Case No: 2300987/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT:	**LONDON SOUTH**
BEFORE:	**EMPLOYMENT JUDGE K ANDREWS**
MEMBERS:	**Ms Y Batchelor**
	Dr S Chacko

BETWEEN:

Mr K Scarlett

Claimant

and

St Mungo's Community Housing Association

Respondent

ON:	**30 & 31 (am) October 2019**
	31 October & 1 November 2019 in chambers

Appearances:
For the Claimant: **Mr K Perera, Legal Assistant**
For the Respondent: **Mr F McCombie, Counsel**

JUDGMENT

The claimant was not unfairly dismissed.

The claimant was not discriminated against because of his age or his race.

REASONS

1. In this matter the claimant complains that he was unfairly dismissed and directly discriminated against because of his age and race. The claimant is now 53 and identifies as black British/black Jamaican.

2. The allegations of less favourable treatment relate mainly to his dismissal. After clarification with Mr Perera and by reference to the further information

supplied by the claimant after the preliminary hearing, it was established that the claimant compares himself to:

a. comparator A (who is late 40s and black Nigerian) who he says took food home in 2014 but suffered no repercussions; and
b. comparator B (who is in his early 30s and white British) who the claimant says was investigated for a much more serious offence involving the death of a resident but suffered no repercussions whereas a black lady was dismissed.

3. The claimant also says that he was replaced by a white person aged under 35 (and that since December 2017 the respondent has only recruited white people under 35), the respondent has dismissed 13 mostly black people and he was put on capability review for having a few typos in his emails.

Evidence & Submissions

4. We heard evidence for the respondent from Mr J Lally (Regional Director) and Ms K Murphy (Regional Director). We also heard from the claimant.

5. In the course of our post-hearing deliberations, we asked by email to the respondent, copied to the claimant, for confirmation as to who wrote a particular document upon which the respondent had relied. The respondent replied with a copy to the claimant. That prompted further emails from both parties. We have taken that exchange of correspondence into account in making our findings of fact below. We did not consider that it was necessary to seek oral submissions or further evidence.

6. We also had an agreed bundle before us to which the claimant added documents at the commencement of the hearing. Both parties made oral submissions. At the commencement of day two of the hearing the claimant sought leave to add to the bundle an article written by Unite the union on racism within the respondent. Having heard submissions from both this was refused for the reasons given orally to the parties.

Relevant Law

7. Unfair dismissal: By section 94 of the Employment Rights Act 1996 ("the 1996 Act") an employee has the right not to be unfairly dismissed by his or her employer.

8. In this case the claimant's dismissal was admitted by the respondent and accordingly it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2). If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

9. In this case the respondent relies upon conduct and therefore the Tribunal must consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient reason for dismissing him.

10. In that exercise, the Tribunal is guided by the principles set out in British Home Stores Ltd v Burchell [1978] IRLR 379, affirmed by the Court of Appeal in Post Office v Foley [2000] ICR 1283. Accordingly the Tribunal will consider whether the respondent by the standards of a reasonable employer:
    a. genuinely believed the claimant was guilty of misconduct;
    b. had reasonable grounds on which to sustain that belief; and
    c. at the stage at which it formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

11. Any evidence that emerges during the course of any internal appeal against dismissal will be relevant in that exercise but otherwise material not before the employer at the relevant time is irrelevant.

12. Further, the Tribunal must assess – again by the standards of a reasonable employer - whether the respondent's decision to dismiss was within the band of reasonable responses to the claimant's conduct which a reasonable employer could adopt (Iceland Frozen Foods v Jones [1983] ICR 17 and Graham v S of S for Work & Pensions [2012] IRLR 759, CA). The band of reasonable responses test also applies to whether the respondent's investigation was reasonable (Sainsbury's Supermarkets v Hitt [2003] IRLR 23). One factor to consider is whether the respondent has acted inconsistently in its treatment of employees but only where those employees are in "truly parallel circumstances". The EAT emphasised in Hadjioannous v Coral Casinos Ltd ([1981] IRLR 352) that flexibility must be retained and employers are not to be encouraged to think that a tariff approach to misconduct is appropriate.

