EMPLOYMENT TRIBUNALS

Claimant: Ms K David-Ogundele

Respondent 1: Alternative Futures Group Limited
Respondent 2: Lilian Dim
Respondent 3: Aimee Fox
Respondent 4: Sandra Murray

HELD AT: Liverpool (by CVP) **ON:** 15, 16, 17,18, 19, 22 March 2021 & 26 March 2021 (in chambers)

BEFORE: Employment Judge Shotter

Members: Mrs H Fletcher
Mr J Ostrowski

REPRESENTATION:

Claimant: Mr HB O'Odusanya, solicitor

Respondent 1, 2, 3 & 4: Ms S Johnson, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not treated less favourably because of her protected characteristic of race by the first, second respondent, third and fourth respondent, and her claims of direct discrimination brought under Section 13 of the Equality Act 2010 are dismissed against all respondents.

2. The first, second, third and fourth respondent did not engage in unwanted conduct related to the protected characteristic of race and the claimant's claim of harassment brought under section 26 of the Equality Act 2010 is dismissed against all respondents.

3. The claimant was not subjected to a detriment for raising a protected act and her claim for victimisation brought under section 27 of the Equality Act is dismissed against all respondents.

4. The first respondent did not unfairly dismiss the claimant and her claim for unfair dismissal is not well-founded and is dismissed against the first respondent.

5. The race discrimination complaint relating to the WhatsApp group Christmas 2017 was not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done). The complaint is out of time and in all the circumstances of the case, it is not just and equitable to extend the time limits. The Tribunal has no jurisdiction to consider the complaint, which is dismissed.

6. The race discrimination complaints relating to the disciplinary process starting from the reports made by the second, third and fourth respondent on the 16 June 2018, 18 June 2018 and 2 July 2018 through to dismissal on 28 September 2018 formed part of a continuing act, and in the alternative, in all the circumstances of the case it was just and equitable to extend the time limit and the Tribunal has the jurisdiction to consider the complaints.

REASONS

Preamble

The hearing

1. This has been a remote hearing by video which has been consented to by the parties. The form of remote hearing was Kinley CVP fully remote. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

2. The documents that the Tribunal was referred to are in a main bundle of 584 pages, together with number of documents submitted in evidence during the final hearing, the claimant's witness statement signed and dated 10 December 2019, witness statement of Blesson Oni signed and dated 10 November 2019, Alvine Andres, unsigned and undated, Amy Fox signed and dated 5 February 2010, Andrea Roach signed and dated 9 December 2019, Jayne Prichard signed and dated 30 January 2010, Ngozi Lilian Dim signed and dated 21 November 2019, Sandra Murray signed and dated 4 February 2020 and Shaunna Thompson signed and dated 29 January 2020. In addition, the Tribunal has considered the written submission made on behalf of the parties, for which it is grateful and the case law to which it was referred to.

3. At the outset of the hearing an issue arose concerning Amy Fox, who is adversely affected by depression and anxiety, a condition she has suffered from a young age as recorded by the Tribunal in its findings of facts below. Ms Johnson made an application for special measures, in other words reasonable adjustments supported by medical report. The measure requested was simply that the claimant switched off her camera when Amy Fox was giving her oral evidence. Mr Oumuamua objected to the application.

4. The Tribunal heard oral submissions from both representatives which it took into account, after giving Mr Oumuamua sufficient time to take instructions and referring the parties to the updated Equal Treatment Benchbook, requiring cogent argument why the adjustment could not be made and any adverse effect on the claimant's final hearing.

5. The medical report dated 8 March 2021 from Dr Catherine Harris confirmed Amy Fox had suffered from anxiety and depression since the age of fourteen with "symptoms becoming increasingly worse over the last 2 years. You feel anxious on a daily basis with a feeling of panic and a racing heart. You have fluctuating moods and you are currently taking medication to deal with these symptoms."

6. Ms Johnson submitted Amy Fox experienced feelings of fear and intimidation by the claimant and would have difficulties giving evidence when the claimant's camera was switched on, and there would be an adverse effect on her ability to take part in this trial. Ms Johnson argued the claimant's Article 6 rights would not be affected, as the claimant could see and hear all of Amy Fox's evidence. Mr Oumuamua objected to the application on the basis that he did not accept Amy Fox was intimidated by the claimant. He questioned whether Amy Fox got anxious every time she saw a "black woman" in an attempt to divert the Tribunal from the key issue which was access to justice as there was no suggestion by Amy Fox that she was nervous in the presence of black women per se as opposed to a specific individual i.e. the claimant.

7. Mr Oumuamua referred the Tribunal to case law which he did not produce, confirming there was no need for case law to be looked at as it dealt with just one issue, namely Amy Fox's medical condition, submitting the Tribunal should examine Amy Fox to discover the alleged causes of her disability and ascertain whether they are genuine. The Tribunal took the view that examining the cause of what appeared to be a long-standing medical condition would not assist the parties and refused to do so. However, it understood the gist of Mr Oumuamua's objections to be the application was "a cheap scoring exercise…she wants to milk the fact. The claimant is trying to fight for her liberty and the police are waiting."

8. The Tribunal took into account oral submissions and ordered the claimant's cameral would be turned off when Amy Fox was giving oral evidence accepting she had a long-standing medical condition and in contrast with Mr Oumuamua's submission, it was satisfied the medical report was sufficient for the Tribunal to make a reasonable adjustment bearing in mind it did not impact of the claimant's access to justice, but did impact of Aimee Fox who is the third respondent, taking into account the provisions set out in the updated Equal Treatment Benchbook at paragraphs 31 and 45 onwards. The Tribunal make it clear to the parties that ordering the reasonable adjustment it is not making any findings of fact that the claimant at any stage during the relevant period of this case, made Amy Fox fearful or intimidated and this is an issue which can only be decided after the Tribunal has heard oral evidence and considered the contemporaneous documentation which the Tribunal is yet to hear and consider. In short, it is satisfied the reasonable adjustment in no way impacts upon the evidence the Tribunal is yet to hear and the findings it will be making. Finally, at the time when the Tribunal heard this application it indicated when giving its oral decision whether or not the police were waiting the outcome of this case or not was irrelevant to its deliberations. As it transpired, there was no issue with the police waiting for any outcome, and nor was the claimant's liberty at stake despite Mr Oumuamua's submission to the contrary. The application made on behalf of the claimant and the respondent's objections took from approximately 10.15 to 12.10 am to resolve in a case listed for 4-days when it was a matter that could have reasonably been resolved with agreement given the fact that the Tribunal

regularly orders reasonable adjustments in cases, including cameras being switched off and other similar measures when necessary, in the interests of justice.

The pleadings

9. In a claim form received on 2 February 2019 following ACAS early conciliation between 10 December 2019 and9 January 2019, the claimant, who at the time was employed as support worker until her dismissal without notice, brings complaints of:

1. Unfair dismissal, contrary to sections 94 and 98 of the Employment Rights Act 1996;
2. Direct discrimination because of race, contrary to sections 13 and 39 of the Equality Act 2010 ("EqA");
3. Harassment related to race, contrary to sections 26 and 40 of EqA;
4. Victimisation, contrary to sections 27 and 39 of EqA.

