Case No: 2602026/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr E Nzononye

Respondent: Elysium Healthcare (Healthlinc) Limited

Heard at: Lincoln

On: Monday 29, Wednesday 31 October and 1 November 2018

Before: Employment Judge Blackwell
Members: Mr R N Loynes
Ms H Andrews

Representation
Claimant: In person
Respondent: Mr Baker of Counsel

JUDGMENT having been sent to the parties on 21 November 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Mr Nzononye represented himself and called by way of witness summons Ms Ngono. He also called Ms Gedney. Mr Baker represented the Respondent and he called Ms Laing (who carried out the investigation into allegations made against Mr Nzononye), Ms Fleming (who took the decision to dismiss Mr Nzononye) and Mr Ngwang (who heard the appeal). There was an agreed bundle of documents and references are to page numbers in that bundle.

Background and findings of fact

2. On 13 April 2015, Mr Nzononye began work with the Respondent. On 14 February 2016 (page 75), Mr Nzononye made a complaint against a colleague, a Ms Diane Kitchener.

3. On 21 September 2016, a complaint was made against Mr Nzononye that he had been using his own mobile 'phone.

4. That was followed on 29 September by a report that Mr Nzononye was found sleeping on duty.

5. On 3 December 2016, another colleague (Miss Hewlett) made a complaint about inappropriate sexual conduct by Mr Nzononye that led to him being suspended by letter of 14 December 2016 (page 86).

6. There then began an investigatory process conducted by Ms Laing in relation to the three complaints against Mr Nzononye. The first related to use of a mobile telephone whilst on duty. Mr Hoyle was interviewed at page 93 and Mr Nzononye in that regard at pages 106 and 107.

7. Subsequently, a Ms Richardson was also interviewed in that connection but that interview occurred after the dismissal.

8. As to the allegations of inappropriate sexual behaviour, Ms Hewlett was interviewed at pages 94 and 95; Ms Ngono at 98 and 99 and Mr Nzononye at pages 108 to 110. We note that during that interview, Mr Nzononye raised a complaint in relation to a breach of confidentiality in that his wife had been informed by a member of the family of Mr Seagrief of the reason for his suspension. At page 113, Ms Ngono was interviewed again.

9. The third allegation of misconduct related to the complaint that Mr Nzononye had been found sleeping at work. Ms Kitchener was interviewed at page 96 and we note that Ms Kitchener herself makes reference to Mr Nzononye calling her a racist.

10. At page 100, Mr Chiutsi is interviewed. At page 102, Ms Hewitt and at 104, Ms Jonga. At 111 and 112, Mr Nzononye is interviewed in that connection. There is a further interview with Mr Nzononye at pages 115 to 119.

11. On 5 May 2017, Mr Nzononye was summoned to a disciplinary hearing in relation to the same three complaints. That disciplinary hearing took place on 19 May and the notes are at 129 to 138. Mr Nzononye does not accept that these notes are an accurate record and we shall return to that point.

12. At page 151 is the outcome letter which dismissed Mr Nzononye. In conclusion, it found all of the three complaints proven and it said as follows:

"*Therefore, in conclusion I find you culpable of one act of serious misconduct and two acts of gross misconduct, namely your inappropriate behaviour towards female staff and sleeping whilst on duty. Your position at HealthLinc House Hospital is a position of trust working with vulnerable adults. The issue of trust is of paramount importance to us in order to ensure the safety of the patients in our case and our workforce.*

Therefore, the outcome of your disciplinary hearing is that you are summarily dismissed without notice or pay in lieu of notice from the

position of support worker at HealthLinc House Hospital with effect from the date of this letter."

13. It is common ground that Mr Nzononye did not in fact see the letter until 27 June.

14. At page 161 and bearing a date of 30 June is Mr Nzononye's appeal against that dismissal. For the first time in the documents we have before us, he makes an allegation (indeed he makes several allegations) of racial discrimination. He also repeated a number of matters which he raised by way of defence during the investigatory and disciplinary process. We also note that up until this point, Mr Nzononye had been represented by his trade union but he wrote to the Respondent on 27 June informing them that he would no longer be represented by the trade union and that he had made a complaint against the official who had represented him.

