Case Number: 2201907/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr MO Akinola	**v**	**West London YMCA**

Heard at: London Central **On**: 26 –28 (in person) and 29 (in chambers) October 2020

Before: Employment Judge E Burns
Ms S Pendle
Ms C Buckland

Representation

For the Claimant: In person

For the Respondent: Mr M Green (counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

(1) The claimant's claim of unfair dismissal is dismissed

(2) The claimant's claim of direct discrimination because of race is dismissed.

(3) The claimant's claims for unpaid notice paid, arrears of pay and holiday pay are dismissed.

REASONS

CLAIM

1. This was a claim arising from the claimant's employment with the respondent from 1 May 2007 to 22 December 2017. The claimant presented his claim on 6 April 2018 following a period of early conciliation between 23 February to 6 April 2018.

THE ISSUES

2. The issues were discussed at a preliminary hearing conducted for case management purposes on 1 August 2018. The judge conducting that hearing ordered the claimant to provide some further information of his claim for race discrimination which he duly did. We therefore spent time at the start of the hearing reviewing that and clarifying and agreeing a final list of issues.

3. The issues to be determined were as follows:

Race Discrimination

3.1 It was not in dispute that the respondent dismissed the claimant.

3.2 Was the dismissal "less favourable treatment", i.e. did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

The claimant relied on a hypothetical comparator

3.3 If so, was the less favourable treatment because of the claimant's race?

The claimant wished us to take account of the following assertions when considering his discrimination claim:

"(i) [Ms Burl] was disgusted/racial that a black person have an air of superiority to her, especially telling her what to do. She was determined to find fault and punish me.

(ii) She developed a narrative that casts doubt on my eligibility to work. In the letter of dismissal for example, the manager said they thought about reducing my hours to accommodate supplementary work, but they concluded that I cannot even do that. Thus the narrative is that I am not eligible to work. Where is this coming from if not from a racial prism.

(ii) Even before going to tribunal my immigration case was settled and I gave [the respondent] the judgement, they still refused to reconsider. I am not sure [Ms Burl] brought this to the notice of management. This shows that the issue at stake was more than my eligibility to work.

There is an underlying hatred and decision to punish me for something I cannot fathom but I think is racially motivated for having.

(iii) [Ms Burl] conspired to pay me always in bits giving one excuse or the other. For example when I lodged my sick certification and self-certification, they were first refused and salary deducted and I was always forced to fight before they will accept and then pay a refund that when I totalled never gets to my salary. This left me humiliated. Whenever I asked the person in charge of pay, she refers me to HR and whenever I want to talk to someone else in HR, they claim they are not able to attend as they do not know all the facts and I have to talk to [Ms Burl]. Even the 10 weeks pay was not paid in bulk at the same time. It was paid in bits and I had to write several emails before the payments got to the amount that was calculated by [the respondent] (which I am disputing). I have never seen any white person treated this way.

(iv) I tried several times to complain but it seems the management defers to whatever has been done by [Ms Burl]. Especially after the unfair dismissal. They seem to think that I would soon be deported and as such they have no obligation to treat me fairly. This attitude is racial.

(v) The fixing of the disciplinary was done by [Ms Burl], she corralled the managers into thinking how can a strong black person be sick and not able to come to a meeting. Even when I gave Doctors certification, they could not believe that I could be sick enough not to be able to attend the meeting. This is stereotype is racial in nature."

Unfair dismissal

3.4 What was the principal reason for dismissal and was it a potentially fair reason in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

The respondent asserts that the dismissal was for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

3.5 In all the circumstances, including the size and administrative resources of the respondent and in accordance with equity and the substantial merits of the case, did the respondent act reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the claimant?

The claimant said that the following should be taken into account by the tribunal:

(i) the treating of the immigration position as irregular. when it had previously been found to be satisfactory by Ms Kent, when an Immigration Tribunal outcome was pending.

(ii) insufficient investigation was carried out of his Restrictive Positive Notice and a wrong interpretation was put on it.

(iii) There was also wrong treatment of his application for permanent residency, which was on appeal at the time.

(iv) He should not have been suspended.

(v) There should have not been pressure on him to attend a disciplinary meeting when he was ill and the meeting should not have gone ahead in his absence.

(vi) The outcome, and decision to dismiss were disproportionate or premature: a decision should have been postponed. pending the outcome of his immigration appeal (which had been successful).

(vii) The appeal outcome was baseless and the result of Ms Burl's campaign to get rid of him.

Claim for Monies

3.6 Up until what date should the claimant have been paid? Should this be the date of the dismissal letter (22 December 2017) or the date of the appeal outcome (31 January 2018)?

3.7 If the latter, is the claimant owed:

(i) Arrears of pay
(ii) Notice pay
(iii) Holiday pay

Remedy

3.8 If the claimant succeeds with his claim, what compensation should he be awarded?

THE HEARING

4. The hearing was conducted in person over the course of 3 days. The claimant requested that the panel provide a reserved judgment so that he did not have to attend the tribunal on the fourth day. The panel deliberated in chambers on the fourth day.