10. In short, the claimant maintains the second, third and fourth respondent falsified statements, conspired to get her into trouble, and as a result she was disciplined and dismissed by a panel who failed to take into account the fact the date on which the alleged incident took place could not be correct. The claimant believes that the actions of the individual respondents and disciplinary panel amounted to unlawful race discrimination, and the investigation was "biased and skewed" towards punishing the claimant because of hr race.

11. It is notable the claimant also pleaded (para. 2.24) that she had complained about the second and fourth respondent's "bad work practices" and she "reminded" the second respondent (who was "lazy") "of her duty" evidence which the appeal panel did not take into account.

Comparators

12. The claimant relies on actual comparators set out in the pleadings as follows;

6.1 Jayne Prichard: paras. 3.2.1

6.2 Aimee Fox: paras. 3.2.1, 3.2.3, 3.2.5, 3.2.6

6.3 Sandra Murray: paras 3.2.1, 3.2.2, 3.2.4, 3.2.5, 3.2.6

6.4 hypothetical comparator is a white British employee: para. 3.2.1

13. The pleaded comparators were changed by the claimant during the final hearing.

14. On the first day of the hearing the issues to be decided were discussed, including the comparators relied upon. Mr O'Odusanya asked for time to confirm the name of the actual comparators which he intended to rely upon, and by the fourth day of the final hearing in the afternoon, he was in a position to provide this information to the respondent and Tribunal.

15. Mr O'Odusanya confirmed the claimant was relying on Andrea Fox and Sandra Murray as her only comparators for the claims brought under section 13 and 26, and a hypothetical comparator

for the section 27 complaint. For the avoidance of doubt the Tribunal also considered the section 13 complaint against a hypothetical comparator given its findings that Andrea Fox and Sandra Murray were not appropriate comparators given neither were facing disciplinary proceedings entailing allegations involving the serious abuse of a service user as set out below. There was no need for the Tribunal to consider a hypothetical comparator in respect of the other complaints.

16. The respondent denies the claimant's claim maintaining the claimant had been fairly dismissed for gross misconduct after she was found guilty of abusing a service user, and if there were any procedural defects given the serious nature of the misconduct she would have been dismissed in any event.

The agreed issues

17. The parties agreed the issues as follows. The numbering set out in the list of issues has been duplicated by the Tribunal in the reserved judgment and these are the issues it decided after hearing all the evidence and oral submissions. It admitted the claimant had been removed from a WhatsApp group conversation in late 2017 maintaining the purpose of the group was to discuss the Christmas party and the claimant chose not to come to the party, and the claim had been lodged outside the statutory time limit set out in section 123(1) of the Equality Act 2010 ("EqA"). At the preliminary hearing dealing with case management held on the 7 May 2019 it was agreed that any complaint presented before 11 September 2018 was outside the statutory time limit and the Tribunal would consider whether the act extended over a period of time which ended on or after 11 September 2018 and if not, whether it would be just and equitable to extend the time limit.

18. With reference to the victimisation claim the respondent maintains there was no protected act during the disciplinary hearing and therefore the dismissal cannot amount to a detriment, which was accepted by the claimant.

19. The respondent accepted the claimant raised a protected act during the appeal hearing. The detriment relied upon by the claimant, namely, her appeal being unsuccessful, was disputed.

Complaints and issues

Unfair dismissal

It is common ground that the claimant had the right not to be unfairly dismissed and that the first respondent dismissed her. The tribunal must decide:

a) Whether or not the first respondent can prove that the sole or main reason for the dismissal was its belief that the claimant had tied a hoist in order to prevent a service user from leaving their room. (If that was the reason, it clearly related to the claimant's conduct.)

b) If so, whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss her.

c) If the dismissal is found to be unfair, further issues arise in relation to remedy:

d) Should the claimant's compensatory award be reduced on the ground that, had the respondent acted fairly, the claimant would or might have been dismissed in any event?

e) Would it be just and equitable to reduce the claimant's basic and/or compensatory awards to reflect the claimant's contributory conduct?

The parties agreed that these latter two issues should be determined at the same time as the fairness or otherwise of the dismissal.

Direct race discrimination

The claimant self-identifies as being Irish-Nigerian. Relevantly for the purposes of this claim, she says she is black and of Nigerian ethnic origin.

Here is a complete list of the allegations of less favourable treatment of which she complains. Except where a comparator is specifically mentioned, the claimant compares herself to a hypothetical comparator.

a) Ms Pritchard going out of her way to "fill in the gaps in the evidence" of the claimant's accusers.

b) The decision to take disciplinary action against the claimant. Here the claimant compares her treatment to the way in which the first respondent treated Aimee Fox. The claimant was invited to a disciplinary meeting and Ms Fox was not.

c) The decision to dismiss the claimant.

d) Refusing to investigate her grievance.

e) Dealing with the claimant's appeal with a "dismissive attitude".

The issues for the tribunal to decide will be

1. Whether or not the claimant was treated as she alleges; and
2. If so, what was the reason for the treatment? Was it because the claimant is black and/or of Nigerian origin? Or was it for other reasons?

Harassment related to race

Here is a complete list of the unwanted conduct which the claimant says amounted to harassment:

a) On three occasions between April 2018 and 13 June 2018, when Ms Dim worked alongside the claimant, Ms Dim refused or failed to carry out tasks and left them for the claimant to do. The third occasion was on 13 June 2018.

b) "A couple of times" (on dates to be clarified), Sandra Murray worked alongside the claimant and behaved in a similar way towards her. On one of these occasions Ms Murray was meant to take a service user for an appointment but failed to do so.

c) The investigation report.

d) The dismissal.

e) The appeal outcome.

f) At one or more meetings during the investigative and disciplinary process, the claimant pointed out that she had not been at work on the date of the alleged misconduct. She received the answer, "It doesn't really matter whether you were there or not."

Here the issues for determination are

1. Whether or not the respondents conducted themselves as alleged;
2. Whether or not the conduct was unwanted?

Victimisation

It is common ground that the claimant did two protected acts by complaining of race discrimination in her grievance letter and dismissal appeal letter. In relation to those two protected acts, the issues are:

1. Did the first respondent subject the claimant to a detriment by not investigating her grievance?
2. Did the first respondent subject the claimant to a detriment by dealing with her appeal in bad faith and simply confirming the original dismissal decision?
3. If so (in relation to either detriment), what was the reason why the first respondent subjected her to that detriment? Was it because the claimant had complained of race discrimination? Or was it for other reasons?

Time limit issues

Allowing for the effects of early conciliation, it appears that the claim form was presented within the time limit for any contravention of EqA that was done (or must be treated as having been done) on or after 11 September 2018.

For anything done before that date, the tribunal must consider:

1. Whether the alleged contravention formed part of an act extending over a period which ended on or after 11 September 2018; and
2. If not, whether or not it would be just and equitable to extend the time limit.

