EMPLOYMENT TRIBUNALS

Claimant: Mr Ceesay

Respondent: City Facilities Management Ltd

Employment Judge: E P Morgan
Members: Mr Taj
Mr Pearse

Hearing: **By CVP: 7 & 8 December 2020**
Deliberations in Chambers: 9 December 2020

Representation:

Claimant: In Person
Respondent: Mr Brown (Solicitor)

JUDGMENT

1. The Claimant was unfairly dismissed contrary to section 98 (4) Employment Rights Act 1996.

2. The claim of automatically unfair dismissal contrary to section 104 of the Employment Rights Act 1996 is not well founded and is dismissed.

3. The claim of direct race discrimination contrary to section 13 of the Equality Act 2010 is not well founded and is dismissed.

4. The matter will be listed for a remedy hearing with an estimated time of 1 day. The hearing will be conducted by CVP.

REASONS

The Claim

1. By his claim lodged with the Tribunal on 28 August 2019, the Claimant alleges he was unfairly dismissed. He believes his dismissal was on the grounds of his race and/or was, in any event, procedurally and substantively unfair. Further, he alleges that the dismissal was on account of his having asserted a statutory right to remain on his existing terms and conditions of employment; the benefit of which he retained following a TUPE transfer some years earlier.

The Response

2. The claims are denied in their entirety. It is admitted that the Claimant was dismissed summarily. The Respondent asserts that the reason for the Claimant's dismissal was conduct; being the Claimant's unauthorised absence from the workplace which, it is said, constituted 'gross misconduct'. It is denied the Claimant was subject to any form of discrimination on the grounds of race; whether by way of dismissal or at all. It is also denied that the dismissal was in any connected with the Claimant's wish to remain on his existing terms and conditions of employment.

Issues Requiring Determination

3. In advance of the hearing, case management orders were issued in the usual way. At the outset of the hearing, the parties confirmed the orders had been complied with. Neither raised any preliminary legal or housekeeping matters requiring consideration prior to reception of the evidence. It was further agreed that the issues requiring determination where those identified within the earlier case management hearings; supplemented by an agreed statement of facts of 14 April 2020 [**p45**].

Evidence

4. The Tribunal was provided with an agreed bundle extending to some **125** pages. Within the agreed bundle, there was also a document entitled: Agreed Facts [**page 45**]. As requested by the parties, the Tribunal has read and had regard to the terms of that document in the formulation of its factual findings in this Judgment.

5. The Tribunal received evidence from the following:

    5.1 On behalf of the Claimant: The Claimant, Mr Ousman Yarboe and Mr Baba Darboe; and

    5.2 On behalf of the Respondent: Mr Brownridge (Cluster Facilities Manager), Mr Constable (Depot Hygiene Manager) and Mr Macauley (Facilities Manager).

Principal Findings of Fact

6. Having considered the evidence adduced by the parties and upon the balance of probabilities, the Tribunal makes the following primary findings of fact:

    6.1 The Respondent is concerned in the provision of cleaning and related services to logistics and retail operator clients within warehouse facilities and other outlets;

    6.2 The Claimant was transferred to the employment of the respondent in 2011. Since that time, he has remained upon certain of his original contractual terms and conditions insofar as they relate to pay and working hours. For the purposes of these proceedings, it is conceded that the Claimant is to be taken as having continuity of employment with the Respondent from 2006. Accordingly, at the time of the events with which the Tribunal is concerned, the Claimant enjoyed somewhere in the order of 13 years' service;

    6.3 The Claimant was employed by the Respondent as a cleaner. In that capacity he operated as a member of a two person team of employees allocated upon a four-week shift rota basis. At all times relevant to these proceedings, the Claimant worked exclusively on the night shift. This meant that he would, ordinarily, report to and be managed by, Vanessa Martin, a Depot Hygiene Manager. In this capacity, Ms Martin would be required to approve any annual leave requests. There was no HSS on the night shift;

6.4 The Tribunal heard evidence, and accepts, that the demographic of the Respondent's workforce is comprised of approximately 10-15% BME employees. The claimant is Black African. He originates from The Gambia. Members of his immediate family, including his mother, have remained there;

6.5 In consequence of a TUPE transfer which took place in July 2011, the Claimant was one of a significant group of employees who had retained pre-transfer terms and conditions. Like his colleagues, the Claimant was approached periodically and given the option to migrate to the Respondent's existing terms and conditions. The Tribunal is satisfied that approaches of this kind occurred on an annual basis; coinciding with the annual pay review exercise. The Tribunal finds that in making these approaches, there was no attempt to single out the Claimant. Rather, he was, together with his colleagues, part of a wider workforce based process, applied to those employees who had chosen to remain upon their original contractual (i.e. pre-transfer) terms;