5. For the claimant we heard evidence from him. For the respondent we heard evidence from:

- Ms Nicola Kent, HR Officer at the relevant time
- Ms Efrat Burl, (gave evidence remotely via video), HR Officer at the relevant time
- Ms Josephine Gray (gave evidence remotely via video), Housing Manager (conducted the disciplinary hearing)

- Ms Ayoku Ademoye, Head of Supported Housing Services (conducted the appeal hearing)

6. There was an agreed trial bundle of 264 pages. We read the evidence in the bundle to which we were referred and refer to the page numbers of key documents that we relied upon when reaching our decision below.

7. We explained our reasons for various case management decisions carefully as we went along and also our commitment to ensuring that the claimant was not legally disadvantaged because he was a litigant in person. We regularly explained the process, visited the issues and explained the law when discussing the relevance of the evidence.

FINDINGS OF FACT

8. Having considered all the evidence, we find the following facts on a balance of probabilities.

Background

9. The respondent is a charity which provides support to young people at all stages of their lives. At the material time, the respondent employed approximately 133 employees. It had an HR department made up of 4 people: a Head of HR (Ms Margaret Murphy), a HR Business Partner (Ms Nicola Kent), an HR officer (Ms Efrat Burl) and an HR administrator.

10. The claimant is from Nigeria. He describes himself as black.

11. The claimant originally came to the UK on 19 January 2007 under a student visa. He remained on a student visa until 30 January 2013 (202)

12. The claimant was granted a visa as a Tier 2 minister of religion which covered the period from 25 January 2013 to 10 February 2016. The sponsoring employer of this visa was the Redeemed Christian Church of God (RCCG), Winners Way, Dartford (120 – 125)

13. The claimant was granted a visa as a Tier 2 general migrant from 2 October 2014 to 14 September 2015. The sponsoring employer was Hayes School (Bromley) (131 – 135) for whom the claimant worked as a physics teacher from 1 September 2014 to 31 August 2015 (137 – 139).

14. The claimant applied for leave to remain in the UK on 11 September 2015. He was initially refused, but appealed. His appeal to the First-tier Tribunal was heard on 5 June 2017 and dismissed. His appeal to the Upper Tribunal was heard on 23 February 2018 and granted. The Deputy Upper Tribunal Judge hearing the appeal noted (amongst other things) that at the time of the First-tier Tribunal hearing, the claimant had been lawfully in the UK for ten years (231-232).

15. The claimant undertook a variety of roles for the respondent. He commenced working for the respondent on 1 May 2007 as a Duty Support

Officer and Night Manager (bank worker). On 23 August 2008 he started in the role of Weekend Duty Officer, at Ealing Common Housing Project (16 hours per week). His hours in this role were decreased to 8 hours per week on 2 May 2009. He started a second job as Duty Support Officer Weekday at Uxbridge Housing Project (30 hours per week) on 13 June 2012. His hours were decreased in this role to 12 hours per week on 1 September 2012. He resigned from this second job with effect from 14 September 2014. He commenced the role of Night Support Manager at South Ealing (average 35 hours per week) with effect from 3 October 2016.

2015 Employment Check

16. In or around August 2015 the respondent's HR department carried out a right to work audit for all employees. The reason was to ensure that all the HR records were up to date.

17. When, HR officer, Ms Kent tried to use the online employer checking service to check the claimant's status, she was directed to a website page advising her that a check was not necessary. Ms Kent had given the claimant's start date of employment as 1 May 2007 in the form she completed for the purpose of the check.

18. The web page stated:

"**You do not need to request a Home Office right to work check**

If the employee has been working for you, without a break in employment, from a date before 29 February 2008, then you do not need to request a right to work check.

Document checks should have been carried out when the person was recruited. This would have established you with a statutory defence from prosecution which you retain through the individual's employment. Therefore no further checks are required provided the employment has been continuous." (112)

19. Ms Kent told us that she called the Home Officer Border Agency helpline to check the position further when she received this result and was told that it was correct. She later confirmed what she had done to the claimant in an email to him dated 14 April 2016. This was in response to an email he had sent her. Ms Kent explained that the Home Office had advised the respondent that it did not need to proceed using the employer checking service as the Claimant's start date was before 29 February 2008 and that she had telephoned them to confirm this was correct. Ms Kent also asked the claimant to provide a copy of his up to date visa in her email (113). We note that he did not respond to this request and Ms Kent did not follow it up.

October 2017

20. In July 2017 the respondent was contemplating merger with another YMCA organisation. An announcement was sent to staff about this (115).

21. As part of that process a due diligence exercise was undertaken in October 2017 relation to all employees working for the respondent which included a right to work audit. That work was undertaken for the respondent by one of its HR officers Ms Burl. The timeline for completion of the audit was by around the end of December 2017, because at that time the merger was due to complete in February 2018.

22. When undertaking the audit, Ms Burl identified that there were two employees working for the respondent whose files did not contain up to date right to work documentation, one of whom was the claimant. She emailed both of the employees on 13 October 2017 (115a & 115c) asking for a copy of their current Visa as a matter of urgency. The emails she sent are identical.