Evidence

17 The Tribunal heard evidence under oath from the claimant and giving evidence on her behalf Blesson Oni, an agency worker had completed a number of shifts at the first respondent's premises. Blesson Oni's evidence did not assist the Tribunal resolving the conflicts and issues in this case. Her evidence that Amy Fox had used the words "I don't know it's dodgy, I don't know it's dodgy" made no sense in the context used by Mrs Oni and she was unable to provide a coherent explanation when giving oral evidence, putting the words allegedly used in some form of context.

18 The claimant was not found to be a credible witness; she did not always answer questions in a straight-forward and full manner and gave stock answers several times. On re-examination the claimant confirmed she was "perfect" at work when the appraisals reflected otherwise, and the Tribunal found her evidence to be inaccurate and unreliable. Ms Johnson submitted that at point 20 of the Claimant's witness

statement, the Claimant states that she, "always insist [the service user's] TV should be left on until around 12.30am", and that if she tied the hoist/sling as alleged between LOB and [service user's] TV then she would not be able to turn off [the service user's] TV. The Tribunal was referred to page 431 which is a daily record for 14 June 2018, particularly the last entry at 2030 states that [the service user] was put to bed. Ms Johnson argued that if the claimant had turned off [the service user's] TV then why is there no entry to that effect as the Claimant had done on other occasions when she supported him? The contemporaneous documentation did not support the claimant's position and so the Tribunal found on the balance of probabilities as indicated below in its findings of facts, when it resolved other conflicts in the evidence.

19 On behalf of the respondent the Tribunal heard oral evidence from Alvine Andrews, registered manager and the dismissing officer, Amy Fox the third respondent and support worker employed by the first respondent until November 2018 when she moved to a different city, Andrea Roach, head of operations for Liverpool City Region North, who heard the appeal, Jayne Prichard, team leader, who carried out the investigation, Ngozi Lilian Dim, agency worker and second respondent referred to as Lilian Dim in these proceedings, Sandra Murray, support worker employed by the first respondent, and finally, Shaunna Thompson the team leader responsible for the unit where the alleged incident took place, and the claimant's line manager.

20 There are a number of conflicts in the evidence between the claimant and the respondents. On the balance of probabilities, the Tribunal preferred the evidence given by second, third and fourth respondents resolving the conflicting evidence for the reasons set out below. Alvine Andrews was a credible and honest witness whose evidence was supported by the contemporaneous documentation. It is notable she believed what the claimant had to say until further investigations were carried out which undermined the claimant's credibility and caused her to question whether the claimant had carried out the act of gross misconduct as alleged by her colleagues.

21 It is notable at the disciplinary the claimant covertly recorded the hearing on her phone and continued to record the conversation between Alvin Andrews and the human resources representative when the claimant had left the room, leaving her phone behind. The claimant was told at the appeal hearing she should not be recording and confirmed her phone was on flight mode and yet she continued to record the hearing. The claimant's actions brought into question her credibility, although this was not a deciding factor when it came to the Tribunal resolving the conflicts in the evidence.

22 The Tribunal has considered the documents to which it was taken in the bundle, the additional documents produced during the hearing, and written and oral submissions, which the Tribunal does not intend to repeat and has attempted to incorporate the points made by the parties within the body of this judgment with reasons, It has made the following findings of the relevant facts having resolved the conflicting evidence on the balance of probabilities.

Facts

23 There are a number of agreed facts which have been used by the Tribunal as a framework incorporated into its findings below for which it is grateful to the parties.

24 The respondent is a large health and social care registered charity operating throughout the United Kingdom including a property referred to as "JBR" based outside Manchester, in which vulnerable adults were cared for. This case involved two vulnerable adults referred to the Tribunal as the "female vulnerable adult" and the "male vulnerable adult". Both vulnerable adults were non-verbal. The male vulnerable adult was diagnosed with quadriplegia, cerebral palsy; epilepsy and double incontinence which caused a history of skin break-down and the Care Plan recorded intense monitoring was needed as it was a painful condition. These are all factors found to be relevant in the decision-making process leading to the claimant's dismissal and rejection of her appeal.

25 The male vulnerable adult joined the supported living accommodation at JBR in March 2018. On joining his parents made a request that the claimant be locked in is room at night, and the first respondent made it clear that to the staff that this was unacceptable. The male vulnerable adult prone to epilepsy and seizures was on medication. He was unable to walk unaided and required a manual hoist to be used when taking showers.

26 The male vulnerable adult could become very distressed and anxious. The Care Plan set out the best way to support his challenging behaviour. The unchallenged evidence before the Tribunal was that the male vulnerable adult regularly bruised himself and when agitated he could stay awake throughout the night "aggressively rolling." The male vulnerable adult also regularly banged his head on the wall or floor if agitated and distressed, and there were guidelines on what to do to reduce the agitation, for example, watching videos. Taking care of the male vulnerable adult required patience and understanding, it was a demanding job and vital the care workers understood his care plan and needs.

Respondent's policies and procedures relevant to this claim.

27 The respondent issued a number of policies and procedures including a Disciplinary Policy dated March 2017 which specified at 3.0 that it operated within the parameters of The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. Appendix A provided a list of the disciplinary rules.

28 Clause 3.1.3 provided for a suspension on full pay pending investigation "which is not regarded as a form of disciplinary action."

29 The Disciplinary Procedure reflected the ACAS Code and the Tribunal was taken to the Appendix A which set out a non-exhaustive list of gross misconduct examples including at 3(a)(vii) "actions which seriously endanger the health or safety of the individual or another person whilst at work," (xiv) "Abuse of service users by actions or omissions, and (xviii) Serious breach of AFG Policy or Procedure."

30 Under the hearing "Preparation for a Disciplinary Hearing" provision was made for questions to be put to witnesses and employees could call "any fellow employee witnesses who can provide relevant information in support of your arguments" and the employees should provide their names. It was "not automatic" that all witnesses would be required to attend the disciplinary hearing, and there was nothing to stop the claimant asking for a particular witness to attend.

31 The appeal process was set out, including that "it is for the individual to identify who they wish to have present as witnesses".

32 The respondent had a procedure dealing with abuse of service users including "Deprivation of Liberty".

The claimant's employment

33 The claimant describes herself as an Irish Citizen of African descent and Nigerian by birth. In written closing submissions made by Mr O'Odusanya there was also a reference to the claimant's colour, and she was described as "black." A number of the respondent's witnesses, as recorded below, also describe themselves as "black."

34 The claimant commenced her employment as a support worker and she was issued with a contract of employment on 17 March 2014, which the claimant signed the day she started work. The claimant in the body of the contract was referred to the respondent's policies and procedures referred to as non-contractual.

35 Despite the claimant's oral evidence on re-examination when she said that she was a "perfect" employee, the contemporaneous documents reflect she was not the perfect employee and had performance issues.

36 As of February 2018, the claimant starting working nights referred to as "waking nights." As a permanent member of staff, she worked with a less experienced employee or an agency support worker. The claimant worked with Amy Fox, a younger care worker who joined JBR in February 2018.