6.6 Throughout the period with which the Tribunal is concerned, the Respondent operated a detailed annual leave policy; with the annual leave year operating from April to March. Pursuant to the terms of this policy, the Respondent did not permit accrued unexercised leave to be carried over from one leave year to the next. The Tribunal finds that the terms and operation of the annual leave policy were widely known within the Respondent organisation. Employees, including the Claimant, understood that they were obliged to give four weeks' notice of prospective leave. This obligation was recognised as being of particular importance in relation to those employees seeking "extended leave". Within the context of this particular employment, "extended leave" was said to comprise a single leave period exceeding 10 consecutive days. The scheme of the annual leave policy was affirmed by, amongst other things, an 'Absence Policy' operated by the Respondent. Taken together, these policy arrangements confirmed the Respondent's perspective that the requirement of cover and co-ordinated absences were important to operational efficiency and the attainment of the service levels necessary to meet client demand;

6.7 Prior to 2017, the Claimant had demonstrated his familiarity with the requirements of these policies, through the exercise of annual leave. There is no suggestion of any ambiguity or uncertainty as to the terms of the policies in question, or, the process to be followed. Indeed, at some stage during 2017, the Claimant requested and obtained permission for an extended period of leave. Whilst the precise date upon which he did so is unclear, the Tribunal is satisfied that this period of extended leave occurred within the three years preceding April 2019;

6.8 During 2018, the Claimant became the subject of a disciplinary procedure. This was said to have related to workplace practices; including an allegation that the Claimant had left operational equipment unattended. Mr Brownridge was directly involved in the disciplinary process adopted at that time. Matters culminated in the imposition of a final written warning. This warning was applied to the Claimant on 23 July 2018. It was not the subject of appeal. The Claimant does not – within these proceedings – raise any challenge or criticism in connection with the conduct of the disciplinary process, Mr Brownridge's involvement in it, or, the disciplinary sanction which was imposed at that time;

6.9 For day to day operational purposes, the Claimant reported to Vanessa Martin and Dawn Whittle (HSS). The Tribunal is satisfied that Mr Brownridge was not based at the same site as the Claimant. He was in fact Miss Martin's line manager. As a consequence, the operational interaction between the Claimant

and Mr Brownridge was extremely limited. The Tribunal accepts the evidence of Mr Brownridge to the effect that they had shared no more than 15 conversations over the period of 8 years which had elapsed since the Claimant was transferred to the employment of the Respondent. There is no suggestion of any antagonism or adverse interaction between Mr Brownridge and the Claimant;

6.10 As at March 2019, the Claimant had accrued 3 days annual leave which was outstanding. If the Claimant was to exercise this leave in line with the Respondent's policies, he needed to do so prior to 31 March 2019. In conformity with the annual leave policy, the Claimant made the necessary request and the approval of this leave was granted;

6.11 The Claimant's mother lives in The Gambia. On or about 25 March 2019 the claimant became received notice that his mother was seriously unwell and required significant cardiac surgery. On receiving this news, the Claimant telephoned Mr Brownridge. In doing so, the Claimant recognised that his own line manager (Ms Martin) was herself absent and further that the supervisor (Miss Whittle) did not have the necessary authority to approve any further holiday requests in Ms Martin's absence;

6.12 At the time of receiving the Claimant's telephone call, Mr Brownridge was driving. The conversation involved the Claimant making a request for leave which was both urgent and, inevitably given its purpose, was to be extended. In the view of the Tribunal, the Claimant was, in effect, seeking a dispensation from the needs to provide the necessary 4 weeks' notice of proposed absence; whilst at the same seeking an extended period to allow him to return to The Gambia and be with his family. The Tribunal finds that both requests implicitly involved a recognition on the part of the Claimant that there were conditions under the annual leave policy which but for his family difficulties, required compliance. As an experienced manager, Mr Brownridge was aware of the conditions determining eligibility for extended leave under the annual leave policy. He also had a recollection that the Claimant had, at some stage in the preceding three years, been granted a request for extended leave. He was therefore of the provisional view that the Claimant was not eligible for extended leave at the time of making the request of 25 March 2019;

6.13 The Tribunal finds that it was during the course of this conversation that the Claimant gave the reason for the request as relating to his mother's ill-health. Initially he did not disclose to Mr Brownridge the significance or detail of his mother's medical condition. However, the Tribunal is satisfied that he did impress upon Mr Brownridge the nature of the urgency and the seriousness of her medical position at a later stage in the conversation;