23. The other employee initially failed to provide the documents to Ms Burl who instructed that he should be removed from the respondent's list of bank workers (115c). He was reinstated, however, after meeting with Ms Burl and providing her with a copy of his papers (119b).

24. The claimant told us he spoke to Ms Burl twice on the phone in response to her receiving her email to tell her that he didn't need to provide any paperwork and that, when she refused to accept this, he called Ms Kent on 19 October 2017. Ms Kent agreed with the claimant to use the same reference details as previously and to undertake a check using the employer checking service (115b)

25. Ms Burl said she could not remember any conversation between her and the claimant, but did not deny it. Ms Kent could not recall why she took over the claimant's check. The most likely explanation is that there was at least one conversation between the claimant and Ms Burl in which they did not agree, hence he rang Ms Kent. We find it is likely that Ms Burl told the claimant that she needed him to provide his right to work documentation.

26. The Home Office Employer Service Check was completed on 27 October 2017. Ms Kent took responsibility for completing the form and decided, by herself how she should do it. She was not influenced in this regard by Ms Burl.

27. The form was completed in the name of the respondent. However, in response to the question "Does this person already work for you?" Ms Kent responded with the answer "No". She said the reason she did this was because it was anticipated that, post-merger, the respondent's employees would likely transfer to become employees of a different legal entity, albeit with their continuous service preserved. In her mind, she completed the form on behalf of the new employer.

28. Our finding is that Ms Kent completed the form incorrectly. She should have said YES to the relevant question and entered the claimant's correct start date. We accept her explanation as to why she completed the form in the way she did as genuine however.

29. The ECS check returned a Positive Verification Notice which confirmed that the claimant had the right to work in the UK, but this was subject to restrictions (116).

30. According to the ECS check the work restrictions said to apply to the claimant were: "Tier 2 (Gen, Religious worker, Sportsperson, ICT); can only work for previous employer + supplementary and secondary work until new leave awarded" (116)

31. The check results were received by Ms Kent who forwarded them to Ms Burl. Ms Burl initially believed the positive check was sufficient for the respondent's purposes. She emailed the claimant to confirm the outcome of the check to him (119a). Ms Kent was concerned, however, about the reference to the restrictions. She discussed this with Ms Burl and her boss, Ms Murphy, who was at that time the Head of HR. The HR team (primarily Ms Murphy) decided to get legal advice. The advice they received led them to believe that the matter needed further investigation.

32. That legal advice led the the HR team to concluded that an investigation into this matter needed to be undertaken. They asked Kerry Oldfield Spence, the claimant's line manager to conduct the investigation.

33. An investigation meeting was held with the claimant on 6 November 2017. This meeting was conducted by Ms Oldfield Spence (Housing Manager) with Ms Murphy in attendance as note taker.

34. During the investigation meeting the claimant clarified that he had had two Tier 2 visas, one sponsored by RCCG and one sponsored by Hayes school. He confirmed he was no longer employed by either RCCG Winners Way Dartford or Hayes School, but said that he had made an application for permanent residency in the UK before his last visa expired. He told Ms Oldfield Spence, that although the application had been rejected, the claimant confirmed that an appeal was in process and that in the meantime he had "clocked 10 years in the UK" (144-145).

35. Following the meeting, the claimant provided the respondent with further documentation which included information produced by the Home Office about the 10 years continuous resident rule under which he applied for Indefinite Leave to Remain (143), the Grounds of Appeal submitted in his application for indefinite leave to remain (141-142), his Tier 2 General Visa documentation (131-136), relevant extracts from his contract with Hayes School (137-139) and a letter acknowledging that his application for indefinite leave to remain had been made to the Home Office before the expiration of his Tier 2 General Visa (140).

36. We note that the Visa documentation included guidance produced by the Home Office on the restrictions. It effectively meant that the claimant could do the following paid work:

- For his sponsor in the employment for which a Certificate of Sponsorship was assigned (subject to any notification of a permissible change to that employment, as defined in Home Office guidance)

- Undertake supplementary employment, meaning other employment in the same profession and at the same professional level as the employment for which his Certificate of Sponsorship was assigned provided:

    - he remained working for his sponsor in the employment for which his certificate of sponsorship was assigned; and

    - the other employment did not exceed 20 hours per week and took place outside the hours he was contracted to work for his sponsor in the employment for which his Certificate of Sponsorship was assigned (134).

37. Following a review of the above documentation, the respondent decided to suspend the claimant. This was because, based on further legal advice, the respondent had formed the view that the claimant's employment did not appear to fall within the restrictions on his right to work. The decision to suspend was taken by Ms Oldfield-Spence, but she relied heavily on the advice of Ms Murphy.

38. The decision to suspend the claimant was confirmed in writing to him in a letter dated 15 November 2017 signed by Ms Oldfield-Spence. The letter stated:

"*The concerns we have, after seeking legal advice, are as that the restrictions of being sponsored are that you may only take up secondary or supplementary employment with another employer if that employment meets these requirements:*

A. It does not exceed 20 hours per week; and
B. It is of the same profession of that you are employed in by your sponsor; or
C. It is a role that is on the shortage occupation list.