37 Amy Fox had worked for the respondent since 2016. Amy Fox during the relevant period was in her early to mid-twenties and suffered from depression and anxiety since the age of fourteen. In contrast, the claimant was in her early fifties and had children, and the claimant's evidence that Amy Fox was not younger and could have been the same age as the claimant, was not credible. Amy Fox is clearly younger than the claimant and of a nervous disposition, she found the claimant's manner "abrupt" and felt anxious in her presence. The Tribunal makes no findings as to whether this was intentional on the claimant's part, and took the view that it was more likely than not the situation was attributable to incompatible workplace relationships exacerbated by a medical condition, that did not denote any racial prejudice on the part of Amy Fox or unreasonableness/bullying behaviour on the part of the claimant.

38 There was an issue during closing submissions as to whether the Amy Fox had given evidence that she was intimidated because the claimant shouted down the phone in her African language. The Tribunal checked three sets of written notes of evidence. Amy Fox did not refer to the claimant speaking in her own language shouting down the phone; this evidence came from Shaunna Thompson who did not refer to Amy Fox witnessing this but other unnamed staff reporting it to her. Amy Fox was unable to provide any evidence on why she felt intimidated, describing how she felt fearful "it was her attitude and the way she came across to me. I don't know how to explain it. She wasn't openly friendly." The Tribunal found on the balance of probabilities that the claimant did nothing expressly against Amy Fox. Amy Fox found the claimant unfriendly, and until the alleged incident she had witnessed, would not have described the claimant as "bad staff."

39 At some point before the incident witnessed by Lilian Dim, Amy Fox told Sandra Murray that she did not like working with the claimant "she is bad her" but did not say why.

The alleged incident on 14 June 2018.

40 Lilian Dim and the claimant worked the shift on the 14 June 2018.

41 As the only full-time member of staff the claimant completed the Diary and Lilian Dim made no written observations. The diary in the claimant's writing recorded at 10.20pm the male vulnerable adult was "still vocal and agitated…very agitated…" On a close reading of the Diary the Tribunal found the note is markedly different from other notes in the diary where the claimant has recorded "…is sleeping" which was recorded on four occasions with times when he was checked. The 14 June diary records only one time in the left-hand corner and that the male vulnerable adult "did not have a good night sleep up and down the corridor and very vocal…slept around 4.15am got up at 6.00am…and staff directed him back to his room and put on his DVD. Stayed there until 8.00am." The diary was not considered during the investigation, when it should have been, and the first respondent can be criticised for this. It was not considered at the disciplinary hearing when it should have been but this was put right to at the appeal hearing when the claimant admitted she and not Lilian Dim had written the note "because, I'm a permanent member of staff and I know better than her…" At the end of the appeal hearing Andrea Roach decided to check the daily diaries. The daily diaries should have been presented to the claimant and Sandra Murray as a matter of good practice, however it made no difference to the outcome as the Diary did not clear the claimant from the allegation and so the Tribunal found having considered the contemporaneous notes made by the claimant.

42 On the 16 June 2018 Lilian Dim informed her co-worker Sandra Murray that the claimant had committed an act of abuse, and in her written evidence stated Sandra Murray was going to report it to the manager and thought "someone else may have seen" the claimant doing this to. The evidence before the Tribunal included Lilian Dim being told "staff had previously noticed it" and so the Tribunal found. Sandra Murray told Lilian Dim to report it, and when Lilian Dim said she just wasn't going to work anymore with the claimant and would not report it, Sandra Murray took it upon herself to report the allegation hence the confusion with dates.

43 Sandra Murray reported it two days later on the 18 June 2018 to Shauna Thompson, as the claimant due to work on the 19 June 2018 and she wanted to ensure there was no repeat. When reporting the alleged incident Sandra Murray did not mention Amy Fox's name, but she believed it was Amy Fox who may have witnessed an earlier incident with the claimant. In her written witness statement, she recorded; "I did not mention Amy's name, but it would have been obvious because Amy was the only other person doing waking nights at JBR." The Tribunal found this information was not entirely correct, Amy Fox was the main permanent member of staff working waking nights, however another member of staff irregularly worked waking nights and her name was not mentioned. In contrast, Shaunna Thompson in her witness statement refers to being told by Sandra Murray "other staff members doing waking nights could have seen this and the only other staff member doing waking nights at the time was Amy Fox."

Claimant's suspension

44 The claimant was suspended on full pay pending investigation by Sandra Murray.

45 On the 22 June 2018 Lilian Dim emailed Shaunna Thompson making her aware "of a situation that occurred on the 14/06/2018 at about 11ish…as my co-worker I was extremely surprised by the action Kofo [the claimant] took when [the male vulnerable adult] tried to come out of his room but Kofo didn't let him out which at the time I taught [thought] she only wants him to go back to his bed, but to my surprise she brought a

sling and tied to the door with the door next to that [the vulnerable adult] can't come out of his room, which he tried to come out several times but failed, I tried to check on him but she said he was fine. I think she deprived him of his right which I told Sandra (staff) and she said she will report the matter to a manager."

46 On the 29 June 2018 there was an exchange of emails about who was to investigate the allegation, and Jayne Pritchard took on the role of investigating officer and conducted a number of interviews with staff. Wendy Heaton from HR had received Lilian Dim's statement. The first respondent was aware the alleged incident took place on 14 June 2018. As Lilian Dim was an agency worker it took time for Jayne Prichard to arrange an investigation meeting.

47 On 2 July 2018 a "formal conversation" took place with Amy Fox and Shaunna Thompson, and notes were taken. The 2 July 2018 notes start as follows; "Amy has come to our attention that you witnessed K tying a sling around…bedroom door handle and …bedroom door handle. Is there any reason why you didn't report this to me?" Amy Fox, who was fearful of being disciplined for not reporting safeguarding, confirmed she had witnessed the claimant preventing the male vulnerable adult from leaving his bedroom by tying a sling to his door handle and that of the female vulnerable adult, which she did not report because "to be honest I felt very intimidated by Kofo and because I was new to the house I didn't feel comfortable addressing this with Kofo so I just untied the hoist string and put it away. I didn't say anything to you because I was a new staff member and I was worried as I knew I may have to complete waking nights with Kofi and I didn't want it to be awkward."

48 Amy Fox who also referred to the conversation she had with Shaunna Thompson, and her concern that she may be disciplined, There is a link between Sandra Murray informing Shaunna Thompson others doing waking nights may have witnessed the same behaviour as had Lilian Dim. There is a gap between who and when Amy Fox admitted she had witnessed the same behaviour and the 2 July 2018 meeting. Amy Fox was questioned about the safeguarding Policy and she was concerned that as a result of reporting the claimant so long after the event, that she would be disciplined and the Tribunal found Amy Fox to be a truthful witness on the balance of probabilities, who raised the allegation against the clamant when originally she had no intention of doing so. The Tribunal did not accept on the balance of probabilities that Amy Fox had conspired with Lilian Dim to get the claimant into trouble; the reality was that she believed the Whistleblowing Policy would not protect her against repercussions from the claimant, she remained silent on a serous safeguarding issue and in so doing, exposed herself to the possibility of disciplinary action when the disclosure was finally made after the alleged event.