6.14 Mr Brownridge's response was initially unsupportive. This was on account of fact that he considered the claimant to be ineligible under the terms of the annual leave policy. The Tribunal is satisfied that the Claimant became agitated. It was on this account that Mr Brownridge issued a warning that if the claimant was unable to control either his tone or his manner of communication, the conversation would be brought to an end. Shortly after this exchange, the conversation was terminated. Immediately thereafter, Mr Brownridge contacted the Respondent's Human Resources team. By this means, he was able to satisfy himself of both the conditions of eligibility under the annual leave policy and the fact that the Claimant had received the benefit of an extended period of leave in the 3 years preceding this telephonic request;

6.15 Equipped with this confirmation from Human Resources, and having stopped his vehicle, Mr Brownridge felt himself able to resume discussion with the Claimant with sufficient focus. He returned the Claimant's telephone call. During the course of the resultant conversation Mr Brownridge informed the

Claimant that it would not be possible for him to exercise an extended period of leave on the dates contemplated. However, the Tribunal is satisfied that Mr Brownridge did make a counter proposal, namely: that the Claimant should exercise the initial 3 days accrued leave on the days for which they had already been booked, return to work, and thereafter be given a further period of leave of 10 days. From the Claimant's perspective, the adoption of this proposal had two immediate and unwelcome consequences, namely: (a) it would prevent the Claimant from leaving for The Gambia immediately; and (b) the discontinuous nature of the arrangement, would deprive the Claimant of the ability to be with his mother at the time she required his presence most (i.e. in the period immediately preceding her surgery). Mr Brownridge's counter proposal would also have increased significantly the financial cost of the Claimant's journey. There is no suggestion of any question being raised over the nature of the Claimant's proposed journey or the matters which prompted it. The Tribunal finds that the Claimant made clear this request was the product of a family emergency; one which required his return to The Gambia. For the Claimant, this was not a matter of choice. In his view, the counter proposal would have the effect of depriving his mother of his arrival and presence at the family home at the very time when his attendance with his family was most acutely needed. The parties were unable to agree a method by which the Claimant's aspirations could be fulfilled;

6.16 Whatever else may be said with regard to this conversation and eventual exchange, the Tribunal is satisfied that during the course of this particular discussion the Claimant made clear that he would not be in a position to return to the workplace prior to 18 April 2019. The Tribunal is satisfied that this communication was made not as an act of belligerence on the part of the Claimant, but rather, as an indication of the invidious position in which the Claimant considered he was, by reason of the family emergency, placed. In this discussion with Mr Brownridge, the Claimant made clear he was confronted with an irreconcilable dilemma. From both a familial and cultural perspective, it was important that he should be seen to be providing support to his mother in The Gambia whilst she was awaiting serious surgery. The Tribunal is satisfied that the Claimant was during the course of this conversation, seeking to impress upon Mr Brownridge what was for him a situation in which there was, in reality, no choice. He communicated this dilemma to Mr Brownridge; making clear that he could not be present at work until 18 April 2019;

6.17 Given this position, Mr Brownridge was under an obligation to refer the Claimant to the operation of the Respondent's absence procedures and did so. The Claimant accepted that, in due course and upon his return, he might be subject to the Respondent's procedures and "face the book'. Importantly, at no stage during this conversation was mention made of the emergency leave or compassionate leave policies operated by the Respondent;

6.18 In their discussion concerning the potential application of the absence policy, the conversation and quality of understanding between the Claimant and Mr Brownridge entered into particular difficulty. According to Mr Brownridge, he was alerting the Claimant to the fact that there would need to be a return to work interview and the operation of absence policy procedures might follow thereafter. The Claimant accepts that this was his own understanding as far as it went. However, from the Claimant's perspective nothing was said to him to indicate that the period of absence beyond the authorised paid annual leave, would be treated or categorised as absence without leave (AWOL) or misconduct. He formed the view, that the additional absence had been notified to the Respondent and would be treated as a period of absence in respect of which he would receive no pay;

6.19 The Tribunal finds that the discussion between the Claimant and Mr Brownridge concluded with the position that both parties had communicated what they considered to be their own perspective and expectation in clear and unequivocal terms. The Tribunal is satisfied, however, that whilst they believed they shared an understanding, they were in fact at cross purposes;

6.20 The Claimant was, in consequence of both the accrued leave from the current leave year and the concession given to him by Mr Brownridge, able to embark upon leave immediately. This was an important concession. At the end of the conversation both understood that the Claimant was able to exercise immediate authorised paid leave for a consecutive period which extended until 10 April 2019. There is no suggestion that the concession placed any operational difficulty upon the Respondent or that the Claimant's departure imperilled operational efficiency;