Your employment with us does not meet the above requirements and you are also no longer employed by your sponsor. The ECS result we have back has said we are only able to continue to employ you based on the above restrictions applying. Given we know your employment with us does not meet these restrictions it would seem that you are not legally allowed to work for us, especially as we have not taken over the sponsorship of you."

39. The claimant was asked to provide any information or other documents that he might have relevant to his right to work by no later than 22 November 2017 (148 – 149). The letter was sent by email to the claimant on 16 November 2017 by Ms Burl. In the covering email the claimant was advised not to contact his colleagues while being suspended, other than Ms Burl and Ms Murphy (149a).

40. The claimant did not provide any further supporting documentation. and so the respondent decided to proceed to a disciplinary hearing. Ms Murphy spoke to Ms Ademoye, then Head of Supported Housing for the respondent and asked her to identify someone to conduct the hearing. Ms Ademoye asked Ms Gray, Housing Manager Ventura House to do this.

41. On 28 November 2017, Ms Gray, wrote to the claimant inviting him to attend a formal disciplinary hearing on 1 December 2017. The claimant was advised of the matters he would be asked to respond to at that hearing, namely:

- "*that the organisation has reasonable belief that you do not have the right to work for us in your capacity as Night Manager;*
- *to continue to employ you places the Organisation at risk of Civil and/or Criminal sanctions."* (150)

42. The invitation letter informed the claimant of his right to be accompanied and advised that a potential outcome could be dismissal. The claimant was also reminded to bring to the hearing any documentation he had which could prove his eligibility to work in the UK (150-151). The letter was sent to the claimant by email from Ms Burl on 28 November 2017 (153).

43. On 30 November 2017 the claimant emailed the respondent to say he was unable to attend the hearing saying this was because he had "*severe pain in his chest area coupled with nasal congestion and cough which [his] GP suspected to be a relapse of Pneumonia infection which led to [his] Hospitalisation previously*." He added that he had "*been placed on an initial 7-day course of antibiotics and prescription cough and codeine*" which had started the previous day, 29 November 2017 (152).

44. Ms Burl replied to the claimant that same day on 30 November 2017 asking him to send a copy of his GP certificate. She said she would send a rescheduled meeting invite shortly (152). She later sent an updated invite to the rescheduled disciplinary hearing (to take place on 8 December 2017) (161). This was timed to coincide with the end of his 7 day treatment period. This invitation letter contained the same information as before, but further advised the claimant that if he failed to attend the hearing, the hearing may proceed in his absence and a decision made based on the evidence on the respondent's possession (155 – 156).

45. As the claimant had not been given a certificate by his GP he sent a copy of his prescription for antibiotics to the respondent instead. This was sent on 1 December 2017 (152 and 154). Ms Burl responded by asking him to send "*the GP note to say that [he] was unfit to attend [that day's] meeting*" because the respondent did not accept prescriptions as proof of a sick note (157).

46. On 7 December 2017 the claimant emailed the respondent to say that his health situation had not improved and he had been placed on "higher antibiotics while a referral to the hospital is being sought." He informed the

respondent that he was in more pain and feeling very weak and that he had specifically asked the GP to provide a certificate so that he could send it to the respondent. He attached that certificate and added that his GP had said he could self-certify for the previous week (161). He attached a medical certificate covering the period from 7 to 11 December 2017 giving his reason for absence as "chest infection on antibiotic treatment" (159).

47. The respondent rescheduled the hearing for 12 December 2017, the first date following the period covered by the fit note. A further letter confirming this was sent to the claimant on 8 December 2017 (164). Again, that letter contained the same information as the original letter, but further advised that the hearing may take place in his absence if he failed to attend (168 – 169).

48. On 11 December 2017 the claimant emailed the respondent and told them his health situation had not improved and he was not able to attend the re-scheduled hearing (170). The claimant provided a further fit note dated 11 December 2017 which gave the reason for his absence as a chest infection and covered the period from 11 to 17 December 2017 (171).

49. Initially Ms Burl emailed the claimant on 11 December 2017 to say that the hearing would proceed in his absence and invited him to provide any documents he would wish the respondent to consider (175). The claimant responded the next day, 12 December 2020, with an email making a number of points including expressing his view that "*holding the meeting in [his] absence, will amount to a violation of the rule of law especially the principle of fair hearing and it is clear evidence that you have made a decision before hearing.*" (174)

50. The respondent rescheduled the disciplinary hearing for 15 December 2017, despite the fact that this was a date when the claimant had been certified by his GP as unfit to work. The respondent took the view that this was a reasonable action because the claimant had not submitted medical evidence saying he was too unwell to attend the disciplinary hearing, only that he was not fit for work.

