiot you paid for them"* (at R1 222) and that he could not deny that he paid for the cigarettes (at R1 225);

    72.5 In his appeal letter (at R1 230-232), that no cigarettes were purchased at the shop because DP already had them on him and that DP fooled him into believing he had paid for them in the shop;

72.6 To Ms Vanessa Russell, a Children's Residential Worker at No. 66, that DP wanted his pocket money and to maintain his behaviour the Claimant wanted to take him out to spend it and later on he said in answer to whether he had purchased cigarette he said to maintain behaviour (at R1 185);

72.7 To Ms Lewis, that he purchased the cigarettes to calm DP and manage his stress (cited at the disciplinary hearing at R1 219);

72.8 In handwritten responses to specific questions from the Claimant, Ms Lewis subsequently stated that the Claimant had said to her that he did not know if he had paid for the cigarettes (at R1 248);

72.9 To Ms Oyediran, that he was fooled by DP into paying for cigarettes;

72.10 To a recruitment agency, Hays (at R1 295) in respect of a subsequent job application, that "*I was accused of buying them, but I obviously didn't"*.

73. On analysis we believe that there can only be three explanations: 1) that Claimant bought the cigarettes; 2) that DP bought the cigs; and 3) that no cigarettes were bought.

<u>The investigation into the incident</u>

74. The incident was investigated by Ms Margerison. In evidence she pointed us to the Daily Summary for Friday 18 August 2017 at R1 183-184 which stated in relation to DP: *"we returned home, went to the shop with staff and returned for his dinner. DP watched TV with staff until 21.15 hours when he was asked to settle for bed at 21.30 hours without any issue"*.

75. She was first alerted to the incident when she was contacted the following day by one of the Claimant's colleagues, Ms Vanessa Russell, a Children's Residential Worker. Ms Margerison referred us to a statement which she states was drafted by Ms Russell and is at R1 185-186. In oral evidence she stated that she had typed it up for Ms Russell. We note that the statement is not signed or dated.

76. The statement sets out what Ms Russell told Ms Margerison had happened on 18 August 2017 after the Claimant returned to No 66 with DP. In essence, she states that Ms Lewis provided DP's pocket money on the basis of it being a supervised spend, the Claimant set off to the shop with DP and Tola. Tola returned shortly after leaving DP with the Claimant, who had the money in his hand. On return, as the Claimant was processing the receipts, Ms Russell queried what the money had been spend on and the Claimant stated: *"cigarettes aren't cheap you know*". When Ms Russell asked if the Claimant had purchased cigarettes for DP, the Claimant responded that he needed to *"maintain his behaviour"*. The statement goes on to set out events of the following day and then sets out questions from Ms Margerison to Ms Russell and her answers.

77. We would note that it is unclear when this statement was drafted, given that it refers to incidents occurring over two days and contains questions which could only have been formulated with more knowledge of the incident than was available at that time. Ms Margerison said in oral evidence that she initially interviewed Ms Russell on the telephone and must have spoken to her again after speaking to the Claimant. She stated that they both drafted the statement and then Ms Margerison typed it from her notes. She said that she did not retain her notes after doing so.

78. Ms Margerison then spoke to the Claimant and after their discussion she immediately typed up her notes of their meeting. This statement is at R1 187 and whilst it refers to the incident on 18 August 2017, it is undated and unsigned. In essence, in it the Claimant states that when they were in the shop, DP asked the shopkeeper for something, but he could not make out what he said. The shopkeeper put a packet of cigarettes on the counter. The Claimant explained to DP that he could not have them and could not be smoking. DP grabbed the cigarettes and walked off. The Claimant tried to encourage him back, but DP refused. The Claimant paid for the cigarettes so as not to criminalise DP. When they returned to No. 66, the Claimant told Tola and Ms Lewis that he had to pay.

79. The Claimant's position is that he did not see this document until after he returned from annual leave in Nigeria (his last working day was either 25 or 26 August 2017 and he returned to work on 8 October 2017 – R1 217 and 220) and that its contents are untrue.

80. Ms Margerison also referred us to a statement that she had typed up which is headed 31 August 2017, and which refers to her conversation with Ms Russell on 19 August 2017. This is signed and dated 10 October 2017 (at R1 191). In essence, this document states that on 18 August 2017 after returning from the shop, the Claimant told Ms Russell that he had purchased a packet of cigarettes for DP as it would keep him calm for the evening. Ms Russell tried to raise her concerns about this, but the Claimant was very dismissive.

81. Ms Margerison's evidence was that she very concerned by what the Claimant had said at interview and commenced a formal investigation into the incident. By this time the Claimant was on annual leave.

82. She referred us in evidence to an investigation witness statement pro-forma at R1 188-190 in respect of a telephone/interview on 31 August 2017 and by implication it would appear to have been with Ms Lewis. This in essence repeated what was contained in the document at R1 191 as to the purchase of the cigarettes. We note that this document is not signed or dated. In evidence Ms Margerison said that she typed the statement prior to going on annual leave.

83. The Claimant was on leave until 8 October (he travelled to Nigeria where his father was seriously ill and sadly passed away whilst he was there). Ms Margerison was going away on 16 October and having contacted HR it was decided to ask Mr Martin Cole, the Implementation and Project Manager, to

finish the investigation. She states that she signed her statement off on 10 October 2017 and gave it to Mr Cole (the statement at R1 191).

84. On a general level we find that Ms Margerison interviewed various people and then typed up the statements from her notes afterwards and did not get them dated or signed or verified as accurate. She did not produce her notes taken at the time in evidence.

85. We were referred to the Investigation Report at R1 192-196. This indicates at R1 192, that the investigation was commenced by Ms Margerison on 31 August 2017 and completed by Mr Cole on 3 November 2017 However, it would appear from oral evidence that it is more likely that Ms Margerison handed the investigation over to Mr Cole prior to going on holiday. The Report sets out the background to the investigation, the names of those persons interviewed and not interviewed, the evidence collected and not collected, the findings, a summary of the witness evidence, the facts established and not established as well as other relevant information. The conclusion of the report is the recommendation of formal action.

86. By a letter dated 19 October 2017 from Ms Doris Afreh, the Head of Human Resources, the Claimant was required to attend a disciplinary hearing scheduled for 27 October 2017 (R1 197-198). The letter stated that the purpose of the meeting would be to address the allegation that on 18 August 2017, the Claimant unlawfully purchased cigarettes for a young person under 18, such behaviour not complying with the Respondent's policies around the health and well-being of children and young people. The letter warned the Claimant that the allegations was considered sufficiently serious to potentially constitute gross misconduct under the Respondent's disciplinary procedure. The letter advised the Claimant of his right of accompaniment and enclosed statements taken from Ms Russell, Ms Margerison and Ms Lewis.