13. We are also mindful of the EAT decision of Burdett v Aviva Employment Services Ltd (EAT0439/13) which confirms that even if a Tribunal has concluded that the employer was entitled to regard an employee as having committed an act of gross misconduct, that will not be determinative of the question of fairness. The answer in most cases might be that it was, but that cannot simply be assumed. The Tribunal still needs to consider whether dismissal was within the range of reasonable responses.

14. When considering the procedure used by the respondent, the Tribunal's task is to consider the fairness of the whole of the disciplinary process. Any deficiencies in the process will be considered as part of the determination of whether the overall process was fair (OCS Group Ltd v Taylor [2006] ICR 1602). The Tribunal will also take account of the ACAS Code of Practice on Disciplinary and Grievance procedures.

15. In coming to these decisions, the Tribunal must not substitute its own view for that of the respondent but to consider the respondent's decision and whether it acted reasonably by the standards of a reasonable employer.

16. Direct Discrimination

17. Section 13 of the Equality Act 2010 (the 2010 Act) provides that a person discriminates against another if, because of a protected characteristic, he treats that person less favourably than he treats or would treat others. Race (which includes colour, nationality and ethnic or national origins) and age are both protected characteristics.

18. To answer whether treatment was "because of" the protected characteristic requires the Tribunal to consider the reason why the claimant was treated as he/she was. The Equality and Human Rights Commission Code of Practice states that whilst the protected characteristic needs to be a cause of the less favourable treatment it does not need to be the only or even the main cause.

19. It is a matter for the Tribunal to determine what amounts to less favourable treatment in a common-sense way and based on what a reasonable person might find to be detrimental.

20. Section 23 of the 2010 Act refers to comparators and says that there must be no material difference between the circumstances relating to each case. The relevant circumstances are those factors which the employer has taken into account when treating the claimant as it did with the exception of the protected characteristic (Shamoon v Chief Constable RUC 2003 IRLR 285).

21. The burden of proof of discrimination is set out at section 136 of the 2010 Act. It states that 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 but that does not apply if A shows that A did not contravene the provision.

22. It is generally recognised however that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with these provisions and the guidance set out in Igen v Wong and others ([2005] IRLR 258) confirmed by the Court of Appeal in Madarassy v Nomura International plc ([2007] IRLR 246). In the latter case it was also confirmed, albeit when applying the pre-2010 Act wording, that a simple difference in protected characteristic and a difference in treatment is not enough in itself to shift the burden of proof; something more is needed (although that something more need not be a great deal – Deman v CEHR [2010] EWCA Civ 1279). It is important in assessing these matters that the totality of the evidence is considered.

Findings of Fact

23. Having assessed all the evidence, both oral and written, and the submissions made by the parties we find on the balance of probabilities the following to be the relevant facts.

24. The respondent is a not for profit community housing association. The claimant was employed from April 2009 until his dismissal as a Project Worker at its Spring Gardens site, a hostel for single homeless men and women with medium to high support needs. His line manager was Mr BobEmmanuel (who is black Nigerian), his second line manager was Mr McCarthy (white British) who reported to Mr Lally (white British).

25. The respondent has a Code of Conduct which sets out the standard of conduct expected and required of its employees. It states that any breach will be investigated and may lead to disciplinary action. It provides that high standards of integrity and honesty are expected at all times which includes being truthful and honest when asked appropriate questions by managers and other colleagues about any matters having a bearing on employment with and work at the respondent. It also emphasises the importance of maintaining the respondent's reputation given its reliance on fundraising. The respondent also has a separate disciplinary procedure which sets out types including gross misconduct which includes acts of dishonesty. Their procedure for dealing with allegations of misconduct is of the sort one expects to see in well organised and reputable organisations.

26. On 24 July 2017 Mr Bob-Emmanuel emailed the claimant (cc'ing Mr McCarthy and Ms Blant of HR) following a meeting they had had to discuss concerns about the claimant's capability in performing his duties. He attached an invite to a formal capability stage 1 meeting which identified that one area of concern was a poor standard of written communication including spelling mistakes, with an example given. The letter set out the claimant's right to be represented at the meeting, enclosed a copy of the relevant procedure and confirmed the purpose of the meeting. At the meeting that was then held on 2 August, the claimant was issued with a performance improvement plan. One of the two areas of performance to be improved was noted as 'spelling errors and writing in plain simple English' and set out the performance expectation, support needed (including a dyslexia assessment) and measurements in evaluation progress.