15. On 18 July, the appeal hearing was held jointly by Ms Nutt and Mr Ngwang. Again, Mr Nzononye does not accept that the notes (which begin at page 172) are accurate and particularly he does not accept that he withdrew an allegation that Ms Kitchener had drugged his tea leading to him being asleep on duty. He also denies that, as the minutes record on page 180, that he withdrew an allegation of racial discrimination following an explanation by Ms Nutt, which is set out in full on that page.

16. The outcome was sent to him by letter of 25 July 2017 at page 185. It appears that the allegation in relation to inappropriate behaviour was only partially upheld but the other two allegations of misconduct were upheld and therefore the dismissal stood.

17. We now turn to the issues to be determined against that background.

Direct discrimination

18. Mr Nzononye brings claims of direct discrimination pursuant to section 13 of the Equality Act 2010, which we explored at the beginning of the hearing with the use of the document served by Mr Nzononye - which we shall refer to as the further and better particulars of his claims of discrimination. That begins at page 41. We established that the first complaint of direct discrimination concerned an alleged failure by the Respondent to investigate a written complaint against a work colleague (Diane Kitchener) and that constitutes the less favourable treatment and the comparison is with the complaints made against Mr Nzononye in relation to the three matters which brought about his dismissal.

19. Mr Nzononye is black and, with the exception of Ms Ngono, all the other relevant participants in this matter are white. In relation to this particular complaint, we find as a fact that Mr Nzononye did, with the assistance of Nurse Humphries, produce the document which we see page 75 and which bears the date of 14 February 2016. We further accept that on the instruction of Nurse Humphries, Mr Nzononye put this in the appropriate pigeonhole expecting it to be dealt with, either by Ms Laing or Ms Fleming. Both Ms Laing and Ms Fleming deny knowledge of this complaint until the

matter was raised by Mr Nzononye in the disciplinary process and it is common ground that the complaint was never investigated.

20. We note that at page 85 we have an employee supervision record dated 15 October 2016 and it is likely that the incident which led to Mr Nzononye's complaint against Ms Kitchener is referred to at the middle of page 85, as follows:

"*There was an incident a few months ago when he was insulted by a member of staff and he doesn't feel it was dealt with adequately but he wants to move on and put the episode behind him.*"

The supervision notes otherwise report general contentment with the job, colleagues and patients.

21. Mr Nzononye contrasts that failure to investigation with the fact that when complaints were made against him as a black worker, those complaints were investigated and disciplinary action followed.

22. The second matter concerns a Mr Aiton. Mr Nzononye's allegation is that he was "*internally dismissed"* from apartment 8, which is an apartment within the Lighthouse building in which patients are cared for. That internal dismissal is the less favourable treatment. Mr Nzononye says, and we accept, that he was moved from apartment 8 without explanation and without hearing his side of the matter. We further accept that he was moved because Mr Aiton complained to the charge nurse and Mr Rowbottom that Mr Nzononye had not been following care plans.

23. Ms Fleming recalls the incident and says that his normal practice was to follow whatever advice she was given by the charge nurse (Mr Rowbottom) and in this case he advised that Mr Nzononye should be moved from this particularly challenging environment, both for his own benefit and that of the patient. Ms Fleming says, and we accept, that moving employees was a common practice and it was done both to help the employee and the patient concerned.

24. We note that (and this was drawn to our attention by Mr Nzononye) in the appeal hearing, Mr Aiton was described as being abrupt and he was not just abrupt with EN (Mr Nzononye). The same explanation for moving Mr Nzononye is also advanced in the same paragraph on page 174. It is accepted by Ms Fleming that in this case, Mr Nzononye was neither consulted nor was the reason for his move explained to him.

25. The next allegation of less favourable treatment concerns complaints made by Ms Ngono. Of course, we know that one of the allegations of sexual inappropriate behavior was made by Ms Ngono and we know that that complaint was investigated and it led in part to Mr Nzononye's dismissal. Mr Nzononye also refers to the allegation that Ms Ngono made a complaint against a white colleague (Mr Newton) who it was alleged had threatened Ms Ngono. Initially, it was Mr Nzononye's case that that allegation was not even investigated. We find as a fact, based on the evidence of Ms Ngono to this tribunal, that it was investigated; that Mr

Newton was moved to a different workplace within the building and that he apologised for his behaviour to Ms Ngono.