49 On the 27 July 2018 Lilian Dim was interviewed and provided a witness statement which she signed confirming the vulnerable male adult was unable to come out of his bedroom because his bedroom door handle had been tied to the other service users handle, and he tried four times to come out. The statement confirmed the vulnerable male adult had been locked in his bedroom from 11pm to 7am and he had been distressed "banging his head on the floor" according to the claimant who stated "that is what he does he will go to bed soon." The date of the alleged incident was not recorded. It is notable Lilian Dim confirmed she had not worked in JBR before the night of the incident, when the evidence before the Tribunal was that she had worked there on several occasions previously. This discrepancy has never been resolved and was noted when it came to the Tribunal balancing the evidence and credibility of witnesses.

50 In Amy Fox's witness statement at paragraph 13 she refers to being asked to meet Jayne Prichard on the 31 July 2018. Handwritten notes taken at the investigation meeting, reveal Amy Fox was reluctant to point the finger at the claimant and it is evident from the notes taken she was being questioned about her failure to report the alleged abuse and she asked if she was going to get into trouble. It was left that she would be "spoken to again because she had failed to report a safeguarding…Aimee [Amy] said she didn't report it because Kofo would have known it was her and that she is intimidated by Kofo." Amy Fox was interviewed 30 July 2018 and the note reflects she would be spoken to about her behaviour. It is undisputed she was not, and the Tribunal finds the first respondent took no action against Amy Fox for her failure to report an alleged serious safeguarding issue because of her mental health and the fact that she had eventually whistle-blown against her own self-interest.

51 On the 30 July 2018 Sandra Murray was interviewed. Sandra Murray met with Jayne Prichard and provided a written witness statement describing the vulnerable male service users "challenging behaviour" and how Lilian Dim had questioned her about the locked door and during this exchange "I stated that another staff member may have witnessed it. I am not 100%. I think it may be Amy Fox who witnessed this happen before with Kofo."

52 The claimant's investigation interview took place on the 1 August 2021.Sandra Murray did not refer to the date of the alleged incident, and question the claimant about "two staff members have alleged…on separate occasions you have tied a hoist sling around [the vulnerable male service user's door] to restrict him from coming out of his bedroom." The claimant, when asked why she thought the allegations had been made, stated "I don't know maybe the way I talk to him" and "the hoist sling wouldn't reach both bedroom doors."

Investigation Report prepared by Jayne Prichard

53 The Investigation report confirmed the investigation started on 19 July 2018. In the record of investigation there is no reference to the 2 July 2018 meeting with Jayne Prichard. The report confirmed "Sandra disclosed to me that another member of staff Aimee [Amy] Fox may have witnesses…"with Shaunna Thompson

54 The appendix to the report attached Lillian Dim's statement and interview. Lilian Dim was a key witness and the claimant would have known from her report sent to the first respondent on the 22 June 2018 the incident she was allegedly involved in took place on the 14 June 2018 according to Lilian Dim. It is unfortunate the investigation report referred to the "night that the allegation was made (16/6/2018) as opposed to the date when the incident allegedly took place (14 June 2018), however, the report is very clear about the specifics of the allegation and the claimant would be able to understand the case she had to meet.

55 Sandra Murray had carried out a demonstration of both the client's doors being tied by a hoist sling and took a photograph attached to the report, which concluded "…the findings point to the fact the alleged incident took place on two occasions and that Kofo neglected [the vulnerable male service user] by not checking on him within 8-hours the door was tied closed and his needs were not met. Kofo has restricted him from accessing any food or drink that he may have wanted and she has not taken any ill health into consideration…knowing he needs personal care throughout the night and by not checking him if he was banging his head on the floor he may have caused himself some damage which may of [have] needed medical attention." Sandra Murray

recommended disciplinary proceedings for acts of abuse in relation to the claimant and for Amy Fox "additional safeguarding training…and to have a formal conversation with her line manager Shauna Thompson." It is not disputed the first respondent did not check to establish whether the vulnerable male service user had caused himself damage when allegedly banging his head against the floor and the explanation for this was that the service user in question regularly acted in this way and it would be difficult to establish how any marks arose. There was no evidence whatsoever the vulnerable male service user suffered any injury the night of the alleged incident and the Tribunal found Jayne Pritchard had no basis other than supposition for suggesting that he may have caused himself injury, and the report should have reflected no medical attention required even though the risk was present and went unchecked for 8-hours.The first respondent can be criticised for the incompetency of Jayne Pritchard which was recognised at the appeal stage. Jayne Prichard was not an experienced investigator and this was reflected in aspects of her report.

56 Jayne Prichard made a number of recommendations under the title "Lessons to be Learnt" which included staff training, review of practices, and "allegation relating to other staff [staff] which needs to be investigated separately" that included the following note; "Aimee [Amy] knows that she will be in trouble for not reporting it at the time but I feel that it has taken a lot for Aimee [Amy] to come forward to report it now knowing she may be in trouble."

57 In a letter dated 17 August 2018 the claimant was invited to a disciplinary hearing for abuse of a service user and provided with a copy of the investigation report together with attachments. The ACAS Code of Practice was complied with, and the claimant was informed that she could call witnesses, had the right to be accompanied and could be dismissed.

<u>Disciplinary hearing before Alvina Andrews 19 September 2018 reconvened 28 September 2018</u>

58 The disciplinary hearing took place on 19 September 2018. Notes were taken and the claimant surreptitiously recorded the hearing from which a transcript was produced. The claimant was represented and the allegation described as "locking a service user in their room." The notes reflect the claimant understood the allegations. There was a reference to Amy Fox coming forward and there is a reference to the meeting with Jayne Prichard "Aimee [Amy] didn't know what the meeting was about because Jayne didn't tell her, she just said I need to catch up with you about something- until she said [sat] and said this is what the interview was about, she didn't even know what is was about, because at the end of the interview Aimee [Amy] was a bit upset that she might get into trouble because I did not tell anyone."

59 Alvine Andrews put to the claimant the allegation and the 16 June 2018 date, and her response was that she had not worked with Lilian Dim that night, and had not worked nights to which HR responded; "it could be a wrong date we can check that out." There was no date for the earlier allegation as Amy Fox was unable to provide one.

60 The claimant alleged she had reported Lilian Dim to Shauna Thompson about timekeeping and confirmed when it was put to the claimant "it is a big stretch to imagine she [Lilian Dim] would make this up" the claimant's response was "maybe." When shown the photograph of the hoist sling reaching both doors the claimant still denied that this was possible.

61 The hearing was adjourned in order for Alvine Andrews to carry out further investigation as she was concerned whether the allegations had occurred at all, and not so concerned about the dates given the claimant's confirmation that she had worked a waking night with Lilian Dim the week in question. Alvine Andrews found the claimant's evidence that Lilian Dim and Amy Fox may have had problems with the claimant and made up the allegations in order to get back at her, credible and she wanted to investigate this further together with the claimant's comment that she had never been disciplined, had an "excellent work record" suggesting this could be checked with a manager, Alvine Andrews was given the impression by the claimant that she was an exemplary employee." She had no idea at the time the claimant was recording the meeting and the discussion that took place between Alvine Andrews and HR during the adjournment which showed no hint of race discrimination, and so the Tribunal found.