27. On 4 August the claimant attended a local branch of Sainsbury's where he was offered the opportunity to take items for the respondent as a donation. He did this in conjunction with an employee of Sainsbury's. When he returned to the project he brought the bags of items in and discussed them with Mr Bob-Emmanuel. The food items were taken to the kitchen and the toiletries were booked into Mr Welcome's office (the deputy manager).

28. On 8 August Mr Welcome received a telephone call from the Sainsbury's employee expressing concern about some of the items chosen by the claimant which Mr Welcome noted. Having considered the documents and

the responses received from both parties, we find that the handwritten list at appendix 7 to the later investigation report, is the list that Mr Welcome made during that conversation. He then spoke to Mr Bob-Emmanuel and they agreed that he would check with the kitchen staff to see what items had been brought in. Mr Bob-Emmanuel also asked, either on that or the following day, the claimant to write a list of what he had taken from Sainsbury's. The claimant produced a typed list which did not include chewing gum or pens. The catering manager subsequently (it is not clear exactly when) confirmed that the items on a more detailed list provided by Sainsbury's had been received with the exception of the chewing gum and pens.

29. Mr Welcome then emailed Mr McCarthy, Mr Bob-Emmanuel and Mr Lally on the same day informing them of the situation. Mr Lally replied the following day and his email included the following:

> 'I'm not entirely clear from the below, but it appears there is a possibility that Keith has acted inappropriately/deceitfully? Julius, please can you involve Nikki Blant when planning this (or any) investigation.… I tend not to get too involved in the investigation process itself as this may undermine my ability to oversee any subsequent disciplinary action (should that become necessary)…'

30. Ms Blant emailed Mr Bob-Emmanuel and Mr Welcome on 10 August suggesting that the former has a preliminary chat with the claimant about his understanding and saying:

> 'Even if the items were for the project, it might be a good idea to set out exactly what a more helpful approach would have been as clearly a packet of gum is not really going to be suitable to take (though correct me if I'm wrong). You may feel that this should be picked up in the capability process that Keith is currently going through.
>
> If you suspect the items were for personal use then that would be gross misconduct and suspension should be considered, though we can obviously discuss this after the prelim.'

31. On 22 August Mr Bob-Emmanuel emailed Ms Blant (cc'ing Messrs Lally, McCarthy and Welcome) attaching a note of his actions and his discussion with the claimant. That note was not however referred to in or appended to the later investigation report. Mr Lally accepted in his evidence that it should have been included and could not give an explanation as to why it was not. It seems most likely that it was oversight.

32. Mr Bob-Emmanuel recorded that he had met the claimant and asked specifically for the chewing gum and pack of pens. The claimant produced a pack of pens together with one pen that he was already using. In relation to the chewing gum he confirmed that he had picked it up from Sainsbury's and had handed it to the kitchen. When he was told that these items had not been accounted for the claimant said he would go and check the car again if any to see if any item had fallen out from the bag. The note recorded that the claimant returned about an hour later and said that he had found the chewing gum on the floor of his car.

33. On 1 September the claimant was suspended by Mr Bob-Emmanuel pending an investigation of allegations of potential gross misconduct. Mr Lally approved the fact of that suspension.

34. On 15 September the claimant submitted a grievance against Mr BobEmmanuel in respect of a number of matters including having been falsely accused of appropriating donated goods and he indicated that he wanted a change of line manager as he felt his working relationship with Mr BobEmmanuel had broken down. In consequence of the grievance, the respondent allocated both the grievance and the disciplinary investigations to Ms C Duke, HR Admin Team Leader. She interviewed the claimant in respect of both matters on 17 October. She also interviewed Mr BobEmmanuel and Mr McCarthy in respect of the disciplinary matter.