51. A final invitation letter was sent to the claimant on 12 December 2017. The claimant was advised to send any evidence of his right to work or any supporting documents by 14 December 2017 (172 – 173). The covering email from Ms Burl highlighted that the claimant's most recent fit note did not confirm that he was not fit to attend the meeting, but instead only confirmed that he was not fit to attend work and carry out his day to day role (178). She did not expressly say to him, however, that if he wished the respondent to postpone the hearing again, he should ask his GP for a more specific indication of his ability to participate in a disciplinary hearing.

52. The claimant emailed the respondent on 14 December 2017 challenging the decision to proceed with the disciplinary hearing at a time covered by his medical certificate. He also made a number of additional points about his right to work for the respondent in his role (177).

53. The claimant's emails of 12 and 14 December 2017 were treated as written submissions. We note that in his emails, that the claimant did not make any allegations of race discrimination against anyone. Nor did he contend that the ECS check result was inaccurate.

54. His argument was that the reference on the ECS check result to previous and supplementary and secondary was deliberate and aimed to preserve his right to work before his Visa expired. He said that "This implies that I have the right to work with any organisation that have been working for before my Visa expired" and added that he believed that the Home Office had explained this to [Ms Kent] when previous clarifications had been sought. He also suggested that the respondent had conducted several ECS checks with positive outcomes for him (177).

55. We note that the claimant did not argue that there was a problem with the form used for the purposes of the ECS check. We find this was because he was not provided with a copy of the form and nor was Ms Gray.

56. The respondent decided to proceed with the disciplinary hearing on 15 December 2017 in the claimant's absence. This decision was made by Ms Ms Murphy and supported by Ms Gray.

57. We were told that the reason for proceeding with the disciplinary hearing in the claimant's absence was because she considered that the respondent needed to urgently resolve the question of the claimant's right to work. This was because of its concern, based on the legal advice received, that the claimant was not working for it lawfully. In addition, the respondent did not want to keep the claimant suspended on pay any longer than necessary. The timetable for concluding the merger due diligence was also in the respondent's mind.

58. The respondent considered it was significant that the claimant's medical evidence confirmed that he was too unwell to attend work rather than said he was too unwell to attend the disciplinary hearing.

59. The hearing was conducted by Ms Gray with Ms Burl in attendance as a note taker. A note was taken of Ms Gray's thought processes including the fact that she waited 20 minutes at the start of the hearing to see if the claimant would arrive (184 – 185).

60. Ms Gray's decision was to uphold both allegations against the claimant and that he should be dismissed with a payment in lieu of notice. In her letter to him sent after the hearing on 22 December 2017 (186 – 190(a)), she explained she reached this decision because:

> "*1. [The claimant did] not have the requisite documentation to evidence that [he was] legally able to work in the UK.*
>
> *2. The [respondent was] therefore unable to establish that [the claimant] had the right to work in the UK.*

3. To continue to employ [the claimant] place[d] the [respondent] at risk of civil and/or criminal sanctions if it established [he did] not have the right to work." (187)

61. The reasoning for this decision was set out in full in the letter. Ms Gray recorded that:

- She had reviewed the first Tier 2 Visa provided by the claimant which permitted him to work for RCCG as a Minister of Religion;
- She had reviewed the later second Tier 2 Visa provided by the claimant which permitted him to work for Hayes School as a Teacher;
- The claimant was no longer employed by RCCG or Hayes School;
- The claimant was permitted to undertake supplementary employment under these visas, but only where he remained in employment with his licensed sponsor (which he was not);
- The work the claimant had been carrying out for the respondent had not been in the same profession or at the same professional level as the roles the claimant was permitted to perform under his two previous visas; and
- The claimant was in the process of applying for permanent residency in the UK. While this was pending, the claimant was entitled to remain in the UK on the basis of his conditions immediately preceding the appeal.

62. Ms Gray's letter also stated that she had considered alternatives to dismissal but noted that the respondent was unable to provide any employment that met the terms of the supplementary and/or secondary employment rules. She added that she did not believe the claimant could perform such work, in any event, because he was no longer working for a licensed sponsor (189).

63. Ms Gray's letter advised the claimant of his right of appeal (190).

64. The claimant's employment was terminated with immediate effect, but with a payment in lieu of notice. Ms Gray's letter also confirmed that 16 days accrued but untaken holiday were owed to the claimant. (189)

65. The claimant submitted an appeal against the above decision in a letter dated 2 January 2018 sent by an email of 3 January 2018 (191 – 193). He cited four substantive grounds of appeal:

1. The disciplinary hearing should not have proceeded in his absence due to illness;
2. The decision to dismiss him failed to take into account his pending appeal in relation to his right to remain in the UK;

3. The decision failed to consider that he had children and the impact of section 55 of the Borders, Citizenship and Immigration Act 2009; and

4. He had a right to work in the UK by virtue of section 3C of the Immigration Act 1971.

66. We note that the respondent's appeal process says the following:

"An employee has the right of appeal against any formal disciplinary taken. An employee may choose to appeal for example because:

- *They think the finding or penalty is unfair*
- *New evidence comes to light*
- *They think the disciplinary procedure was not conducted fairly.*

The appeal should not in most circumstances take the form of a complete re-hearing of the matter. The purpose of the appeal Is to determine whether the original disciplinary decision was reasonable or not, given the relevant circumstances.