87. We noted during the hearing that this letter and the date set for the disciplinary hearing actually pre-date the date on which the investigation was completed, although the disciplinary hearing did not actually take place until 7 November 2017.

88. In evidence it became clear that the report was not finalised because the Respondent had been attempting to obtain a witness statement from Tola, Ms Oyedrian (at R1 192). This was at the behest of the Claimant, who had raised concerns that she had not been interviewed. The Claimant alleged that the Respondent had Ms Oyedrian's full contact details in a book in its office, but the Respondent's position was that its Human Resources department was not privy to this. Mr Cole and HR had been attempted to contact Ms Oyedrian (R1 208-209). However, after the Claimant provided the Respondent with her telephone number, it was able to speak to her on 6 November 2017 (at R1 215A) and then emailed a pro forma witness statement to her that day.

89. We were referred to this at R1 209A and B and we note that it clearly directs Ms Oyedrian to answer number of questions and that the first one answer had been completed before the document was sent out. The Respondent

said in evidence that this document was "corrupted" and so it sent a further blank version but with the same questions and received a completed response from Ms Oyedrian later that day (which is at R1 210-215).

The disciplinary hearing and dismissal

90. The disciplinary hearing took place on 7 November 2017. The hearing was conducted by Ms Angela Harris, the Regional Manager for West London. The Claimant was accompanied by his TU representative, Mr Brian Woolgar. Ms Afreh took notes. We were referred to the notes of the hearing at R1 218-226.

91. The Claimant received a pack of documents in advance of the hearing. He also provided a statement to the disciplinary hearing which is at R1 216-217. Ms Harris confirmed that this had been considered.

92. The Claimant only received had only received the documents including Ms Oyedrian's statement the day before and had not had the opportunity to read it. Ms Harris offered the opportunity to the Claimant and Mr Woolgar to adjourn and read those papers on three occasions, but they declined.

93. Ms Harris summarised the case against the Claimant, the Claimant then presenting his case and both side to then sum up. Ms Harris then asked questions of the Claimant and after then Ms Harris summed up.

94. Ms Harris made it clear at the start that Mr Woolgar could confer with the Claimant but not answer questions on his behalf. She also explained that Ms Afreh was there to take notes, provide HR advice and manage timings.

95. In Ms Harris' summary of the case, it was clear that the Respondent had been provided with a number of versions of what had happened during the incident in question as to the purchase of cigarettes. These are set out at R1 219 paragraphs j to m. In addition, Ms Harris summarised that there was no reference to the incident on DP's file, in the daily summary and no incident report was completed.

96. In response, the Claimant complained that the statement taken by Ms Margerison and attributed to him was a fabrication of events. Ms Harris said that it been emailed to him by Ms Margerison on 26 August 2017 in which he was asked to read through it and confirm its accuracy. We were not provided with a copy of Ms Margerison's email. The Claimant stated that he had not seen the email or statement until after his return from leave on 8 October 2017 and that his last day of work was 26 August 2017. He said he had over 800 emails in his inbox on return. He stated that did not see the statement until it was received as part of the case documents for the hearing.

97. In oral evidence Ms Margerison said that she sent the email to the Claimant at about 5.30 pm on 26 August 2017 and that she walked past him sitting at his computer that evening and saw the statement on his screen.

98. The Claimant denied that he had seen the email or indeed had to opportunity to do so as he was about to go on leave for 6 weeks. Further, we note that in his statement to the hearing at R1 216-217 he does state that his last day after work before going to Nigeria was 24 August 2017.

99. We note that Ms Margerison did not send any other statements to be verified to any of the other witnesses, that most of the statements were not dated and her own statement of 31 August 2017 was signed on 10 October 2017.

100. On balance of probability there is no certainty as to when the email was sent if at all and we accept the Claimant's explanation.

101. At the hearing the Claimant also denied the account given by Ms Russell and described her as a hostile witness because of personal matters between them. He also denied the account given by Ms Lewis.

102. The Claimant stated that he returned from the shop and told his colleagues of the incident with the purpose of raising a safeguarding concern. However, he did not do so.

103. The Claimant also raised what he considered to be double standards employed by the Respondent in purchasing cigarettes for minors (at another home).

104. He also raised the issue of *"a culture of racial bias"* of which he had evidence.

105. The Claimant then set out a summary of his case (which is at R1 221-222) in which his explanation as to the cigarettes was that when he asked DP outside the shop where he had got cigarettes from, DP replied *"you idiot you paid for it"*. He stated that on return to No 66 he told Ms Oyedrian that *"I have been fooled by DP into purchasing cigarettes"*. He also stated that he was not a smoker and had no idea of the price of a packet of cigarettes.

106. In reply to questions from Ms Harris, as to whether the Claimant was aware of DP's cigarette problem via his care plan, the Claimant answered yes it was part of the placement plan. We were unclear whether this was his state of knowledge at that time or at the time of the incident in question.

107. Ms Harris also asked why the Claimant had not recorded the incident in the daily summary. His response was that it was not deliberate because he had shared the incident with his colleagues, Ms Oyedrian and Ms Lewis, so there was no need to record it. He was then told that it was his responsibility to record incidents and to complete Clear Care to alert managers. The Claimant replied that it was the responsibility of the staff at the end of the shift to complete the record. He also stated that he had problems with his memory following the incident with ER, he had notified Mr Townsend of this and was awaiting assessment by OH. The Claimant was asked whether this condition had been diagnosed and he said he could not confirm this. He was asked why he did not report the matter to a manager, and he said it was because it was the weekend. He was asked if he reported it the next

time a manager was on shift and he said no, he must have forgotten. He then stated: *"I cannot deny that I paid for the cigarette"*.

108. After a short break, Ms Harris asked the Claimant for more details of his reference to the care of young people, the question of neglect and a culture of racial bias. In response the Claimant said: at Allen House a young person was having an unprofessional relationship with a staff member but he was unaware whether action had been taken; that a staff member was living at Allen House and he did not know when they moved out, the manager at the time providing no feedback; that same member of staff was having a relationship with the young person; as to a double standard policy as to purchasing cigarettes; that there was a lot of racial bias, an "*us and them culture"*, the *"us"* being black people when Ms Margerison was around; there is a strong bias due to Ms Margerison's management and so he knew he was on his way out as soon as she came to No. 66. Ms Harris assured the Claimant that Ms Margerison was not making the decision on this case. Mr Woolgar stated that he has asked the Claimant to forward evidence related to these allegations (R1 225).