62 Alvine Andrews conducted an additional investigation by speaking to Shauna Thompson, the claimant's line manager, who confirmed that there had been issues with the claimant's work, and she had placed her on performance management. The Tribunal took into account the claimant's appraisals that were before it, and concluded the claimant was not the "perfect" employee as stated when giving evidence on re-examination, although it is clear she had many strengths, was an experienced member of staff who was up to date "with support essential refresher training " in the 21 May 2018 appraisal. In the same appraisal reference was made to the claimant who "often forgets to complete keyworker roles." The documentary evidence in the agreed bundle reflects the claimant was spoke to about medication errors, unauthorised absences and there several instances when the claimant was spoken to about using her mobile phone whilst on duty.

63 Alvine Andrews took cognisant of the information provided by Shauna Thompson which brought into question what she was being told by the claimant, and she eventually concluded that the claimant's evidence could not be relied upon. Alvine Andrews explored the possibility that there had been collusion between staff. She rang Amy Fox and was satisfied that she had no issues with the claimant and did not "really know" Lilian Dim the agency worker. Alvine Andrews took no notes of her conversation with Amy Fox and she can be criticised for this. She did not inform the claimant of what had been discussed before she came to the decision to dismiss. Amy Fox can recall having a conversation but not the detail.

64 Alvine Andrews in her written statement described how she concluded that there was "no element of Amy being racist." At the time prior to the appeal race discrimination was not an issue that had been raised by the claimant. It was open to Alvine Andrews however to prefer Amy Fox's evidence that the incident had occurred having concluded Amy Fox was telling the truth against her own self-interest and she had not colluded with an agency worker she did not really know; taking into account the manner in which Lilian Dim came to raise the complaint and the discrepancies in the claimant's evidence as to her work performance. Given the seriousness of the allegations Alvine Andrews reached the conclusion that dismissal was appropriate and there was no mitigation for a lesser sanction. In contrast to the claimant's argument at the time that had the vulnerable male service user been banging his head there would have been marks the next day, Alvine Andrews in her written witness statement recorded this would not be conclusive evidence either way given the fact the fact the vulnerable male service user was prone to banging his dead on the wall and floor. She referred to the handover notes for the 13 June 2018 which recorded the vulnerable male service user had been rolling

on the bed and floor, however this evidence was not before Alvine Andrews prior to her decision to dismiss. It was however available at appeal stage.

65 On the balance of probabilities, the Tribunal concluded Alvine Andrews did not dismiss the claimant because of her national origins, race or colour and her decision was based only on the fact the claimant had committed a serious act of abuse towards a vulnerable service user for which any employee would be dismissed without notice. She concluded that according to the evidence of Amy Fox and Lilian Dim, which was preferred to that of the claimant, on balance the alleged incidents had taken place and the claimant was not telling the truth. Alvin Andrews believed it was "quite a leap" for the claimant to show that Lilian Dim had made up the allegation because she had allegedly been reported by the claimant for poor timekeeping when there was no record of such a complaint being made. As referenced by the Tribunal earlier, unlawful race discrimination was not an issue raised by the claimant until later on in the appeal process and as a consequence there was no requirement for Alvine Andrews to consider this aspect.

66 The dismissal was confirmed in an outcome letter dated 28 September 2018, the effective date of termination was stated to be the date of the outcome letter and so the Tribunal found. The claimant was advised of her right to appeal.

Appeal

67 The claimant appealed on the 5 October 2018 relying on a number of grounds including the fact that the incident was "said to have occurred on 16 June 2018…I was not at work and never worked with Lilian that night…I made a complaint about Sandra and Lilian in the past…about their working methods and timekeeping. It cannot be doubted that my complaint against them formed the basis of this allegation. Aimee [Amy] is a friend to both of them and all three are whites…"

68 With reference to the investigation she alleged Jayne Pritchard had misrepresented the facts "and engaging in deliberate falsehoods in her report…she never seemed to have pretended over that her clear mission was – to ensure that these allegations stuck and prepare a way for my summary dismissal." The claimant alleged "neither the investigator nor the disciplinary panel made any efforts to ascertain the veracity of the false allegation carefully procured by Sandra and delivered by Lilian and Fox."

69 At the end of the appeal letter the claimant wrote; "be assured…it will no longer be in your power to act as you please. Be assured that I will not rest until the truth is established and all those who participated in these unfortunate events are punished." When Andrea Roach read this on or around the 9 October and found the comment threatening indicating as much to Wendy Heaton and Andrea Woodward, HR in an email sent on the 9 October 2018 when she commented on the procedure "If I am honest this is a right mess and I think the investigation lacks a lot of detail. I am also not happy with the final threat in the email and will address this during the hearing." Before the claimant raised her grievance Wendy Heaton, HR, emailed Andrea Roach explaining the delays were due to Lilian Dim being an agency worker and hard to get hold of, pointing out "it is curious that she states we believe the "voices of 3 white people" – Lillian, Shaunna and obviously Alvine are not white."

Grievance

70 A grievance was raised on the 13 October 2018 and the claimant referred to a "gang-up" against her, maintaining Alvine Andrews and Jayne Pritchard had "handled this

allegation with a pre-determined intention to punish me.". The claimant alleged "I made a disclosure to the company over the poor work practices of the individuals that made this allegation against me and delivered by Lilian and Fox "

71 It is notable that in paragraph marked (ii) the claimant wrote "I want to draw your attention to the fact that this is a clear instance of supporting members of staff, whose bad conducts had been exposed by me, to punish me. Earlier in the year I made a disclosure to the company over the poor work practices of the individuals that made this allegation against me…" The claimant at the time was alleging whistleblowing detriment as stated at paragraph 3 in the reference to "backlash", and the "strong motive" for the "deliberate falsehood" was the fact the claimant had "made disclosures against my principle accusers…My line manager Shaunna Thompson; Jayne Prichard and Alvine Andrews, cannot claim ignorance of the fact that my accusers had a strong motive to want to get rid of me by this deliberate falsehood. It beats my imagination why the fact that I had made disclosures against my principle accusers was not taken into cognisance in weighing the allegation…" It is notable the claimant's grounds of appeal centred around whistleblowing detriment for reporting poor working practices and not race discrimination.

72 In a letter dated 16 October 2018 Andrea Roach, head of quality and operations, wrote to the claimant with an appeal hearing date and confirmed the right to be accompanied providing addresses for UNISON and the RCN.

<u>The suggestion that the grievance and appeal would be dealt with together.</u>

73 A second letter was sent on the 17 October 2018 by Andrea Roach regarding the claimant's grievance as follows; "I have reviewed and compared the points raised within the e grievance to those in your appeal letter…and find that all the points raised within the grievance feature in the appeal letter. I therefore propose that all the points within both letters will be taken into consideration during the appeal process and hearing; however, if you feel that is not a suitable suggestion and there are additional points to be reviewed then please let me know."

