EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Benjamin Kamanga	AND	Driskal Limited (In Administration)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (By CVP) **ON** 28 and 29 January 2021

EMPLOYMENT JUDGE Bax

Representation

For the Claimant: Mr Kamanga (in person)
For the Respondent: Ms Jones (lay representative)

JUDGMENT

1. The claims of discrimination on the grounds of sex and/or sexual orientation are dismissed following a withdrawal of the claims by the Claimant.

2. The claims for holiday pay, notice pay and other payments are dismissed following a withdrawal of the claims by the Claimant.

3. The claims of discrimination on the grounds of race are dismissed.

REASONS

1. In this case the Claimant, Mr Kamanga, brings a claim of direct race and sex/sexual orientation discrimination and monetary claims in relation to notice pay and a holiday, against his former employer, Driskal Limited, the Respondent.

2. The Claimant had notified ACAS of the dispute on 7 March 2019 and a certificate was issued on 15 March 2019. The claim was presented on 23 March 2019.

Procedural matters and background

3. Due to the lockdown as a result of the COVID-19 19 pandemic, the hearing had been converted to be heard by Cloud Video Platform. The Claimant physically attended the Tribunal. It was agreed with the parties that I would sit in a Tribunal room and that the Claimant would also be present and that the Respondent would join by the video link. It was agreed that the second day, when judgment was given, that the parties would join remotely by video. On the second day there were problems with the video connections, and it was agreed that Judgment would be given by telephone by way of BT Meet Me.

4. On 18 January 2021, Ms Williams, on behalf of the Respondent, e-mailed the Tribunal and said that the parties consented to the claim being heard by a Judge sitting alone. I checked with Mr Kamanga at the start of the hearing whether he also consented and explained that the Tribunal should be constituted with a Judge and two lay members and he was entitled for his claim to be heard by such a Tribunal. He was informed that if the parties feely gave their consent in writing that the case could be heard by a Judge sitting alone, but that he should not feel under pressure to do so. The Claimant confirmed that he was happy for me to sit alone and provided signed written consent at the hearing.

5. On 10 June 2019, Ms Williams of BKR Care Consultancy confirmed that it had authority from the administrators to represent the Respondent. A response was entered on behalf of the Respondent and an additional Respondent Woodlands Manor Care Home.

6. On 29 October 2019, Employment Judge Sutton QC conducted a telephone case management preliminary hearing, at which the Claimant did not attend. Directions were given for the Administrator to confirm it consents to the continuation of the proceedings. I was shown a copy of the e-mail granting consent at the start of the hearing.

7. On 28 May 2020, Employment Judge Cadney conducted a preliminary hearing by CVP at which the Claimant consented to the claim against Woodland Manor Care Home Limited being dismissed. The Claimant had insufficient service to bring a claim of unfair dismissal and that claim was dismissed. In the claim form the Claimant had ticked the box that he had been subjected to sexual orientation discrimination, it was clarified that if such a claim was pursued it was on the basis of his sex and the Claimant agreed to confirm whether such a claim was being pursued and he was ordered to do so by 11 June 2020. The Claimant did not comply with that order and was reminded to comply on 25 June 2020 and told to respond by 2 July 2020. No response was received and on 15 July 2020, Employment Judge Cadney directed that the case would proceed on the basis that the

only claims being pursued were the race discrimination claims identified at paragraph 6(i) to (v) of his case management summary.

8. On 10 August 2020, the claim was listed for a final hearing on 28 and 29 January 2021 and directions were given that a joint bundle of documents was agreed by 7 January 2021 and that witness statements were exchanged on or before 14 January 2021.

9. The Tribunal received a joint bundle on 25 January 2021. The Claimant had included a witness statement in the bundle.

10. The issues as set out in the case management summary dated 28 May 2020 were discussed. The Claimant confirmed that he was not bringing a claim of discrimination on the grounds of sex or sexual orientation. He said that his holiday pay had been paid. The claim for other payments were losses flowing from his claim of race discrimination. He also confirmed that he was not bringing a claim for notice pay. Those claims were withdrawn and were dismissed upon that withdrawal.