35. Ms Duke wrote to the claimant on 9 November informing him of the outcome of his grievance, namely that although some specific matters he had raised were upheld or partially upheld, largely it was not upheld and in one respect she recommended that an informal investigation take place to establish whether he had made a malicious allegation against Mr Bob-Emmanuel. The claimant appealed against that outcome on 10 November.

36. Ms Duke concluded her investigation of the disciplinary matter on 15 November setting out her approach and conclusions in a comprehensive report with a number of appendices. She recommended that three allegations of gross misconduct be referred to a formal meeting.

37. On the same day Mr Lally wrote to the claimant informing him that the investigation had concluded and serious concerns had been raised in relation to his conduct and that he was required to attend a formal disciplinary hearing on 12 December. The three allegations of gross misconduct were set out as follows:

> '1 You chose chewing gum and pens from a donation from Sainsbury's for yourself and not the clients on 04/08/2017
>
> 2 You misrepresented the truth when you said that the chewing gum fell out of your car in the preliminary meeting 16/08/2017
>
> 3 You took chewing gums and pens, without permission, for your own use instead of giving them to the clients.'

38. The claimant was advised of the possible outcomes of the process which included summary dismissal. The letter stated that the investigation report was attached together with the disciplinary procedure and code of conduct. The list of enclosures to the letter included those three documents together with the appendices to the report. The claimant was also advised of his right to be accompanied at the hearing and to call any witnesses that he wished.

39. That disciplinary meeting took place as planned on 12 December and the claimant was represented by his union (who actively participated). Ms Duke summarised the contents of the investigation report at the beginning of the

meeting and the claimant was given a full opportunity to comment on the allegations against him.

40. During the course of the meeting Mr Lally summarised and checked with the claimant his understanding of the claimant's position on each allegation and in summary that his understanding was that the claimant said he did not choose items specifically with clients in mind and he felt that they were for the staff and clients. Mr Lally asked the claimant whether he thought it was a coincidence that the two items about which Sainsbury's were suspicious were the items that fell out in to the car to which the claimant said yes.

41. Mr Lally also asked the claimant specifically how long it was between being asked to check the items and when they were retrieved. The claimant said a day. He then asked Ms Duke to confirm if it was two days and she said that neither Mr Bob-Emmanuel or the claimant were clear with the timelines and the claimant said he was not sure. Ms Duke confirmed that she had relied on the information provided by Mr Bob-Emmanuel.

42. The claimant also referred to difficult personal circumstances he was facing at the time.

43. There was a discussion, at the union representative's prompting, of Ms Duke's questions of the claimant's colleagues which she referred to at appendix 6 of the investigation report. It was established that two of the four people present at the time of the incident had not been questioned. Mr Lally asked the claimant if he wanted Ms Duke to speak to those other employees but he said no as he just wanted it to be over.

44. Mr Lally wrote to the claimant on 20 December advising him that all three allegations were upheld and why, again referring to the investigation report and its appendices. He also stated that he had considered the claimant's mitigation but did not find there to be grounds to warrant a commuted charge for any of the allegations. He therefore concluded that the claimant's contract would be terminated summarily as his actions were so serious in nature that they destroyed the employment relationship making any further working relationship and trust impossible. The claimant was advised of his right of appeal.

45. The claimant presented an appeal on 24 December on the basis that the dismissal was unfair, procedure was not followed correctly, extenuating circumstances were not taken into consideration and the penalty was inappropriate considering his record and length of service. The claimant was invited to an appeal hearing on 29 January 2018 by Ms Murphy.

46. At that hearing the claimant was again represented, and Mr Lally was present to give a summary of how he came to his decision. The particularly relevant matters raised during that appeal are highlighted in the conclusion section below.

47. Ms Murphy wrote to the claimant on 15 February advising him of her conclusion that the appeal was unsuccessful. In that letter she also

recorded that she had carried out further investigations by speaking to the two other employees as to whether they recalled the claimant asking them if they had seen the chewing gum and the pens. Their evidence was that they did not.

Conclusions

48. Unfair dismissal:

49. We are satisfied that the reason for the claimant's dismissal by the respondent was conduct, one of the potentially fair reasons pursuant to the 1996 Act.