74 The claimant did not object to the grievance and appeal being dealt with at the same time and did not respond to the 17 October 2018 letter. Until these proceedings there was no suggestion from the claimant (or her legal advisors) that the first respondent was refusing to investigate the grievance and this amounted to direct race discrimination.

75 Prior to the appeal hearing a number of issues concerned Andrea Roach, who was not impressed with the investigation. The Tribunal found Andrea Roach looked at the appeal objectively and with an independent mind; she was concerned about the serious allegations raised both in respect of and by the claimant in her appeal and grievance, including race discrimination and the issue of the incorrect date, taking the view that she would need to carry out additional investigation.

<u>The appeal hearing on the 30 October 2018.</u>

76 The appeal hearing took place on the 30 October 2018. The transcript of the recording covertly taken by the claimant who was told that she should not be recording and assured Andrea Roach that her phone was on flight mode, reflects the claimant agreed that she had last worked with Lilian Dim on the 14 June 2018, the date when the alleged incident had taken place, and as the permanent member of staff she was the only one who had written in the log book/diary. The claimant's allegation that she had raised

complaints about the staff in question had been investigated, and Andrea Roach discussed with the claimant that apart from the claimant telling her team leader she had "a feeling" about Sandra, there were no complaints and no whistleblowing by the claimant,. When it was put to the claimant that she did not give anything specific and just said "I don't trust her" in relation to Sandra Murray, the claimant agreed that was accurate.

77 On the issue of race and the claimant's comment that "all three are whites" the claimant repeated that they were, when this was clearly not the case as Lilian Dim was Nigerian and described herself as "black", although Mr O'Odusanya attempted to undermine this fact in oral submissions, by alleging both came from different parts of Nigeria on which no evidence had been heard from any witness, including the claimant herself.

78 The claimant made reference to Blesson Oni, stating she had spoken with Ms Oni who informed her she had been told by Any Fox that the claimant was not "coming back soon" to work and "that it is a bit dodgy and she doesn't know if you are coming back" in contrast to the evidence given by Blesson Oni to this Tribunal.

79 After the appeal hearing Andrea Roach carried out additional investigating including contacting Shaunna Thompson, the claimant's line manager, about Sandra Murray, who confirmed the claimant had never complained about Lilian Dim but asked not to be put on a shift with Sandra Murray without giving any reason. Andrea Roach concluded Sandra Murray and Lilian Dim had not colluded; the latter was an agency worker who did not know Amy Fox or Sandra Murray very well and had only worked at JBR on a "few occasions." Andrea Roach looked at the supervisions carried out with the claimant and noted they were silent about any issues with staff, noting in the 6 August 2017 supervision conducted by Shaunna Thompson that the claimant has "no complaints and she is getting on brilliant with peoples support and no issues with staff…if she did have an issue with any staff she would speak to them 1 to 1." The contemporaneous documents do not reference the claimant having issues with the first, second and third respondent and there is no evidence she ever had a one-to one discussion, and the Tribunal finds on the balance of probabilities the claimant did not raise disclosures about any of the three individual respondents, she reported that she had whistle-blown and the serious allegation relating to male vulnerable adult retribution, with the intention of masking her own gross misconduct behind allegations of race discrimination and whistleblowing.

80 Andrea Roach investigated the possibility that Amy Fox knew the reason for the claimant's suspension and colluded with Sandra Murray as maintained by the claimant, concluding she had not. She discovered the suspension took place on the 18 June at the same time as the first respondent completed a Safeguarding Adult Concern Form which confirm the date of the incident was 14 June 2018 and the date the concern was raised 19 June 2018 by Shaunna Thompson as recorded in the report, and when the police were informed. On the information before her, Andrea Roach was satisfied the matter was kept confidential and Shaunna Thompson had informed staff the claimant "was away", and she took the view (as did the Tribunal having heard from Ms Oni) that there was "no chance" Amy Fox knew the claimant had been suspended or discussed suspension with Blessing Oni.

81 Andrea Roach looked into the claimant's allegation that the respondent believed white employees, that Amy Fox had allegedly witnessed the tying of the doors by the hoist, had not reported it and yet she had not been disciplined when the claimant had been dismissed. Andrea Roach in evidence before the Tribunal explained why Amy Fox and

Sandra Murray had not been disciplined which included the fact that both had eventually reported the incidents and disciplining could affect employees reporting serious incidents, which the Tribunal accepted as credible concluding the claimant's position as the person who allegedly committed the act of serious abuse was incomparable to employees who had witnessed it and taken no part; and in the case of Amy Fox, taken physical steps to prevent it. Andrea Roach took the view Sandra Murray could not be criticised as she had reported the incident when Lilian Dim had not, and as a consequence had not breached the safeguarding procedure.

82 Andrea Roach took into account the fact that Shaunna Thompson, Lilian Dim and Alvine Andrews were black, and there was no evidence before her the claimant's race had anything to do with the allegations or disciplinary process, concluding whilst race discrimination does sometimes happen in the workplace, there was no element of it when it came to the claimant. Andrea Roach was satisfied there was enough evidence, taking into account the incorrect date previously provided to the claimant, that the allegations raised against the claimant had taken place and the issue was about whether the vulnerable male adult had been locked in his room and not whether he had suffered any injury as a result of banging his head. Andrea Roach took the view from the information provided to her, as supported by the vulnerable male adult's care plans, that it was not uncommon for him to have bruising, and the daily diary recorded he was agitated the night in question which supported Lilian Dim's report.

83 Having considered the contemporaneous documentation and evidence provided by Andrea Roach, the Tribunal concluded the appeal hearing was carried out independently with care and thoroughness. It fell within the band of reasonable responses open to a reasonable employer, and there was no evidence the claimant's concerns as set out in her appeal and grievance were ignored. The Tribunal considered Andrea Roach's decision-making process concluding it was untainted by unlawful race discrimination, and her decision not to overturn the dismissal was unconnected with the claimant's race and colour, and a direct reflection of Andrea Roach's analysis of the evidence before her. Andrea Roach was entitled to conclude the claimant was guilty of gross misconduct as she had committed a serious breach of safeguarding and dismissal was an appropriate sanction.

84 The outcome was confirmed in a letter dated 13 November 2018.

Law

Unfair dismissal

85 Section 94(1) of the Employment Rights Act 1996 ("the 1996 Act") provides that an employee has the right not to be unfairly dismissed by her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes conduct of the employee as being a potentially fair reason for dismissal.

86 Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient

reason, and this shall be determined in accordance with equity and the substantial merits of the case.

87 Where the reason for dismissal is based upon the employee's conduct, the employer must show that this conduct was the reason for dismissal. For a dismissal to be procedurally fair in a case where the alleged reason for dismissal is misconduct, Lord Bridge in Polkey –v- A E Dayton Services Limited [1981] ICR (142) HL said that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee has to say in explanation or mitigation. It is the employer who must show that misconduct was the reason for the dismissal, and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct – British Home Stores Ltd v Birchell [1980] CA affirmed in Post Office v Foley [2000] ICR 1283 and J Sainsbury v Hitt [2003] C111 to which the Tribunal was referred to by Mr O'Odusanya. In short, the Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation, without substituting itself for the employer and the Tribunal has had this in mind throughout the decision-making process.