An employee who wishes to appeal must lodge the appeal in writing with the HR Department, setting out briefly the grounds of the appeal, no longer than 5 working days after the employee has been notified in writing of the disciplinary penalty.

[The respondent] will write to the employee with details of the arrangements for hearing the appeal as soon as reasonably practicable and inform them of their right to be accompanied by a trade union representative or a work colleague at the appeal hearing." (85)

67. The claimant was invited to attend an appeal meeting on 11 January 2018. The claimant was advised of his right to be accompanied at that meeting, but we note that he attended alone (194).

68. The appeal meeting took place on 11 January 2018 as arranged. The hearing was conducted by Ayoku Ademoye, Head of Supported Housing Services with Ms Murphy in attendance as note taker. At the hearing the claimant was given a full opportunity to explain his grounds of appeal in more detail. Detailed notes of the meeting were contained in the bundle at pages 195 – 200.

69. During the appeal hearing the claimant did not make any allegations of race discrimination against anyone. According to the notes of the hearing (which we find to be accurate) he said that he believed that "*a pre conceived decision was made before the [disciplinary hearing and] the people who were hearing that meeting already made up their minds*" (198). He suggested that Ms Kent had contributed to this as she raised the issue from the beginning (198). He also said that he felt there was a vendetta against him from Ms Spencer-Oldfield (198) and accused Ms Burl of being "*just like a wall*" when dealing with the issue of his sickness absence (199).

70. We note that the claimant did not argue that there was a problem with the form used for the purposes of the ECS check. We find this was because he was not provided with a copy of the form and nor was Ms Ademoye.

71. Ms Ademoye did not give claimant her decision straight away, but instead adjourned the hearing to consider the matter. She had found the claimant's argument that he was able to work for the respondent as a "previous" employer by virtue of "Section 3C" convincing and wanted to double check it. She therefore insisted on speaking to the lawyers involved in providing the respondent with advice directly.

72. Once she had received this advice, she concluded that the claimant's dismissal should be upheld. She concluded that a fair and reasonable process had been undertaken in relation to the claimant's dismissal, but that in any event, dismissal was the correct outcome.

73. Her reasons were:

- She agreed with Ms Gray's view that the claimant was not legally able to perform the role of Night Support Manager for the respondent;

- She accepted that the claimant had the right to live and work in the UK under section 3C of the Immigration Act 1971 (pending the outcome of his appeal). However, she understood this was based on the same permissions that he had immediately prior to the application being made. As such the claimant's rights to work were based on his permission prior to his 2015 application when he was present in the UK on the basis of his Tier 2 (General) Visa.;

- In her opinion, the claimant's Tier 2 (General) Visa did not give the claimant the right to work on an unrestricted basis. The visa gave the claimant the right to work in the role for which he was sponsored (i.e. as a teacher for Hayes school) and carry out supplementary work or secondary employment;

- The role which the claimant was undertaking for the respondent did not meet the requirements for supplementary work or secondary employment. This would continue to be the position until such time as the claimant's appeal was determined in his favour, at some unknown point in the future; and

- The respondent was not required to consider section 55 of the Borders, Citizenship and Immigration Act 2009

74. The claimant was advised in writing by letter dated 31 January 2018 that the decision had been reached to dismiss the appeal and uphold the termination of his employment (216 – 219).

Pay Issues

75. Some issues with the correct calculation of the claimant's pay arose during his sickness absence (before his dismissal) and later in connection with his termination payment.

76. Ms Burl dealt with the sick pay issue. It arose because the claimant did not complete the correct self-certification form covering the first 7 days of his sickness absence and submit it before the payroll cut-off date of 10 December 2018. This issue was later resolved. Ms Burl advised the claimant that if he was unhappy with the way she had approached the pay issue he could write to Ms Murphy (190b).

77. Ms Kent dealt with the issue involving the claimant's termination payment. This was also resolved, but it took until the end of April 2018 to achieve this. The claimant told us that in the course of trying to resolve the issue, he rang and tried to speak to payroll and HR many times. He said that he was repeatedly told that Ms Burl was dealing with the matter and was the only person he could speak to, but she was never available.

78. The claimant has provided very little evidence of the number of times he tried to contact the respondent about his pay. His email of 25 April 2018 refers to him still being due a balance of £677.98 "*after several phone calls and emails*" (225).

79. We note that Ms Burl went on maternity leave after 2 March 2018 and so she was not at work for two months of the period to which the claimant is referring.

80. We accept the evidence of the respondent's witnesses that pay issues do occur within the organisation as a result of missed deadlines and mistakes and that it did not deliberately calculate the claimant's pay incorrectly.

Leave To Remain

81. Following the outcome of appeal, the claimant initiated the Acas pre claim conciliation process. During the conciliation process, the claimant's application for leave to remain was considered by the Upper Tribunal. He provided a copy of the judgment in the case (231 – 232) to the Acas conciliator involved who forwarded it to Ms Kent by email of 5 April 2018 (229).