50. Further we accept that the respondent, through Mr Lally and Ms Murphy, had a genuine belief in the guilt of the claimant's misconduct in respect of

the three allegations set out in the letter inviting him to the formal disciplinary meeting. Their evidence as to that belief was credible and compelling.

51. As to whether there were reasonable grounds for that belief, we have considered this in relation to each of the allegations and in particular as set out by Mr Lally in the dismissal letter and his answers to cross-examination which were consistent with the dismissal letter.

52. In respect of allegation one, Mr Lally found this proved on the basis of the coincidence that the gum and the pens were noted by Sainsbury's as being suspicious items to select, that when the claimant was asked to write a list of the items donated he left those two items off the list and further that it was those two items that he said had fallen out of the bags into his car (although we note that on some accounts it was just the gum that was in the car).

53. In respect of allegation two, Mr Lally acknowledged that it was possible the items would fall out of the bag but he found it highly improbable that that would only affect the items the claimant was alleged to have taken for himself. Again, taking that in conjunction with the claimant having omitted the gum and pens from the list he was asked to write (and in respect of which he noted that although the claimant's explanation was that the list was of food items only, he had included other items/toiletries), Mr Lally found this to be implausible. Mr Lally in relation to this allegation specifically noted that two members of staff had not recalled the claimant asking about these items as he alleged he had done (albeit it does seem that one of those two was the wrong person to ask). Mr Lally offered to speak to the remaining employees but the claimant declined that request. In any event, it is noted that at appeal stage Ms Murphy did speak to the other employees both of whom confirmed that they had no recollection of the claimant asking them about the items.

54. As for allegation three, Mr Lally's conclusion that the claimant had selected the items with his own use in mind, not randomly and not with the intention of sharing with either staff or clients, was based again on the coincidence already referred to and the fact that he did not either share or offer to share

the items until after he had been questioned. In addition he found it implausible that someone with the claimant's experience would have considered it appropriate to select donated items with anyone other than the charitable beneficiaries in mind.

55. In respect of all three allegations we find that Mr Lally's logic in reaching his conclusions, and in particular as to the implausibility of the coincidence he highlighted, was sound and there were reasonable grounds for each (notwithstanding that there were some areas of factual inconsistency in the various accounts). Ms Murphy agreed with and adopted Mr Lally 's logic and conclusions.

56. As to whether the respondent carried out a reasonable investigation, we conclude that they did. The matter was reported to them by Sainsbury's further to which the claimant was reasonably asked for his initial information about what he had taken from Sainsbury's which was followed by a formal investigation. At the claimant's request the investigator was changed to someone who had no previous knowledge of or dealings with him. Ms Duke did a thorough job; the scope and content of her investigation was well recorded.

57. We have noted that, as above, Mr Lally offered to speak to two other members of staff at the disciplinary hearing stage and the claimant declined as a result of which Mr Lally took no further action. In our view, best practice would have been to conduct those interviews in any event but reasonableness is not judged by the standard of best practice. In any event, as also noted above, Ms Murphy did undertake this further investigation at appeal stage with no new information coming to light.

58. Turning to whether the procedure followed by the respondent was reasonable, we conclude that it was. It was compliant with the ACAS code of practice. The claimant was properly told of his position, possible outcomes and his right to representation throughout. The claimant has criticised the process saying that Mr Lally was not sufficiently impartial and specifically referred us to the early correspondence in which Mr Langley was involved when the matter was first reported to the respondent as well as his approval of the claimant's suspension and the fact that he admitted having some knowledge that the claimant has dyslexia. We have no significant concerns about these matters. They are in keeping with Mr Lally's senior role and note that in his email of 9 August 2017 he expressly stated that it is only a 'possibility' that the claimant had acted inappropriately/deceitfully and noted that he would not get 'too involved' in the investigation process as that might undermine his ability to oversee any subsequently necessary disciplinary action. This was a balanced and fair approach.

59. Further the claimant sought to argue in cross-examination of the respondent's witnesses that there was a conspiracy between all those managers involved to get him dismissed. There was no evidence to support that allegation and we do not find that there was such a conspiracy. We are

satisfied that each of the managers involved in the disciplinary process acted in good faith.

60. The claimant also criticised the delay between the matter being reported to the respondent by Sainsbury's and his suspension. We do not regard this delay as problematic. It was a reasonable time period over which the respondent reviewed the position. Furthermore, the claimant has sought to argue that the delay shows that the matter at first was regarded as a minor matter. The emails exchanged by management between 8 and 10 August 2017 show that that is not the case. It was explicitly acknowledged that the matter might be serious.

61. The claimant has also criticised the failure of the respondent to include Mr Bob-Emmanuel's note of his preliminary meeting with the claimant on 16 August 2017 within the investigation pack which of course meant that the claimant did not see it (and, significantly, the discrepancies between Mr Bob-Emmanuel's account then with his later account in the investigation process) until after his dismissal and appeal. It is noted that Mr BobEmmanuel's note was copied to Mr Lally on 22 August 2017 and it seems likely therefore that he read it as part of his process of approving the suspension.

62. We have considered the contents of Mr Bob-Emmanuel's note and the discrepancies between it and his subsequent accounts (and undoubtedly there are some discrepancies). In all the circumstances however we do not conclude that this is a flaw sufficiently serious to fatally undermine the fairness of the process followed. In particular, Ms Duke acknowledged that there was a difference in recollection between the claimant and Mr BobEmmanuel but concluded her investigation on the basis of the claimant's position. Further, Mr Lally did not rely on the supposed delay highlighted in Ms Duke's report of the claimant in going to check his car after he had been asked by Mr Bob-Emmanuel about the missing items, in coming to his conclusion. If he had relied upon that then the discrepancy between Mr Bob-Emmanuel in his note of 16 August saying that the claimant did that within an hour and him later saying to Ms Duke that he did it the following day and Ms Duke concluding that it might even have been longer than that, would have been more concerning. For the reason stated, however, we find it was not material.

63. Finally, the claimant also says that he did not receive the appendices to the investigation report prior to the dismissal hearing. Upon reading the transcript of the appeal hearing, it is apparent that at that stage he appears to have been saying that he had not received either the report or the appendices. The letter inviting the claimant to the dismissal meeting expressly indicated that the report and appendices were enclosed and Mr Lally's evidence was that he has no reason to think that he did not enclose them either in the soft or hard copy that was sent to the claimant. Further, neither the claimant nor his union raised any concerns about not having received the report at the disciplinary hearing. Given in particular that Ms Duke summarised the investigation report at the very beginning of that hearing and later referred to a specific appendix, it does seem surprising

that they would not have done so if any of the document was missing. It is also apparent when reading the transcript of the appeal hearing, that the union representative thought that perhaps the claimant was mistaken about not having received these documents. On balance, our conclusion is that Mr Lally did send the report and appendices to the claimant. It might well be the case that the claimant then mislaid them or did not realise that he had received them.

64. The final matter to consider in relation to the fairness or otherwise of the dismissal is whether, having come to a reasonable conclusion that the claimant was guilty of gross misconduct, the sanction of summary dismissal was within the band of reasonable responses open to the respondent. Although Mr Lally dismissal letter does not expressly state that he took the claimant's length of service and record into account, we accept his oral evidence that in fact he did and it is clear that they were taken into account

    by Ms Murphy at appeal stage who also referred to Mr Lally having considered them (noting that Mr Lally was present at the appeal hearing).

65. Although summary dismissal will very often be the response to findings of gross misconduct, it is by no means the case that it always is and that it is always reasonable. The claimant has sought to argue that the value of the items concerned and the fact that there was limited evidence that he had actually used them for his own personal use, mitigates against dismissal. We do not agree with that submission. We do, however, find that summary dismissal in all the circumstances was at the harsher end of the range of reasonable responses open to the respondent. This is a case where this Tribunal would probably not have dismissed in these circumstances but that is not relevant. We are satisfied that in all the circumstances summary dismissal was within the band of reasonable responses given the trust and confidence that the respondent was entitled to ensure it had in its employees.