109. Then in summary, Ms Harris identified four different accounts regarding the purchase of the cigarettes (we were not sure where the fourth account comes from having only identified three at paragraphs j to m at R1 219) but what was known was that cigarettes were purchased by the Claimant and she would consider the nature of the incident and the failure to report to management. She also said that she would consider the length of experience and the impact on the Claimant's decision making and any previous investigations and findings from the final written warning proceedings.

110. The Claimant received a letter from Ms Harris dated 10 November 2017 advising him of the outcome of his disciplinary meeting which is at R1 227-229. This set out her reasons as follows: during the meeting the Claimant confirmed that he purchased cigarettes for DP whilst he was at the shops under a supervised spend; the Claimant stated that he was fooled by DP into purchasing the cigarettes whilst distracted when paying for and receiving the goods purchased in a bag; that he did not know how much money was in the pocket money envelope or how much he handed over to the shopkeeper, although there was evidence that the Claimant had signed for the £8 allowance prior to leaving No. 66; the Claimant did not know what was in the bag, but understood that DP had to be supervised when out spending his pocket money; the Claimant did not follow the recording policy or procedure; he did not complete an incident report; he did not report the incident to manager either that night or subsequently; he forgot to record and report due to a medical condition but did not provide any evidence of this condition; at the meeting he did recall the events of that day and provided a very detailed summary of events both verbally and in writing.

111. In her conclusion, Ms Harris, in essence, stated that did not accept the Claimant's version of what happened as to the purchase of the cigarettes and that most concerning that, in the light of the previous disciplinary sanction, he did not follow the recording policy and procedure.

112. At paragraph 12 of Ms Harris's witness statement, she states that she had difficulty accepting the Claimant's new version of the incident. However, we would note that whilst this might have been new in the sense that the Claimant said at the hearing, it was reflected in what Ms Oyedrian said he stated to her at the time (in her witness statement at R1 210-215).

Appeal against dismissal

113. The Claimant appealed against his dismissal in a letter to Ms Afreh dated 15 November 2017 which is at R1 230-232. In essence, his grounds of appeal were as follows: the Respondent had fabricated evidence against him; there was no evidence to prove what happened in the shop; there were conflicting accounts and his was the most credible; as nothing happened there was no incident to report; DP only had £8 pocket money available to him, when the cheapest cigarettes cost £7.59 and some as much as £9; on thorough reflection, it was now obvious to him that no cigarettes were purchased in the shop, DP must have purchased them prior to this; the Respondent was applying double standards in that it purchased cigarettes for young people at another of its homes but punished him for this incident; the Respondent had failed to act on his doctor's recommendations that he should not work alone and had not referred him to occupational health regarding his memory lapses resulting from the incident with ER; there is racial bias within the organisation and Ms Margerison has started *"ethnic cleansing"* within No. 66.

114. The appeal hearing took place on 30 November 2017. The appeal officer was Mr Phil Townsend, the Director of Operations. The Claimant attended with Mr Woolgar. The notetaker was Ms Edwards. The notes of the meeting are at R1 233-239.

115. The Claimant called Mr Stephenson and Ms Lewis as witnesses. However, he was informed at the start of the meeting that Ms Lewis was unable to attend due to a personal emergency but was available by telephone.

116. There was then a discussion as to the role of Mr Woolgar and the order of events. The Claimant then went through his grounds of appeal, as follows (at R1 223-236):

    116.1 The Respondent had failed to refer him to occupational health in respect of his previous head injury contrary to point 7 of his contract of employment relating to medical examinations;

    116.2 There was no consistency applied for similar offences and the Respondent provided cigarettes to young people at other homes. In response, Mr Townsend confirmed the home that the Claimant referred to and explained that this was a Safe Steps home for girls at risk of exploitation and the provision of cigarettes was by written agreement with Social Services to avoid girls performing sexual acts to obtain cigarettes. The Claimant responded that this was against the law;

116.3 He had insufficient time to review the witness statements given his work hours. Some of them had only been provided on the day of the disciplinary hearing;

116.4 His final written warning stipulated that he be moved to a 16+ home and must not undertake 1 to 1 work with young people. But he was sent to a home and required at short notice to do 1 to 1 work with a high-risk young person who was supposed to be on 2 to 1 and of whom he had no prior knowledge;

116.5 No proper investigation was undertaken. His statement had been fabricated by Ms Margerison, it was not signed by him, it written on his behalf and he knew nothing about it;

116.6 Ms Oyedrian's witness statement was misleading and had been partially completed before it was sent to her. Ms Edwards stated that she had sent the witness statement to Ms Oyedrian and was certain it was blank, and Ms Oyedrian had signed it to say it was her own words. Ms Edwards and Mr Townsend agreed to look into the matter outside of the meeting;

116.7 Ms Harris did not believe that the Claimant was guilty because no one knew what happened in the shop as there was no CCTV and no witnesses, so there was no genuine belief in his guilt;

116.8 There was no belief that the Claimant purchased the cigarettes because DP had insufficient money to do so. His pocket money was £8, the cheapest packet of cigarettes is £7.59, and DP bought chocolate and drinks as well. DP lead the Claimant to believe he had bought the cigarettes, but DP already had them in his pocket. Mr Townsend said that it was clear from the Claimant's statement that DP did not have cigarettes as he had been stopped from getting them from strangers. The Claimant stated that DP had cigarettes at the hospital;

116.9 The Claimant only received a copy of the pocket money sheet after the hearing, he had never worked with DP before, was asked to do so at short notice, did not know he was on a supervised spend and DP was on a 1 to 1;

116.10 There was no incident to report or record throughout the trip to the shop. He did not think the smoking incident was a concern because he raised it with the team. If he had known how much cigarettes cost he would have disputed it at the time. Ms Edwards asked he Claimant why he had not recorded the incident where DP had threatened to spit in Ms Oyedrian's face (if she accompanied them to the shop). The Claimant responded that DP said this because he did not like women of colour and when reporting an incident, it had to be factual not opinion and there were more pressing incidents in the home.

117. The Claimant then called Mr Stephenson as a witness and asked him a number of questions (at R1 236-237). Mr Stephenson responded as follows: DP was a regular smoker and he obtained cigarettes from his ex-foster carer and from strangers; DP had a mild learning disability and used cigarettes as means of social inclusion; he was not really a smoker and the team were trying to discourage him; he pretends to smoke but does not actually; he makes up stories or exaggerates things and everything he says should be taken with a large pinch of salt; there are grave concerns as to who he is with and that is why he is on a 1 to 1; sometimes he needs a 2 to 1, but Mr Stephenson did not think this was official; Mr Stephenson was sent DP's risk assessment and briefed a few days before he started working with him.

118. The Claimant then turned to discuss the previous final written warning (at R1 238) and Mr Townsend read the decision of the previous disciplinary panel.

119. The Claimant then explained that he had posted medical evidence to HR. Ms Edwards stated that she had not received this. The Claimant provided copies. Ms Edwards confirmed that HR requested a report from the Claimant's GP s to his head and scrotal injury. He sent a report detailing the scrotal injury. A recommendation was made to refer him to occupational health in six months' time once treatment was underway. HR requested further information about the head injury but received a telephone call from the Claimant's doctors' surgery stating that there was none because there was no record of treatment for such. She said that there was thus no basis to refer the Claimant to occupational health for the head injury.

120. The Claimant stated that there were no witnesses in the shop and he does not write up incidents without getting the facts right. There was no incident, no disclosure and no complaint from the young person.

121. The Claimant further stated that the disciplinary process did not give adequate time to prepare and his contract was not changed and so this was a breach of contract. Ms Edwards clarified that staff are issued with one contact and any changes are made as a variation so the disciplinary letter was a variation of contract following disciplinary action.

122. The Claimant then stated (at R1 239) that Ms Margerison was carrying out *"ethnic cleansing"* and the Respondent was *"racially biased"*. He said that wherever she goes black people leave and she has a history of discrimination against black people. She had challenged him a number of times. He further stated that the Respondent was a racist organisation where black people are discriminated, against and Ms Margerison fabricates evidence. She has dismissed three staff in three months at No. 66.

123. The Claimant then summarised his case at R1 239.

124. We note that Ms Lewis was not telephoned during the hearing. We did not hear any evidence as to why Mr Townsend or Ms Edwards did not telephone her as had been indicated. However, at the end of the meeting, Ms Edwards

suggested that the Claimant provide a copy of his questions to Ms Lewis which she will email to her. Claimant did so.

125. The meeting was then adjourned.

126. We note the email exchange between the Claimant and Ms Edwards and Ms Edwards and Ms Lewis regarding the Claimant's questions to Ms Lewis (at R1 241 -246).

127. The Claimant's questions are at R1 240 and Ms Lewis' answers which are dated 8 December 2017 are at R1 248. In her answers Ms Lewis states the following:

127.1 In answer to question one, there was no mention of supervised spending to the Claimant at the time he collected DP's pocket money. We note that this is the opposite of what is contained in her witness statement to Ms Margerison at R1 188;

127.2 In answer to the second question, Ms Lewis states that both she and Ms Russell were in the office when the Claimant returned from the shop;

127.3 In answer to the third question, Ms Lewis states that the Claimant told both of them that *"DP had a box of cigarettes which was big box and you don't if you paid for it – something along those lines."* We note that in her witness statement to Ms Margerison at R1 188-190, Ms Lewis states at R1 188 that when DP returned from going to the shops with the Claimant, DP had a box of cigarettes and the Claimant advised the team that *"he had purchased them to calm DP down, as he becoming (sic) quite hyped up. (She) does not recall the exact wording, but explained it was along these lines"*;

127.4 In answer to the question 4 as to whether the conversation between Ms Russell and the Claimant set out in Ms Russell's witness statement to Ms Margerison (at R1 185-186) ever took place (which the Claimant denies), Ms Lewis states *"no, I can't remember this conversation taking place"*;

127.5 In answer to question 5 as to what Ms Lewis said in response to the Claimant stating that he may have been fooled to pay for the cigarettes, she answers *"I said "No", you can't do that you can't pay for cigarettes for young people*". We note that there is no reference to this comment within her witness statement to Ms Margerison.

128. We heard no evidence as to whether or not the Respondent asked Ms Lewis why her answers to these questions were at odds with the written statement to Ms Margerison given that in a number of respects her answers to the questions had changed significantly.

129. In oral evidence, Ms Margerison said that she had much experience to taking statements. She said that there was no scope for misinterpretation of what the Claimant said to her in the statement at R1 187, although she

accepted that he might not have used the word *"criminalise",* but it was the essence of what he said. With regard to Ms Russell's witness statement, she said that she initially spoke to her over the telephone but given the specific questions raised with her, she must have done so after speaking with the Claimant. Ms Margerison confirmed that they both drafted Ms Russell's statement and that she either typed it up at that time or a later date. Her rough notes taken at the time would have been shredded afterwards simply to be neat and tidy. She did not appreciate that perhaps it would have been better to have retained and filed them.

130. By a letter to the Claimant dated 13 December 2017, Mr Townsend notified the Claimant that he had upheld the original decision to dismiss. This is at R1 251-252. We note that the letter cites the reason for the Claimant's dismissal as:

"… Gross Misconduct... primarily due to a diminution of trust and confidence in your abilities to fulfil your role as Children's Residential Worker due to your failure to follow recording and reporting procedures. This was because, despite the incident(s) of the 18th August, you were already subject to a Final Written Warning for failure to follow recording and reporting procedures."

131. The letter does not completely tally with the reasons and the conclusion cited for dismissal by Ms Harris in the dismissal letter at R1 227-229).

132. We heard evidence from Mr Townsend. He stated in his witness statement at paragraph 6 that he considered the questions to answers from Ms Lewis, he considered the original statements and the Claimant's complaint of fabrication, the statement from Ms Oyedrian, the investigation report and the dismissal letter. He further stated in his statement that he concluded that the Claimant lacked consistency and credibility, whereas there was quite a consistent theme to the witnesses' evidence. He also took into account what he referred to in his at paragraph 7 of the statement as to how the Claimant *"vacillated in the meeting and changed his version to the extent that there had not even been an incident in this case"* and he concluded that the Claimant was *"not an appropriate person to be working with children"*.

<u>The victimisation claim</u>

133. The Claimant alleges that because he brought his first Tribunal claim against the Respondent, the Respondent victimised him by: a) not providing a reference to prospective employers on request from a recruitment agency; and/or b) providing an unfavourable reference. This caused him to lose employment that he might otherwise have obtained and specifically losing employment through one agency that he had already commenced.

134. In his second Tribunal claim form (at R1 261), the Claimant states that applied for a number of jobs after his dismissal from the Respondent's employment. He says that in an email dated 19 December 2017, the Respondent agreed that it would only provide factual references to prospective employers. He registered with Central Recruitment Services ("Central Recruitment") and alleges that his consultant was unable to obtain

a reference from the Respondent despite constant chasing over a three week period. He also registered with Hays Specialist Recruitment ("Hays") and alleges that Hays had to chase the Respondent for more than a month but obtained no response. He further alleges that he started in his employment through Hays only to be dismissed following receipt of a bad reference from the Respondent. He asserts that the reference was bad because it stated that he had been dismissed by the Respondent. He further asserts that the Respondent and Hays have a close working relationship and it would be easy for the Respondent to influence Hays by providing a bad reference.

135. The Respondent's position in its Response (at R1 275) is that it restricts references to facts that are known about the individual in question and was only aware of a request for a reference for the Claimant from Hays. The Respondent states that a reference was provided on 20 March 2018. This set out the Claimant's job title, dates of employment, reason for leaving as dismissal, a statement as to the overall purpose of his role, indicated that there were disciplinary issues by stating *"yes"* and indicating that there were no performance or safeguarding issues by stating *"no"* to each. The Respondent further states that subsequently Hays sought confirmation of the reason for the Claimant's dismissal, to which the Respondent responded stating that he had been dismissed for "*gross misconduct due to failure to follow recording and reporting procedure"* (the Respondent taking this wording from the letter of dismissal). The Respondent also states that it subsequently received contact from Hays as to whether it gave its permission to for them to disclosure information held about the Claimant further to a Subject Access Request that he had made (under the Data Protection Act 1998). The Respondent denied the suggestion that it collaborates closely with Hays and conspired against him.

136. We would note that the Claimant's first claim form (at R1 1-12) does not raise a complaint of race discrimination. It brings a complaint of unfair dismissal. It does tick the box *"if claiming discrimination, a recommendation"* and state *"£50,000 Loss of income and unfair discrimination (sic)"* as the remedies sought at R1 8. But otherwise it is not obviously a complaint of race discrimination. Indeed, the complaint of race discrimination was identified and added to the claim at the preliminary hearing held on 20 February 2018. However, we accept that the Claimant did raise the issue of race discrimination during the disciplinary process at both the disciplinary hearing and the appeal hearing and the Respondent was aware of this.

137. From the documents before us we were able to ascertain the following:

    137.1 On 2 January 2018, Central Recruitment emailed the Claimant stating that they had been attempting to obtain references from the Respondent and from another referee, City Training Centre, since 24 November 2017 and have resent the references again that day after several attempts. The email further states that Central Recruitment's policy is not to pursue references beyond a maximum of three weeks and so the Claimant's account would be put on hold. This is at R1 286;

137.2 On 4 January 2018, Central Recruitment emailed the Claimant seeking contact details for City Training Centre, having been unable to find an email address and website. The email also stated that they were still waiting on a reference from the Respondent. This is at R1 287;

137.3 On 13 March 2018, a consultant at Hays sent an email marked urgent to Ms Karen Hogg, then a member of the Respondent's HR department, requesting completion and return of a reference from (at R1 288);

137.4 On 16 March 2018, the consultant at Hays sent an email to the Claimant seeking his assistance in obtaining a reference from the Respondent. The email stated that Hays had constantly chased the reference, having first sent the request on 2 March 2018 and then again on 8 March 2018. Further, that Hays had been calling the Respondent constantly for the past two weeks, but Ms Edwards and colleagues had *"refused"* to speak to her. It would appear from the email that the consultant had not been able to get beyond the telephone receptionist. She had made it clear to the receptionist that the Claimant could not start his new job for the past two weeks and has been without money and it appeared as if they did not care. The email further states that the receptionist said that it is *"a common occurrence and it is very unfair"*. She asks that the Claimant gives the Respondent a call. This is at R1 289;

137.5 The reference provided by the Respondent dated 20 March 2018 is at R1 290. The contents are as set out in the Response as mentioned above;

137.6 The consultant at Hays emailed the Claimant on 20 March 2018 indicating that she had received the reference but it has come back that he had been dismissed and asks him to call her to discuss further (at R1 291);

137.7 The Claimant replies by email later that day in which he states *"It's a shame that St Christophers (sic) would write a bad reference because I turned down their settlement offer in exchange for references"*. He requests a copy of the reference. The remainder of the email then goes into some detail of the disciplinary process (albeit in cryptic terms if the recipient was unaware of the full context) that led to his dismissal, his concerns as to the fairness of the process and then discusses settlement negotiations. This email is at R1 292-293;

137.8 In response, by email dated 21 March 2018, the consultant asks the Claimant to provide a statement explaining what happened and how it led to action against him (at R1 293). The consultant states that for legal reasons she is unable to forward the reference to him, but he was able to request it directly from the Respondent;

137.9 In an email to the consultant sent later that morning, the Claimant sets out a summary of what happened, as follows:

"I raised a safeguarding issue, as a protected whistle blower which involved Karen Edwards and other senior management of the organisation. I became a target of racism, harassment and bullying since 2015 because I covered up the abuse scandal.

In August 2017, I took a resident to the shop to spend his pocket money of £8. He bought snacks and drinks under my watch and we returned home. The resident was a regular smoker who was later seen smoking which no one knew where or how he got the cigarettes

I was accused of buying cigarette (sic) which I obviously didn't".

137.10 We would comment that it is fair to say that this is not an accurate representation of the reasons for the Claimant's dismissal although it might reflect the Claimant's belief;

137.11 On 28 March 2018, the Social Care Compliance & Audit Manager at Hays, sent an email to Ms Hogg seeking confirmation of the reason for the Claimant's dismissal and the accuracy of the statement provided to Hays by the Claimant. The email states that Hays takes its responsibility to safeguard its candidates and clients seriously and would like to be able to make an informed decision on the Claimant's application. The email is at R1 296;

137.12 In response, Ms Hogg replies that same morning confirming, as stated to Hays' consultant, that the reason for the Claimant's dismissal was *"Gross Misconduct due to failure to follow recording and reporting procedures";*

137.13 What follows at R1 297-298 is email correspondence regarding provision of the Respondent's reference to the Claimant as part of a Subject Access Request he made of Hays under the Data Protection Act 1998.