82. Ms Kent had taken over responsibility for being the point of contact for the early conciliation process when Ms Murphy ceased to be Head of HR. She was therefore not involved at the start of the conciliation process. We note that Ms Burl was absent from work on maternity leave from 5 March 2018.

83. Ms Kent was not sure why she was being sent the judgment as the covering email did not explain this and there was no express request that the respondent reinstate the claimant in the email. Ms Kent discussed this with the new head of HR and because there was no request and also the claimant had only sent the judgment and not a visa, they decided not to do anything with it.

84. The claimant says that it should have been obvious to the respondent that the outcome he wanted from the conciliation process was to get his job back. He later indicated this on his claim form, submitted the following day, 6 April 2018 (9).

85. We have, quite properly, not been provided with any information about the discussions that took place between the claimant and the respondent during the early conciliation process. Based on what we have been told, we find that it was not obvious to the respondent that the reason the claimant sent them the outcome of his immigration appeal was because he wanted his job back.

LAW

86. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

87. Under s98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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.'

88. Tribunals must consider the reasonableness of the dismissal in accordance with section 98(4). This requires us to consider whether it was reasonable for the respondent to dismiss the claimant for that reason in all the circumstances of the case. We have also reminded ourselves that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for us to substitute our own decision.

89. The range of reasonable responses test applies to all aspects of the question whether an employee was fairly and reasonably dismissed. (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23, CA)

90. We accept that when considering the question of the employer's reasonableness, we must take into account the disciplinary process as a whole, including the appeal stage. (*Taylor v OCS Group Limited* [2006] EWCA Civ 702)

Direct Race Discrimination

91. Under section 13(1) of the Equality Act 2010 read with section 9, direct discrimination takes place where a person treats the claimant less favourably because of race than that person treats or would treat others.

Under section 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

92. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as he was.

93. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a respondent has contravened the provision concerned, the tribunal *must* hold that the contravention occurred, unless the respondent can show that it did not contravene the provision.

94. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others* [2006] IRLR 748; *Madarassy v Nomura International plc* [2007] IRLR 246, CA.)

95. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states:

'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

Effective Date of Termination

96. The effective date of termination in a situation where notice is not given, is governed by section 97(1)(b) of the Employment Rights Act 1996. That provides that where employment terminates summarily (that is, without notice), the effective date of termination is the date on which the termination "*takes effect*."

97. This is the date of dismissal and not the date of appeal, unless the respondent's disciplinary policy contained an express provision to the contrary (*West Midlands Co-operative Society Ltd v Tipton* [1986] ICR 192, *Drage v Governing Body of Greenford High School* [2000] ICR 899, CA)

ANALYSIS AND CONCLUSIONS

Race Discrimination

98. The claimant's claim of direct race discrimination is based on the allegation that Ms Burl is racist and deliberately engineered his dismissal through her manipulation of her senior colleagues. We consider this allegation to be completely without foundation. It has no doubt caused Ms Burl significant unnecessary distress.

99. In reaching this view we have considered the matters the claimant wished us to consider and make the following findings.

100. There was an initial conversation between Ms Burl and the claimant, but no evidence that she took against the claimant following the conversation or as a result of the conversation.

101. Ms Burl was not responsible for completing the Employer Checking Service Form that led the respondent to investigate the claimant's right to work. We have found that Ms Kent decided how to complete the form and did it herself. We have also found that her reasoning for the way she completed the form was genuine and therefore it cannot constitute a fact suggesting a prima facie case of direct race discrimination.

102. Ms Burl was also not responsible for the decision to proceed with the disciplinary hearing in the claimant's absence. This decision was made by Ms Murphy and supported by Ms Gray. Ms Burl was merely responsible for communicating it to the claimant.

103. Ms Burl was not responsible for making the decision to dismiss the claimant. She was a junior member of the HR department who was involved in undertaking administrative tasks and proving basic advice. There is no evidence that either Ms Gray or Ms Ademoye allowed themselves to be manipulated into discriminating against the claimant on the grounds of his race. Both made their own decisions about the claimant's right to work. Ms Ademoye ensured that her decision was based on specialist legal advice which she obtained directly.

104. Ms Burl was not responsible for the entirety of the pay issues that the claimant experienced. She was only involved in one of these issues. The more significant issues arose in connection with the claimant's termination payments which were dealt with by Ms Kent. Ms Burl was absent on maternity leave after 2 March 2018 when the claimant was seeking to resolve his pay issues. We accept the respondent's evidence that problems with pay arise for a number of its employees from time to time and this issue was not exclusive to him or black members of staff.

105. Ms Burl was also on maternity leave when the claimant sent the respondent details of the outcome of his immigration appeal via Acas. The decision not to respond to this was made by Ms Kent in conjunction with the new head of HR. The appeal outcome was received four months after the claimant had been dismissed in circumstances where it was not clear that the claimant was asking for his job back. We do not consider this to be a fact from which we can properly infer a prima facie case of race discrimination.

106. Having rejected the above, we have considered if there are any other facts which suggest a prima facie case of direct race discrimination. Or if, standing back from the detail and looking at the overall position, this is a case of potential direct discrimination.