26. The next matter concerns the breach of confidentiality, which we have referred to above. We accept that Mr Seagrief in discussing Mr Nzononye's suspension with his wife led to the matter being conveyed in a supermarket to Mr Nzononye's wife. Mr Nzononye raised the matter on 21 and 27 February and raised a formal grievance. He alleged correctly that there had been a breach of confidentiality and, as a consequence, Mr Seagrief's conduct was investigated. Mr Seagrief accepted that he had been guilty of a breach of confidentiality. He apologised for that breach and we find that he was issued with a final written warning.

27. Mr Nzononye points out a difference of treatment as between himself as a black employee and Mr Seagrief, a white employee. He says both were found to have committed gross misconduct and we see at page 72 that a serious breach of confidentiality normally constitutes gross misconduct. Thus, Mr Nzononye points out that he was dismissed notwithstanding that he apologised for his being found asleep at work, whereas Mr Seagrief was issued with a final written warning.

28. The Respondent's explanation via Ms Fleming for the difference in treatment was that Mr Seagrief had both admitted the offence, shown remorse and had several years of exemplary service.

Victimisation

29. We turn now to the allegations of victimisation. Section 27 of the Equality Act 2010 requires there to have been a protected act before a person is entitled to the protection of section 27. We therefore need to examine the acts which Mr Nzononye relies upon to determine whether they constitute protected acts within the definition of subsection (2) of section 27. We refer to paragraph 3.3 of the further and better particulars on page 46 and paragraph 6 of Mr Nzononye's witness statement.

30. The first matter he relies upon is "*… a result of the complaint I made against them* (ie Heather Laing and Donna Fleming) *for race discrimination …*"

31. When exploring this issue with Mr Nzononye at the beginning of this hearing, he indicated that that complaint was made to Mr Rowbottom (Nurse Bob as he refers to him) but at that point he stated that the complaint was made after his dismissal. If that was so, then that complaint could not constitute a protected act because the two detriments complained of are a failure to give a reference and the dismissal itself.

32. It was unclear to us exactly when that complaint was made or the nature of the complaint. In our view, it is likely to have been the complaint that Mr Nzononye made in relation to his internal dismissal from apartment 8. Also, we note that neither Ms Laing nor Ms Fleming were aware of any

such complaint against them. Thus, whatever that complaint is, in our view it cannot constitute a protected act.

33. The next matter relied upon is the complaint made against Diane K (ie Diane Kitchener) which we see again at page 75. As we have said above, we accept that that complaint form was completed and put in the appropriate pigeon hole. However, there is in that document no reference to race discrimination or any other form of discrimination and it seems to us that it cannot fall within the definition set out in subsection 2.

34. The next matter relied upon is the complaint about the internal dismissal from apartment 8. Again, we accept that such a complaint was made but the nature of the complaint was simply that Mr Nzononye had been moved on the basis of a false allegation by Mr Aiton and that he was not given any opportunity to deal with that allegation. Again, we see nothing which could fall within the definition of a protected act.

35. The final complaint relied upon is that in relation to the breach of confidentiality by Mr Seagrief. Again, in our view, it does not fall within any of the definitions set out in subsection (2).

36. It must follow therefore that Mr Nzononye cannot rely upon section 27 because he has not done a protected act. We will, for the purpose of considering it as a relevant fact, examine the detriment that Mr Nzononye alleges he was subjected to, namely the failure of the Respondent to give him a reference which led to him not being accepted on a university course. Ms Laing accepted in evidence that she initially agreed to provide a reference to Mr Nzononye but upon taking advice from HR Department, she decided not to do so whilst Mr Nzononye was suspended from duty under investigation.

37. We see at page 137 (which is part of the disciplinary notes) the explanation advanced on behalf of the Respondent and which is identical to the evidence that Ms Laing gave to us.

38. As to the alleged second detriment of dismissal, and which can also be regarded as an allegation of direct discrimination, we think this turns on whether there was a difference in treatment as between Mr Nzononye compared with Messrs Norton and Seagrief. We also regard the evidence of Mr Ngwang as being relevant in our consideration of the relevant facts. These are set out in his paragraphs 14.3, 14.4 and 14.5 and largely repeat Ms Nutt's comments made to Mr Nzononye during the appeal hearing.