11. In relation to the claims of direct race discrimination the Claimant confirmed that the allegations as set out by Employment Judge Cadney were correct, save that in relation to the final allegation it should also have included the referrals to the Disclosure and Baring Service ("DBS") and the Local Authority's safeguarding team. The Claimant said he relied on an actual comparator, Mr Ephiram Ananoit (of Filipino origin) and a hypothetical comparator.

12. The Respondent confirmed that it was not calling any witness evidence.

13. At the start of the hearing, it was confirmed that the bundle was a joint bundle and that the Claimant's documents had been incorporated into it. The Claimant was accessing the bundle from his telephone. Part way through cross examination of the Claimant, he had difficulty in locating documents in the bundle on his telephone and a break took place whilst the Tribunal printed the Claimant a paper copy.

The evidence

14. I heard from the Claimant and read his witness statement in the bundle. I read a statement from Lynda Williams on behalf of the Respondent, however she did not attend to give evidence and limited weight was attached to her statement.

15. I was also provided with a bundle of documents consisting of 85 pages. Any reference in square brackets in these reasons is a reference to a page in that bundle.

The facts

16. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

17. The Respondent was a care home for older adults with dementia and nursing needs. It was known as Woodlands Manor Care Home Limited, Bristol, until the Respondent purchased its assets and the employees' employment was transferred to it by reason of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

18. In June 2017 the Care Quality Commission rated the home inadequate and put an embargo on the admittance of new residents.

19. Administrators, RSM UK, were appointed in the autumn of 2018 and they engaged BKR Care Consultancy Limited on 23 November 2018 to provide crisis management and improve the provision of care and viability with a view to selling the home as a going concern. The home was in a state of disarray.

20. The Claimant commenced work for Woodlands Manor Care Home Limited on 31 August 2018 as a staff nurse. He identifies as a black male of African origin. He had been a nurse at Southmead Hospital and had intensive care experience and had been trained to assess capacity.

21. The Claimant challenged Ms Brown and Ms Helliker, care providers, about their clinical skill. He had been asked why he had refused to wear an apron and Ms Helliker had questioned him about why a patient had not been put on a fluid chart and the Claimant had explained his concerns about the patient. He referred to having to do many supervisions with them to see that care was properly provided. The Claimant suggested in oral evidence that the subsequent incident alleged against him was invented because he had challenged them and that they had challenged him because of the colour of his skin.

22. On the night of 30 November/1 December 2018 a patient (D) made an allegation to two carers, Ms Brown and Ms Helliker, about a staff member. The resident's communication sheet recorded "this is what that black guy does to me" and showed us on Rachel's arm. He said, "this isn't right is it it's the same as the other place I can't take this pain." He showed us with a fist and with a knuckle bent and jabbed into his chest, this was repeated several times." I accepted that D reported an incident to the staff members.

23. Patient D was a resident in the home who had severe arthritis in his hands and legs. He had significant pain in his legs and would cry out when care assistants provided care to him. The Clamant said that D lacked capacity on the basis that he could be disorientated when asked about the time or where he was, but that there had not been a formal assessment of him. The Respondent did not accept this. I was not provided with any documentary evidence about the records of assessments of capacity of the Claimant. I accepted that he might be confused at times but on the balance of probabilities there was insufficient evidence for me to be satisfied whether he lacked capacity.

24. The alleged incident was recorded in the Resident's communication sheet and reported to the Respondent.

25. On the night of 30 November/1 December 2018 the following staff were working, the Claimant, Mr Ephiram Ananoit (of Filipino origin), Ms Lisa Smith (of white origin), Hayley (of white origin) and Mr Abdul Okoro, a consultant (a black male). Ms Jackie Brown and Ms Rachael Helliker worked later in the shift and were white females.