6.21 Before embarking upon the leave period, the Claimant had a further discussion with Dawn Whittle. It involved the completion and submission of an annual leave request form [**page 79**]. The document was thereafter processed for signature by the Respondent's managers. The Tribunal is satisfied that this took place after the Claimant had embarked upon the leave in question. The Tribunal is also satisfied, however, that in the completion of this document, Dawn Whittle had annotated the request form with a return date of 18 April 2019. This followed a conversation with the Claimant;

6.22 It follows, that the annotation of 18 April 2019 was made prior to the document being presented to the Respondent's managers for approval of the leave itself. The Tribunal considers the annotation was conspicuous and could not have been overlooked by any person called upon to countersign the form. In reality, the holiday leave for which the Claimant had made requests and obtained permission, was also clearly recorded on the same document. The form was completed so as to indicate a defined period of approval. Somewhat unusually, however, and from the Tribunal's perspective, significantly, there was no attempt on the part of management to engage with the annotation of the anticipated return date of 18 April 2019;

6.23 The Claimant travelled to The Gambia in order to be with his family. Whilst there, he was alerted to correspondence having been received at his home address indicating the respondent had activated its Absence Policy with regard to absence without leave. Having been so alerted, the Claimant attempted to make contact with the Respondent's HR Department: "People Services". He was unable to do so;

6.24 The Claimant returned to work on 18 April 2019. It was his evidence, which was not contradicted, and the Tribunal accepts, that he participated in a return to work interview and was counselled in connection with the duration of his absence. He then continued to work his shifts as rostered between 18 April 2019 and 26 April 2019. In that period, and by letter dated 23 April 2019, the Claimant was invited to participate in an investigatory interview concerning potential misconduct. The misconduct was to comprise unauthorised absence, failure to comply with the Respondent's Absence Policy and non-compliance with a management instruction. He attended the interview with his manager (Vanessa Martin) on 26 April 2019. It was Ms Martin's task to determine whether or not the Claimant's absence and alleged non-compliance was such as to generate the potential for disciplinary action. She considered the Claimant had been intentionally absent and further, that the case was one of potential misconduct justifying a disciplinary process. Within the investigation process conducted by Ms Martin, there was no attempt to probe the provenance or rationale of the return date on the annual leave form; a form which, on the evidence before the Tribunal, she in fact processed. Similarly,

the explanation provided by the Claimant for the timing and duration of his absence was seemingly not challenged or taken into account;

6.25 By letter dated 30 April 2019, the Claimant was invited to attend a disciplinary hearing. The Tribunal is satisfied that the invitation included a specific direction to the Claimant to make contact with the Respondent in the event that either the appointed time and/or venue were likely to prove inconvenient. The letter also made express reference to the right to be accompanied. The Claimant did not respond to the letter of invitation;

6.26 It was the Respondent's practice as far as possible, to convene employment related meetings and hearings during in line with the employee's shift pattern. The Tribunal accepts the explanation given on behalf of the Respondent to the effect that this arrangement was intended to ensure meetings of this kind did not trespass upon the ordinary rest periods or days off to which the employee might otherwise be entitled. The Tribunal heard evidence that this practice was subject to alteration where there had been a suspension. However, there is no suggestion that the Claimant was suspended or considered a candidate for suspension;

6.27 The disciplinary hearing proceeded on 3 May 2019 as indicated in the invitation. The hearing was chaired by Mr Constable. The Claimant attended unaccompanied. He did not request an adjournment or indicate any difficulty in securing a colleague or representative to accompany him. In the view of the Tribunal, the Claimant is an articulate person who had made a choice to proceed to the hearing without assistance. The Claimant considered he had already been counselled in a return to work interview; with the result that he did not attach the same degree of seriousness to these matters as might otherwise have been conveyed by the Respondent's correspondence. In this respect, the Claimant was, amongst other things, drawing upon the fact he had not suspended;

6.28 Mr Constable is a senior manager. The Tribunal accepts his evidence that he is highly experienced in the conduct of employee related matters and workplace hearings. The Tribunal is satisfied that Mr Constable had both the authority and competence to convene a meeting and make a determination with regard to the allegations which had been presented against the Claimant. Before the Tribunal, the Claimant disputed Mr Constable's authority. The Tribunal is satisfied that there was no basis for him to do so. The Tribunal also finds that there was no adverse or other history between the Claimant and Mr Constable which could have undermined his impartiality or affected his determination of the issues he was required to consider;