107. In fact, there is additional evidence that points us to the opposite conclusion. At the same time as considering the position of the claimant, Ms Burl and the respondent had to consider the right to work of another employee who was also a black man from Africa. The respondent initially took action to prevent this employee from working for it as a bank worker because the respondent was concerned that he had not provided it with evidence of his right to work. However, as soon as the employee provided the relevant documentation (within a few days), the respondent reversed this decision. This suggests that the reason for the respondent's different treatment of the claimant was based solely on his failure to provide documentation showing his right to work and not his race.

Unfair Dismissal

Reason

108. We find that the respondent's reason for dismissing the claimant was its belief that the claimant did not have a legal right to work for it. This is a fair reason by virtue of section 98(1)(b) providing the respondent's belief was reasonable.

109. The respondent's investigations into the claimant's right to work included meeting with the claimant to understand his position, reviewing all of the documentation provided by the claimant and considering his written submissions. The respondent also undertook its own research into the claimant's right to work and took specialist legal advice.

110. As a result of its investigations, the respondent formed the belief that the claimant's right to work was based on section 3C of the Immigration Act 1971. This section became operative when the claimant applied for indefinite leave to remain in the UK. However, the claimant's right to work was subject to the same restrictions as under his Tier Two General Visa.

111. Under that Visa, the claimant was able to work for his previous sponsor (Hayes School). In addition, he was entitled to undertake supplementary work or secondary employment which met certain conditions. The conditions were not met in relation to the claimant's role as a Night Support Manager. The role was not as a teacher and is completely different. We found the claimant's attempts to try and argue otherwise lacked any merit or credibility. The Night Support Manager role was also for more than 20 hours per week.

Procedure

112. We are satisfied that, when looked at as a whole, the respondent followed a fair procedure.

113. The procedure was a three stage process with different people involved at each stage. There was an escalation in their seniority enabling the earlier decisions in the process to be overturned.

114. The decision to suspend the claimant was not made until after an investigation meeting with him and was based on the legal advice received by the respondent.

115. For the most part, the claimant was provided with clear information about the case against him and was warned of the potential outcome of the process. We note, however, that neither the claimant nor Ms Gray or Ms Ademoye were provided with a copy of the form used to undertake the ECS check. Had this been provided to the claimant, it would have enabled him to make the same arguments during the internal process as he has made in front of the tribunal panel.

116. We do not think this omission was significant enough to render the procedure unfair or that would have made any difference to the outcome, however. The form was simply a catalyst. Once the ECS check came back the respondent was entitled to investigate it, even though the form had been incorrectly completed. In addition, the respondent would have been entitled to insist, ahead of the merger, that the claimant provided copies of his right to work documentation rather than rely on the ECS process. He would not have been able to do this.

117. The claimant was offered the opportunity to be accompanied at meetings, but chose to attend alone. He was also given advance notice of all meetings.

118. We were concerned about the respondent's haste to conduct the disciplinary hearing and the fact that it was conducted in the claimant's absence. We understand the respondent's reasons for proceeding, however, and find that to do so was within the range of reasonable responses for reasonable employer. We consider that the respondent could have done more to communicate the need for the claimant to provide medical evidence that he was too unwell to attend the hearing, in the form of a GP letter or similar. Busy GPs are often reluctant to do more than issue a fit note unless the circumstances are made absolutely clear to them.

119. We are firmly of the view, however, that any procedural concerns we have with the disciplinary hearing were resolved in their entirety by the quality of the appeal hearing. The claimant was given a full opportunity to argue his case and make whatever points he wished. Ms Ademoye's approach at the appeal hearing was exemplary.

Was dismissal within the range of reasonable responses of a reasonable employer?

120. We consider that dismissal was firmly within the range of reasonable responses of a reasonable employer.

121. The respondent considered alternatives to dismissal, but formed the reasonable belief that it could not offer the claimant any role that he could lawfully perform under the terms of his Tier Two General Visa.

122. The claimant has argued that the respondent's decision should have been postponed pending the outcome of his immigration appeal. This was an option open to the respondent, but one that carried significant risk. It reasonably believed that continuing to employ the claimant put it at risk of incurring civil or criminal penalties. The claimant was not able to tell the respondent when the appeal would be heard, nor to reassure them that it was certain that it would be successful. In our judgment, it was within the reasonable range of responses of a reasonable employer not to wait.

Date of Termination of Employment

123. The respondent was right to treat the 22 December 2017 as the date of the claimant's termination of employment. This is the usual position. There is nothing about the wording of the appeal process within the disciplinary policy that requires any different treatment for the respondent's employees. This includes the reference to it applying to employees. The appeal process applies to all disciplinary penalties and therefore it is sensible for it to refer to employees rather than former employees.

124. The claimant was, eventually, paid all payments that he was due based on a termination date of 22 December 2017 and so his claim for unpaid salary, notice pay and arrears of pay is without merit.

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Employment Judge E Burns
10 November 2020

Sent to the parties on:

.10/11/2020

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For the Tribunals Office : OLU