26. The Claimant's evidence in relation to the colour of Mr Ananoit's skin was inconsistent. In his disciplinary hearing he said that Mr Ananoit was "pretty much as dark as me" and at the appeal meeting said, "he is as black as me". In the Claimant's annotations to the documents, the Claimant referred to the white carers and that "the Filipino is also a bit darker". In oral evidence when asked whether Mr Ananoit's skin was black he said, "he is a Filipino he is not white". It was not in dispute that Mr Ananoit was Filipino.

27. On 3 December 2018, Ms Delicata and a colleague conducted an investigation into what D had said. She checked the rota to see which male staff members were on duty. She checked those staff member's files and there was a picture of the Claimant, but not of Mr Ananoit. D had said the person was a black member of staff. She made enquiries about, Mr Ananoit with other staff members and the common perception was that he was not black. Photographs were obtained from the staff files and pictures were taken from the internet. A selection of 7 photographs were shown to D consisting of 2 white females, a darker skinned female from the internet, 3 darker skinned males (the Claimant, Mr Okoro, and one from the internet) and a white male from the internet. The photographs were included in the bundle. D was not shown a picture of Mr Ananoit because there was not a photograph of him in the staff file.

28. Ms Delicata said in her statement, for the purpose of the disciplinary hearing, that photographs were obtained of the staff members from staff files and pictures were taken from the internet to help gauge whether D could differentiate between. She said it was clear to her that D could

differentiate between the various people. D reacted defiantly to the photograph of the Claimant, which showed him being clean shaven, and said that it was the person who had hurt him, but that the man had hair on his top lip and beard area. She was informed that the Claimant had facial hair at the time of the incident. She attempted to telephone the Claimant three times, but he did not answer. The Claimant asserted that this evidence had been fabricated, however, on 3 December 2018, a safeguarding referral was made to the local authority [p6-8] in which details of the identification process were provided. I therefore accepted that Ms Delicata had undertaken the exercise with D and that he had identified the Claimant to her.

29. I accepted the Claimant's evidence that he was unaware of any telephone calls from Ms Delicata.

30. On 3 December 2018, the Claimant was sent a letter of suspension to investigate the allegation that "a service user alleges that a male used his knuckles to rub his chest causing him pain. When the service user was shown a selection of photographs, they identified you as the member of staff." The Claimant was told he was suspended to allow an investigation to take place [p13]. The Claimant at this time was living between two addresses as his usual home was being renovated and he did not inform the Respondent of this. It was likely that one of the workmen signed for the suspension letter when it was delivered. I accepted that the Claimant was unaware that he had been suspended.

31. Mr Ananoit was not working for several days after the alleged incident and by the time of his return Ms Delicata and undertaken her enquiry with D. Mr Ananoit was not suspended and was not questioned about the incident.

32. Mr Okoro was suspended immediately after the report had been made whilst investigations were undertaken.

33. A body mapping chart of D, dated 3 December 2018 [p77], did not show any injury to the sternum/chest area, although there were some marks and bruises in areas unrelated to the allegation against the Claimant. This did not appear to form part of the documents for the subsequent disciplinary hearing.

34. Statements were taken from the following people. Mr Okoro made no mention of an incident on 30 November 2018. Ms Smith and Ms Curtis said in statements that they had never heard D make allegations about abuse. Lorraine McHugh made a statement about a fluid chart but not the incident in question.

35. The Claimant was not invited to attend an investigatory meeting. I accepted that the Respondent's disciplinary policy did not have such a requirement. The Claimant, in oral evidence said that if his skin had been a different colour it would have been different, although he did not explain the basis for the assertion. He referred to false witness evidence and that the allegation was organised and that not enough people were questioned.

36. On 6 December 2018, the Claimant was invited by a letter delivered by hand to attend a disciplinary hearing on 11 December 2018 to consider the allegation. He was informed of his right to be accompanied, but the letter did not include the evidence to be used at the hearing. I accepted that the Claimant did not receive this letter at the time, due to living at two addresses. The Claimant had not been invited to an investigatory meeting beforehand.