39. The relevant facts are as follows.

- Five black agency workers were no longer working for the Respondent as a result of gross misconduct.

- A white agency worker was no longer working at the Respondent due to gross misconduct.

- Another three prospective employees, not black, had their offers of employment retracted for various reasons.

- Eight members of staff were dismissed, only one of whom was black.

40. Mr Ngwang went on to explain that 97% of the support workforce are white. However, 90% of the nursing staff are black and, in his period of office, he had asked one black agency nurse not to return to the service due to performance related issues.

41. He goes on to record (as is recorded in the appeal notes) that in the face of that evidence, Mr Nzononye withdrew his complaint of racial discrimination. Again, we record that Mr Nzononye denies that he did so.

42. As to the relevant law, we remind ourselves of the burden of proof provision set out in section 136 of the 2010 Act and Mr Baker drew our attention to the well-known case of ***Madarassy***. We also remind ourselves that no one admits to unlawful discrimination. Sometimes discrimination is subconscious and not even known to the discriminator. We thus need to look at the facts as set out above in the round so as to reach a conclusion as to whether we can draw an inference of race discrimination. We have pointed out above that there are differences in treatment but for each of those, the Respondent has provided a credible explanation.

43. In our view, what tips the balance against Mr Nzononye is that at no point up until the dismissal does he complain of race discrimination. He raises, both in the investigatory process and the disciplinary process, all the matters he now relies on as acts of either direct discrimination or victimisation. The failure to investigate the complaint against Ms Kitchener, the internal dismissal from apartment 8, the failure to give a reference, the breach of confidentiality by Mr Seagrief are all referred to in the lengthy investigatory process and the lengthy additional statements given by Mr Nzononye voluntarily.

44. In our view, therefore, up until the point of dismissal Mr Nzononye did not believe that he had been racially discriminated against. We accept that he does not agree that the notes of the disciplinary hearing are accurate but, if there is a suggestion that complaints of race discrimination were not included within those notes, then we would have expected to see that raised as a ground of appeal and it was not.

45. In our view, therefore, all of Mr Nzononye's complaints of race discrimination must fail.

46. We have not dealt with issues of jurisdiction because we have dealt with the merits of the claim. Had we taken a different view (ie had we found in favour of Mr Nzononye) we would have had to have dealt with time jurisdictional issues.

Unfair dismissal

47. We now turn to the final complaint, that of unfair dismissal and it follows from what we have said that it is untainted by any form of race discrimination. Thus, it is for the employer to prove a potentially fair reason for dismissal and in this case the employer relies upon conduct, which is a potentially fair reason for dismissal. If that reason is made out, then it is for us to apply to that reason the statutory test of fairness set out at subsection 4 of section 98. In addition, it is for the employer to prove that at the time of the dismissal they had a genuine belief in the misconduct complained of. Also, that at the time they held that belief on reasonable grounds following a reasonable enquiry.

48. As Mr Baker correctly points out, the test of the band of reasonable responses applies not only to the decision to dismiss but also to the investigatory process and disciplinary process which led to that decision.

49. Mr Baker referred us to the well-known case of ***Iceland Frozen Foods*** in which the correct approach for this tribunal to adopt was set out as follows:-

> *"(1) the starting point should always be the words of subsection (4) of section 98;*
> *(2) in applying the section a tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair;*
> *(3) in judging the reasonableness of the employer's conduct an Industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
> *(4) in many (though not all) cases there is a "band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*
> *(5) the function of the tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.*"

50. As we have recorded above, there were three elements of misconduct alleged against Mr Nzononye. We have no doubt that in dismissing Mr Nzononye, Ms Fleming had a genuine belief that he had committed all three of the branches of conduct put against him.

51. The first, and the least serious, is the use of his own mobile 'phone whilst being in charge of patients. Mr Hoyle makes that initial allegation and Mr Nzononye has throughout denied the allegation. Mr Nzononye indicated that there had to be other witnesses other than Mr Hoyle. We note that Ms Richardson was interviewed and did confirm not only Mr Hoyle's account but she went further and said that not only was Mr Nzononye using his 'phone, whilst doing so he was not paying attention to his patients. In that regard, it seems to us that the Respondent had reasonable grounds

to believe that Mr Nzononye had been using his telephone when he should not have been.

