Case No: V 260 2583/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr Briscoe

Respondent: Derby City Council

Heard at: Nottingham **On:** Monday 4 January, Tuesday 5 January, Wednesday 6 January 2021 and 14 January 2021.

Before: Employment Judge Rachel Broughton sitting with members; Mrs Lowe and Mrs Morris

Appearances

For the Claimant: In person
For the Respondent: Mr McMahon - solicitor

JUDGMENT

It is the judgement of the Tribunal that;

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

REASONS

Background

(1) By a claim form presented to Tribunal the on 16 of November 2018 the Claimant issued a claim of unfair dismissal, disability and race discrimination following a period of ACAS early conciliation from 9 July 2018 to the 23 August 2018.

(2) The Respondent defended the claim on the basis that the Claimant did not have sufficient continuity of service to pursue a claim of unfair dismissal pursuant to section 108 of the Employment Rights Act 1996 and that the claims of discrimination were brought out of time. The Respondent also complained that the claim had not been sufficiently particularised.

(3) Further particulars of the claim were provided by the Claimant **[p. 21 and 26]** dated 1 March 2019 attaching with it an appendix A and appendix B.

(4) Following a case management hearing before employment Judge Britton on 12 April 2019, the claim for unfair dismissal was dismissed for lack of qualifying service and the claim of disability-based discrimination was also dismissed. Employment Judge Britton extended time on just and equitable grounds for the Claimant to pursue the claims of race discrimination. An order was made that the Respondent provide a full response to the claim by 16 May 2019. The Claimant was given a right to reply by 7 June 2090.

(5) At a further case management hearing on 28th of January 2020 before Employment Judge Heap, the merits of the 8 separate allegations of race discrimination were considered; six of the allegations were struck out under rule 37 on the basis that they had no reasonable prospect of success. The 7th allegation was dismissed on withdrawal and a deposit order was made in relation to the last allegation, allegation 8.

Allegation 8

(6) The only remaining claim of race discrimination is an allegation as set out in the Claimant's Scott Schedule prepared by the Claimant on 15 January 2019 that; *"the decision to dismiss the Claimant and the fact that there was a failure to explore alternative sanctions*". The Claimant in relation to this allegation informed Employment Judge Heap at the case management hearing, that he was relying on an actual comparator, a Team Manager called Bert Polheimer (BP).

(7) It is worth setting out here what the other allegations were that were struck out so that it is clear what the issues are (and are not) which need to be determined by the Tribunal. The allegations which were dismissed by employment Judge Heap were;

1. The failure to appoint an independent investigator to consider the allegations against the Claimant/the decision to appoint someone who was not independent

2. The decision of the Respondent not to renew the Claimant's fixed term contract

3. The failure of the investigation to consider medical findings

4. The delay in completing the investigation

5. The failure of the investigation to take into account inconsistencies in the evidence

6. Reaching a finding that the Claimant had breached professional standards

7. The Claimant was not able to say what the actual complaint was and this was withdrawn

Issues

(8) It was agreed between the parties that the allegation of race discrimination with regards to the findings that had been reached that the Claimant had breached professional standards (allegation 6), had been struck out. The remaining allegation of race discrimination therefore relates only to the decision that the appropriate sanction (had the Claimant remained employed) would have been dismissal on the grounds of gross misconduct and failure to consider other alternatives and not in relation to the findings of the disciplinary hearing that the Claimant had breached professional standards.

(9) Employment Judge Heap recorded in her order (paragraphs 48 and 49) that;

"…*even where there is a difference in treatment and a difference in race that in itself is not going to be sufficient and something more is needed The Claimant suggested that information provided from the Respondent shows that black employees are more likely that their white counterparts to be taken through a disciplinary hearing. However, there are no details of the proportions that* ***led to dismissal in relation to those matters or findings of gross misconduct and that is the crux of this particular aspect of the claim".*** *[Tribunal's own stress]*

(10) It was agreed with the parties that the Claimant is permitted to raise as background evidence his wider complaints about his treatment and the disciplinary and investigation process, to the extent that these are either directly relevant to the remaining allegation of race discrimination (for example where relevant to matters which it is argued should have been taken into account in mitigation) or to the extent it may be appropriate for the Tribunal to draw *inferences* from those when making findings in relation to the remaining allegation and whether it was on the grounds of the Claimant's race.

(11) It was agreed between the parties that the following are the issues for the Tribunal to determine;

EQA, section 13: direct discrimination because of race

(i) It is not in dispute that the Respondent subjected the Claimant to the following treatment:

The decision that if the Claimant had remained employed he would have been dismissed on the grounds of gross misconduct.

(ii) Was that treatment "less favourable treatment", i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

The Claimant relies on Bert Pollheimer as an actual comparator and/or hypothetical comparators.

(iii) If so, was this because of the Claimant's race ie colour – the Claimant describes himself as black.

Evidence

(12) The Tribunal was presented with a joint agreed bundle of documents, numbering 215 documents in total. The parties had not included the minutes of the suspension, investigation or disciplinary hearings, only the correspondence to the Claimant on the basis that the only claim outstanding relates to the sanction that was applied. The Claimant had agreed the contents of the bundle and as it transpired there was little factual dispute over what actually happened during the meetings.

(13) The Claimant presented a witness statement comprising of only three pages. The first page was a copy of a letter sent to the Tribunal asking for an extension of time to serve his witness statement, the second page mainly consisted in the first four paragraphs of references to witnesses who the Claimant considered may assist his case but who had

been contacted he alleged, by the Respondent and discouraged from being witnesses. The remaining content of the document which was put into evidence as the Claimant's evidence in chief, comprised seven short paragraphs (the Tribunal numbered the paragraphs with the agreement of the parties to assist with referencing).

(14) The Claimant was unrepresented and his witness statement did not address the substance of the allegations. The Claimant's evidence in chief by agreement with the Respondent, was treated as including the further information dated 1 March 2019 filed in support of his claim **[p.21 to 31]** and the particulars dated 26 June 2019 filed in response to the Respondent's further particulars of its response dated 14 June 2019 **[p.46 to 52].** However, the Claimant did **not** he confirmed to the Tribunal, want to rely on references in the document attached to his claim form as follows;

- Paragraph pertaining to the evidence of Mr. Morris **[p.23],**
- Paragraphs headed under the mitigating circumstances section **[p.24]**; working environment, systemic weakness, Employment History and Consequences of dismissal

(15) As the Claimant was unrepresented and given the deficiencies in his witness statement, with the agreement of Mr McMahon, the Claimant was also permitted to read out his witness statement and when doing so to expand upon the points that he had made in it and explain them in the context of his claim. The Tribunal is grateful for the co-operative approach adopted by Mr McMahon in his representation of the Respondent.

(16) The Claimant confirmed at the outset of the hearing, that in relation to allegation 8 he is relying upon BP as an actual comparator but in the alternative also relies upon a hypothetical comparator.

Witnesses

(17) We heard evidence from, the Claimant who was cross examined by the Respondent. He did not call any witnesses.

(18) On behalf of the Respondent we heard evidence from Fiona Colton, employed by the Respondent as Head of Services within the People Department. Ms Colton produced a statement and was cross examined by the Claimant.

Findings of fact

Background

(19) The Claimant commenced employment with the Respondent from 18 April 2017 as a Multi - Agency Safeguarding Hub Manager (MASH Manager) on a one-year, fixed term contract due to end on 17 April 2018.

(20) The Respondent's Children's Social Care is the lead agency for protection enquiries and the Claimant in the role as MASH Manager had responsibility for authorising section 47 enquiries following a strategy discussion/meeting. The MASH Manager forms part of a team of three different agencies; namely the Local Authority, the Police and Health. The MASH Manager is the lead professional in ensuring appropriate and proportionate safeguarding actions are co-ordinated and taken in respect of all referrals that meet or seem to meet the threshold for Child Protection.

(21) The threshold for section 47 Children Act 1989 places; "a *duty on a Local Authorities to make enquires into the circumstances of children considered to be at risk of 'significant harm' and, where their enquiries indicate the need to undertake a full investigation into the children's circumstances."*

(22) A duty to investigate arises where the Local Authority has reasonable cause to suspect that the child is suffering or is likely to suffer significant harm.

(23) The threshold for Section 17 of the Children Act 1989 states; *"It shall be the general duty of every local authority …(a) to safeguard and promote the welfare of children within their area who are in need; and (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs."*

(24) Section 17 applies therefore where the child is 'in need', section 47 applies where the child is at 'risk of significant harm'.

The Health Care and Professions Council (HCPC)

(25) The HCPC from 1 August 2012, took over the regulation of social workers In England from the General Social Care Council and HCPC it is not in dispute, was the regulatory body at the relevant time. The HCPC has standards for conduct, performance and ethics which apply to those who are registered with the HCPC and with which they need to comply with.

Disciplinary and Dismissal Policy

(26) The Disciplinary and Dismissal Procedure dated June 2008 provides at paragraph 4.5.19 that **[p.153];**

"In exceptional circumstances, where the offence warrants dismissal but there are mitigating circumstances, the authorised officer may consider action short of dismissal such as;

- *Transfer to alternative employment in the department with an agreed review date*
- *Reduce their seniority or level of responsibility."*

(27) The policy was updated and a new policy implemented on 1 February 2011 **[p.167].** It provides at para 2.11.2;

"Where disciplinary action is required, a number of sanction are available;

- *Formal verbal warning*
- *First written warning*
- *Final written warning*
- ***Action short of dismissal including final written warning***
- *Dismissal "*

[Tribunal stress]

(28) The Disciplinary and Dismissals Policy was further updated in May/June 2018 and provides that with regards to how long the disciplinary process will take, it states "*without unreasonable delay*" **[p.183].** It does not prescribe a time limit for the process or specifically the investigation process.

(29) Further, where disciplinary action is required the sanctions available are more limited than the previous versions of the disciplinary policy and include; **[p.185];**

- *First written warning – duration 12 months*
- *Final written warning – duration 18 months*
- *Dismissal*

Incident – 10 November 2017 - summary of events

(30) It is not in dispute that on Friday 10 November 2017 a child attended hospital (Child A) with unexplained injuries.

(31) The Team Leader in the First Contact team was contacted by the hospital and the case was then referred to the Claimant as the MASH Manager. It is not in dispute that referral happened at about 4:05pm on Friday 10 November 2017. The report from the hospital, the Tribunal accept, was that the child was under 12 months of age, was presenting with an injury which could be a burn and in clothes which were the wrong size.

(32) The undisputed evidence of the Claimant is that ordinarily he would have conducted a Strategy Meeting with the Police and Health, where a set of written outcomes would be recorded and agreed. The Claimant's evidence is that it is normal practice where a Strategy Meeting is to be called to implement a Safety Plan to ensure the child remains safe overnight or for a weekend.

(33) It is not in dispute that at about 4.20pm that Friday, the Claimant arranged a meeting to discuss Child A with Ms Haywood, Safeguarding Health Advisor, MASH, and DC Yoxall, Detective Sergeant, Derbyshire Police MASH. The Claimant describes it as a 'brief meeting **[p.22].**

(34) Ms Haywood and DS Yoxall gave an account of that meeting during the disciplinary investigation and their evidence is that they understood that it had been agreed that a section 47 Child Protection Medical (CMP) would be authorised, which would involve the hospital carrying out a medical assessment to determine the possible cause of the injury. The Claimant however disagrees that this is what had been agreed at that meeting. The Claimant accepts that it would have been his personal responsibility to action a CMP by personally contacting the hospital.

(35) The Claimant produced a document attached to his particulars of claim **[p. 29 – 31]** identifying inconsistencies in the evidence the Respondent relied upon at the disciplinary hearing. The Claimant informed the Tribunal that he had been shown the witness statements of Ms Haywood and DC Yoxall taken during the disciplinary investigation and he had prepared this document from those statements. Neither party had included the witness ststaments in the bundle but there was no dispute over the inconsistences in the evidence that the Claimant had set out in this document.

(36) Ms Haywood gave evidence that an informal strategy plan meeting had taken place and that it had been agreed that a CMP was required and although her evidence is not consistent with the Claimant's (who denied this had been agreed), the Claimant does not dispute that her evidence was consistent with DC Yoxall's account of what had been discussed **[p. 30].** In answer to questions from the Tribunal the Claimant stated;

"I am pretty sure I did not agree to a child medical on that Friday – as child still at the hospital"; and "my failure was to not alert EDT and the hospital with regard to the safety plan"

(37) Dr Hambleton at the hospital had given evidence in an unsigned statement to the Respondent during the investigation, that she had spoken to a male from Social Care who told her to release Child A from hospital on 10 November 2017, she thought it may have been the Claimant but could not recall who she had spoken to. The Claimant denied that he had spoken to Dr Hambleton, that they did not speak until Monday 13 November 2017 when they discussed a CMP and he alleges that she suggested that this take place the next day (Tuesday 14 November).

(38) The Claimant informed this Tribunal that as the child was at the hospital in the outpatient department he had thought it was sensible for the hospital to continue their investigations and if they had further concerns they could pick those up with the Emergency Duty Team (EDT) over the weekend however, he did not communicate that decision to the hospital or to the EDT team, he finished his shift and went home.

(39) The Claimant it is not in dispute, never tried to speak to Dr Hambleton that Friday afternoon before leaving work. The child was discharged from the hospital that Friday 10 November 2017 into the care of his parents.

(40) The undisputed evidence of Ms Colton was that the Respondent have an out of service Careline manned by a Team Manager that provides 24-hour cover at the weekend and who can deal with a serious referral. Ms Colton's undisputed evidence is that the case of Child A would be considered serious given it was an unexplained injury. In that situation it would be expected that a social worker from MASH or the Reception Team would attend hospital to look at the injury, a safety plan would be drawn to include a referral/note to Careline to do a visit to the child to carry out welfare checks over the weekend if the child was discharged without a CMP.

(41) The Claimant admits that he did not contact Careline to make them aware of the Child A over the weekend or send a social worker to the hospital.

(42) The Claimant accepted that there was no strategy meeting as such, but an informal meeting because of the time of day. That was consistent with the evidence of DC Yoxall and Ms Haywood.

(43) The Claimant accepts that it was his responsibility to put in place a safety plan however during evidence before this Tribunal he stated;*"…the responsibility for the safety plan as Team Manager was down to me – so the only thing I can say is that I can't give you an excuse why it didn't happen – can't given any reason it didn't happen – I listened to advice from colleagues – I shouldn't have done".*

(44) In terms of the advice he listened to, he stated it was not in the documents in the bundle and he gave no evidence about who it was who gave him the advice, he does not allege it was someone in a more senior post and he accepted it was his personal responsibility and that;

"I should not have taken that course of action ";

"I should have followed my instinct and if didn't feel I needed to send out a social worker I should have contacted the EDT or the hospital – I should have followed gut instinct and ensured robust enough safety plan" and

"I left matters for the EDT to pick up without speaking to them or the hospital."

(45) The undisputed note of the initial discussion with the hospital and the First Contact team was as set out in the witness statement of Ms Colton which records that; "*GP felt a medical should be done*." However, no GP was involved, that was an error in the record, it is not in dispute that the referral was first made by Dr Hambleton, a consultant in the outpatient's department. The report recorded the alleged abuse category as "*physical abuse".*

(46) It is not in dispute that no CMP was carried out until Tuesday 14 November 2017 and that Child A had been allowed to leave the hospital into the care of the parents on Friday 10 November 2017 with no plan in place to protect the child over the weekend.

(47) The Claimant alleges that he spoke to Dr Hambleton late on Monday 13 November (after he alleges that he tried to telephone her in the morning) and the Dr proposed a CMP the following day. Ms Colton's evidence was that the follow up after the weekend was actually instigated by the Reception Team Manager Ms Whelan on Monday 13 November who had spoken to the Claimant and that this was the evidence provided by Ms Whelan to Mr Dakin during the investigation. The Claimant did not dispute that this is the evidence Ms Whelan provided during the investigation process however he maintains that he tried to speak to Dr Hambleton on the Monday morning,13 November 2017. However, the Claimant accepted that there is no dispute that because of his failure to contact the hospital or notify the EDT, the child was left for 4 days at an unassessed risk and that was the crux of the disciplinary proceedings.

Suspension – 21 November 2017

(48) The Claimant attended a meeting on 21 November 2017 with Judith Russ, Head of Service, Children's Safeguarding and informed that the Respondent was starting an investigation into his conduct and that allegations were **[p.195];**

That on [sic]whilst on duty as MASH Manager on Friday 10/11/17 you failed to follow procedure and take the necessary steps to protect a child, namely TT

A complaint raised by another agency states that a safety plan was agreed with you, to have a CP medical that day, safety plan for the weekend and strategy discussion on Monday 13th. These discussions are not recorded on the case file and did not take place.

If the above allegations are found to be substantiated this breaches the employee code of conduct regarding maintaining professional standards (2.16)

If the above allegations are found to be substantiated thisbreaches the HCPC professional standards of conduct for social workers as below;

6. Manage Risk

Identify and minimise risk
6.1 You must take all reasonable steps to reduce the risk of harm to service users, carers and colleagues as far as possible
6.2 You must not do anything or allow someone else to do anything which could put the health and safety of a service user, carer or colleagues at unacceptable risk.

(49) The Claimant was informed that Ms Russ would be appointing an investigating officer and within the letter she stated; "*I anticipate the investigation will not take more than 6 weeks*".

(50) Within this letter the Claimant was also informed ; "*I appreciate that an investigation can cause worry and concern. The Council provides The Wellbeing Counselling Service which you may use if you wish. They provide face to face support and counselling*." Ms Russ provided the contact details, email and telephone number.

Counselling

(51) The Respondent complains that he did not receive welfare support doing the investigation process. His evidence under cross examination was that he tried to contact them by telephone but that this was not successful and he then sourced his own external support. The Claimant he did not inform anyone at the time within the Respondent that had experienced any difficulties reaching the support service by telephone. He did not explain what relevance this had to his claim of race discrimination.

Alternative Duties

(52) The Claimant and his Union requested alternative duties for the Claimant rather than suspension and this was granted. He was placed on alternative duties during the investigation at another office, as additional Team Manager responsible for Chairing CIN reviews (Children in Need Reviews). His alternative duties were to be reviewed on a fortnightly basis.

(53) Following acceptance of a section 17 referral by the Local Authority, the Children's Social Care (CSC) team must determine the needs of a child and the support that they and their family may require.

(54) The Claimant complains that if he presented such a significant risk, he should not have been allowed to carry out alternative duties. It is not in dispute however that the section 17 reviews were less urgent and presented potentially less risk than the work he had carried out as MASH Manager, these were children deemed to be 'in need' rather than emergency situations where children were at risk of significant harm. The work carried out by the Claimant involved reviewing decisions whether to not to continue to work with children or not. Ms Colton's evidence is that the section 17 case reviews the Claimant was Chairing involve a number of professionals, the Claimant's role was to Chair the review meetings which are then quality assured by quality assurance services.

Comparator

(55) PB who was identified by the Claimant as his actual comparator; was employed by the Respondent as a Service Manager and the Claimant describes him as white. He was

suspended on full pay pending an investigation in October 2010. As confirmed in the suspension letter dated 13 October 2010 **[p.154],** the reasons for his suspension were;

- *He had failed to follow Derby and Derbyshire Safeguarding Children's Procedures*
- *That his actions may have resulted in a situation that could bring the Respondent into disrepute.*

(56) The allegation against PB was that in essence that there had been child that came to the attention of the Respondent's children duty service in June 2010, the father of the young Child admitted to grabbing the child on the shoulder causing marks, the mother had informed the nursery that the father had left the house. PB as the Service Manager had recorded that the mother was a protective factor and that the father was no longer at the house and decided to proceed under section 17 of the Children Act 1989 and not under section 47 and in doing so, it was decided that PB failed to follow the appropriate legislation and procedures. The decision affected that way the family were supported in that the children were not seen as being in 'need of protection' but as 'children in need' as defined by the Act. A younger child of the family was later admitted to hospital while in the sole care of the father with significant injuries. PB was suspended on the 13 October 2020 **[p.154]** and his disciplinary hearings took place 12 July and 2 August 2011 and the outcome confirmed by letter dated 8 August 2011 **[p.171]**.

(57) The sanction applied in the case of PB was demotion with effect from 3 August 2011.

(58) The suspension of PB lasted for almost 10 months. The Respondent informed the General Social Care Council of the decision on 15 October 2020 **[p.156].** None of these facts concerning PB are in dispute.

(59) The Claimant in comparison to PB was not suspended and the investigation in his case, which he complains was too long, lasted for less than 5 months ie from 21 November 2017 to his resignation on the 30 March 2018, however the disciplinary hearing took place on 9 April although it had been due to take on 21 March but adjourned at his request. 5 months is not an inconsiderable period but significantly less than the investigation into PB's conduct.

(60) Both in terms of the suspension and length of investigation, PB was treated less favourably than the Claimant.

(61) Following a disciplinary procedure, it was decided that the issue was not PB's understanding of the Children Act but his interpretation of it and his judgement in this case. PB is recorded in the disciplinary documents in the bundle (which are not in dispute) as believing his judgement was reasonable at the time, but that in hindsight he would probably do something different, he accepted that his Initial Assessment was not of sufficient quality and contained gaps.

(62) Following a disciplinary hearing it was held that the allegations against PB constituted gross misconduct but that in view of the mitigating circumstances, the decision was taken to apply a sanction short of dismissal; he was demoted, transferred to the post of Social Worker and he received a final written warning.

(63) Ms Colton was not involved in PBs case however she identified in her evidence what she considered to be the differences between the two cases;

- The claimant failed to ensure any investigation took place for 4 days whereas PB initiated investigations but selected the wrong procedure.

- PB admitted he would probably do something different in hindsight which she distinguished from the Claimant's response during the disciplinary hearing

- PB and been employed by the Respondent since 2008 compared to the 7 months the Claimant had been employed.

(64) Further, Ms Colton was unsure whether the 2008 or amended 2011 disciplinary policy would have been followed in PBs case however, the 2008 policy provides for demotion under para 4.5.19 **[p.153]** and she believed that the 2011 policy still allowed action short of dismissal however under the 2018 policy (which applied in the Claimant's case) the options were now limited to first or final written warning or dismissal. The Claimant when taken to the policies under cross examination gave evidence that;

"I *see what you are saying and information does indicate there is a difference*". He also stated that; "it *could explain*" the difference in treatment between the sanction applied to him and PB.

(65) The Claimant also complains that he was told not to contact his colleagues during the investigation and complains of alienation, however the Tribunal find that it is not unusual for an employee to be instructed not to contact colleagues to ensure that there is no influence being brought to bear on potential witnesses during an investigation and while the Tribunal accept that this may have made him feel alienated, he would doubtless have felt even more alienated had he been suspended as PB had been.

(66) The Tribunal find on a balance of probabilities that it was reasonable to consider the Claimant's offence to be more serious than the offence committed by PB in that PB had put in place a plan to support the child with social worker involvement however he had assessed it as a section 17 rather than a section 47 case, whereas the Claimant had neglected entirely to put in place any plan, leaving the young child at risk over a number of days without any checks or oversight from a social worker.

(67) While at the outset of the hearing, the Claimant sought to rely on PB as a comparator his position shifted during his submissions when he informed the Tribunal that he no longer considered him a compactor.

(68) The Claimant also seeks to rely in the alternative on a hypothetical comparator who he defines as a white Team Manager who had committed similar safeguarding issues that could be seen as placing a child at risk, however he went on to state when giving his evidence that he believed there could be a number of reasons for his treatment; because of his race, because he was employed on a different short-term contract and/or that he was surplus to requirements because here was no longer a role for him.

Supervision

(69) The Claimant complains about a lack of supervision while he was in his role.

(70) The Claimant accepted that he had not raised any previous grievance about a lack of supervision and only when asked by the Tribunal whether he had raised any complaint did he say; "*yes, but not strongly enough*" and he did not seek to elaborate further.

(71) It was not alleged by the Claimant that he or his union representative raised a complaint about supervision as an issue at the disciplinary meeting.

(72) Ms Colton accepted that she would expect supervision meetings to take place once every 4 weeks however a decision about the level of supervision will be made dependant on the role of any individual. Her evidence was not disputed and we accept it.

(73) The Claimant does not allege that Ms Colton was aware of any issue over his supervision and nor does he seek to compare his treatment to anyone else in a similar role employed by the Respondent.

(74) We accept the Claimant's evidence however on a balance of probabilities that he did not receive a supervision meeting every 4 weeks. His line manager Ms Moore was off sick for a quite a long period, she was absent from 10 November 2017 returning in January 2018, she met with him in January and informed him that his contract would not be renewed in April 2018., she was then absent again according to the undisputed evidence of the Claimant. We accept on the Claimant's evidence that the Claimant had received a supervision meeting from Ms Moore in October 2017, there was a meeting with Ms Moore in January 2018 when the Claimant was told that his contract was not being renewed and a meeting in February or March with Judith Russ. There were no supervisions in November or December 2018 while Ms Moore was absent. He could not recall how many supervisions he had had between April 2017 and the incident in November 2017. There was no evidence that there was any issue however with his performance before the incident in November 2017.

(75) The Claimant did not raise the supervisions as mitigation at the disciplinary hearing. The Claimant does not compare his treatment with regards to the supervisions with an actual comparator and nor does the Claimant allege that his performance was an issue prior to the 10 November 2017 incident or that he in fact felt that he required more training or support. The Claimant does not explain why he required further supervision sessions, he has not identified what was lacking in his performance and there is no evidence that there was any issue identified with his performance prior to November 2017.

Non-renewal of the Claimant fixed term contract

(76) The Claimant complains that he was 'surplus to requirements', that in fact he had no role and that he had always known the role would end in April 2018. He does not allege that there was a role he should have been kept on doing or that he the role should have been extended. He explained in his evidence that his role had been to provide cover in the contact service when the Team Manager was not available, to cover in the Reception Team and cover the MASH team when the Manager was not available but that he *"didn't actually have a role"* and "*I knew it would come to an end, there was not a role for me".*

(77) The Claimant gave evidence that if he was being "*cynical*" he could see it as the Respondent pushing him out but that "*I never suggested Ms Colton had any power or influence to not renew my contact – I knew I was surplus to requirements* "

Investigating officer

(78) Mr Dakin, Deputy Head of Service, Children in care was appointed to carry out the investigation. It is not in dispute that he interviewed Ms Haywood, Ms Whelan, Team Manager Reception services, David Morris, team Manager First Contact Team, Estelle Hargrave, named Nurse Safeguarding Chair Derby Royal Hospital, Dr Hambleton, Derby Royal Hospital and DS Yoxall.

(79) The Claimant alleges that the disciplinary investigation should not have been carried out by Mr Dakin who had supervised him at times when Ms Moore was absent and because Mr Dakin's direct line manager was Judith Russ who had made the decision to start an investigation. The Claimant did not allege however that Mr Dakin had conducted the investigation unfairly.

(80) The Tribunal was not taken by the Claimant to anything within the policy which he alleges had been breached.

(81) Ms Colton's undisputed evidence was that normally someone who supervises an employee will not carry out their investigation however in some cases this does happen. Further her undisputed evidence that was that Mr Dakin had been supervised by Judith Russ but from 2017 he was supervised by Andrew Kaiser, new Head of Speciality Services. Further Mr Dakin was not the Claimant's line manager, he had only covered for the Claimant's line manager on some occasions.

(82) In response to questions from the Tribunal the Claimant confirmed that he knew Mr Dakin would be carrying out the investigation about a week after the letter from Ms Russ on 22 November 2017 **[p.195].** There then followed several months before the disciplinary hearing, during which the Claimant gave various answers about whether and if not, why he did not complain about Mr Dakin carrying out the investigation but ultimately confirmed he did not complain because he; "*went with advice by my union representative".* However, he did not identify any complaints about how the investigation had been conducted other than how long it took.

Length of the investigation process.

(83) The Claimant complained that the investigation process took longer than the 6 weeks he had been told it was anticipated to take.

(84) The undisputed evidence of Ms Colton was that the length of any disciplinary and investigation depends on the subject matter and the circumstances of each case but that ideally the process takes 6 to 8 weeks but that she is currently dealing with an investigation which has taken over 12 months.

(85) The disciplinary policy however does not prescribe any time frame, it states at paragraph 2.4 that; "*Managers will carry out the disciplinary process without unreasonable delay…" (see above)*

(86) The Claimant did not identify any policy document which prescribed a 6-week period for the investigation process or indeed any length of time.

(87) It is not in dispute that the period of the investigation covered the Christmas and Easter holiday periods.

(88) The Claimant did not raise with Ms Colton at the disciplinary hearing any complaint about the investigation process.

(89) We find that the investigation process was longer than normal and longer than had been anticipated however it is reasonable to expect that there would be some delay over the Easter and Christmas break however, it is clear that investigations do on occasions take longer than 6 weeks and in PB's case, whom the Claimant had proposed as his comparator, the investigation took twice as long as it did in the Claimant's case.

(90) The Tribunal were not shown any letters/emails to the Claimant and he denied receiving any, keeping him informed about the length of the investigation and we find on a balance of probabilities that the reason for the delay was not communicated well to the Claimant. The Claimant was of course still working during this period and he does not allege that he or his Union representative complained at the time about how long the investigation was taking.

(91) The Claimant under cross examination conceded that his allegation that Mr Dakin was not impartial may be "*the wrong word, I mean independent*". When asked whether he thought Mr Dakin had been unfair in the investigation he stated; "just *about the process – the process said he would be impartial*" and "if *investigation been done outside if the structure I would have more readily accepted their assessment of me."* When pressed further to identify any unfairness, he referred to the length of time it took and not *"keep me up to speed",* he identified nothing further.

(92) It is not alleged by the Claimant that Ms Colton had any involvement in the investigation process or that the investigation affected the fairness of the disciplinary hearing itself.

Change in disciplinary policy

(93) It is not in dispute that there was a change in policy about the ability to demote under the disciplinary policy (see above) which meant that demotion was no longer available at the time of the disciplinary proceeding under the policy.

Disciplinary decision – 9 April 2018

(94) The Claimant was called to a disciplinary hearing on the 21 March 2018 however this was adjourned at his request.

(95) On the 23 March the Claimant asked Ms Russ to be released from his contract early as he had secured alternative employment. That was agreed with his last day being 30 March 2018. Ms Colton was unsure whether it was the 30 or 31 March however, the Claimant asserts it was 30 March and this is consistent with the Respondent response to the claim **[p.42].**

(96) The Claimant was informed that given the offence involved safeguarding and given the Respondent's regulatory duties, the disciplinary hearing would however proceed regardless of the Claimant's resignation. He was called to a hearing on 9 April 2018 and was represented by his union. The hearing was Chaired by Ms Colton, Head of Service.

(97) It is not disputed that Ms Colton had no prior involvement with the Claimant although she was aware of him as a member of the Social Care management team but had not supported or managed him.

(98) Ms Colton presented to this Tribunal as a thoughtful and credible witness.

(99) The Claimant complains about the inconsistencies in the evidence and that this was not considered by Ms Colton. The Claimant conceded under cross examination however that Ms Colton had always acknowledged the inconsistencies.

(100) The undisputed evidence of Ms Colton was that she based her decision on the evidence presented to her. That she was presented with the witness evidence of DS Yoxall and Ms Haywood which corroborated each-others account of events including that it had been agreed that a CMP would be carried out. She had taken into account that the Claimant denied this had been agreed, but given the consistent account of the other two witnesses she preferred their evidence on a balance of probabilities.

(101) The Tribunal accept Ms Colton's evidence that she had also taken into account that the witness statement of Dr Hambleton was not clear in terms of who she had spoken to on Friday 10 November when she was told Child A could be released home and although Mr Dakin had attempted to get a signed statement from her, he had not managed to. Ms Colton had considered the strength of the evidence without taking into account Dr Hambleton's statement and reached the same conclusion on the gravity of the offence because the Claimant for the purposes of the disciplinary hearing, had not alleged that he had arranged a CMP, further he had not alleged that he had contacted the EDT nor had he alleged that he contacted the hospital to speak with Dr Hambleton about the child.

(102) The Claimant complains that the outcome of the Child Protection Medical carried out on Tuesday 14 November 2017 which concluded that Child A had not been harmed deliberately, had not been taken into account by Ms Colton as mitigation. The undisputed evidence of Ms Colton is that she did not consider it relevant mitigation.

Acas

(103) The Claimant wad reminded that he had alleged that there had been a breach of the Acas code and he was given the opportunity to identify the alleged breach however he did not do so.

Outcome of disciplinary hearing

(104) The Respondent confirmed the outcome of the disciplinary hearing in an undated letter **[p. 198]** from MsColton. This confirmed that the outcome was that allegations were substantiated and should the Claimant have still been employed by the Respondent, he would have been dismissed on the grounds of gross misconduct effective from 9 April without notice.

(105) Ms Colton's undisputed evidence was that she formed a reasonable belief that the Claimant had had failed to follow procedures to safeguard and protect a child in that a child under 12 months was released from hospital with a lesion that could have been non- accidental and remained at an unassessed level of harm and risk while not seen for 4 days.

(106) In terms of allegation 2; that a safety plan was agreed with the Claimant to have a CPM that day and a safety plan for the weekend and a strategy discussion on Monday 13 November; these discussions were not recorded on the case file and those actions did not take place. Ms Colton referred to the inconsistency in the evidence of the Claimant and DS Yoxall and Ms Haywood, but as his two colleagues engaging in the initial discussion when the referral was made, agreed that this was the outcome, she formed a reasonable belief that the allegation was substantiated. Further she noted, and this was not disputed by the Claimant, that this was reflected in the Claimant's own entry in the child's file 10/11/18.

(107) Ms Colton concluded that the Claimant had failed to protect a small child, breached the Employee Code of Conduct and breached the HCOC professional standards for social workers.

(108) The Claimant was informed in the outcome letter that HCPC would be notified of the outcomes.

(109) The Claimant stated in evidence in chief; " ..*based on the medical of the child where is the serious negligence or misconduct is my question. I cannot understand why a local authority would take the view I would put a child at risk but medical findings were child not at risk …"*

(110) Ms Colton did not consider the outcome of the CMP to be relevant, what was relevant she considered was that the Claimant did not follow procedure and take necessary steps to protect a child and put place a safety plan to cover the weekend, and those failings meant; "*we could have been in a very different situation if something else had happened to the child*". Ms Colton did not consider there were any mitigating factors.

(111) The evidence of Ms Colton was that demotion or any other alternative to dismissal was not available under the new policy however, even if the option of demotion was available, she would still have decided on dismissal for gross misconduct on the facts of this case.

(112) The Claimant's evidence before the Tribunal was that if the child medical which was carried out had shown that the injury to Child A was non- accidental;

"I would give up social work"

(113) The Claimant alleges that the Respondent in reaching the decision that it did, acted; "*irrationally, disproportionally and with malice"* and that there "there *is no reason for Derby City Council to have acted in the way it did other than to be racially motivated".*

(114) The Tribunal have little difficulty in finding that the Respondent's decision that there had been gross misconduct was on the evidence, a reasonable decision to arrive at. Whether the injury was non-accidental or not, this the Tribunal accept does not reasonably detract from the seriousness of the Claimant's failure to protect the child in the interim and it could so easily have been a different outcome.

(115) The Claimant gave evasive and unsatisfactory answers when it was put to him under cross-examination whether he accepted that, albeit unintentionally, he put a child at risk;

"*I could see how lack of action could be seen as not acting in an appropriate manner for the child hence the investigation and disciplinary taking place" and*

"I don't want to accept that but could accept why people may say that "

(116) The Claimant in response to a question from the Tribunal stated that he would "*absolutely"* have accepted the outcome if it had been a final written warning. When asked whether he would have thought dismissal would have been an appropriate sanction if the medical assessment of the child was that the injury was not accidental, he stated;
"yes".

HCPC

(117) The Claimant does not contend that a referral to HCPC should not have been made. His undisputed evidence is that he personally contacted HCPC and self-reported in June 2018. In terms of the Respondent reporting, it is not clear who initiated that, if anyone. The undisputed evidence of Ms Colton was that she left it for HR to make the referral. The Claimant however accepted that he had a duty to self-report in any event and that he was not disadvantaged by any failure or delay by the Respondent in also reporting the incident.

(118) The Claimant's undisputed evidence is that when he contacted HCPC they informed him that they had not been contacted by the Respondent. There were no documents within the bundle disclosed by the Respondent evidencing a report to HCPC only later email communication in August 2019 after the Claimant had self – reported.

(119) The letter outlining Ms Colton's findings **[p.199]** however confirmed that HCPC would be notified of the outcome of the hearing.

(120) The Tribunal find on a balance of probabilities, given the Claimant himself accepts that the seriousness of the offence meant that he was obliged to self-report and the letter from Ms Colton shows a clear intention to report; that any failure to report by the Respondent's HR team was not indicative of the Respondent not considering it serious enough to report but was more likely than not an oversight on their part.

Statistical evidence

(121) In the response to the claim, the Respondent provided statistics showing a table of social workers, classified by the employee's stated ethnic group, employed by the Respondent from 2004 to date with a column showing the number of each group which has faced any disciplinary action including capability. It shows that out of 102 black social workers, 6.8 % (total number of 7) had been through a disciplinary or capability procedure as compared with, out of 600 white social workers, (22) a percentage of 3.7%. There is a category for "Other Ethnic Groups" for those who do not declare their ethnic group, of 11.1%. The difference in percentage terms between black and white social workers is therefore 3.1 % .

(122) We have considered the statistical evidence and what if any inference it is appropriate to draw from that evidence. The Claimant had referred in his replies to the response that the statistical evidence was 'fabricated' however he confirmed that he was not alleging that it was falsified but that it was unclear what the "Other Ethnic Group" category included. The Respondent could not assist with explaining what this category covered as the information relates to the categories selected by the employee. It would be pure speculation on the part of the Tribunal to attempt identify who may fall within this group.

(123) The evidence is drawn from a broad category i.e. disciplinary and capability, and is not limited to dismissals for misconduct.

(124) Ms Colton gave evidence about 3 other employees in her department who had been dismissed for gross misconduct during the last 6 years who, it is not disputed by the Claimant, did not share his protected characteristic.

(125) The Tribunal did not hear evidence from the Claimant about the treatment of others and nor did he put to Ms Colton any questions about how other black employees have been treated.

Submissions

Respondent's submissions

(126) The Respondent accepts PB is an actual comparator, a social worker Team Manager who was alleged to have failed to follow safeguarding procedures and brought the Respondent into disrepute when he proceeded under section 17 rather than section 47. It is submitted however that the difference in treatment is explained by; i) the disciplinary policy which applied, allowing the Respondent to consider an action short of dismissal ii) the mitigation which applied to PB. However, it is submitted that in the alternative PB may help in the construction of a hypothetical comparator if he is not an appropriate actual comparator.

(127) It is submitted that the Respondent was entitled to make the finding it did on the inconsistency of evidence between the Claimant, DS Yoxall and Ms Haywood namely that it had been agreed that a CMP would be required.

(128) The Claimant accepted that the child was not seen for 4 days although the Claimant denied that he had "*wilfully*" put the child at risk.

(129) The issues raised by the Claimant about Dr Hambleton's evidence does not mean that her evidence should have been disregarded by the Respondent but in any event, Ms Colton evidence is that she had considered the decision she would reach discounting it, and it would not have changed the outcome.

(130) The Claimant conceded that he should have followed his instinct and put a safety plan in place.

(131) The investigation took 17 weeks, the policy provides that it will be undertaken without unreasonable delay however the investigation into PB was 10 months and Ms Colton's undisputed evidence is that she is dealing with another case where it is taking even longer. There is no evidence that the delay is on the grounds of race.

(132) It is submitted that the Claimant complains about not being able to access welfare support, he tried to telephone but could not access it however he never raised this with anyone.

(133) The Claimant gave evidence had no supervision meetings but then his evidence shifted and he accepted he had a supervision meeting in October 2017, January 2018, and then February or March 2018.

(134) The Claimant refers to the failure to report to the HCPC by the Respondent as evidence that the offence was not that serious and thus he was treated less favourably however, it is submitted that Ms Colton understood it had happened and if it did not, which it appears it may not have done, then that was an oversight.

(135) The Respondent submits that the CMP which was carried out on 14 November 2017 and its conclusions is not relevant to the gravity of the error on the part of the Claimant.

(136) In terms of being placed on alternative duties during suspension, the Claimant had challenged suspension and does not appear to allege this was unfavourable treatment due to race but alleges that he should not have been put on alternative duties if his offence was so grave, but that what he appears to accept was this was more favourable treatment.

(137) It is submitted that although the Claimant refers to the unfairness of the investigation, the Claimant did not identify any actual impartiality on the part of Mr Dakin.

(138) Ms Colton expressly refuted that dismissal had anything to do with race. It is submitted that it was obviously a case of gross misconduct and the Respondent was entitled to dismiss.

(139) In terms of burden of proof; it is submitted that Employment Judge Heap at the Preliminary hearing determined that this one allegation should survive but that it had little reasonable prospect of success. The Claimant invites the Tribunal to draw inference from events but he haS not made it clear how and why the Tribunal is to conclude the events evidence discrimination based on race.

(140) It is submitted that the Claimant has not shifted the burden of proof but in any event, the Respondent has provided an adequate explanation for the decision that he would have been dismissed had he remained employed.

(141) The Respondent referred to **Talbot v Costain Oil, Gas and Process Ltd and ores 2017 ICR D11 EAT** His Honour Judge Shanks in this case, having looked at the relevant authorities — summarised the following principles for employment tribunals to consider when deciding what inferences of discrimination may be drawn*:*

•it is very unusual to find direct evidence of discrimination

•normally an employment tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question

•it is essential that the Tribunal makes findings about any 'primary facts' that are in issue so that it can take them into account as part of the relevant circumstances

•the tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference

•assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also of reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities

•where there are a number of allegations of discrimination involving one person, conclusions about that person are obviously going to be relevant in relation to all the allegations

•the Tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors that point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment

•if it is necessary to resort to the burden of proof in this context, S.136 EqA provides, in effect, that where it would be proper to draw an inference of discrimination in the absence of 'any other explanation', the burden lies on the alleged discriminator to prove there was no discrimination.

(142) In the Costain Oil case the Tribunal fell into the error of looking at the allegations in isolation rather than the totality of the circumstances in considering what inferences to draw, however the Respondent submits that the case is it be distinguished in that, in the case before us there is no evidence of hostility toward the Claimant from which inferences may be drawn of the reason behind the treatment and there is no issue around a failure to disclose relevant documents.

(143) The documents included in the bundle were the ones the Respondent considered relevant to the remaining issue. The Claimant was asked if there were any more documents he wanted to include and he confirmed that there were no others.

(144) In terms of the statistical evidence; it is summitted that it is of no assistance given the small sample size. The reasons under capability could be due to absenteeism or ill health and therefore such statistics must be treated with upmost caution.

Claimant's submissions

(145) The Claimant refers to PB as a manager managing the duty system but that is where he submits, the similarities end, he is white and an established member of the team. The Claimant submits that his circumstances are in fact different to the Claimant's and that having reflected on it, the only similarity is that they were managers and both managed the duty teams and he confirmed that he no longer seeks to rely on him as a comparator.

(146) It is submitted that there were inconsistence in the evidence of DS Yoxall, Dr Hambleton and Ms Haywood and his view was they provided a lack of clarity and the Respondent built the case around inconsistencies in evidence provided by white established colleagues who he submits were well liked and believes the Respondent would have supported them.

(147) The Claimant submits that he believed the treatment HE received was "akin" to direct discrimination because Ms Colton disregarded key information namely the outcome of the CMP which concluded that the injury was accidental. The Claimant submitted that;

"Hindsight is a wonderful thing – rather than leave matters to chance I will in future err on the side of caution – I was distracted by other views and opinion and did not address as I should have."

(148) The Claimant invites Tribunal to draw inferences from the statistical evidence which he submits indicates that black social workers who have been dismissed for gross misconduct or capability are proportionally higher.

(149) The Claimant submits that to dismiss him was malicious and that it has affected his career, and he should have simply been allowed to leave.

Legal Principles

(150) Section 13 of the Equality Act 2010 provides as follows;

"(*1) A person (A) discriminates against another (B) if* ***because*** *of protected characteristics, A treats B less favourable than A treats or would treat others*.

(151) Section 9 defines race as including at section 9 (1)(a) *"colour."*

Burden of proof.

(152) Section 136 EqA provides as follows

(2) If there are facts from which the court could decide, in the absence of any other explanation*, that a person (A) contravened the provisions concerned, the court must hold the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(153) ***Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 1005 ICR 931, CA***. The Tribunal should adopt a two-stage approach; the first stage requires a *Claimant to prove facts* from which inferences could be drawn that the Respondent treated the Claimant less favourably on the protected ground assuming no adequate explanation for the treatment. When the burden of proof has shifted onto the Respondent it is for the Respondent to provide an adequate explanation for the treatment.

(154) Section 136 therefore applies a shifting burden of proof rule to the determination of liability for discrimination. At the first stage the Claimant has to prove facts from which the court or Tribunal could decide that discrimination has taken place, which is commonly described as a 'prima facie case of discrimination'. The second stage is only engaged if such facts have been made out to the tribunal's satisfaction i.e. on the balance of probabilities. Once the burden of proof shifts, the respondent, which must prove, again on the balance of probabilities, a non-discriminatory reason for the treatment in question.

(155) Tribunals will only need to apply the provisions of section 136 if they are not in a position to make clear positive findings based on the evidence presented as to whether there has been discriminatory treatment and about the putative discriminator's motives for subjecting the Claimant to that treatment (if relevant).

Comparator

(156) Section 23 EqA provides that;

23(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be ***no material difference*** *between the circumstances, relating to each case. [Tribunal stress]*

Inferences

(157) Employment tribunals have a wide discretion to draw inferences of discrimination where appropriate. However, they must do so based on clear findings of fact.

(158) It is well established that inferences may be drawn not only from the specific incidents and acts detailed in the Claimant's claim taken in isolation but also from the full factual background of the claim, including evidence about the conduct of the Respondent before and after the act about which the complaint is made.

(159) ***Rihal v London Borough of Ealing 2004 IRLR 642, CA*** : The Court of Appeal held that an employment Tribunal had been entitled to take into account its finding that a glass ceiling operated within the Respondent Council when upholding the Claimant's claim that he had been passed over for promotion for a discriminatory reason. The Council's own figures showed that no non-whites held senior management positions within the Claimant's department, and the Tribunal was entitled to draw an inference of a culture of racial stereotyping that influenced, albeit unconsciously, management decisions.

(160) There is a danger, however, if a Tribunal relies simply upon generalised assumptions or a mere impression of a discriminatory culture as the basis for drawing an inference in a particular case.

(161) As Lord Justice Peter Gibson put it in ***Chapman v Simon 1994 IRLR 124, CA*****,** 'a mere intuitive hunch… that there has been unlawful discrimination is insufficient without facts being found to support that conclusion'.

(162) The Court of Appeal again stressed this point in ***Anya v University of Oxford and anor 2001 ICR 847, CA***, the employment Tribunal in that case had failed to make specific findings of fact in relation to various circumstantial allegations raised by the employee, and so had no material from which it could properly draw an inference of discrimination.

(163) In ***Stockton on Tees Borough Council v Aylott 2010 ICR 1278, CA*****,** Lord Justice Mummery cautioned tribunals against concluding that liability for discrimination has been established simply by relying on an unproven assertion of stereotyping persons who share the same particular protected characteristic as the Claimant. His Lordship emphasised that direct discrimination claims must be decided in accordance with the evidence, not by making use, without requiring evidence, of a verbal formula such as 'institutional discrimination' or 'stereotyping' on the basis of assumed characteristics. There must be evidence from which the Tribunal could properly infer that wrong assumptions were being made about that person's characteristics and that those assumptions were operative as part of the conscious or subconscious motivation for the respondent's detrimental treatment, such as a decision to.

(164) In ***British Medical Association v Chaudhary (No.2) 2007 IRLR 800, CA***, an

employment Tribunal made the mistake of inferring discrimination from assumed facts, as opposed to clear findings of fact based upon the evidence.

Employer's rebuttal evidence.

(165) when deciding what inferences can be drawn when considering whether a prima facie case has been made out for the purposes of applying the shifting burden of proof rule, the respondent's explanation for the alleged discriminatory treatment should generally be discounted, this being a matter for the second stage. However, the Tribunal is permitted at the first stage to take account of the respondent's rebuttal of any evidence adduced by the claimant to establish a prima facie case for example, in relation to evidence of any past conduct that has been prayed in aid by the claimant to suggest that the respondent had a discriminatory motivation for the treatment in question.

(166) The respondent could seek to rebut this evidence by, for example, arguing that the prior conduct has no link with the treatment complained of and therefore cannot be used to establish an inference of discrimination. Or it could argue that its past behaviour was justified and not discriminatory. The Respondent is not here adducing evidence to explain the alleged discriminatory treatment; rather, it is explaining its past conduct with a view to demonstrating that no inference of discrimination can be drawn from it for the purposes of the present claim.

Inferences should be drawn from totality of evidence.

(167) Tribunals are obliged to make findings of fact in relation to the circumstantial matters raised by the Claimant, it is not necessary for a Tribunal to make a specific finding as to whether any one of those matters would of itself amount in law to a discrete act of discrimination: ***Qureshi v Victoria University of Manchester and anor 2001 ICR 863, EAT*.** The Tribunal must look at the totality of its findings of fact and decide whether they add up to a sufficient basis from which to draw an inference that the Respondent has treated the complainant less favourably on the protected ground.

(168) An employer's failure to follow procedures set down by its policies can support an inference of discrimination. In ***Anya v University of Oxford and anor 2001 ICR 847, CA*,** the Court of Appeal criticised an employment Tribunal for not setting out what, if any, conclusions it drew from the Respondent University's failure to abide by its own equal opportunities policy.

(169) Relevance of statistical evidence which is usually produced to support indirect discrimination can be relevant to claims of direct discrimination : ***West Midlands Passenger Transport Executive v Singh 1988 ICR 614, CA***. There, the complainant sought and obtained disclosure of data showing the numbers of white and non-white applicants for, and appointees to, posts that were broadly comparable with that for which he had unsuccessfully applied. The Court recognised that this data might be something from which the employment Tribunal could infer discrimination if it revealed a pattern of treatment towards persons of S's racial group, and might also be used to rebut the respondent's contention that it operated an effective equal opportunities policy. The Court recognised the difficulties that complainants face when attempting to prove direct discrimination and noted that in many cases the only way for them to do so is by the Tribunal drawing appropriate inferences from all the evidence.

(170) Tribunals hearing complaints of direct discrimination must be wary of drawing

inferences from minor statistical variations : Court of Appeal in ***Appiah and anor v Governing Body of Bishop Douglass Roman Catholic High School 2007 ICR 897, CA***: this case involved a student's claim that her exclusion from school was discriminatory on the ground of race. The statistics showed that black Caribbean students made up 15 per cent of the school roll but accounted for 27 per cent of exclusions; black African students accounted for 20 per cent of the roll and 26 per cent of exclusions; and for white students the figures were 26 and 17 per cent, respectively. The Court of Appeal held that the county court judge who had rejected the claim had been right to conclude that there was little, if any, probative value in the statistics. Although there was a stark imbalance in the figures in respect of black Caribbean students, this was not true of the figures in respect of black African students, the Claimant's racial group. The figures being reasonably close, the statistics could only gain probative force if it could be shown that a significant number of the previous exclusions of students in the racial group in question were or might have been discriminatory.

(171) In ***Odi v Intellectual Property Office ET Case No.1601948/10*** an employment Tribunal refused to draw adverse inferences from statistical evidence that between 1 April 2007 and 31 March 2010 the IPO received 53 job applications from people whose ethnicity was described as 'black' yet selected only two for interview and appointed just one. By contrast, of 903 white candidates, 260 had been selected for interview and 102 were appointed. The Tribunal commented that these statistics ought to prompt the IPO to ask whether it was doing enough to encourage applications from members of ethnic minority groups. Nevertheless, it accepted the IPO's unchallenged evidence that about five per cent of its workforce was drawn from members of ethnic minorities. The Tribunal also bore in mind that O's evidence, taken as a whole, did not support her claim of race discrimination.

(172) When comparing the treatment received by a dismissed employee with that which was or would have been received by a comparator of a different race, it is necessary to take account of all the surrounding circumstances. In ***Ahmad v Morse Chain Division of Borg Warner Ltd ET Case No.25005/78***, for example, a black employee was dismissed for fighting but his white antagonist was not. However, although potentially discriminatory, the dismissal did not amount to either unfair dismissal or race discrimination in the circumstances because the disparate treatment could be justified on non-racial grounds: the black worker, but not the white worker, was already under warning for a previous fighting incident.

(173) The mere fact that an employer has behaved unreasonably in dismissing an employee does not mean that it acted in a discriminatory fashion. However, where that unreasonableness is extreme in its nature, the Tribunal may conclude that the Claimant has shown a prima facie case of discrimination and require the employer to provide a non-discriminatory explanation. ***Gayle v Works 4 Ltd ET Case No.2300786/07*** **G** :The tribunal, found the dismissal to be both procedurally and substantively unfair. Turning to the discrimination claim, it accepted that mere unreasonableness cannot lead to an inference of race discrimination. However, it considered that the extreme unreasonableness and the 'sham' disciplinary process were enough to shift the burden of proof to the employer to provide a non-discriminatory explanation. No explanation for the treatment was put forward and nor was there evidence from which the Tribunal could infer a non-discriminatory reason.

(174) The rationality of an employer's decision to treat a person in a particular way may well be taken into account. In ***Nelson v Newry and Mourne District Council 2009 IRLR***

548, NICA**,** the fact that the employer's decision making was not irrational or perverse must be very relevant in deciding whether there was evidence from which it could be inferred that the decision making was motivated by an improper discriminatory intent.

Analysis

Investigation

(175) The Tribunal find that there was no breach of the Respondent's policy. The investigation took longer than had been anticipated however the Tribunal accept that with the Christmas and Easter period it was understandable that this caused some delay. The delay was not well communicated however, the Claimant never complained or asked about timings. The Tribunal accept the evidence of Ms Colton that investigations can take longer and indeed in the case of PB who the Claimant had initially relied on as a comparator, was subject to an investigation which was twice as long as the Claimant's. The Claimant was during this period (unlike PB) not suspended but had found alternative duties at his request, which was more favourable that the treatment afforded to PB.

(176) The Tribunal do not consider that it is appropriate to draw any adverse inferences from the treatment around the length of the hearing, it was not in breach of policy and the Respondent provided a satisfactory and credible explanation.

(177) In terms of the impact on the outcome of the disciplinary hearing, which is the claim of direct discrimination, the Claimant does not allege that the length of the investigation or indeed the way it was carried out, prejudiced him at the disciplinary hearing. Other than length of time, he did not identify any unfairness in the investigation process.

Statistical evidence - inference

(178) The statistical evidence relates to a broad group which extends beyond dismissal for gross misconduct. Capability is wide ranging in terms of what it may cover, for example it may include illness and performance.

(179) It is not possible to conclude from those statistics that predominantly more black than white staff were dismissed after a disciplinary processing involving the sort of allegations that the Claimant faced or indeed generally for disciplinary issues.

(180) The Tribunal consider that the statistical evidence involves small numbers and conclude that there is little, if any, probative value in the statistics. The figures being reasonably close, the statistics could only gain probative force if it could be shown that a significant number of the previous dismissals were or might have been discriminatory. The Claimant does not identify within those figures any employees whose dismissals he alleged were or might have been discriminatory.

(181) The Tribunal conclude that no inference can be drawn from those statistics.

Comparator

(182) PB was charged with a safeguarding offence but he was demoted and not dismissed. The Claimant however conceded in cross examination that the difference in the available sanctions could have been an explanation for the difference in treatment but

in any event, he now submits that PB is not an appropriate comparator.

(183) PB was a Team Manager and he was involved in a serious safeguarding matter however, the Tribunal conclude that he is not an appropriate comparator for the purposes of section *23(1) EqA* in that there were material differences between the circumstances relating to each case, namely the gravity of the offences, and the likely mitigation including PB's acceptance of his failings with the assessment process and his insight into his judgment in that case and possibly his length of service. In terms of alternative sanctions; Ms Colton's evidence is that even if available she would not have considered applying an alternative sanction in the Claimant's case.

(184) Even if PB were an appropriate comparator such that there was then a difference in treatment (namely the outcome of the disciplinary hearing) and a difference in race, the Respondent has provided an adequate explanation for that difference in treatment i.e. the gravity of the offence and the presence of mitigation. PB did carry out a procedure to safeguard the child but it was deemed to be the wrong procedure, he had been employed for longer than the Claimant and had shown some insight into his judgement on that occasion. The Claimant took no action to protect the child by his own admission, the child was left at an unassessed risk for a number of days.

(185) We therefore do not find PB to be a relevant comparator but even if he were the Respondent has shown an adequate non-discriminatory explanation for the difference in treatment.

(186) The Claimant argues that to dismiss him was malicious and that it has affected his career, and he should have simply been allowed to leave. However, there is no evidence that the dismissal was motivated by malice and indeed this was not put to Ms Colton. Although the Claimant was directed by the Tribunal to put to Ms Colton his allegation that the dismissal was because of his race and only when so directed did he put that allegation to her, he did not put it to her that it was motivated by malice which he raised in his submissions.

(187) The Tribunal found Ms Colton to be a considered witness, who had taken into account the inconsistencies in the evidence and weighed those when reaching a decision as she explained, on a balance of probabilities. She had also carried out the intellectual exercise of discounting Dr Hambleton's evidence and deciding whether that would make a difference.

(188) We find that the decision to leave his shift on a Friday 10 November 2017 taking no steps to ensure Child A was protected, was a gross dereliction of his duty which was reasonably considered to be gross misconduct.

(189) The Claimant complains about not having supervision meetings every 4 weeks, however he did not raise a grievance at the time, he did not raise this during the disciplinary and he admitted that he had some supervisions but that his line manager was absent for a long periods on sick leave. He gave no evidence about the number of supervisions he also had between April and November 2017. He does not allege that this put him at any disadvantage because he does not identify what he required from more supervisions and there were no performance issues identified before the incident in November 2017 and he does not allege that he himself considered that there were any issues.

(190) In terms of welfare support, he tried the telephone number and did not make contact,

he does not allege that this had anything to do with his race. He never raised this with anyone and simply decided to source his own support.

(191) The Claimant did not explain to this Tribunal what the alleged complaints about supervision and lack of welfare support had to do with his complaint of race discrimination, what they had to do with race and/or what inferences he was inviting the Tribunal to draw about Ms Colton's decision at the disciplinary hearing and why and it was not obvious to the Tribunal.

(192) In terms of the report to the HCPC, the Tribunal accept that Ms Colton expected such a report to be made but that this appears to have been overlooked, that oversight is not we find an indication that the offence was not considered serious. The Claimant self-reported acknowledging that was required to do so in the circumstances.

(193) The Tribunal conclude that there are no adverse inferences to be drawn from the primary findings of fact.

(194) The Tribunal do not find that the Claimant has identified a prima face case of discrimination. He has established less favourable treatment but he has not established a difference in treatment on the grounds of race. Even if the Claimant had with PB as a comparator, established a difference in treatment and race, the Respondent has provided a non-discriminatory and satisfactory explanation for the treatment i.e. for the decision that the Claimant would have been dismissed and that some other sanction would not have been applied in his case.

(195) It was clear to the Tribunal that the crux of the Claimant's case is that he remains convinced that because the injury to Child A was believed, after the CMP, to be accidental that this finding should have been accepted as mitigation which rendered a dismissal unfair. Had the assessment shown it was deliberate harm, he stated that he would not have continued as a social worker and would not have challenged the decision to dismiss. He therefore maintained the view that because the harm to the child had been found to be accidental, this must mean that his neglect was less grave.

(196) The Tribunal find it profoundly concerning that the Claimant continues to maintain that an outcome over which he had no control, should diminish the seriousness with which his actions are to be judged. The Tribunal would encourage the Claimant to reflect more carefully on the fact that the consequences could have been grave to the child and he had left it to chance what those consequences may have been.

(197) It is not malicious to proceed with the disciplinary hearing rather than allow him to resign and leave. The responsible thing to do, was to complete that process and report the findings to the HCPC.

(198) This was a case involving the potential harm to a small child in circumstances where the Respondent and the Claimant had a duty of care to protect the child. The Claimant accepts that he failed to do what was required of him, he went home after his shift that Friday without contacting the hospital or the Emergency Team, the child could have been exposed to serious harm in the days which followed. For the Claimant to maintain the belief that he should have simply been allowed to leave the Respondent's employment rather than the Respondent conduct a disciplinary process and fulfil its regulatory requirements or something short of a finding that he would have been dismissed had he not resigned, is utterly unreasonable and misguided.

(199) The Tribunal conclude that the treatment the Claimant received was in no way whatsoever related to his race, race was not a reason or cause of the decision to find that he would have been dismissed for gross misconduct if he had remained employed or a reason or cause for the decision not to apply an alternative sanction.

(200) The claim is dismissed.

Employment Judge Rachel Broughton

Signed: 13 April 2021