37. On 11 December 2018, the Claimant did not attend the meeting. He was sent a letter of the same date inviting him to a further meeting on 14 December 2018 [p17] in which he was also warned that the allegation could impact on his disclosure and barring record and there may be NMC referral implications. This letter was not delivered to the Claimant, as acknowledged by the Respondent.

38. On 12 December 2018, the Claimant attended work and was informed by a colleague that he had been suspended. The Claimant went to his car and wrote a letter to the Respondent and resigned with immediate effect. He made reference to unprofessional healthcare assistants, a false allegation and he had not been listened to because of the colour of his skin. He raised various matters about medication, training and care plans. He also said he had been the most experienced nurse but was continually treated like a junior nurse because he was black. The Claimant did not elaborate on these matters when giving evidence.

39. At some point on or after 12 December 2018, Ms Delicata provided her statement to the Respondent [p32 to 32].

40. On 17 December 2018, the Claimant was sent a letter inviting him to attend a further meeting on 21 December 2018 [p24].

41. On 10 January 2019, the Claimant attended a disciplinary meeting, chaired by Ms Padgett, at which he was accompanied by an RCN representative. [p36-40]. The Claimant was not provided with any evidence relied upon by the Respondent before or during the meeting. The Claimant said that he had moved and had not received the letters. He said that he doubted D would be able to identify and that he lacked capacity and the other male on duty was "pretty much as dark as me". The Claimant's representative asked that why if there was another black male on duty, he was not included in the

identity process and was told that it was felt the process was right and a selection of people, male, female, white and black including her colleague (Mr Okoro) who was black and who was also on duty. After a break Ms Padgett said that she had established that the other member of staff was from a different ethnicity.

42. On 14 January 2019, a referral was made to the Nursing and Midwifery Council ("NMC") about the Claimant regarding the incident [p9-12]. I accepted that when allegations of abuse are made that a referral should be made to various regulatory bodies, including the NMC, DBS and the Safeguarding team at the Local Authority.

43. On 15 January 2019, the Claimant was informed by letter that it was concluded that on the balance of probabilities that the incident had occurred, and his explanation was less believable. It was concluded that had he not resigned he would have been dismissed. The Claimant was informed that referrals had been made to the NMC and DBS. He was informed of a right to appeal. There was no evidence that, after the disciplinary hearing, Mr Ananoit had been spoken to by the Respondent, or that any check was made with D as to the accuracy of his memory.

44. On 18 January 2019, the Claimant appealed against the decision, the grounds of which included that he had not been disclosed the information relied upon and it had still not been provided and that there had potentially been discrimination. [p43-45].

45. On 23 January 2019, the documents used at the disciplinary hearing were provided to the Claimant.

46. On 25 January 2019, by way of a letter the Respondent explained that the Claimant should have had an opportunity before the hearing to consider the documents, but the disciplinary officer erroneously did not do this. It was also acknowledged that the second invitation to a disciplinary hearing had not been delivered [p48].

47. The Claimant's representative responded by saying that there had been details of other allegations that the Claimant refuted, which had not been mentioned and he had no opportunity to respond.

48. The Respondent offered to set aside the disciplinary hearing and hold a new hearing. The Claimant said he wanted to go straight to appeal. I accepted the Claimant's evidence that, by this stage, he no longer trusted the Respondent.

49. The Claimant produced a statement after receiving the documentation [p78-79], in which he said that the other male colleague, "who is also black

(Filipino, same height, same complexion, black hair and facial hair was working that same night in question and he was not included on Photo ID".

50. The appeal was heard on 20 February 2019 and was chaired by Ms Williams. The Claimant said that the other staff member, Mr Ananoit, was not suspended and not involved in the investigation[p62]. In relation to the photographs shown to D, there were only 3 men of black origin and did not include the other male staff member on duty. Ms Williams said it was stated he had fairer skin to which the Claimant replied, "he is as black as me." [p63] It was suggested that Ms Ananoit should have been interviewed. [p64]. The Claimant said that this showed unfair treatment and there was a discussion about potential discrimination. [p65] The Claimant also said that he thought D lacked capacity.