52. The second allegation was that of sleeping on duty. Mr Nzononye admitted that he had been sleeping on duty but advance as a defence that the tea which Ms Kitchener had given him had been drugged.

53. That allegation, we accept, was not directly put to Ms Kitchener although one could reasonably draw the inference from her statement that she had not done so. We also note Ms Hewitt's evidence at the foot of page 102 in which she stated that she had watched Ms Kitchener prepare the tea and had seen nothing untoward.

54. Ms Fleming reasonably held the view that it was unlikely given that Ms Kitchener was a support worker that she would have had access to drugs that were administered to patients. She therefore concluded that any wish to drug Mr Nzononye would have had to have been premeditated. In our view, Ms Fleming was entitled to come to the conclusion that Mr Nzononye's explanation was unlikely. Thus, in the face of his admission, the conduct was proven.

55. The final allegation is one of inappropriate sexual behaviour and there were two witnesses, Ms Ngono and Ms Hewlett. We must of course take the decision as to whether the dismissal was unfair on the basis of what was known to the employer at the time of dismissal. However, we do need to deal with the evidence that Ms Ngono and Ms Gedney gave to this tribunal. They were here because the tribunal had issued witness summons against them and it is our understanding from the application and references in the disciplinary hearing that the purpose of their attendance from Mr Nzononye's point of view was that Ms Ngono would confirm that she had given the statements at pages 98 and 113 only because she was forced to do so.

56. Secondly, that she had accepted the explanation put forward during the disciplinary process by Mr Nzononye that he had not exposed himself to Ms Ngono but simply that his outer pair of personal protective trousers had fallen down. In both instances, Ms Ngono's evidence was to the contrary. She confirmed that she had given the evidence voluntarily and that she had signed both documents to be true. In fact, the trigger for her giving evidence was that she found out that Mr Nzononye had been flirting with two other employees and, as she put it to us, "here you are doing it again". That was her motivation in giving the evidence.

57. Ms Gedney, who heard the telephone conversation between Ms Ngono and Mr Nzononye confirms that evidence. Both witnesses also denied that they had been told by the Respondent not to give evidence. We accept Ms Ngono's and Ms Gedney's evidence as truthful.

58. Thus, in our view, the complaint of inappropriate sexual behaviour is made out on the evidence of Ms Ngono and Ms Hewlett.

59. In our view, therefore, there are reasonable grounds upon which the Respondent could have come to the view that Mr Nzononye was guilty of the misconduct complained of.

60. In relation to whether there was a reasonable investigation, the only complaints made by Mr Nzononye were that only one witness was interviewed in relation to the misuse of his telephone and, as we have recorded, that was rectified.

61. The allegation that Ms Kitchener had drugged his drink we accept was not formally put to Ms Kitchener but we do not see that as a flaw in the investigation.

62. The one issue not raised by Mr Nzononye but which, in our view, renders the investigation far short of exemplary is the length of time between the various complaints being made and the investigation being carried out. However, that does not in our judgment impact upon the fairness of the decision.

63. We need also to deal with those matters of inequality of treatment in relation to the disciplinary action taken against Mr Newton and Mr Seagrief. We rely upon the same set of facts as we have set out in relation to the claims of race discrimination. It seems to us that Mr Newton's misconduct was relatively minor and that the disciplinary action taken against him is to us to have been appropriate. Mr Seagrief's misconduct was far more serious and, as we have recorded above, it was gross misconduct. However, we note the mitigating factors; length of service, admission, apology and remorse and again it appears to us that the issue of a final written warning on those facts was proportionate. Thus, finally we ask ourselves did the decision to dismiss Mr Nzononye fall within the band of reasonable responses. We have no doubt that it did. Either of the complaints of gross misconduct, ie sleeping on duty or inappropriate sexual behaviour, would in our view on their own be sufficient to fall within the band of reasonable response.

64. Thus, the claim of unfair dismissal must also fail.

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Employment Judge **Blackwell**

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Date: 23 July 2019

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE