# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| **Ms E Arko** | **v** | **Royal Mencap Society** |

**Heard at**: Watford

**On**: 6-8 January 2020 and
4, 5, 7, 10 February 2020
(in chambers)

**Before:** Employment Judge R Lewis
Mrs I Sood
Mr D Sutton

**Appearances**

**For the Claimant:** In person, assisted by Mr K Abere, friend
**For the Respondent:** Mr T Perry, counsel

## RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent and her claim of unfair dismissal is upheld.

2. The claimant's claim of wrongful dismissal (notice pay) succeeds and is upheld.

3. The claimant's claim of harassment by recording that she was "quick to play the race card" succeeds and is upheld.

4. All the claimant's other claims fail and are dismissed.

5. Remedy to which the claimant is entitled will be decided, unless agreed, at a remedy hearing on **Wednesday 20 May 2020.** A separate case management order has been made.

## REASONS

**Procedural**

1. This was the hearing of a claim presented on 3 January 2018. Day A was 26 October 2017 and Day B 10 December 2017. The claimant has been assisted by Mr Gordon Sankey of Stevenage CAB, who has not always been on the record.

2. A preliminary hearing for case management took place before Employment Judge Henry on 21 June 2018. The order was sent on 4 July 2018 (75). Where below we refer to for example 'Issue 7' we refer to the number and definition in his order.

3. The initial listing was for 25 March 2019. That listing could not be maintained, and was adjourned to September 2019, when it was adjourned at short notice due to absence of non-legal members. Notice of the present hearing was given on 16 October 2019.

4. The original listing was for six days. At the start of the third day, the present judge was taken ill and was unable to proceed. Fortuitously, a matter had arisen the previous afternoon which required case management and probable adjournment in any event. That was dealt with at the start of proceedings on 8 January, after which the hearing was adjourned and re-listed for the above further dates in February.

5. This hearing was to decide on liability only, and all issues on remedy, including any question of contribution or Polkey, are to be dealt with on 20 May 2020.

6. We record that Mr Perry on behalf of the respondent informed the tribunal that if any part of the claim were upheld (as has happened), the respondent was open to matters being resolved by settlement before the remedy hearing. Certainly the tribunal encourages the parties to do their utmost to resolve their differences.

7. At this hearing there was an agreed bundle of over 400 pages. It was not always in chronological order and not always easy to follow. On the afternoon of the second day, Mr Perry put forward seven pages of additional documents from an HR recording system called Ask HR. It was obvious that this was part of a larger record about the claimant, and the respondent was ordered to disclose the totality of the record, which was available the following morning. It consisted of some 57 pages of dedicated HR records about the claimant. Much of it was plainly relevant to the issues before the tribunal. It was difficult to understand why this document was not disclosed until such a late stage.

8. The parties had exchanged witness statements. In addition, the claimant was supported by submissions prepared by Mr Sankey. The claimant was the only witness who attended on her own behalf. She submitted written statements from three others who did not attend; Ms Deon Reyes, who had been the claimant's manager until December 2015; Ms Akissi Aka, who was a former colleague of the claimant; and Ms Elizabeth Mensah, who knew the claimant outside the workplace.

9. The respondent's witnesses were Mr Andrew Reeve-Smith, who had been the claimant's line manager in her last year of employment; Ms Caroline Jordan, Area Operations Manager, who had dismissed the claimant; Ms Shena Gambold, Regional Operations Manager, who had rejected the claimant's appeal; and Ms Moira Kinnear, Head of Employment Law, who had had almost no dealings with the claimant's case, but spoke about wider HR matters.

10. The claimant's case was heard first. All witnesses present adopted their statements on oath and were cross-examined. There were closing submissions from both sides. Mr Perry referred to the Judgment of the Court of Appeal in Jesudason v Alder Hey Children's NHS Trust [2020] EWCA Civ 73, decided the previous week, and Woods v Pasab Ltd [2012] EWCA Civ 1578. In discussion, the judge referred to West Midlands PTE v Singh 1988 IRLR 186.

**Case management**

11. Some case management matters arose in the course of the hearing. The claimant was permitted at the start of the hearing to amend the claim by the addition, to her claim under s.103A Employment Rights Act, of a claim under s.100(1)(c). That was a pure re-labelling of an existing case. In light of the late disclosed material, the claimant was permitted to add two additional claims by way of amendment, which were that by writing that the claimant was "quick to play the race card" Mr Reeve-Smith on behalf of the respondent harassed her and/or victimised her.

12. The claimant produced supplemental evidence not specifically relevant to her individual dismissal, or post-dating it. It was explained that while some of that material was potentially relevant to remedy, none of it could be relevant to the liability issues before us. That said, the tribunal noted that the claimant had in 2018 after dismissal been diagnosed with a skin cancer and also in 2018 had been recorded as having presented with memory impairment. The claimant referred to the latter on a number of occasions when asked about inconsistencies in her evidence or about recollection of events. The claimant also presented a number of positive work related references about her current employment, and one from the respondent of 14 July 2010.

**General observations**

13. We preface our findings of fact with a number of general observations. In this case, as in many others, the tribunal heard evidence about a wide range of matters, some of them in depth. Where we make no finding about a matter of which we heard, or where we do so, but not to the depth to which the parties went, that should not be taken as oversight or omission, but as a reflection of the extent to which the point was truly of assistance.

14. While that general observation is true in many cases, it was of particular importance in this case, where the claimant appeared not to have understood the discipline set by the list of issues identified by Judge Henry

in June 2018 and sought to introduce into evidence wider matters about which she felt strongly. It was repeatedly necessary to direct her not to do so.

15. A particular problem was that the claimant had little insight, then or at this hearing, into the distinction between serious incidents (eg those affecting the safety or wellbeing of a PWS) and those which presented as no more than everyday workplace trivia (eg the tone and manner of speech between colleagues). She also did not appreciate that events which were important to her, and which therefore may have lodged in her memory, may have been of relatively little importance to others, and therefore difficult to deal with fairly in evidence in the tribunal. She did not appreciate in full the importance which the tribunal (and many workplaces) attach to written records. In that context, the claimant challenged much of the content of notes of meetings which she attended. The tribunal's expectation is that a note of a meeting is accurate, so far as it goes. It is not a complete transcript of everything that is said, and its selection must be such as to give a fair picture. It is common practice, not followed at this respondent, that notes of meetings are made available to the employee concerned, with a time limited invitation to comment on their accuracy.

16. It was not always clear that the claimant understood the structure of her own case, or that she understood the discipline implied in a case of direct race discrimination, namely that the case cannot proceed purely by identifying the protected characteristic and perceived detriment, but requires evidence of causation between the two.

17. The claimant's evidence used on a number of occasions the vocabulary of generalised grievance. That evidence was not of assistance. A complaint of having been "bullied" cannot as such take a claim further unless it is clarified, so that the tribunal understands the factual basis of the allegation (ie what happened to the claimant) and what has led her to classify it as some form of improper behaviour (ie "bullying"). In a claim of discrimination, the question then arises as to the relationship between the factual event and the protected characteristic in question.

18. Mr Perry invited us to make findings contrary to the claimant's credibility. We do not think that the general concept of credibility assists us. It is more useful to record that the claimant did not always articulate her case clearly or fluently or consistently. She sometimes showed a poor grasp of the detail of the events in question, and plainly struggled when questioned about some of the problems which that caused. On a number of occasions for example it was put to her that she was alleging that an event was caused by, or was the result of, something which in fact post-dated the primary complaint. Although the claimant's witness statement was long, it was not always focused, and we did not allow the claimant to add to it. The respondent's witness statements were by contrast short to the point of minimalist, and did not cover all relevant events.

19. Although the respondent had prepared a substantial bundle, it was, as indicated above, incomplete. The most notable example was the omission

of the claimant's Ask HR records. The disclosed Ask HR records referred to attachments, which generally were not disclosed. We noted that other potentially relevant documents were referred to, but were not before the tribunal. There were meetings which were either not documented, or of which no record was presented to the tribunal.

20. While were grateful to Mr Abere for his commitment to the claimant's case, his inexperience of the tribunal process required some assistance from the tribunal.

**General scene setting**

21. The tribunal finds the following. The claimant, who identifies as black British, was born in May 1955. She first worked for the respondent as an hourly paid zero hours worker in November 2007 (100). Her continuous employment dated from September 2013 (109). The date was set out in a statement of terms of 12 February 2018, which recorded that her notice period was then four weeks, which we understood to represent four completed years of service (109).

22. The claimant worked as a support worker for vulnerable adults supported by Mencap in a residential setting. We follow the practice of the parties in using 'PWS' (which stands for Person / People We Support) to refer to any service user(s). We do not refer to any PWS in this public document by his or her actual name or actual initials.

23. We were not told a great deal about the structure of the claimant's work or the team within which she worked. We would have benefitted from a greater understanding of how the claimant's team was organised, shifts worked and shifts allocated, the locations in which they worked, and the management structure. We accept, as a matter of common sense and human experience, that the work undertaken by the support workers for PWS was a constant challenge. We accept that it was 24 hour work, and therefore gave rise to pressures and stresses.

24. Allowing for all of those considerations, we found in the bundle evidence of an active, widespread culture within the claimant's team of complaint and recrimination, and of a sometimesunrestrained willingness to present grievances about colleagues, including grievances about everyday workplace trivia. We heard evidence about former colleagues of the claimant, notably Mr McGuire and Ms Roberts. The claimant was severely critical of both, and her working relations with both were poor. The tribunal has not heard evidence from either, and can make no finding about whether any of the mutual complaints or concerns was well founded.

25. The breadth, frequency and language of the mutual complaints indicated that they were not focused on the claimant; and that they were underpinned by working friction, and not by race. Mr Stenhouse's discussion of the behaviour of Ms Roberts (224L) was a strong indication that the experience of finding Ms Roberts difficult to work with was a general perception of staff, irrespective of race. We heard little evidence of how line managers dealt

with this friction, or of how management above Mr Reeve-Smith addressed it as an issue which must have constituted a drain on management time and resource. Certainly, the poor team relationships cannot have assisted anyone to support any PWS.

**Ask HR**

26. We heard evidence about "Ask HR." We understand it to be a system whereby national HR support is provided to Mencap managers through a team of HR advisers operating an online system which creates its own record. A manager seeking advice about an HR matter might do so by emailing Ask HR, or sending Ask HR a document, or by a phone call which would be logged by the Ask HR team member. We noted that the Ask HR team were proactive in following up with managers to say that Ask HR had opened a case on a particular point or query or individual, and pressing managers for update and conclusion.

27. The value of the Ask HR records from our point of view was that they appeared to be created at the time of each event, and to record the contemporaneous concerns and thought processes of individual managers. The most helpful instance was the record of Ms Jordan's call to Ask HR during the meeting which concluded with the dismissal of the claimant.

28. Ask HR was not a full personnel record: if a manager did not log an event with Ask HR, it was not recorded there. If there were a separate management personnel file about the claimant, we were not aware of it, or of having seen any extracts from it. The disclosed Ask HR material was not internally complete (eg many letters were referred to which were not in our bundle) nor was it arranged in strict chronology. We saw the material relating to the claimant; but we understand that if the claimant made a complaint or report about colleagues, then that complaint or report, if recorded, would be in colleagues' records, none of which were available.

29. Ask HR was accessible online to managers (and therefore to all the witnesses called by the respondent at this hearing), as we understood it, but not to those who are the subject of the record. At the material time, Ms Kinnear was the head of Ask HR. She did not deal operationally with individual HR cases. Her evidence was that if a senior manager spoke to her about a particular case or event, neither she nor the senior manager made any record of the conversation, and their interaction did not appear on Ask HR.

**The letter in October 2013**

30. The first matter in chronology with which we were concerned was a handwritten letter sent by the claimant on 11 October 2013 (113) to management, in which she complained about Mr McGuire's procedure in administration of medicines, and reported an incident in which she said that he had put a paper item into a microwave oven, causing a fire to start (Issue 7). We were shown evidence that at that time Ms Reyes was advising and

supporting Mr McGuire in supervision of which the claimant was unaware (111).

31. We heard about a minor issue before us about the claimant's application for flexible hours, submitted in about late 2014. We find that allowing for operational factors, the request was granted relatively promptly, although not quite as promptly as the claimant wished (423). No more turns on this.

**The October 2015 incident**

32. The first significant event with which we were concerned was an incident in October 2015. A dispute arose then between the claimant on the one hand and Mr McGuire and Ms Roberts, which related to consumption and disposal of food. The issue was that it was alleged that the claimant ate food or took food that was intended for PWS. It was also alleged that when challenged about this she made a comment to the effect of, "White people are so stingy with your food" (128). The claimant was, and remains, vehement in her denial of all these allegations.

33. The Ask HR record reads (428),

> "Allegations that she has been taking food from PWS without their permission... she has recently taken some chicken and a packet of mushrooms. Feel this may have been going on for some time however never been dealt with previously... It may be that the food was out of date and about to be thrown out however we need to investigate and the practice needs to stop."

34. The full report implied, at least, a history of under-management. Staff absences caused by sick leave and annual leave delayed any investigation. The claimant maintained her denial of wrongdoing, and asserted that the actions complained of had been authorised by management (at that time, Ms Reyes) and undertaken by others. Mr Reeve-Smith became line manager of the team which included the claimant, Mr McGuire and Ms Roberts in about January 2016.

35. On 21 March 2016 Ms Jordan noted on Ask HR (438),

> "I now have the paperwork from the investigation... I think given the length of time since incident occurred (5 months) we should close the case. I will send an insufficient evidence letter (also attached) and ask her now manager to have a recorded conversation with her."

36. On 23 March 2016 Ms Jordan wrote to the claimant to give her the outcome of the investigation into the food matter. The letter should be read in full (149A, Issues 29.1 and 29.2). After stating that there was insufficient evidence to proceed further, Ms Jordan continued:

> "I have asked Mr Reeve-Smith to hold a formal conversation with you to clarify our expectations which will require you to strive to make improvements in the following ways … Ensure all communications with your colleagues and people you support remains professional and is not considered racist or disrespectful; As with all employees we will continue to monitor your conduct on an ongoing basis."

37. Mr Reeve-Smith gave evidence, which we accept, that he had a conversation to the above effect with the claimant, following the structure directed by Ms Jordan, shortly after 23 March 2016. No record of the conversation was available. He pointed out in evidence that the claimant made no complaint about the conversation or its contents at the time. We accept that that was the end of the October 2015 matter.

**Incidents in April and May 2016**

38. In late March 2016 Ms Roberts made a written complaint about the claimant, which the tribunal did not have (443A). On 31 March the claimant wrote a text to Mr Reeve-Smith complaining about how Ms Roberts spoke to her, and that Ms Roberts had used the phrase "Oh shut up" towards her (151). In isolation this complaint was an illustration of workplace trivia. It did not assist this tribunal.

39. Although the details are not clear, we find that by about 4 April 2016 another issue had arisen between the claimant and Ms Roberts, who were said to have had an argument in the presence of PWS (443B). Ms Jordan, to whom Mr Reeve-Smith reported, considered that it appeared that both had behaved inappropriately in front of PWS, and she wanted the conduct of both to be investigated.

40. The Ask HR record shows that as a result, arrangements were made for both to be interviewed on 12 and 13 April (443B). There was no record before us of either interview. The investigations then ran into the ground. Mr Reeve-Smith wrote that he was waiting to discuss the matter with Ms Jordan, but that he had not done so by the time Ms Roberts went on her first maternity leave in May (443D). At that point, he could of course not pursue the point with Ms Roberts, and understandably he did not feel that he could take the matter forward with only one person of the two involved.

41. In the course of interviewing the claimant, which we take to have been on or about 12 April 2016, Mr Reeve-Smith put to the claimant that she had been seen wearing earphones at work. His oral evidence to the tribunal was, "Her initial reply was, Kim is a racist and making things up". He continued in oral evidence, "I was surprised how quickly she said race." Mr Reeve-Smith's evidence to us was that he could not now remember whether he had identified Ms Roberts as the source of the earphones allegation, or whether the claimant had introduced her name in her reply; and there was no document recording the discussion.

42. Ask HR prompted Mr Reeve-Smith to report on whether the investigations into the argument had been concluded. On 11 May 2016 he wrote (443E) an email which should be read in full. It was first seen by the claimant in the tribunal on 8 January 2020. He mentioned that he was new to the service. He recorded having received the earphone allegation and then wrote,

> "I am reluctant to go any further because [the claimant] is very quick to play the 'race' card. She and Kim did not get on, and says that because Kim is a 'racist' she is making things up. As I am still very new to the service, I am still gaining little snippets of info

> from the rest of the team, and some do have concerns about [the claimant's] overall conduct.
>
> … At the moment people are being a bit guarded, so lots of 'hear-say'. I will ask staff to report to me any areas of concern which means we can still get the best out of [the claimant], as she can be a good worker. Perhaps she may 'improve' now Kim has gone on maternity leave for a year? Interesting case and one to observe as regards staff team dynamics!!"

43. Mr Reeve-Smith thereby confirmed that the allegation of an argument in front of PWS would go no further.

**Ms Dines' report in August 2016**

44. The next relevant event arose at the end of August 2016. The setting was that support workers were and are responsible for supporting PWS in life tasks including shopping, and the management of personal money. While we were not shown the applicable procedure or rule, we find that support workers including the claimant understood the importance of handling PWS' funds and belongings with the utmost probity. We understand that this is a particularly important point in a setting where a PWS may not have full capacity to manage his or her own money, so that risks arise of financial abuse.

45. On 31 August, another colleague of the claimant, Ms Sally Dines, wrote to Mr Reeve-Smith an email which must be read in full (164-165) which she started:

> "I have had reason to believe that Emilia is financial abusing the clients. After monitoring her for a few months I am 100% sure she is taking advantage of the situation."

46. The complaint went into some detail about PWS and specific events. The sting of the complaint was that the claimant was taking advantage of PWS' vulnerability when they bought food items, and taking, or accepting, purchased items from PWS for herself. She named three PWS. She also raised an allegation of food being taken.

47. Mr Reeve-Smith reported the matter to Ms Jordan, who asked for the involvement of Ask HR. Later the same day Mr Reeve-Smith supplemented Ms Dines' allegations with information from two other colleagues of the claimant and informed Ms Jordan: "I spoke to Sally and she very eloquently and thoughtfully put across her concerns." (163)

48. Ms Jordan instructed Mr Reeve-Smith to log the matter with Ask HR. She wrote: "This is Gross misconduct in my view" (163). Ms Jordan was pressed by Mr Abere that this indicated that she had reached a conclusion about the allegations. We accept her answer, which was that what she wrote was an indication that the allegation was on its face so serious that when investigated it should be categorised as gross misconduct, and therefore potentially a matter for dismissal. We find that her email stated a category, not a conclusion.

## The final written warning in October 2016

49. Mr Reeve-Smith raised the possibility of suspension (163). On 2 September, Mr Reeve-Smith met the claimant to tell her that she was suspended, and confirmed the reason and basis of suspension by letter the same day (152). He interviewed Ms Dines on 14 September (166) and Ms Dines confirmed her allegations, and provided what appeared to be some documentary evidence in the form of copies of receipts (167). On the same day he interviewed two other colleagues.

50. The claimant was invited to attend an investigation interview on 15 September (175). The seriousness of the allegations was made clear in the invitation letter. The interview took place on 20 September. It was conducted by Mr Reeve-Smith and a note taker was present (182). Mr Reeve-Smith completed a report in which he recommended that there was a case to answer (158) and on 28 September the claimant was invited to attend a disciplinary hearing to be conducted by Ms Selina Kelly, Area Operations Manager.

51. The bundle did not contain a note of the disciplinary hearing of 5 October, but contained an email from Ms Kelly to Mr Reeve-Smith of 10 October, setting out the standards and expectations set of the claimant in consequence.

52. We had the outcome letter of 14 October (196), and a note of the meeting at which Ms Kelly informed the claimant of the outcome. The note included the words: "Ms Arko thanked Ms Kelly; grateful that it is not dismissal as this would be too shameful." The claimant denied having said those words, which could be taken to constitute an admission. We accept the written record, which was that the claimant said words to that effect.

53. Ms Kelly's outcome letter is thoughtful and should be read in full (196-198). She upheld some but not all allegations, relating to taking food belonging to PWS (whether or not with the apparent consent of the PWS) and failing to keep full financial receipts. The sanction was a final written warning for two years. The letter set out eight bullet point expectations of standards to be maintained in future. The letter concluded (198),

> "You should note that any further failure to meet Mencap's standards of conduct or behaviour may lead to further investigations which could, depending on the outcome, result in further sanctions or possibly dismissal."

That wording mirrors the disciplinary procedure which states (121-122):

> "Final written warning
>
> If your behaviour or conduct does not improve or if your misconduct is very serious we will give you a final written warning.
>
> We will write to you to tell you why we have given you the warning and what you need to do to make improvements. A copy of the warning will be kept on your personal file, but it will be

> disregarded after 24 months, assuming that there are no further concerns with your performance or behaviour. In exceptional circumstances the period may be longer or for the duration of your employment with Mencap."

54. We note that both in the procedure and in the letter the respondent does not use language which we have sometimes noted in procedures, namely to the effect that for the currency of a final written warning, any further disciplinary failing, whether or not of the same type, and no matter how minor, may or will of itself trigger dismissal. On the contrary, it plainly left open to the discretion of the next disciplining manager the consequence of any further infraction during the period of the final written warning.

55. Ms Kelly's letter concluded with informing the claimant of her right of appeal. The claimant did not exercise her right of appeal. We attach some weight to that. The claimant was not reticent to exercise her rights, as she saw them, and her failure to appeal seems to us at one with her comment that she was glad not to have been dismissed.

56. The claimant returned to work after a period of suspension of at least some weeks. Mr Reeve-Smith gave evidence that there were some teething difficulties around her return, of which the only documented evidence was the SYF record below. We prefer his evidence, that he offered her the opportunity not to work with Ms Dines while things settled down, and reject the allegation at Issue 35, which was that Mr Reeve-Smith directed her to work at a different location 'because Ms Dennis [sic] did not want to work with her' (79). Mr Reeve-Smith struck us as a manager who did not inflame conflict if it could be contained, and his evidence was consistent with that approach.

57. At the end of January 2017 the claimant had a "SYF" (Shape Your Future) meeting with Mr Reeve-Smith: that was the respondent's form of performance appraisal and review of objectives. Mr Reeve-Smith wrote (202):

> "Trustworthy: the claimant has made some mistakes, but she appears to have learnt from those mistakes. She said that she didn't have a desire to behave like this, and didn't do this as a deliberate action or malice, but as a genuine mistake. She said that perhaps staff will be gossiping and be chatting about these things, and she finds that difficult. Discussed about the long term aspects of the how the team is functioning. Also about how the team are responding to the claimant and how they treat her. The claimant said that she has no longer has any anger. Some staff are feeling they can remind her to do tasks, and this is making her uncomfortable."

58. It seemed to us striking that there were more references in the SYF record to the claimant's relationships with colleagues than to her interaction with PWS. Clearly at that point there was a mutual understanding between the claimant and Mr Reeve-Smith that working relationships were a continuing concern.

59. The claimant's Issues 38 and 41 were that at times which were not clear, she asked Mr Reeve-Smith for the opportunity to work extra hours; and for the opportunity to accompany PWS on holiday; and that she was refused both types of request. Mr Reeve-Smith replied to the former with a vague

recollection of a request for hours which could not be accommodated. This issue morphed into the related questions of whether the claimant could work full time and would work weekends. Our finding is that we have been shown no reliable evidence of a specific request for extra hours at a stated time, and can therefore make no finding about the reasons for refusal. We accept Mr Reeve-Smith's evidence, which was that the claimant could not be considered for full time work unless she committed to work alternate weekends, which she declined to do, although she did work occasional weekends.

60. We accept the respondent's evidence that there was not a standing opportunity to arrange holidays with PWS; but rather a system whereby PWS or support workers put forward a specific request as a proposal, which was then considered. We accept Mr Reeve-Smith's evidence that the claimant never made such a request, and no PWS did so in terms which would have involved the claimant.

**Reports from outside organisations in March and May 2017**

61. On 1 March 2017 Mr Reeve-Smith received an email from Mr Paul Chambers. Mr Chambers wrote from a Luton Borough Council email account. We understand that he was manager of Stopsley Day Centre. The subject heading was "1:1". The email in full reads (216A):

> "Hello
>
> Sorry for delay in emailing.
> Basically staff in Sky have made comments that Amelia has slept again whilst she has been here with X and generally doing very little to support her.
>
> As this isn't the first time this has happened can I ask that she does not attend/support when X comes to Sky as it really doesn't benefit X in any way and is a poor reflection on your other good staff that supports X properly.
>
> If you need any more info please ring me on [phone number]."

62. Mr Reeve-Smith wrote later that he emailed Mr Chambers on about 15 March and late in May for further information, but got no response.

63. In late April 2017 the claimant was tasked with accompanying a PWS, Z, once a week to work in a Sue Ryder shop. In the event, she only did so on two occasions. On the first, there was a disagreement about whether this involved the claimant in helping out the shop staff: the claimant thought not, the shop staff thought so. The claimant called Mr Reeve-Smith, and they spoke on her mobile, after which he asked to speak to the store manager by phone, and they had a conversation.

64. On 11 May Ms Graves, another support worker, emailed Ms Jordan. Ms Jordan's evidence (451) was that Ms Graves had contacted Ms Jordan in Mr Reeve-Smith's absence on leave, spoken to her, and been asked to confirm the call by email. Ms Graves' email read, so far as material (224A),

> "Good afternoon,
>
> Just to confirm our telephone conversation,
>
> When I attended the Sue Ryder charity shop placement for Z, a lady called Elizabeth (I believe working for New Horizons) and the shop manager called Paulina pulled me aside to tell me that [the claimant] had previously been supporting Z and had been falling asleep, not communicating with other volunteers or staff members and sitting on her phone, as well as browsing the shop and using the toilet for long periods, they said on one occasion it was for 45 minutes and they had to knock on the door to see if she was OK.
>
> They have expressed their concerns as they feel it is not fair on Z, as this is a voluntary position they are frustrated as they have given Z the opportunity and her support staff are not helping her do the job she is there for, they do not have the staff available to help the volunteers, so they have 2 people there not doing much, when they have other volunteers who are more able…
>
> Paulina is the shop manager and she has given me the contact number of [ ] to call her on.
>
> I have explained to her that someone will call her to speak about this and she is happy to give any information she can."

65. Mr Reeve-Smith later wrote that he had attempted to speak to the manager of the Sue Ryder shop but had been unable to do so (237).

66. Also on 11 May another support worker, Mr Stenhouse, spoke to Ms Jordan to log a concern about the claimant's interaction with a named PWS (451). He was interviewed (224L) in late June, when he was highly critical of Ms Roberts, and of the team dynamic within which he worked. While the record of his remarks was of some evidential value to us, we were not told that management took any further step specifically in response to his report.

**The claimant's complaints in May / June 2017**

67. On a date after 18 May the claimant wrote to Mr Reeve-Smith to make complaints about Ms Roberts (219). Her letter was headed 'Professional Misconduct' and in three paragraphs made a number of short points: the first was that Ms Roberts had reported "a fourth incident that did not happen against me;" the second was that she had had a disagreement in the kitchen with Ms Roberts on 18 May. The third was that on 18 May Ms Roberts had declined to support the claimant with making up bedding, although the claimant found it difficult to do so because of back and shoulder pain (Issues 11 and 44). Mr Reeve-Smith agreed in evidence that he had received this letter but was unable to say how or when, save that it must have been after 18 May because the letter included a complaint about an event that day.

68. The bundle contained a second version of the same document (223) headed: 'Rewriting of case I have already reported to you' and dated 5 May 2017. That was plainly the wrong date, as the document post dated the first version, which in turn set out a narrative of events on 18 May. It repeated much of the earlier document, but concluded with allegations not found in the first version (Issue 51.2):

> "Some staff went on shift with him, I find myself so down as being treated differently by their attitude, disrespectful, controlled, intimidated, buried and racism, this has gone on for a very long period of time and it need to be dealt with, because this is out of the Mencap Policy, values.
>
> Andy I'm very much disappointed with you for not doing anything about me reporting the above to you, not until Caroline has got your attention, but when any untrue allegation is against me then you take immediate action."

69. We find that the first document (219) was provided by the claimant after 18 May. Mr Reeve-Smith accepted it. We find that the second document was written as an update, and the final two paragraphs update both the claimant's opinion of events, and her particular resentment, which was that while the respondent had not acted promptly on her first email, it had acted on the allegations which had then arisen against the claimant. We therefore find that it was written after, and in reply to, Mr Reeve-Smith's letter to the claimant of 1 June (220) when he told her of the investigation to be undertaken into the allegations from Mr Chambers and Ms Graves that she had failed to support PWS and had slept at work.

70. It might be useful to step back, and summarise where things stood at the end of May 2017. The claimant was seen as capable of good work. She had ten years service. She had fallen into forms of friction, or even conflict, with at least five named colleagues (Dines, Graves, McGuire, Roberts, Stenhouse), and had made a recent complaint against Ms Roberts. At a recent SYF she had acknowledged the existence of friction within the team. She was on a final written warning, which she had not challenged. She was the subject of two separate reports, and requests not to work again, from two external organisations. The external reports were independent of each other, but raised allegations which on their face had similarities, and were in turn similar to the issue raised separately by Mr Stenhouse.

**The disciplinary process in July to September 2017**

71. The claimant was interviewed about the external complaints on 19 July. She was unaccompanied. Mr Reeve-Smith was the interviewer and Ms O'Connor attended as note taker (226). The interview notes in part reflect the muddle and inconsistency which characterised much of the claimant's evidence to us. On Sue Ryder she reiterated her complaint that she was not there to undertake shop work, and vehemently denied sleeping (228). Mr Reeve-Smith interpolated an account of a phone conversation which he had had with the claimant and the Sue Ryder manager while the claimant was at the Sue Ryder shop, although it might have been better practice for that to have been set out in a separate statement from him.

72. The claimant also denied excessive use of her phone or of the toilet. She produced in evidence to us her phone records for 4 May, which showed little by way of telephone call that day, but this evidence could not assist the tribunal as it was not available to those who made the decision to dismiss. It was also in any event evidence of telephone calls only, not about any other use of a smart phone or i-phone.

73. Mr Reeve-Smith asked about the day centre. The notes record (231):

> "I have also received some reports from the day centre at Stopsley when the claimant has been supporting her client X on her days there. These were reports received separately in Feb/March 2017.
>
> I wasn't able to investigate these allegations further as the day centre could not provide me with exact dates and times…
>
> The day centre was stating that on numerous occasions, the claimant was found to be sleeping there…"

74. We find that that was a materially inaccurate case to put to the claimant. Mr Reeve-Smith had received one report only, which was in March, and there was evidence of only one report. Mr Chambers' use in context of the word "again" means more than once; it may mean numerous, but it does not say so. The reason that Mr Reeve-Smith was unable to investigate was not fairly put: the reason was that Mr Chambers, who had made the complaint, was not available to amplify or clarify. We note the ambiguity of the phrase "was found to be sleeping" compared with Mr Chambers' complaint of "has slept". Given the claimant's subsequent admissions, it was not clear to us, and was not clear to Mr Reeve-Smith, whether the allegation was of dozing off momentarily.

75. The claimant in reply referred to an incident when she had worked after a sleep in shift the previous night, and had asked Mr Chambers to jog her awake if she were to doze off. She said that that had happened in Bramingham, which was the previous location of the day centre: if that was correct, the incident took place before the day centre's relocation in about late 2016 and may have been some six months before Mr Chambers' report. If so, Mr Chambers' delay in reporting it may have been a material factor.

76. Mr Reeve-Smith wrote an investigation report (235) in reply to the allegations of failure to support the PWS and sleeping. He pointed out the similarity of the allegations coming from two independent separate sources and concluded that there were no mitigating factors. He considered that the claimant had a case to answer.

77. The report went to Ms Jordan, who on the basis of the contents decided that disciplinary action was justified. By letter of 25 July she invited the claimant to a disciplinary hearing in relation to two allegations, which were "not supporting people you support appropriately when out in the community" which was described as misconduct; and one gross misconduct allegation: "falling asleep when supporting a person we support when in the community" (246). The claimant was advised of the risk of dismissal, of her right of accompaniment, and was sent the appropriate paperwork.

78. The disciplinary hearing took place on 2 August (255). The claimant attended unaccompanied. Ms Jordan conducted the meeting. Ms O'Connor was again the note taker. She noted the claimant asking: "Can you make sure you write everything down correctly, I saw in the notes you

missed a lot of what I said. If you want me to speak slower or repeat myself ask me and I will." (257) That was a significant request. The claimant made no allegation of the notes being in any way distorted, but recognised that she may have been difficult to follow because of the speed of her speech and asked Ms O'Connor to be careful next time.

79. Early in the meeting, Ms Jordan stated: "As you are on a final warning, the penalties are no outcome or dismissal." (256) However logical, that was not the approach to be found in the disciplinary procedure, or in the claimant's final written warning letter, neither of which prescribed what might happen in the event of a further disciplinary matter.

80. The claimant repeated that there had been an occasion when she had one "dozy" episode for the first time and said (257-8),

> "They put me first on that tablet I was feeling very drowsy… I was taking tablets, I can't remember the dates. I didn't write them down, I didn't think this would be an issue… I've been on them six months… you can call my GP."

81. The claimant denied falling asleep but admitted that there had been an occasion at the day centre when she had been "drowsy" to the extent when she heard Mr Chambers say: "Emilia, wake up, you are sleeping" (258). Ms Jordan understood that the claimant was referring to tablets for blood pressure.

82. The claimant denied the allegations against her. Later in the meeting, Ms Jordan attempted to summarise the position. The notes record that the claimant agreed with Ms Jordan's summary (262),

> "In relation to falling asleep at the day centre you said that did happen on one occasion. You said you believed you just started tablets".

83. Ms Jordan asked if the claimant had told anyone that she was on new medication and the claimant said that she had not. Shortly before a break of some 30 minutes the claimant is recorded as saying: "Consider this is an allegation this is not true, the only thing is true that I fell asleep" to which Ms Jordan replied: "The only true this is you fell asleep?" (264), which the claimant agreed. The claimant denied in evidence that she had made this admission. We prefer Ms Jordan's evidence and we find that the claimant said words to that effect.

84. At that point there was a break, and Ms Jordan made contact with Ask HR. The Ask HR record in full states,

> "In relation to falling asleep in the day centre, she said she did fall asleep as she had just started taking some tablets which could affect her drowsiness. Admitted falling asleep. Tablets were for blood pressure, she said to day centre staff that she might fall asleep and to wake her if she did as she had just started taking some tablets. Did not disclose to her manager that she was on medication which might make her drowsy as if she had we could have risk assessed. Still taking tablets so she said but Caroline thinks she is lying about the tablets to excuse her from the situation. Reasonable belief that she has not supported PWS properly at the charity shop however this is misconduct. Taking into account the GM allegations of falling asleep at the day centre and she has admitted

> this and also taking into consideration her live FWW Caroline will be summarily dismissing."

85. We accept that that accurately summarises HR's understanding of Ms Jordan's thought process. We repeat our concern that this document was first disclosed late on the second day of this hearing.

86. The meeting resumed, and Ms Jordan informed the claimant of her dismissal. The claimant objected and we note the following exchange: "But you told me you fell asleep?" to which the claimant replied: "Yes I told you due to medication…" (264).

87. Ms Jordan confirmed her decision by dismissal letter of 4 August (266). The claimant appealed on 15 August (269). In her appeal letter she referred by name to the prescribed medication which she said she had started at the time she was experiencing drowsiness.

88. Ms Gambold, who worked in a different region, was appointed to hear the appeal. She wrote to the claimant on 22 August to make appeal arrangements. The hearing was to be delayed by her two week absence on holiday. We do not agree with Mr Abere's suggestion that as a matter of fairness to the claimant, Ms Gambold should have cancelled her holiday. Ms Gambold's invitation to the appeal informed the claimant that the appeal meeting would proceed in the claimant's absence if she failed to attend without good reason.

89. The appeal was due to be heard on 19 September. The claimant did not attend or make contact before the meeting was due to start. We accept that the respondent made an unsuccessful attempt to telephone the claimant. Ms Gambold proceeded on the papers which she had, and decided to reject the appeal.

90. On 21 September, before the appeal decision has been sent out, the claimant telephoned Ms Gambold. She said that she had been unable to attend the appeal due to a painful boil. She was asked to produce evidence of any medication, and sent in information indicating that she was being treated with Eurax, an over the counter topical cream.

91. Ms Gambold took the view that while the discomfort caused by the boil may well have prevented the claimant from travelling to the appeal, it was not a good reason for not having contacted the respondent before the time set for the appeal to advise of her non-attendance. She declined to re-arrange the appeal and on the information before her rejected it. She confirmed her decision by letter of 28 September (305).

92. We add for the sake of completeness that it was subsequently confirmed that in 2018 the claimant had had surgery for a cancerous growth. That information was not available to Ms Gambold at the material time, and was therefore of no assistance to the tribunal.

**Disclosure and Barring Service (DBS)**

93. After her dismissal the claimant looked for work in the caring sector. She subsequently saw a certificate issued by the DBS dated 23 October 2017, which recorded an allegation of dishonesty against the claimant. While the document should be read in full, it is clearly based on a garbled, inaccurate summary of the matter which concluded with the final written warning dated 14 October 2016. The recorded information contains, in a relatively short narrative, at least four major factual inaccuracies. Apart from the dates and circumstances being wrongly recorded, the record is that the claimant "has stolen" money. That allegation was never put to the claimant by her employer, and was not the basis of the final written warning.

94. In the course of preparing for these proceedings, the respondent asked the DBS for the source of that information. The DBS replied that it was not through a referral from the respondent (313) and later wrote that the source of the information was Bedfordshire Police (319).

**System allegations**

95. The claimant sought to rely on evidence of what she presented to the tribunal as (in our phrase, not hers) systemic discrimination. At paragraphs 152-154 of her witness statement she asserted that BAME staff, whom she named, had been managed out of her workplace, reducing it from a diverse workplace to a white workplace. She made a general assertion that the Mencap workforce was not diverse. She made a parallel allegation that Mencap provides its services solely or disproportionately to white PWS. The common thread of these assertions was that they underpinned the claim that the claimant was dismissed on grounds of race.

96. Ms Kinnear's statement dealt in reply with the individual circumstances of the BAME staff named in her statement by the claimant. In reply to the suggestion that BAME staff had been managed out, Ms Kinnear gave the reasons, so far as she knew them or employment records showed them, for what had happened to the ten individuals named by the claimant.

97. Ms Kinnear wrote that respectively: one resigned while facing a disciplinary allegation; one resigned after graduating from University; one resigned to take up a better paid job concentrating on children work; one remains employed; one left after only two months service and there is an incomplete paper trail; another is still employed; one was dismissed because of financial disciplinary issues; one resigned when she relocated from Luton to London; one left because of an issue about her right to work; and for another there is an incomplete record. The respondent was able to agree therefore that of the ten, it had dismissed one for a reason related to conduct.

98. The claimant has described the departures from Mencap of a number of other BAME staff as if they showed a common pattern. We find that she did so on the basis of incomplete knowledge of what passed between the individual and Mencap. Ms Kinnear's evidence, which we accept, shows the random pattern of job movement which would be expected in any group of ten individuals in low-paid work.

99. In reply to general assertions about the respondent's employment practice, Ms Kinnear also produced ethnic monitoring data, which she asserted indicated diversity within the workforce. We accept that that is what the data indicate. We make that finding in light of an underlying caution about the claimant's approach. In certain circumstances, and in specific factual matrices, accurate numerical or statistical information about comparative pools of employees may be helpful or necessary. (It was in that context that the judge mentioned the West Midlands PTE case). There was, in the present case, no agreed factual pattern, and the claimant's circumstances seemed to us individual and fact-specific. There were no agreed figures or factual pattern, and we do not accept the claimant's bare assertions based on observation and her interpretation. We accept the broad thrust of Ms Kinnear's evidence, and we find that this material did not assist the tribunal to decide this case on behalf of either party.

100. Ms Kinnear's evidence was finally that the respondent does not have ethnic monitoring data of PWS. We do not accept the claimant's bare assertion, based on her own observation and interpretation, about the ethnicity of PWS.

**Other witnesses**

101. Ms Reyes had left the respondent, according to her statement, in December 2015. By definition therefore her evidence could not assist the tribunal because she could give no first-hand evidence of the events with which the tribunal was concerned. In the first half of her statement she described events which had taken place affecting her during her career at Mencap between 2003 and 2015. In the second half she largely gave second hand accounts of events which were not part of the pleaded case, and which appeared not necessarily to be related to race. Ms Aka's evidence spoke warmly and positively of working with the claimant, and consisted in some part of a form of character reference for the claimant: again, that was not a matter that was relevant to the tribunal. She also wrote about Ms Roberts, reinforcing our view that there were working issues within the claimant's team, including issues about Ms Roberts' language and behaviour with colleagues. Ms Mensah's evidence was purely as to character and did not relate to Mencap at all.

**Discussion: unfair dismissal**

102. This was, as Mr Perry pointed out, fundamentally a straightforward claim of unfair dismissal. Unfair dismissal cases have since April 2012 (SI 2012/988) generally been heard by Judge sitting alone. The present judge records his appreciation of the contribution made to this part of the discussion by the non-legal members. All our conclusions on all issues are unanimous.

103. The first question for the tribunal is what was the reason for dismissal, namely the operative consideration in the mind of the dismissing officer, who, we accept, was Ms Jordan alone.

104. The tribunal finds that the material reason was that set out in the letter of dismissal, primarily sleeping at work, in the context of failing to support PWS.

105. The tribunal accepts that that was a reason relating to conduct, and therefore potentially a fair reason within the framework of s.98(2) Employment Rights Act 1996.

106. The tribunal must then consider whether the requirements of s.98(4) have been fulfilled. That provides that the question of unfairness (having regard to the reason)

> "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 shall be determined in accordance with equity and the substantial merits of the case."

107. The respondent's size and administrative resource indicate that it is a national organisation with many thousand employees and access to professional HR and legal advice. The question under s.98(4) should be interpreted through the guidance given in British Home Stores v Burchell [1978] IRLR 379, bearing in mind that that case was decided at a time when there was a different burden of proof from that which now applies.

108. We must take care not to substitute our own view, and to respect that in any discretionary decision, any manager may have before him or her a range of responses, any one of which could be reasonable. We must not apply to any respondent the wisdom of hindsight, nor an unrealistic standard, nor a counsel of perfection. The correct standard is that of the reasonable employer in the circumstances with which he or she must deal.

109. We ask, did Ms Jordan genuinely believe that the claimant had committed gross misconduct and we find that she did.

110. We next ask whether she believed it on reasonable grounds after reasonable enquiry; and we find that the respondent does not meet that test. We preface our discussion with noting that the claimant had ten years service, and as late as 11 May 2017 was recorded by Mr Reeve-Smith to be a good worker.

111. We have noted above concerns about the investigation conducted by Mr Reeve-Smith. Unlike Mr Abere, we are not troubled by the fact that the allegations against the claimant were made at second hand (ie both Mr Chambers and Ms Graves reported what each had been told by primary eye witnesses): that often happens in any workplace. Both sets of eye witnesses were employees of other organisations, and the respondent had no right of access to them, or authority to demand their co operation.

112. We accept that in relation to the Sue Ryder allegations, there was reasonable specificity, in the sense that the claimant had been to the shop

only twice with Z, shortly before the allegations were raised, and was broadly able to answer them.

113. The claimant expressed concern to us that if she had been found sleeping, that would have been caught on CCTV. She argued that the respondent should have asked to see the shop's CCTV footage. We understand that many members of the public have a faith in CCTV evidence which the tribunal does not necessarily share.

114. If the shop had CCTV, access to it could not demanded by the respondent. It was in the hands of Sue Ryder, which could refuse. Most CCTV systems have an over-write function, so that footage is not retained for long. Footage could only assist if it captured the claimant all the time she was in the shop. The footage in question was for two days, which would require several hours viewing per camera: a considerable burden of work to look for something which might not help anyway. The question is whether the failure to ask a third party to provide possibly many hours of CCTV, which might not be available, and which, even if available, might not show what is being looked for, was outside the range of reasonable inquiries, such as to render the dismissal unfair. We have no hesitation in finding that it was not.

115. We have greater concern with the day centre allegation, which was determinative, and about which there was uncertainty about when and where the incident had taken place. If indeed it took place at Bramingham, it was common ground that that was many months before Mr Chambers' report was sent on 1 March 2017.

116. The importance of delay would not necessarily be one of recollection, but of gravity. If Mr Chambers and colleagues were genuinely of the view that something serious had taken place, it might be reported sooner rather than later, and Mr Chambers might be more likely to respond to Mr Reeve-Smith's attempts to make contact. The passage of time might also be a factor in fairness: certainly Ms Jordan had thought so, in the claimant's favour, in March 2016 (para 35 above). There was no indication that this point was considered on this occasion.

117. We are concerned that Mr Reeve-Smith's report overstated the gravity of the allegation and was therefore materially inaccurate (paragraph 74 above).

118. We are concerned by the lack of clarity in the disciplinary meeting notes. We accept that they may reflect the difficulty (also noted in this hearing) of committing the claimant to precise answers. It may well be that that was why Ms Jordan homed in on the one act of wrong doing which the claimant appeared clearly to have admitted. However, the notes show that when the claimant admitted to being drowsy, and having dozed off on one occasion, she at once said that she was drowsy because of medication. Ms Jordan, according to the Ask HR record, thought that that was a lie.

119. In our judgment, at the point at which Ms Jordan realised that the issue of the claimant falling asleep in the day centre had become determinative, it

was not reasonable to proceed to dismiss on the basis that the claimant's assertion about medication was a lie without testing the evidence. There were at least two straightforward ways of doing so: one was to adjourn and give the claimant time to provide evidence from her GP of what the medication was, when she started it, and whether drowsiness was a side effect; the other was to ask the claimant then and there to sign consent for Mencap to ask the GP the same questions. It was troubling that the claimant had given a categorical suggestion (contact my GP) to which Ms Jordan's response (not shared with the claimant) was that it was a lie. If it was a lie, it would have been easy to test and expose. We note that the dismissal letter did not challenge the claimant's assertion about medication, but on the contrary, absorbed it.

120. This approach gave us another concern. Ms Jordan thought that if the assertion about medication turned out to be true, the claimant had committed the misconduct of working under the influence of new medication, without having told her manager about it, and without having undergone risk assessment. That was plainly a material consideration against the claimant, as the dismissal letter said that among eight considerations was (267),

> "Your admission that you fell asleep at the day centre, in your hearing you thought that this might have been to do with medication that you had started taking approximately 6 months ago. However, you stated you had not discussed this medication with your manager and any affect this may have on your safe performance at work."

121. This point was never put to the claimant to answer. If Ms Jordan saw the point as Hobson's Choice (ie, dismissed for gross misconduct if you are lying about medication; or dismissed for gross misconduct if you are telling the truth about taking medication without notifying your manager), she was bound in fairness to put the point to the claimant, preferably in writing and offer her the opportunity of defence, including producing medical evidence. We accept that that may have involved adjournment and delay.

122. We have considered whether it was the claimant's responsibility or that of the respondent to seek medical evidence. Ms Jordan brushed the point aside by stating it could be raised at appeal. That does not seem to us at all right in principle. It was the respondent's duty to conduct the dismissal procedure fairly at every stage. At the moment at which the question of medical evidence was perceived by Ms Jordan as potentially determinative, it was her duty to tell the claimant, and to initiate an arrangement for it to be requested.

123. We were troubled further by the possibility that Ms Jordan and Ask HR were proceeding on a reading of the final written warning which was not confirmed either by the disciplinary procedure itself or by the language of the claimant's final written warning letter. Our experience of disciplinary procedures and final written warning letters is that they often state in terms that any further infringement, even of a different type, and no matter how minor, may or will lead to dismissal. There was nothing in either document in this case (apart from the logic of the word 'final') which expressed a

presumption of dismissal in the event of further misconduct or gross misconduct.

124. In our judgment, taking all the above points together, it has not been shown that the respondent conducted a reasonable inquiry, or reached a conclusion which was in the range of reasonable responses, and accordingly the claimant was unfairly dismissed.

125. In reaching our conclusions on unfair dismissal, we attach no weight to the events after 4 August 2017. We need only ask whether, after the appeal, and taken as a whole, the matter was fairly conducted and we find that it was not. Certainly Ms Gambold did not rectify any element of unfairness. We make no finding as to how Ms Gambold dealt with the claimant's absence from the appeal. Like Ms Gambold, this tribunal understands that the claimant may have been in great discomfort on 19 September, and like Ms Gambold the tribunal does not accept that a painful boil prevented her from making a phone call, or asking somebody else to do so. Ms Gambold's refusal to re-arrange the appeal hearing was not of itself unreasonable. We accept that if a phone call had been made at or before the time set for the appeal, Ms Gambold would, with reluctance, have re-arranged the date.

126. We confirm for avoidance of doubt that the issues of contribution, Polkey, and adherence to the ACAS Code remain for decision at the remedy hearing.

127. The claimant claimed that her dismissal was automatically unfair under s.103A ERA, which requires the tribunal to find that protected disclosure was the sole or main reason for dismissal. That is a high burden, and this claim comes nowhere near it: there was no evidence whatsoever to indicate that the stated reasons for dismissal were tainted by the fact of any protected disclosure. The same reasoning applies to the alternative claim under s.100.

128. The claimant complained that her dismissal was, in addition to being unfair, discriminatory on grounds of race. We set out or findings, and our reasons for rejecting that claim below.

**Discussion: wrongful dismissal**

129. When we come to consider the claim for wrongful dismissal (notice pay) we ask ourselves a different question: has it been shown on balance of probabilities on evidence in this tribunal that the claimant committed gross misconduct such as to entitle the respondent to dismiss her summarily, and disentitle her from receiving notice pay. We find that it has not. The gross misconduct identified in the dismissal letter was sleeping at work. We find that it has not been proved to us that the claimant committed an act of gross misconduct as alleged. Her claim for notice pay succeeds.

130. The parties' schedules of loss showed that they were at odds over the length of notice to which the claimant was entitled. While that is a matter for

the remedy hearing, we remind the parties of what we have said at paragraph 21 above.

**Protected disclosures**

131. The claimant alleged at Issues 7-14 inclusive that she had made two protected disclosures, in accordance with s.43B ERA, which refers to,

> "any disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of … (a) .. a criminal offence … (b) that the health or safety of any individual has been is being or is likely to be endangered .."

132. We accept under Issue 7 that on 11 October 2013 the claimant made the protected disclosure set out at paragraph 30 above. The claimant informed her employer of events (failure to follow medication procedures; risk of a fire) which tended to show dangers to health and safety. In the context of the respondent's responsibility for the care of PWS we accept the presence of a public interest in the disclosure.

133. There was no evidence that any other person of whose management the claimant complained had any knowledge of the letter of 2013, or was influenced by it. It preceded the events which were before us by over two years and at least two changes of line manager. In light in particular of the subsequent history of complaint and counter-complaint by and against the claimant, it seems to us likely that it was not given any particular regard.

134. We find under Issue 11 that the claimant made a second protected disclosure to her employer in her email of on or after 18 May 2017 (219) at the point only where she alleged that Ms Roberts did not sign for medication, a matter which we accept in the care of a vulnerable person related to health and safety and had a public interest. Although not pleaded separately, we find that in her second letter (223-224) the claimant on or after 1 June 2017 repeated the same protected disclosure.

135. We add for the sake of completeness that no matter the strength of the claimant's feelings on the point, we do not find that the claimant's allegations in both emails to the effect that Ms Roberts failed to help her make up a bed had an element of public interest such as to enjoy public interest disclosure protection.

**Whistleblowing detriments**

136. At issues 21 and 22 the claimant alleged that on ground of her having made a protected disclosure 'the respondent sent an incorrect and misleading version of her employment history to DBS.'

137. We share the claimant's concern that a substantially inaccurate report was made to DBS by Bedfordshire Police. We share the claimant's concern for the potential for injustice which could well follow. However, the claim fails because there is no evidence whatsoever that the report to DBS was the

action of the respondent. The evidence was that an inaccurate report was made to the police, which in turn was passed to DBS. It was speculated in evidence that the matter may have been mentioned in a multi-disciplinary meeting and found its way to the police in a garbled fashion; we can only speculate as to other potential sources. However, there is no evidence that would enable us to find that this was an action of the respondent. The claim fails because the factual basis for it has not been made out. We add that we were not asked to decide if the respondent made the report to Bedfordshire Police; but that if we had, we would have reached the same conclusion for the same reasons.

138. At issue 22.2 the claimant alleged that the disciplinary process between 25 July and 2 August was a further detriment. We disagree and the claim fails. The burden of proof rests on the respondent to show the grounds of the relevant act or omission. We find that the respondent has made good the grounds of showing that the disciplinary process in question proceeded because of the external complaints against the claimant, in light of the totality of her employment history. We find that those matters were wholly unrelated to any protected disclosure.

**Discussion: direct race discrimination**

139. At Issues 29-50 the claimant brought complaints under the provisions of s.13 and 39 Equality Act 2010. S.13 provides that,

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

The protected characteristic of race is (s.9) defined to include colour; nationality; and ethnic or national origins. The forms of discrimination are set out so far as material at s.39, of which the material portions were s.39(2)(c) and (d) which provide so far as material:

> "An employer must not discriminate against an employee… by dismissing B … by subjecting B to any other detriment."

140. The burden of proof provision is set out in s.136(2), and provides,

> "If there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred."

We note also that s.23 provides that when comparing a claimant with an actual or hypothetical comparator,

> "There must be no material difference between the circumstances relating to each case."

141. We note in particular that it is insufficient, to cause the burden of proof to shift, that a claimant merely asserts a protected characteristic and complains of detriment. There must be evidence of some facts from which the tribunal could draw an inference of discrimination; or, put more clearly, some evidence which indicates a causal relationship between the two.

Mere unreasonable management, or even mismanagement, need not of itself be probative of discrimination.

142. Issues 29.1 and 29.2 relate to the outcome letter of 23 March 2016 (paragraph 36 above) from Ms Jordan, and to the subsequent conversation with Mr Reeve-Smith (paragraph 37 above). We note the mis-statement of the case at Issue 29.2: the claimant was, on her own case, not subjected to racist or disrespectful communication: she was given guidance in light of the respondent's response to her comment about stinginess.

143. The claimant has here asserted detriments and the protected characteristic. The burden does not shift. There was no evidence whatsoever that a white employee, in the materially same situation, would have been managed differently. Ms Jordan's outcome was on its face a fair one, weighing up in the claimant's favour the passage of time and the quality of the evidence against her. If the burden did shift, we would accept the respondent's reason for having sent the letter and included its contents, which were that there were concerns about what the claimant had said during the investigation, which required management to restate its expectations of standards at work, and to remind the claimant, and her colleagues, of the performance management which would follow.

144. Issue 32 complained that Ms Dines' email of 31 August 2016 (paragraphs 45-46 above) was an act of race discrimination. The claimant has asserted detriment and protected characteristic. There was no evidence whatsoever that causes the burden of proof to shift. The claim fails for that reason. We add that if the burden did shift, the claim would also fail on that footing. We have not heard from Ms Dines. We place considerable weight on what she wrote and the manner in which she expressed herself. She did not write precipitately, but after reflection and observation. She identified specific events and PWS. She produced what appeared to be relevant paper evidence. She was at pains to state her motivation in writing at all. We accept that she wrote to express legitimate, evidence-based concerns about the well being of PWS. We find no evidence which suggested that race played any part whatsoever in her report or its contents.

145. Issues 35, 38 and 41 (respectively: work location; extra hours; holidays) are each based on the claimant's assertions of having asked Mr Reeve-Smith to make a discretionary management decision, and her assertion that her requests were refused. Mr Reeve-Smith has in each case denied the factual basis of the allegation. We accept his evidence, and these three allegations fail because we do not accept the factual premise on which each allegation is based (paragraphs 59-60 above).

146. Issue 44 relates to a single event mentioned in the claimant's emails of May and June 2017 (219 and 223), complaining that Ms Roberts refused, on grounds of race, to help the claimant make up a bed when she (the claimant) was in pain and unable to do so. The claim fails because it is based on the premise that the poor working relationship between Ms Roberts and the claimant was caused by racism on the part of the latter. That has not been shown. In so saying, we note, as said above, that we

have seen evidence of friction between the claimant and colleagues and between Ms Roberts and colleagues. That points to the reasons for friction within the team being personal, not any protected characteristic.

147. In so saying, we attach considerable weight in this context to Mr Reeve-Smith's record of the concerns of Mr Stenhouse on 26 June 2017 (224L). Mr Stenhouse gave a sad picture of conflict within the team. His view was that the conflict seemed to surround Ms Roberts. The conflicts described by Mr Stenhouse were all to do with work, many of them involving colleagues who were not black, and none of them expressed as in any way related to race. That points to the reason for friction being the common factor identified by Mr Stenhouse, ie Ms Roberts, and not a protected characteristic.

148. Issue 47 related to the claimant's dismissal, and issue 49 was not sufficiently clarified to proceed. We find, in light of the above, that when we come to the claimant's dismissal, the burden of proof has not been shown to have shifted. If it did, we would accept the respondent's explanation of its reasons for dismissal. We find that race played no part whatsoever in the dismissal of the claimant.

**Discussion: harassment**

149. This issue was added by amendment following disclosure during the hearing. The allegation related solely to the Ask HR email sent on 11 May 2016 by Mr Reeve-Smith, 443E. The context in which that was written is set out at paragraphs 38-43 above. We note that read as a whole the email was reasonably sympathetic to the claimant. It is set out at paragraph 42 above. This claim related solely to one phrase, 'quick to play the race card.'

150. The definition of harassment is set out in s.26 Equality Act, which so far as material states:

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

151. S.26(4) provides:

> "In deciding whether conduct has the effect referred to in 1(b) above each of the following must be taken into account (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."

152. We find first that by recording that the claimant 'is quick to play the race card' Mr Reeve-Smith engaged in unwanted conduct. In so finding, we of course note that the claimant did not have an opportunity to accept or reject the conduct. Our finding is that she did not consent to being described in those words, and would not have agreed the record in those terms, had she been asked. That is the basis of our finding of 'unwanted conduct.'

153. Was it conduct 'related to a relevant protected characteristic', in this case race (and not necessarily the race of the claimant)? We accept that that is a broad, loose test, which is a matter of objective interpretation by the tribunal. It is not the same as the reason why the words were written, or their purpose. We find that the words were plainly on their face related to race.

154. We ask next what was the purpose of the conduct. At the time, Mr Reeve-Smith was new in post; he found that he was managing a team where working relationships were poor; he had spoken to the claimant about what appeared to him to be a professional matter and no more (an allegation of wearing headphones at work) and her immediate response had been to identify a person who she was confident had made the allegation, and to call her racist.

155. We find that the purpose of the words was to record on the Ask HR system Mr Reeve-Smith's legitimate apprehension about how the claimant might respond to management and challenge in future, in light of how she had previously done so. That was a reasonable, legitimate professional purpose. It follows that the claim cannot succeed as a claim that the conduct has had the purpose of creating the statutory hostile environment. We therefore ask in the alternative whether it has had the statutory effect.

156. To ask that question, we ask the meaning of the words. We note that it is expressed as a general assertion, although it was based on a one-off event: it might be a different case if Mr Reeve-Smith's note had said in terms that he was writing about one specific conversation. We find that the phrase used by Mr Reeve-Smith carries with it the inference of an employee who responds to management with an over-hasty allegation of race discrimination, which may be made insincerely. We do not find that his language was racist, and we make no finding of racism against him personally. Our finding is about one use of a specific phrase. Mr Reeve-Smith's assessment was liable to be read by any member of the Ask HR team, or by any manager with access to Ask HR when dealing with future management of the claimant.

157. We next ask if the claimant's dignity has been violated, or the statutory environment created. Our particular difficulty is that the claimant did not know what had been written about her until over 18 months after the end of her employment; and could give no evidence of any event at work which she attributed to the existence of that record. There was no evidence that the record was in fact seen by any other person, or that its contents had any effect on anyone's dealings with the claimant. We find that the email did not create a hostile environment, and the claim does not succeed under s26(1)(b)(ii). We go on to ask in the alternative if the words violated the claimant's dignity.

158. Can it be said that the claimant's dignity was violated when the overall circumstances included that she was unaware of the violation, and the words in question expressed (however clumsily) a legitimate, evidence-based management concern? We have found this a difficult question,

particularly as the tribunal must take into account the perception of the claimant. The Act does not confine us to the perception of the claimant during the employment in question, and we read the statute as permitting us to take account of the claimant's perception at the time of the hearing before us.

159. The overall circumstances included that the Ask HR record was accessible to a number of managers and HR advisers. We agree that it is important that managers should express their views candidly, and that we should bear in mind that workplace notes are not written to be pored over in the artificial setting of litigation in a court or tribunal years later. We note also that Mr Reeve-Smith has based a general statement on a single event.

160. We can see the logical difficulty of finding that the claimant's dignity was violated, even if she is unaware of it at the time. We can also see that the alternative would be unacceptable: we doubt that it could be said that a management record which was for example openly misogynistic or Islamophobic gave no recourse to the employee who did not find out about till long after the event. The Equality Act is protective legislation, even though it cannot cover every work situation (see Halawi v World Duty Free 2014 EWCA Civ 1387).

161. In our view, the concept of violating dignity is not confined to the claimant's contemporaneous knowledge and sense of self-worth. We find that it may in principle apply to events of which a claimant is unaware: the extreme, ugly facts of Jones v Tower Boot 1997 IRLR 168 come to mind. In that case, decided under the Race Relations Act 1976, a young BAME worker was unaware that colleagues had pinned a note with racist language on his back. We do not think that it could be said under the present legislation either that his dignity was not violated until the moment when the claimant saw the note, or that he had to prove who actually saw it and when.

162. In our judgment, the email violated the claimant's dignity in that it belittled her, and was liable to diminish her stature in the eyes of anyone who read it. It implied that her word and judgment were inherently unreliable in matters of equality. We find in all the circumstances that the email violated the claimant's dignity. The harassment claim succeeds under s.26 (1)(b)(i) only.

**Victimisation**

163. Judge Henry's issues 51 and 52 were brought as claims of victimisation contrary to s.27 Equality Act 2010 which provides so far as material,

> 'A person victimises another person if .. A subjects B to a detriment because – B does a protected act .. [which] is .. Doing any other thing for the purposes of or in connection with this Act ..'

164. The claimant relied on two protected acts. The first was, she said, a conversation with a departing manager, Emily, on Emily's last day of service in 2016, in which she complained of racism by Mr McGuire and Ms Roberts.

There was no cogent evidence that this happened, what was said, or when it happened, or who else if anyone at the respondent knew about it. We do not find that this conversation took place.

165. The second protected act was in her email of early June 2017 (223-4) (paragraph 68), in which she used the word 'racism.' We find, not without misgivings, that that was a protected act. We find that it was a general reference to something arising under the Equality Act, and that it has not been shown to have been written in bad faith. Even if it were written in self-defence to the most recent allegations against her, we find that that does not of itself constitute bad faith such as to deprive it of the protection of s.27.

166. The acts of victimisation alleged were dismissal and referral to the DBS. We find, as set out above, that the claimant's dismissal was for the reasons given by Ms Jordan, and we find that it was in no respect whatsoever related to or caused in any respect by her allegation of racism in June 2017. We find that it has not been shown that the respondent made any referral to the DBS. Although we do not need to make any further finding, we add that we accept in principle that there were proper safeguarding reasons, wholly unrelated to race, for accurately reporting an allegation of financial abuse of PWS by a worker.

167. It follows that the above two claims fail.

168. The final act of victimisation was that added by amendment, ie the claim relating to Mr Reeve-Smith's posting. The allegation was that the protected act was the claimant's allegation of racism against Ms Roberts in response to the ear phone allegation, and that the act of victimisation was writing the words which we have found above violated the claimant's dignity.

169. We have no power in law to decide this allegation, and it fails. The reason is that as we have found that the Ask HR posting was an act of harassment, we cannot, under s.212(1), find it also to have been a detriment: the Act specifies that one event cannot be both. This claim therefore fails.

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Employment Judge R Lewis

Date: ……27/02/2020

Sent to the parties on: .11/03/2020

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For the Tribunal Office