6.29 During the course of the disciplinary hearing, the Claimant was questioned about his conversations with Mr Brownridge and, in particular, the Respondent's perspective that the Claimant had deliberately acted in breach of a management instruction. In the view of the Tribunal, the Claimant's responses confirmed the reason for his requested absence. There was no suggestion from management to the effect that his account was challenged or was considered inauthentic. Instead, the management focus was upon the notion that the Claimant was considered to have *failed to return* and *failed to* report his non-attendance (i.e. had been AWOL). The Claimant indicated he did not accept this depiction of what had occurred. The divergence of perspective involved a general discussion around the absence request form [**page 79**] and the dates which had been expressly agreed as amounting to paid holiday leave. There was no dispute that the Claimant had requested, and obtained, immediate leave without the necessary 4 weeks' notice. There was equally no dispute that the Claimant had the benefit of 3 accrued days

from the preceding holiday year. In the view of the Tribunal, the dispute was in fact confined to the explanation and/or justification for what was considered to be the Claimant's non-reporting and non-attendance at work outside the paid holiday leave period (i.e. the absence from 10 April 2019). The Respondent considered the Claimant was required to notify management of his non-attendance from 10 April 2019 onwards. The Claimant considered he had already openly indicated his intentions to Mr Brownridge, later Ms Whittle and had thereafter ensured this information had been annotated upon the holiday request form; the same form which had, during his holiday absence, been seen and signed by Ms Martin. From the Claimant's perspective, therefore, there had been no failure to notify absence and he was not in fact AWOL. He considered the Respondent's managers were aware of the reason for his absence and his location; having been expressly informed in the conversation with Mr Brownridge;

6.30 During the disciplinary hearing, there was no attempt to receive any oral evidence from Mr Brownridge. Nor was any consideration given to requesting him to provide further clarification of the statement obtained from him in the investigatory process. In fact, Mr Constable, did not carry out any additional investigation or interviews of his own. Mr Constable was therefore confronted with a difficulty. Namely: that the Claimant considered there had been an understanding to the effect that he would remain absent until 18 April 2019; with only part of that period of absence being treated as annual paid holiday leave and thus paid. This perspective - which had been the consistent explanation offered by the Claimant - was not tested or otherwise considered;

6.31 The Tribunal is satisfied that reference was made to the holiday request form during the disciplinary hearing. However, there is no indication that Mr Constable considered it necessary to verify how or by what means the return date had been annotated on the form itself. He did not have the benefit of any evidence from Dawn Whittle or Ms Martin regarding the completion and processing of that form. As a result, during evidence before the Tribunal, he was required to draw upon assumption as to what he believed would have occurred at the time of its completion, countersigning and submission. The Tribunal finds that there was therefore no inquiry within the disciplinary hearing concerning the potential relevance of that annotation or the part played by the Claimant, if any, in securing the completion of the form in that way. Similarly, there was no inquiry made of the managers who had signed the leave form as required under the annual leave policy arrangements;

6.32 Mr Constable considered the information available to him. Like Mr Brownridge (and indeed Ms Martin) he did not give consideration to the potential for emergency leave and/or compassionate leave or indeed, whether the Claimant would have been eligible at that time under either policy. In his view, the Claimant had been absent from the workplace beyond the period approved as annual leave. Mr Constable concluded there had been a failure by the Claimant in the period following 10 April 2018 to notify his employer of his absence. There were, in Mr Constable's view, no mitigating or extenuating circumstances. Despite this, he informed the Tribunal - and the Tribunal accepts - that he approached the issue of disciplinary sanction with considerable reluctance. Having done so, he concluded that the appropriate sanction was dismissal. In reaching this conclusion, he was conscious that the behaviour in question would in other circumstances have led to the imposition of a warning. However, as he made clear in his evidence to the Tribunal, given the Claimant's disciplinary warning from the preceding year, he viewed that the only sanction available to him was that of dismissal. He considered his 'hands were tied';

6.33 In the view of the Tribunal, the discussion held between Mr Constable and the Claimant in the disciplinary hearing was successful in identifying their

respective positions. However, insofar as the hearing was intended to engage with the detail of the Claimant's explanation and understanding, it failed to do so. This failure occurred in the context of a case in which the account advanced by the Claimant had been received without contradiction or suspicion of incredulity. Despite these realities, Mr Constable's notes of his deliberations [**page 105**] record there were no mitigating circumstances. Further, the outcome letter [**page 107**] suggests that the Claimant had in fact admitted the misconduct. The Tribunal is satisfied that whilst the Claimant had admitted the chronology, he had not at any time admitted any wrongdoing. Similarly, and contrary to the terms of the same letter, the Claimant had indeed provided an explanation for his absence and the reasons for it. It was not correct to suggest that no explanation has been provided. In fact, the explanation provided by the Claimant had been repeated on a number of occasions and had not been the subject of challenge;