138. In her written evidence, Ms Afreh denied that any victimisation had taken place. She referred us to R1 277-278 which sets out the Respondent's own policy as to the provision of references. She said this broadly reflected the common position within their sector (working with children and young people). She went through the above documents in the absences of Ms Edwards and Ms Hogg who no longer work for the Respondent. This reflects our own analysis of the correspondence relating to Hays. In respect of Central Recruitment, she referred to Ms Hogg's Mimecast account at R1 284-285, which is her email record at the relevant period. This shows no emails received from Central Recruitment.

139. In her oral evidence, Ms Afreh confirmed that the reference form sent by Hays is at R4. However, she explained that the Respondent did not use it because it complies with Safer Recruitment and so they send back a factual

reference and does not deal with questions relating to a subjective judgement, such as ratings around honesty, integrity, performance and whether they would re-employ. They used their standard format. She confirmed that the reference the Respondent sent for the Claimant is at R1 288.

140. In oral evidence, the Claimant indicated that he thought that the Respondent had agreed to provide a bare factual reference and that given his ongoing claim to the Employment Tribunal it should not have presented a reference in the terms that it did. There was no evidence beyond his assertion of such an agreement. Instead of what he claims was agreed, the Claimant alleges that the Respondent provided a false, inaccurate and misleading reference. When pressed as to how, he said that the reference referred to safeguarding issues when there were none and this litigation was ongoing. However, we could find no such mention of safeguarding issues in this manner.

Submissions

141. The Respondent's Counsel provided a skeleton argument which he spoke to. The Claimant gave oral submissions. We have taken these into account in reaching our findings and conclusions.

Relevant Law

142. Section 98 Employment Rights Act 1996:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case."

143. Section 13 Equality Act 2010:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others..."

144. Section 27 Equality Act 2010

"(1) 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.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act…"

Conclusions

Race discrimination

145. The burden of proving unlawful discrimination is set out in section 136 of the Equality Act 2010, which states:

'…(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision…..'

146. What it boils down to is the following: where the Claimant proves facts from which the Employment Tribunal could conclude in the absence of an adequate explanation that the Respondent committed an unlawful act of discrimination, the Tribunal must uphold the complaint unless the Respondent proves s/he did not commit that act.

147. We have followed the guidance given as to the burden of proof by the Court of Appeal in **Igen Ltd and others v Wong; Chamberlin Solicitors and another v Emokpae; Brunel University v Webster** [2005] IRLR 258.

148. The Claimant alleges direct discrimination. He asserts that as a black person he was treated less favourably by the Respondent than white members of staff in being dismissed for misconduct.

149. We were provided with a breakdown of staff at paragraph 18 of the Respondent's ET3 at R1 21 but heard no further evidence as to racial breakdown of staff. We were not provided with an equal opportunities policy for the Respondent.

150. The Claimant alleged that on appointment, Ms Margerison embarked upon a campaign of *"ethnic cleansing".* He cites a number of examples of this at

paragraph 72 of his witness statement. We note that he refers to a telephone conversation he overheard in an email he sent to the Tribunal dated 26 February 2018 (at R1 28-32). However, we were not referred to the document during the hearing and it was not raised in evidence. In any event we note that these allegations were denied by the Respondent in its letter to the Tribunal dated 16 March 2018 at R1 32-33.

151. The Claimant accepted that the examples he provided were based on what he heard or saw happening and that he had no direct access to the Respondent's personnel records. His knowledge of each allegation was therefore limited, and matters were only furthered by evidence from Ms Margarison.

152. We deal with each allegation below:

152.1 That he was replaced by Charlie Barrick almost immediately after his dismissal. In evidence, Ms Margarison stated that at the time of the Claimant's dismissal, Allen House was closed, Mr Barrick was one of the members of staff there, he was redeployed to No.66 and she had no choice in this;

152.2 That Sapphire was replaced by white staff the day after her dismissal. In evidence, Ms Margarison stated that Sapphire was on probation and this ended whilst she was on annual leave. She was replaced by an agency member of staff. The Respondent has limited pool of staff which it uses;

152.3 Abbas, an agency worker was replaced by Alistair. Ms Margarison said in evidence that she did not recall Abbas being agency staff, but the Respondent often changed agency staff due to their availability for example if they could not work particular shifts or if the young person makes a complaint about them;

152.4 That Grace Supiya was dismissed. Ms Margarison said in evidence that she was not managing Ms Supiya at the time and she thought that she was still working at Allen House and No 66;

152.5 That Mr Stevenson was asked to leave because he did not have NVQ 2. Ms Margarison said in evidence that it was a legal requirement to have an NVQ within two years of employment. Mr Stevenson accepted that he did not have this qualification after 2 hours of employment and this was why he left.

153. The Claimant raised the issue of race discrimination in broad terms at his disciplinary hearing (at R1 221 para 4 l). At paragraph 7 a and b (at R1 225), Ms Harris asked him for more detail. The Claimant provided some at para 7 c to h. His trade union representative then said the Claimant would send evidence. The Claimant did not do so.

154. The Claimant again raised the issue of race discrimination at the appeal stage, in his appeal letter at paragraph 9 (at R1 232). This is again in broad terms but alleges *"ethnic cleansing"* by Ms Margarison.

155. The Claimant raised the issue at the appeal hearing, which is recorded at paragraph 3.17 of the notes of the meeting (at R1 239). In oral evidence, Mr Townsend said that as the appeal hearing proceeded, the Claimant made what was probably too harsh to call a tirade but was a series of allegations as to racial discrimination and collusion by the organisation in fabricating evidence against him. Mr Townsend said that he had to judge the matter on the evidence before him, his knowledge of the case and make a decision as to these allegations, particularly as all the key players apart from Ms Margarison are black (by which he meant Ms Lewis, Ms Russell, Ms Afreh and Ms Oyedrian).

156. TheTribunal also took into account Mr Stephenson's oral evidence as to the treatment of black staff by the Respondent. He said that he was unaware of any issues relating to ethnic origins or colour and that he was generally quite impressed with No 66 and their working relationships.

157. Our conclusion is that the Claimant has not produced sufficient evidence to show that his assertions require the Respondent to give an explanation. The primary facts indicate that the events leading to the disciplinary process which led to his dismissal was because of the incident which occurred with DP and the purchase of cigarettes and his failure to report it adequately.