51. On 1 March 2019, the Claimant was sent an appeal outcome letter [p67-70]. It was detailed that, "D had specifically stated that it was a dark-skinned male member of staff – two members of staff on duty met these criteria – BL (the Claimant) & AO. EA is Filipino and paler skinned. Therefore, both BK & AO were suspended immediately on receipt of the allegation. EA was off for a number of days after the end of the shift on the morning of 01 December 2018 as he only works on Friday nights, and BK had been identified by the service user, D, before his return to work. There was no necessity therefore to formally suspend him." It was confirmed that a selection of 7 photographs had been shown to D, 2 white females, a darker skinned female from the internet, 3 darker skinned males (the Claimant, AO a consultant called in that night, and one from the internet) and a white male from the internet. D had made it clear he had not wanted to be involved in the investigation and therefore a written statement had not been taken from him. The original findings were upheld.

52. The Claimant said that the same matters he had referred to previously were why he believed that his dismissal and referral to the various safeguarding and regulatory bodies was discriminatory.

The law

53. The claim alleged discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the EqA. The Claimant alleged direct discrimination. The protected characteristic relied upon was race, as set out in section 9 of the EqA, which includes colour, nationality and ethnic or national origins.

54. Direct discrimination occurs when, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

55. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

56. The remedies available to the Tribunal are to be found in section 124 of the EqA. The tribunal may make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; may order the respondent to pay compensation to the complainant (on a tortious measure, including injury to feelings); and make an appropriate recommendation. In addition, the tribunal may also award interest on any award pursuant to section 139 of the EqA.

57. The interest payable on discrimination awards is to be calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Interest Regulations"). Under regulation 2 the tribunal shall consider whether to award interest, and if it chooses to do so then under regulation 3 the interest is to be calculated as simple interest accruing from day to day. Under regulation 6 the interest on an award for injury to feelings is to be from the period beginning on the date of the act of discrimination complained of and ending on the day of calculation. All other sums are to be calculated for a period beginning with a mid-point date between the act of discrimination and ending on the day of calculation. Following the Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 2013 the rate of interest payable is 8%.

58. With regard to the claim for direct discrimination, the claim will fail unless the Claimant has been treated less favourably on the ground of his race than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The Claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the Claimant.

59. In Madarassy v Nomura International Plc [2007] EWCA Civ 33 Mummery LJ stated: “The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent “could have” committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment 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 act of

discrimination". The decision in Igen Ltd and Ors v Wong [2005] IRLR 258 CA was also approved by the Supreme Court in Hewage v Grampian Health Board [2012] IRLR 870. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.

60. In Denman v Commission for Equality and Human Rights and ors [2010] EWCA Civ 1279, CA, Lord Justice Sedley made the important point that the "more" which is needed to create a claim requiring an answer need not be a great deal.

61. In every case the tribunal has to determine the reason why the Claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question." It is for the claimant to prove the facts from which the employment tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong), i.e., that the alleged discriminatory has treated the claimant less favourably and did so on the grounds of the protected characteristic. Did the discriminator, on the grounds of the protected characteristic, subject the claimant to less favourable treatment than others? The relevant question is to look at the mental processes of the person said to be discriminating (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07). The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

62. "Could conclude" must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

63. The test within s. 136 encouraged me to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. I was permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see Madarassy-v-Nomura International plc and Osoba-v-Chief Constable of Hertfordshire [2013] EqLR 1072).

64. I needed to consider all the evidence relevant to the discrimination complaint, that is (i) whether the act complained of occurred at all; (ii) evidence as to the actual comparator(s) relied on by the claimant to prove less favourable treatment; (iii) evidence as to whether the comparisons

being made by the claimant were of like with like; and (iv) available evidence of the reasons for the differential treatment.

65. The Claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. Unreasonable treatment of itself was generally of little helpful relevance when considering the test. The treatment ought to have been connected to the protected characteristic. What I was looking for was whether there was evidence from which I could see, either directly or by reasonable inference, that the Claimant had been treated less favourably than others because of his race.

66. Where the Claimant has proven facts from which conclusions may be drawn that the respondent has treated the Claimant less favourably on the ground of the protected characteristic then the burden of proof has moved to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.

67. The circumstances of the comparator must be the same, or not materially different to the Claimant's circumstances. If there is any material difference between the circumstances of the Claimant and the circumstances of the comparator, the statutory definition of comparator is not being applied (Shamoon). It is for the Claimant to show that the hypothetical comparator in the same situation as the Claimant would have been treated more favourably. It is still a matter for the Claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

68. As to the treatment itself, I had to remember that the legislation did not protect against unfavourable treatment per se but less favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (Law Society-v-Bahl [2004] EWCA Civ 1070).

Conclusions

Direct Discrimination

Did the Respondent carry out the following treatment and was it less favourable than the Claimant's comparator was treated?

The Respondent knew from the beginning that the Claimant was not guilty of the offence and the decision to start the investigatory/disciplinary process

Did the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

69. The Respondent had received information that a vulnerable resident had been subjected to some form of abuse, in such circumstances, it would have to investigate the allegation in order to fulfil its duty of care to the resident and also comply with its own regulatory duties. The Claimant suggested that because he knew he was not guilty and that he had challenged the staff that recorded the accusation about their clinical skill and had many supervisions with them about appropriate care about which they were unhappy, the Respondent knew he was not guilty. I rejected that submission. The Respondent had been presented with an allegation and ascertained who could potentially have been responsible. The Claimant suggested this had occurred because of the colour of his skin, but was not able to explain why this was, other than that was what he thought. The evidence of the Claimant tended to suggest that any possible reason to invent an allegation of abuse against him was due to the way he had challenged other staff members. It was significant that two black males had been working on the evening in question and that what had been recorded was that D said it was "a black guy", rather than naming the Claimant and that after investigating the matter the allegation was pursued against the Claimant only. No evidence was adduced that would suggest Mr Ananoit or someone from a different racial background to the Claimant would have been treated more favourably. In the circumstances the Claimant failed to adduce facts from which it could be concluded that the decision to investigate the allegation was due to the colour of his skin or that his comparators would have been treated any differently and he failed to discharge the initial burden of proof.

If so, what was the Respondent's explanation? Did it prove a non-discriminatory reason?

70. As such it was unnecessary to consider the Respondent's explanation.

The Claimant was suspended without being informed

Did the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

71. Mr Okoro was suspended upon the allegation being made. Mr Ananoit was not suspended, however he was not working immediately after the alleged incident and by the time he had returned to work, D had identified the Claimant as the person who had been involved in the incident. There was no evidence to suggest that this had not been the case. I considered whether the lack of showing D a photograph of Mr Ananoit was something that tended to show that the reason for the suspension was connected to the Claimant's race. There was evidence that Mr Ananoit did not have a photograph in his staff file, whereas the Clamant did. If a photograph was not available, it would not have been possible to show D a copy of it. There had been an attempt to ascertain whether D could differentiate between people. It was also notable that D had recognised the Claimant even though that in the photograph the Claimant did not have a beard. Mr Ananoit was not suspended and there was a difference in treatment, however by the time he returned to work D had identified the Claimant and this was significant. An attempt had been made to telephone the Clamant and a letter was sent to his home address. It was unfortunate that the Claimant was living in two addresses at the time and a workman had signed for the suspension letter on delivery. In such circumstances there was no evidence tending to suggest that Mr Ananoit, or a person of a different racial background to the Claimant, would have been treated differently. In the circumstances the Claimant failed to adduce facts from which it could be concluded that the decision to suspend him without personally informing him was due to the colour of his skin or that his comparators would have been treated any differently and he failed to discharge the initial burden of proof.

If so, what was the Respondent's explanation? Did it prove a non-discriminatory reason?

72. As such it was unnecessary to consider the Respondent's explanation.

The investigation was biased in that the other employee working the same shift as the Claimant was not investigated or suspended

Did the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

73. I repeat my conclusions as set out above in relation to why Mr Ananoit was not suspended. Further to which, although there was a difference in

treatment, the Claimant needed to show something more than that. Mr Ananoit was not working from the time of the incident until after the Claimant had been identified. There was not any evidence at that time that suggested that Mr Ananoit had been responsible. In the circumstances the Claimant failed to adduce facts from which it could be concluded that the decision not to suspend Mr Ananoit was due to the colour of his skin and he failed to discharge the initial burden of proof.

74. Mr Ananoit was not investigated for the alleged incident. D had identified the Claimant as the person involved and on the face of that evidence there was nothing to suggest that Mr Ananoit had been responsible. There was no suggestion that D was alleging that anyone else had been present at the time. At the time of the investigation, after D identified the Claimant, there was not any evidence that tended to suggest that Mr Ananoit had been involved. The Claimant suggested when giving his evidence that charge was brought against him because he had challenged others clinical skill. The Claimant suggested that this disparity in treatment was based on his skin colour. He compared himself to Mr Ananoit or a person who was not black. The Claimant was unable to explain, other than a feeling that it was connected to his skin colour, as to why Mr Ananoit was not investigated. No evidence was adduced by the Claimant that tended to show that Mr Ananoit could have been responsible. The Claimant needed to show something more than a difference in treatment and although the 'something more' need not be that great it must still be something. In the circumstances the Claimant failed to adduce facts from which it could be concluded that the decision not to investigate Mr Ananoit was due to the colour of his skin or that a hypothetical comparator would have been treated any differently and he failed to discharge the initial burden of proof.

If so, what was the Respondent's explanation? Did it prove a non-discriminatory reason?

75. As such it was unnecessary to consider the Respondent's explanation.

There was no investigatory meeting, and no evidence was supplied prior to the disciplinary hearing

Did the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

76. The Claimant had been employed for a few months at the time of the allegation and disciplinary hearing. The Respondent's policy did not require an investigatory meeting occurred before a disciplinary meeting took place.

The policy, however, departs from what would generally be accepted as a reasonable procedure for considering potential gross misconduct and is contrary to the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Claimant was not given an opportunity to respond to the allegations before consideration was given as to whether a disciplinary hearing should be convened. Further, the Claimant was not given any advance warning as to the evidence relied upon before or during the disciplinary hearing, this made the process unfair and contrary to the principles of natural justice that he should know the case against him and was a significant procedural failing. The failing regarding the evidence was acknowledged by the Respondent and it offered to annul the disciplinary hearing and hear it again.

77. The Claimant needed to prove some facts which tended to show that this was due to his race. The Claimant had a feeling that it was related to his race, but was unable to point to anything specific that would suggest that was the case. He submitted that the process had been organised against him and had suggested that it had been orchestrated because he had criticised others clinical skill, this tended to suggest a reason other than race. The Claimant said that he knew he was not guilty, but that in itself does not suggest that the reason could be his race. I also considered what had occurred in relation to the photographs and the lack of suspension of Mr Ananoit and rely on my conclusions as set out above. No evidence was adduced that if Mr Ananoit or a hypothetical person had been in the same position as the Claimant that the outcome would have been different. The failings by the Respondent were unreasonable, however that is not the same as less favourable treatment. In any event the Claimant needed to show something more than a difference in treatment and although the 'something more' need not be that great it must still be something. I took into account that the Claimant need not identify positive evidence, but there must be something tending to suggest a discriminatory reason before an inference can be properly drawn. It was not suggested by the Claimant that he had received any unwanted comments from the Respondent or its employees about his race or such comments had been made generally. These matters also had to be considered against the background of a failing business, about which there were serious concerns regarding the quality of care provided to residents. In the circumstances the Claimant failed to adduce facts from which it could be concluded that the failure to hold an investigatory meeting or provide him with the evidence was due to the colour of his skin or that his comparators would have been treated any differently and he failed to discharge the initial burden of proof.

If so, what was the Respondent's explanation? Did it prove a non-discriminatory reason?

78. As such it was unnecessary to consider the Respondent's explanation.

There was a finding that the Claimant had committed gross misconduct which would have led to him being dismissed had he still been in employment and a referral to the NMC, DBS and Safeguarding despite there being no and/or no sufficient evidence that he was guilty of the allegation.

Did the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

79. As identified above there was a significant procedural failing in the investigatory process and giving the Claimant the opportunity to consider the case against him. The Claimant declined the offer for the disciplinary hearing to be reconvened, after it had been acknowledged by the Respondent that the process had been unfair. At both the disciplinary hearing and the appeal hearing the Claimant raised concerns about the capacity of D. I accepted that D was prone to some confusion, however I was unable to conclude that he lacked capacity as there was a lack of medical evidence in relation to the issue. However, after the Claimant had raised the issue, the Respondent did not check the capacity of D or his recollection or check whether he still identified the Claimant as the person involved. This was notwithstanding that the Claimant had raised that D was not shown a picture of Mr Ananoit. The Respondent should have checked whether this could have been a case of mistaken identity. Further after the Claimant raised that Mr Ananoit had not been spoken to no further enquiries were made. I rejected the Respondent's submission that on appeal that these further enquiries were unnecessary. There were a number of gaps in the evidence relied upon by the Respondent and if I was considering whether the charge against the Claimant had been made out on the evidence before me, I would not have been satisfied that it was. However, I did accept that if such a charge is found to have been proven the regulatory and safeguarding bodies must be informed.

80. In order to succeed in his claim, the Claimant needed to show primary facts from which I could conclude that the treatment was because of his race. The Claimant relied upon the same matters as for the other allegations as things that tended to show that the reason was his race. It was notable that when the investigation started Mr Okoro's photograph was show to D, after which allegations were not pursued against him. A photograph of Mr Ananoit was not shown to D on 3 December 2018, because the Respondent did not have a copy of one and I repeat my earlier conclusions on this issue. The Claimant had a feeling that it was related to his race, but was unable to point to anything specific that would suggest that was the case. He submitted that the process had been organised against him and had suggested that it had been orchestrated because he had criticised others clinical skill, this tended to suggest a reason other than race. The Claimant said that he knew he was not guilty, but that in itself does not suggest that

the reason could be his race. The Respondent had an identification from D and relied upon that and there was no evidence that tended to suggest if D had identified Mr Ananoit or another person from a different racial background that the investigation and outcome would have been any different. The failings by the Respondent were unreasonable, however that is not the same as less favourable treatment. It was not suggested by the Claimant that he had received any unwanted comments from the Respondent or its employees about his race or such comments had been made generally. I considered these matters against the background that the Respondent was a failing business in administration and was under a rescue plan and was in a state of disarray. In any event, the Claimant needed to show something more than a difference in treatment and although the 'something more' need not be that great it must still be something. I took into account that the Claimant need not identify positive evidence, but there must be something tending to suggest a discriminatory reason before an inference can be properly drawn. In the circumstances the Claimant failed to adduce facts from which it could be concluded that the decision that he had been guilty of gross misconduct and reporting him to the various regulatory and safeguarding bodies, was due to the colour of his skin or that his comparators would have been treated any differently and he failed to discharge the initial burden of proof.

If so, what was the Respondent's explanation? Did it prove a non-discriminatory reason?

81. As such it was unnecessary to consider whether the Respondent had shown the treatment was for a non-discriminatory reason.

82. Accordingly, the claims of direct race discrimination were dismissed.

Employment Judge Bax
Date: 16 February 2021

Judgment sent to Parties: 25 February 2021

FOR THE TRIBUNAL OFFICE