6.34 The Claimant was informed of his summary dismissal in writing on 14 May 2019 [**page 107**]. He exercised his right of appeal [**page 109**]. Mr Macauley was tasked with hearing the appeal. Like Mr Constable, Mr Macauley had no prior dealings with the Claimant and there was no history between them. Mr Macauley considered it was his role as appeal officer to carry out a review of the process which had been undertaken. He did not conduct any additional interviews or inquiries. The notes of the appeal, like the disciplinary hearing, focus upon the limited nature of the permission given for annual holiday leave. Thereafter, Mr Macauley proceeded upon the basis that the remaining period during which the Claimant was away from the workplace was unapproved and had not been the subject of prior notification from the Claimant. He considered the Claimant had failed to adhere the absence notification procedures and thus had been AWOL. The Claimant attended the appeal hearing with the benefit of a Union Official: Mr Bywater. The Claimant provided a detailed explanation to the effect that he had informed Mr Brownridge of his inability to return to work prior to 18 April 2019. In this explanation, he confirmed his own recollection that he would 'face the book' on his return. In the view of the Tribunal, Mr Macauley accepted (and relied upon) this statement only insofar as it indicated the Claimant's awareness that there might be consequences for his continued absence beyond the approved annual leave. In his conduct of the appeal, Mr Macauley did not delve into either why the Claimant considered he had no other option, or, in fact whether there were other options available to the Claimant or the Respondent. Nor was any consideration given to the annotation upon the holiday leave form and/or the Claimant's assertion that he had given advance notice of his intended absence and the reasons for it. It is clear that Mr Macauley considered only the grounds of appeal. He did not give any consideration as to whether the sanction of dismissal was itself appropriate or proportionate. He did, however, record that he considered there were no mitigating circumstances. His reasons for coming to this view are not recorded. However, the notes provided [**page 119**] indicate he also considered no further investigation was required and the absence in question had been 'admitted'. This represented a less than complete engagement with the issues before him and indeed, betokened a lack of engagement with the explanations which the Claimant had himself provided to Mr Macauley and others in the disciplinary process;

6.35 By letter of 12 June 2019 [**page 121**] the Claimant was informed his appeal had been dismissed and the decision of summary dismissal had been upheld;

6.36 The Respondent operates both compassionate leave and emergency family leave policies. The Absence Policy [**page 51**] acknowledges that absence in respect of either compassionate leave or family emergency would not constitute a trigger to the application of the absence policy itself. The Tribunal

accepts the limited evidence provided to it, which confirms that the compassionate leave policy is not confined to occasions of bereavement. The policy itself was not produced. Mr Constable was unable to express any familiarity with it. The evidence of Mr Brownridge indicated that he was in a similar position. The Claimant considered he was confronted with a family emergency which was compelling. The Respondent has not at any time challenged the veracity of the circumstances which prompted the request for leave or the purpose of the Claimant's return to The Gambia. Despite this, it is clear that no consideration was given – at any stage of the processes to which the Claimant was subjected- to either: eligibility under those policies; or, the fact that the Claimant was confronted with a family emergency which compelled him to proceed as he did. Furthermore, no consideration was given to the important question of whether the Claimant had – in his conversation with Mr Brownridge and the completion of the annual leave form – given advance notice of absence; such that he could not be said to have failed to notify the Respondent as alleged in the disciplinary process.

Submissions

7. On behalf of the Claimant, it was submitted that the dismissal was on account of either his race or his resistance to contractual changes. In any event, the Claimant's fall-back position is that the reason for his dismissal was not conduct and the procedure adopted by the Respondent was demonstrably unfair; with the sanction of dismissal being excessive and disproportionate.

8. On behalf of the Respondent, it was submitted that there was no form of discriminatory conduct, on the ground of race or otherwise. It was also submitted that the Claimant's dismissal was wholly unconnected with the annual discussion around terms and conditions. Rather, the reason for the dismissal was the Claimant's conduct; such being an admissible reason. Further, Mr Brown submitted that the sanction of dismissal was the product of a fair investigation and procedure and ought to be considered 'fair' having regard to all of the circumstances of the case. In the alternative, he submitted that if and to the extent there had been any want of procedure, it was self-evident that the Claimant would have been dismissed following a fair procedure in any event; such that a significant reduction in compensation was required in line with the *Polkey* principle.