158. Whilst we can understand the Claimant's suspicions, we do not find that unlawful race discrimination has occurred.

159. However, we do have the following concerns.

160. The Respondent did not produce any policy document dealing with issues of discrimination at work or equal treatment of staff. Particularly so, given that it was facing a claim of race discrimination. We do not even know if there is such a policy. This would make it difficult for a member of staff to be aware how to raise such concerns, have confidence that the Respondent would deal with such concerns and know what action the Respondent would take;

161. Whilst of course the Claimant raised allegations of discrimination, and at the disciplinary hearing, through his trade union representative, said he would provide evidence in support, but did not, there is no evidence of any encouragement or proactive chasing of such evidence by the Respondent. One would at least expect that given the seriousness of the allegations. However, this is not losing sight of the onus being on the Claimant to provide the details of his allegations;

162. We were concerned about the approach taken by Mr Townsend at the appeal hearing in dealing with the Claimant's repeated allegation of *"racial cleansing*". It was recorded in the notes that it was mentioned by the Claimant, but there is no record of any ensuing discussion, although Mr Townsend said in oral evidence that there was. It did appear that he did not deal with the matter with the level of seriousness it warranted. His evidence appeared dismissive of the allegations. He did tell us that he had training on the Equality Act 2010 at the time it came into force. He should have been aware of the seriousness of such matters and the need to

progress them. If there was an equal opportunities policy then this would have guided him;

163. If the Respondent does not have such a policy we would strongly recommend that it puts one in place and monitors its effectiveness and use.

Victimisation

164. It is unlawful to victimise a worker because he has done *a "protected act".* In other words, a worker must not be punished because he has complained about discrimination in one or other of the ways identified under section 27 of the Equality Act 2010.

165. The Claimant alleges victimisation. The protected act has been identified as bringing his first claim to this Tribunal. Whilst the first claim form does not expressly contain a reference to a complaint of race discrimination, discrimination was identified part of his claim at the preliminary hearing on 20 January 2018 and it was a matter of which the Claimant complained during the disciplinary and appeal process.

166. The detriment has been identified as a) providing the Hays reference in the terms that it did and b) not providing a reference to Central Recruitment Services.

167. Dealing first with the Hays' reference. The Respondent is of course under a duty of care to provide an accurate reference to prospective employers, more so given the nature of the sector which involves working with children and young people and safeguarding requirements apply. It has a policy of providing factual references so as to avoid subjective judgment, which of course can give rise to potential claims of negligent misstatement, malicious falsehood or defamation. There is nothing in the Hays's reference which goes further than an indication of the reason for the Claimant's dismissal and on further enquiry from Hays, in response to the Claimant's summary as to the reasons he was dismissed, further information of a factual nature which put the dismissal in its fuller context. There is nothing to indicate that this reference went any further than one would expect in factual terms and nothing to indicate that it was given so as to victimise the Claimant. We therefore find that the reference provided was not a detriment because of the protected acts.

168. Whilst there would appear to have been some delay in providing the reference to Hays, this was not identified as a detriment. In any event, the email from Hays indicated that the Respondent's receptionist had said that such delays were a *"common occurrence"* albeit *"unfair".* There was nothing in this to indicate that the delay was as a detriment because of the protected act. But it was an indication that it was a general issue, which if it is the case, the Respondent should address.

169. Turning then to the Central Recruitment Services reference request. There was no evidence to show that the Respondent actually received any request was from Central Recruitment and so it cannot be said that the Respondent failed to provide such a reference. Whilst the emails from Central

Recruitment state that enquires had been made, no copies of those emails have been provided and of course the sending of emails does not evidence receipt. The Respondent provided evidence of non-receipt of any emails from Central Recruitment during the period in question.

170. We therefore find that the Claimant was not victimised by the Respondent and the complaint is dismissed.

Unfair Dismissal

171. The Claimant brings a complaint of unfair dismissal. This was set out in the list of issues.

172. We first considered whether the Respondent has shown a potentially fair reason for the Claimant's dismissal within section 98(1) and (2) ERA 1996. Having regard to the purpose of the investigation, the disciplinary invitation letter and the disciplinary hearing, we find that the Respondent has shown that the potentially fair reason was to do with conduct.

173. We then turned to consider whether this was a sufficient reason for the Claimant's dismissal within section 98(4) ERA 1996. This involves an examination of both the way in which the Respondent dismissed the Claimant (the process followed) and the reason for the dismissal (the substance).

174. With regard to the process, we considered the Respondent's own policy at R1 42-54 as well as the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015). In terms of the former, from our findings we can see no obvious divergence, but we were not provided with the HR Guidelines for Managers – Disciplinary Investigation referred to in paragraph 4.1 of the Respondent's policy at R1 43. However, the attention of the reader is clearly drawn to obtaining signed statements. As to the ACAS Code, which sets a bare minimum disciplinary procedure, the process that the Respondent followed was compliant.

175. Given the that the Respondent's policy appears discretionary as to the obtaining of signed written statements, the Respondent may like to reflect upon the difficulties that were caused in this case by not verifying the contents of a statement with the maker of the statement. We particularly cite Ms Lewis' statement as an example of the problems caused.

176. We then considered the sufficiently of the reason for dismissal and had regard to the test contained within **BHS v Burchell** (1979) IRLR 379, EAT relating to conduct dismissals. This requires us to consider the following:

    176.1 Whether the employer believed that the employee was guilty of misconduct;

    176.2 Whether the employer had in mind reasonable grounds upon which to sustain that belief; and

176.3 At the stage at which the employer formed that belief on those grounds, whether s/he had carried out as much investigation into the matter as was reasonable in the circumstances.

177. When assessing whether the **Burchell** test has been met, the Tribunal must ask itself whether what occurred fell within the 'band of reasonable responses' of a reasonable employer. This has been held to apply in a conduct case to both the decision to dismiss and to the procedure by which the decision was reached. **(Sainsbury's Supermarkets v Hitt** [2003] IRLR 23, CA).

178. In addition, we remind ourselves that we must be careful not to substitute our own decision for that of the employer when applying the test of reasonableness.

179. With regard to the reasonableness of the Respondent's investigation. It is clear that the investigating officers interviewed those involved ultimately, having listened to the Claimant's request to interview Ms Oyedrian. However, the difficulties that arose with the evidence that was gathered, which was not in the form of verified and signed statements, caused us to believe that the investigation was not as reasonable as was appropriate in the circumstances.