66. Although not expressly argued by the claimant in the context of his claim of unfair dismissal, we are mindful that in relation to his discrimination complaints he argued that comparator B was not dismissed in similar circumstances. As noted below however, no evidence was put forward to support that allegation. We have therefore no concerns with regard to any unfair consistency of treatment between employees on his dismissal.

67. Accordingly we conclude that the dismissal was fair.

68. <u>Discrimination:</u>

69. It was a stark feature of this case that the claimant submitted very little evidence in support of his two claims of discrimination. Further, the respondent's witnesses were not challenged in cross examination on their motivation for the dismissal and the allegations of discrimination were not put to either of them. Notwithstanding that, we have considered the circumstances of the two comparators specifically named by the claimant

and also the statistical evidence that was supplied by the respondent in response to specific requests from the claimant.

70. As far as the statistical evidence is concerned, as was acknowledged during the hearing, it is of limited use because although we were given various data sets regarding time periods, ethnicity and age of people dismissed and the ethnicity and age of people recruited, we were not given statistics as to the total population of the respondent. Mr Lally was asked if he could estimate and in reply he said that the respondent has about 1,600 employees of which about 200 would be locums. He was not willing to speculate about the ethnicity or age breakdown of the workforce. Save for one specific respect, referred to below, therefore the statistical evidence added nothing useful to our consideration of the claimant's specific claims. The exception is that the data did show, contrary to the claimant's assertion that since December 2017 the respondent has only recruited white people under 35, that between December 2017 and December 2019 they recruited 8 people

    at Spring Gardens, 3 of whom were BAME and 3 were over the age of 35. Indeed, one of those recruited (on 15 January 2018 - close to the time of the claimant's dismissal) was BAME and 45 years, 11 months old.

71. Turning to the comparators identified by the claimant, the correct comparator would be an employee who commits an act of potential gross misconduct that is not dismissed, is not black Jamaican and/or is aged under 35.

72. Comparator A had those characteristics. However the claimant provided no oral or written evidence to support his allegation that comparator A committed an act of potential gross misconduct other than simply stating that he had. Again, the circumstances of comparator A, and whether he committed gross misconduct, was not put to either of the respondent's witnesses.

73. Comparator B did not have the correct characteristics. Although he was white British and 36 (strictly not under 35 but there was sufficient difference in age between comparator B and the claimant for that not to matter), he was a locum worker - not an employee. He was accused of gross misconduct, was formally disciplined and removed from the respondent's locum bank. In any event the claimant seemed to be comparing the treatment of comparator B to another black locum worker but she was also removed from the locum bank.

74. In his evidence the claimant also referred to the dismissal of 13 'mostly black' employees in the year following his dismissal from another of the respondent's sites. Again, these persons do not have the correct characteristics to be comparators, were not identified as comparators and we were given no evidence (beyond Mr Lally's general recollection that there had been a very serious misconduct case affecting an entire team) upon which to properly consider the circumstances of those dismissals (if indeed they were employees and were dismissed).

75. As far as the reference by the claimant to being put on capability review for having typos in a few emails is concerned, notwithstanding submissions made on his behalf it was not entirely clear whether this was being pursued as a separate head of discrimination or as background information. In either case, we conclude that there was nothing untoward about the capability process. Again, other than asking Mr Lally if a capability review was justified (to which he said he was not involved and had not previously seen the documents) this was not pursued in evidence.

76. In all these circumstances we conclude that the burden of proof does not pass to the respondent as the claimant has not proved facts from which we could decide, in the absence of any other explanation, that the respondent has discriminated against him. Even if we are wrong about that (for example if the very general information available to us from the statistics and the fact that the respondent treated the claimant in our view at the harsher end of the range of reasonableness was sufficient to shift the burden), we are satisfied by the respondent's explanation of the reason for his dismissal, namely the genuine belief of Mr Lally and Ms Murphy in his misconduct and their reasonable findings of gross misconduct based on reasonable grounds following a reasonable investigation.

77. Accordingly the claims of race and age discrimination are unsuccessful.

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Employment Judge K Andrews
Date: 22 November 2019

Judgment sent to the parties on:
09 JANUARY 2020

For the Tribunal Office