9. Neither party referred the Tribunal to any legal authorities.

Conclusions

(1) Reason for Dismissal

10. For the purposes of Part X of the Employment Rights Act 1996 (ERA) it is for the Respondent to show the reason for the admitted dismissal. It is well settled that the reason may be a set of facts known to, or beliefs held by, the respondent. The burden of proof has been described as notoriously low. Having considered the entirety of the evidence before it, the Tribunal has no hesitation in concluding that the reason for dismissal in this case was the Respondent's belief that the Claimant had been guilty of misconduct, namely: unauthorised absence and failure to comply with a management request.

11. In reaching this conclusion, the Tribunal has considered the Claimant's assertion that the principal reason for his dismissal related to the assertion of rights for the purposes of section 104 ERA. The Tribunal is satisfied that the Respondent had a considerable number of employees who had migrated to its workforce by reason of transfers under regulation 3(1)(b) TUPE. In the view of the Tribunal, this is hardly surprising given the services provided by the Respondent. It is clear to the Tribunal that the Respondent and its managers were familiar with both the annual request for reconsideration of terms and conditions and the right of the relevant affected

employees to maintain their existing terms. The agreed evidence before the Tribunal confirms that such discussions were common place and were not confined to the Claimant. There is no suggestion that others had been dismissed for reaching the same conclusion and/or expressing the same choice as the Claimant. The Tribunal finds that management had no difficulty with the exercise of choice and/or the decision of individual employee's in response to the approaches which were made. Indeed, certain of the managers recognised that overall the retention of existing terms was in the best interests of the individual employee and considered the choices made in line with their own preferences. Further, the Tribunal is satisfied that these were matters which played no part in the deliberative processes of Mr Constable and Mr Macauley.

12. In consequence, the claim of automatic unfair dismissal contrary to section 104 ERA must fail and is dismissed.

13. The Claimant also contends that the real reason for the dismissal was his race.

14. The Claimant did not dispute the fact that the Absence Policy was well known within the workplace as imposing obligations with which all employees were required to conform. Despite this, the Claimant relies upon the act of dismissal as an act of less favourable treatment and direct discrimination contrary to section 13 of the Equality Act 2010.

15. The Equality Act 2010 is not concerned with unfair treatment but less favourable treatment on the grounds of a protected characteristic. In this instance, the protected characteristic relied upon is the Claimant's "race". For this purpose, of this allegation, the Claimant relies upon a hypothetical comparator. It is well settled that the comparator (real or hypothetical) must not occupy materially different circumstances to those operating upon the Claimant. However, it was not at any time suggested by the Claimant that there have been similar absences to his own which had been tolerated in the sense of having gone without any form of disciplinary reaction, investigation or sanction. Nor was any such suggestion made to the Respondent's witnesses during the course of the hearing.

16. The Tribunal has reminded itself that the only act of less favourable treatment is said to be that of the dismissal itself. As such, it is necessary for the Tribunal to focus its attention upon the deliberative processes of the decision makers themselves.

17. Having done so, the Tribunal has reminded itself that the Claimant need only lay before the Tribunal information from which it could conclude that the treatment of which he complains was on the ground of the protected characteristic of race. If, and only if, he is able to discharge this burden, is it incumbent upon the Respondent to establish that that reason or principal reason for the alleged less favourable treatment was not the Claimant's race.

18. In the unusual circumstances of this case, the Tribunal is satisfied that the Claimant has not laid before the Tribunal information from which it could conclude that the Claimant has been subjected to less favourable treatment on the grounds of race. However, in the event that the Tribunal is wrong in that view, it is nonetheless satisfied that the decisions made by Mr Constable and Mr Macauley were on account of the Claimant's absence from the workplace and were wholly unconnected with the Claimant's race.

19. Having regard to the language of section 13 of the Equality Act 2010, the Tribunal finds that the act of dismissal did not amount to less favourable treatment because of the protected characteristic of race.

20. Accordingly, the claim of direct discrimination is not well founded and is dismissed.

(2) Potentially Fair Reason

21. The evidence before the Tribunal confirms that the Respondent was required to operate and maintain a client service commitment. The Tribunal accepts that the Respondent's attendance and annual leave procedures were intended to enhance the Respondent's ability to deliver that service. The policies were clearly communicated and widely known by the workforce. The Claimant did not suggest otherwise. Likewise, workplace attendance was known, and understood to be, a core requirement of service delivery. The Respondent considered the Claimant had been absent from work without permission for the period 10 April 2019 to 17 April 2018. Its managers were also of the view that such conduct would result in disciplinary sanction up to and including dismissal. Mr Constable considered that the misconduct in question would, but for the prior written warning, have resulted in the imposition of a warning and not dismissal.