180. Whilst Ms Oyedrian's statement was completed and signed by her, we were concerned that a pre-filled pro forma was initially sent.

181. The difficulty that the deficiency in the investigation process caused was that the Claimant alleged that his witness was not what he had said to Ms Margerison and Ms Lewis' witness was significantly at odds with what she said in her later in her written answers to the Claimant's questions. This was perhaps not entirely apparent until the appeal stage. However, there were sufficient pointers to reasonably alert the Respondent to question the quality of the evidence and to seek clarification as to the inconsistencies in the statements. Particularly given that the primary issue as to the purchasing of cigarettes was the finding that the Claimant had been inconsistent in what he had said to witnesses at the time, in his statement taken by Ms Margerison and as to what he said at the disciplinary and the appeal hearings.

182. At the dismissal stage, the Claimant alleged that his own statement was fabricated and that elements of the other statements were untrue. On the face of it the Claimant had admitted that he bought the cigarettes although he at the hearing he said that he was fooled into doing.

183. Perhaps the only thing the Respondent could have done was to verify when the statement was sent to the Claimant by Ms Margerison for verification, given that the Claimant stated that due to annual leave he had no time to consider it and was aware of it until he saw it in the documents for the disciplinary hearing. Given the significance of this, it should have been a consideration in determining credibility although we felt that at it did not fatally affect the reasonableness of the findings at that time.

184. In terms of the reasonableness of the findings at the appeal stage, had the Respondent taken into account what Ms Oyedrian said in her statement and what Ms Lewis subsequently said at the appeal stage, then it needed to make further enquiries before its appeal findings became reasonable.

185. We were also concerned that Mr Townsend upheld the dismissal on the grounds of the Claimant's failure to report and record the incident and because the Claimant was on a final written warning for the same thing.

186. The Claimant was never charged with this offence in the disciplinary invite letter and that whilst Ms Harris referred to her concerns about the lack of reporting and recording of the incident and noted with concern that the Claimant had been warned about this before, this was not the operative reason for dismissal.

187. In evidence Mr Townsend stated that his decision was based on the issue of purchase of the cigarettes, but this is not what the appeal outcome letter states. In oral evidence Mr Townsend stated that if he had to write the letter again, he would do it differently because it did not reflect what happened at the appeal hearing. He apologised for that. We do note that the appeal hearing notes reflect that there was consideration of the cigarettes issue. We would comment that it was not helpful to send a letter which did not reflect the findings of the appeal hearing but focused on another issue which was not a reason for the dismissal.

188. We therefor conclude that it was not reasonable to uphold the dismissal of the Claimant at the appeal stage and so dismissal at that point without more enquiry was not within the band of reasonable responses.

189. The Tribunal also considered the case of **Polkey v A E Dayton Services Ltd** [1987] IRLR 503 in which the House of Lords held that a dismissal may be unfair purely because the employer failed to follow fair procedures in carrying out the dismissal. We also considered the so-called "**Polkey** reduction" whereby any compensation awarded for unfair dismissal may be reduced by a percentage to reflect the likelihood that the employee would still have been dismissed, even if fair procedures had been followed.

190. We do not find it appropriate to make such a reduction. We cannot say if the Respondent had gone away and verified the statements or clarified the evidence that the Claimant would still have been dismissed. The only pointer we have is that Ms Lewis' written answers were significantly at odds to the statement taken by Ms Margerison coupled with Ms Oyedrian's statement. It is not possible to determine whether the other statements would have stood.

191. We then turned to consider the issue of contributory fault. If an Employment Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the employee, it can reduce the amount of any compensatory award proportionally as it thinks fit pursuant to section 124(6) ERA 1996. This is known as contributory fault and the Tribunal usually makes a percentage reduction from any compensation awarded to the employee. The employee's conduct must have been culpable or

blameworthy. This does not necessarily include merely unreasonable conduct – it depends on the extent of the unreasonableness (**Nelson v BBC (No 2)** [1979] IRLR 346, CA).

192. We find as follows. The Claimant did not report an incident involving the purchase or obtaining or being fooled into purchasing cigarettes, whatever way you interpret it. This was someone working in a sector dealing vulnerable children and young people. We find that clearly there was an incident that should have been reported, although one could say that perhaps the Claimant's colleagues should have done so. However, we find that the primarily responsibly was on the Claimant as he was directly involved in the incident. His explanation for not doing so was not compelling. Instead he reported the incident verbally and this gave rise to the disparity of accounts of what he actually said and this in turn gave rise to the disciplinary proceedings. Whilst there is doubt about the veracity of the statement taken by Ms Margerison (given the anomalies in Ms Lewis's statement compared with her written answers), which becomes apparent at the at the appeal stage, the Claimant said that he "*cannot deny he paid for the cigarettes"* although he alleged he was fooled into doing so within the wider evidence set out within the disciplinary dismissal notes and his accompanying statement. The disparity of explanations and his apparent admissions caused his dismissal. On appeal these matters did not assist although we have found that the Respondent acted unreasonably in not seeking to verify the witness statements given the anomalies in Ms Lewis's initial and subsequent evidence. We note the admission by the Claimant contained within his supervision with Ms Odur on 19 October 2017 at R1 202. However, the Claimant said he had not seen this before and had not signed it and given our concerns about the accuracy of the other statements made, we do not feel that this is something that adds to our findings of contribution.

193. We believe that this is a case where it is appropriate to make a reduction for contributory fault of 25%. Whilst the Claimant did not help matters by failing to report the incident, it was the Respondent who took the statements from witnesses without confirming their accuracy with those witnesses or getting them signed and dated (save for Ms Odeyrian). It was the evidence contained in those statements that predominantly caused the Claimant's dismissal.

Further disposal

194. A hearing to deal with remedy for unfair dismissal will be listed for one day on the first available date two months after this judgment is sent to the parties so as to allow them the opportunity to prepare for such a hearing and if possible to reach resolution without having to attend a further hearing. Notice of hearing will be sent in due course.

195. The Claimant must provide a witness statement to the Respondent setting out what happened after his dismissal in terms of his attempts to find further employment, details of any employment obtained and the amount of wages received and the details and amounts of any social security benefits

claimed. This should be provided with documents in support. The Claimant should provide this at least 3 weeks before the date set for the hearing.

Employment Judge Tsamados

Date: 25 July 2019