22. The question whether the sanction of dismissal was within the range of potential disciplinary response to the perceived misconduct must be viewed from the vantage point of the reasonable employer. It is no part of the Tribunal's function to substitute its own view. Adopting this perspective, the Tribunal is satisfied that unauthorised absence and a perceived failure to adhere to absence policy reporting obligations would entitle a reasonable employer to give consideration to the sanction of dismissal.

(3) Fair Procedure

23. Mr Brown invited the Tribunal to conclude that the procedure adopted by the Respondent was, when viewed in the round, fair and proportionate. The Claimant submitted the opposite. The Tribunal has reminded itself that it is necessary to consider the totality of the disciplinary process; from investigation to appeal. It has also borne in mind that it is no part of the employer's obligation to replicate the procedural standards of the courts and Tribunals. There is, however, a core obligation on the employer to engage with the detail of the disciplinary allegation and consider and assess, with care, the employee's response to it. As is commonly the case in misconduct cases, this extends to a duty to identify and consider the information available, and pursue lines of investigation, including exculpatory material, where it is available. Whilst astute to avoid the risk of substitution, in the collective experience of the Tribunal, a reasonable employer would have given careful consideration to the requests made by the Claimant of Mr Brownridge, the unchallenged explanation of the family emergency with which the Claimant was confronted, and the extent to which, if any, the Claimant's domestic needs might well have been accommodated through its own emergency family and compassionate leave policies. Yet these were not considered at the investigatory, disciplinary or appeal stages. More fundamentally, it was Mr Constable's evidence that he considered his hands 'were tied'. The Tribunal accepts his evidence as accurately capturing the position as he perceived it. Despite this, the deliberation documentation [**page 105**] which required completion by him, was populated so as to indicate there were no extenuating or mitigating circumstances. In the view of the Tribunal, the circumstances prompting the Claimant's approach to Mr Brownridge were legitimate points of reference for the disciplinary officer. The completion of the document in the form before the Tribunal is difficult to reconcile with: the unchallenged explanation provided by the Claimant, Mr Brownridge's own counter proposal which accepted the invidious position in which the Claimant found himself, or, for that matter, the fact that, if managed differently, the situation might well have prompted reliance upon other policies operated by the Respondent.

24. Having regard to these matters, the Tribunal has come to the conclusion that the dismissal was procedurally unfair. In the view of the Tribunal, a reasonable employer would have recognised, engaged with, and given consideration to, the matters which prompted the Claimant's request, the timing and form of his request, the implications

of the conversation with Mr Brownridge, together with the manner in which the annual leave form had been completed and processed. These were not considered at the investigatory or disciplinary stages. Their omission was repeated on the appeal hearing conducted by Mr Macauley which, on his own evidence, was confined to a review of the decision reached by Mr Constable. Where, as here, the Respondent operates both a compassionate leave policy and an emergency family leave arrangement, a reasonable employer would necessarily have considered whether the Claimant's conversations with management (and the submission of the annual leave form) ought to have prompted accommodation under either policy. As previously noted in this Judgment, the Tribunal has not been provided with copies of those policies. It was the evidence of Mr Brownridge that compassionate leave was not confined to cases of bereavement and further, that emergency leave could be granted for periods of several days.

25. There is no evidence to indicate that any of these factors were accommodated or featured within the deliberative processes which culminated in the Claimant's dismissal and the rejection of his appeal.

26. It follows that the claim of unfair dismissal contrary section 98(4) of ERA is well founded and succeeds.

(4) Polkey and Contribution

27. Having found the Claimant's dismissal to be procedurally unfair, the Tribunal is required to consider the prospects of the Claimant being dismissed in the event a fair procedure had been adopted. Both parties have made submission on the *Polkey* issue. Mr Brown submits there should be a significant *Polkey* reduction. The Claimant: the exact opposite.

28. However, having formulated its primary findings of fact, the Tribunal has concluded that its ability to conduct the necessary informed hypothesis is presently impeded by the absence of the Respondent's policies concerning compassionate and emergency family leave. Given the potential importance of these documents, the Tribunal has concluded that the proper course is to defer the determination of this issue, together with the matter of potential contributory conduct, to enable receipt of additional documentation and submissions to be received upon the remedy hearing.

(5) Statutory Uplift

29. The parties will be invited to make submissions on the question of the statutory uplift (if any) at the remedy hearing.

Employment Judge Morgan
Date: 30th December 2020