88 The Court of Appeal in British Leyland (UK) Ltd v Swift [1981] IRLR 91 set out the correct approach: "If no reasonable employer would have dismissed him then the dismissal was fair. But is a reasonable employer might reasonably have dismissed him, then the dismissal was fair…in all these cases there is a band of reasonableness, within which one employer might reasonably take one view and another reasonably take a different view. In between extreme cases of misconduct there will be cases where there is room for reasonable disagreement amongst reasonable employers as to whether dismissal for the misconduct is a reasonable or unreasonable response: LJ Mummery in HSBC Bank Plc v Madden [2000] ICT 1283.

89 The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

90 The test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed. Section 98 (4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

Discrimination

Direct discrimination

91 S.13(1) EqA provides that direct discrimination occurs where "a person (A) discriminates against another (B) if, because of a protected characteristic [race] A treats B less favourably than A treats or would treat others.

92 An actual or hypothetical comparator is required who does not share the claimant's protected characteristic and is in not materially different circumstances from him. Para 3.23 of the EHRC Employment Code makes it clear that the circumstances of the claimant and comparator need not be identical in every way, what matter is that the circumstances "which are relevant to the [claimant's treatment] are the same or nearly the same for the [claimant] and the comparator." This is relevant to the comparators relied upon by the claimant who were not in the same or nearly the same circumstances as the claimant.

93 In the well-known case of Chief Constable of West Yorkshire v Vento (No.3) [2003] ICR 318 CA In Vento the tribunal considered the circumstances of four other police constables (not all of whom were male) whose situations were not identical but were not wholly dissimilar either. It concluded that the claimant had been treated less favourably than a hypothetical male comparator. The EAT held that this was a permissible way of constructing a picture of how a hypothetical male comparator would have been treated. This approach was later approved by the House of Lords in the well-known case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL.

94 Section 13 EqA requires not just consideration of the comparison (the less favourable treatment) but the reason for that treatment and whether it was because of the relevant proscribed ground. These two questions can be considered separately and in stages; or they can have intertwined: the less favourable treatment issue cannot be resolved without deciding the reason why issue. As was observed by Lord Nicholls in Shamoon at paragraph 11: "…tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? … If the former, there will … usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable then was or would have been afforded to others." As can be seen from its findings of facts, the Tribunal has examined all of the facts in the case to ascertain whether the claimant was treated less favourably as she alleges both in relation to the actual comparators he relied upon, and a hypothetical comparator, drawing on its findings in relation to the actual comparators.

80 It was not necessary for the claimant to show that the second, third and fourth respondent discriminated consciously. Subconscious discrimination or unconscious discrimination is also prohibited: "Those who discriminate on grounds of race or gender do not in general advertise their prejudices: indeed, they may not even be aware of them:" Glasgow City Council v Zafar [1998] IRLR 36 (HL)). "Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated" Nagarajan v London Regional Transport and others [1999] IRLR 572 (HL). "In some cases the discrimination will not be ill-intentioned but based merely on an assumption that a person would not "fit in:" King v Great Britain-China Centre [1991] IRLR 513 (CA).

The Tribunal must therefore it is suggested enquiring as to the conscious or subconscious mental processes which led the Respondent to take a particular course of action in respect of the Claimant and to consider whether a protected characteristic played a significant part in the treatment as per IPC Media Ltd v Millar [2013] IRLR 707.

81 The discriminatory reason need not even be the principal reason for the Respondent's actions; it only needs to have had "a significant influence on the outcome" as per Owen & Briggs v James [1982] IRLR 502 (CA) and Nagarajan. For direct discrimination to occur, the relevant protected characteristic needs only to be a cause of the less favourable treatment "but does not need to be the only or even the main cause". As indicated below, the Tribunal carried out this inquiry before concluding on the balance of probabilities conscious and unconscious mental processes were such that the claimant's protected characteristic played no part in the first, second, third and fourth respondent's treatment of the claimant. The Tribunal carried out an inquiry into the mental processes of Alvine Andrews, the dismissing officer, concluding on the balance of probabilities, her conscious and unconscious mental processes were such that the claimant's protected characteristic played no part. Alvine Andrews dismissed the claimant because she genuinely believed she was guilty of serious misconduct, and the claimant's race played no part in that decision-making process.

Harassment

82 The EHRC Employment Code provides that unwanted conduct can be subtle, and include 'a wide range of behaviour, including spoken or written words or facial expressions' para 7.7. Where there is disagreement between the parties, it is important that an Employment Tribunal makes clear findings as to what conduct actually took place.

83 Section 26 EqA covers three forms of prohibited behaviour. In the claimant's case the Tribunal is concerned with conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1) It states that a person (A) harasses another (B) if:

A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a), and

•the conduct has the purpose or effect of (i) violating B's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B — S.26(1)(b).

84 The word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited' confirmed by the EHRC Employment Code at para 7.8. Unwanted conduct means conduct that is unwanted by the employee assessed subjectively.

85 S.26(4) states that, in determining whether conduct has the proscribed effect, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. There can be cases where the claimant when alleging the acts violated his or her dignity, is oversensitive and it does not necessarily follow that an act of harassment had objectively taken place despite a subjective view that it had.

Victimisation

86 S.27(1) of the EqA provides: 'A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.' By virtue of S.27(4), the victimisation provisions apply only where the person subjected to a detriment is an individual.

87 A claimant seeking to establish that she has been victimised must show two things: first, that she has been subjected to a *detriment*; and, secondly, that she was subjected to that detriment *because* of a protected act. Contrary to the claimant's reliance on a hypothetical comparator there is no need for the claimant to show that her treatment was less favourable than that which would have been afforded to a comparator who had not done a protected act. The EHRC Employment Code states: 'The worker need only show that they have experienced a detriment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act' — para 9.11.

88 The following are 'protected acts' for the purpose of S.27(1)EqA:
•bringing proceedings under the EqA
•giving evidence or information in connection with proceedings under the EqA
•doing any other thing for the purposes of or in connection with the EqA, and
•making an allegation (whether or not express) that A (the alleged victimiser) or another person has contravened the EqA — S.27(2).

Burden of proof

89 Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (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 that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

90 In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply, as affirmed in Ayodele v CityLink Ltd [2018] ICR 748. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that it did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [in the present race discrimination], failing which the claim succeeds.

Conclusion – applying the law to the facts

Unfair dismissal

91 With reference to the first issue, namely, whether or not the first respondent can prove that the sole or main reason for the dismissal was its belief that the claimant had tied a hoist in order to prevent a service user from leaving their room, the Tribunal found it dismissed the claimant for an act of serious gross misconduct when she allegedly prevented the vulnerable male adult from leaving his bedroom by locking him in using a hoist and this amounted to a serious safeguarding breach.

92 Mr O'Odusanya in submissions referred the Tribunal to Turner v East Midlands Trains Ltd [2012] EWCA Civ 1470. The Tribunal is grateful to Mr O'Odusanya reminding it of the correct test, and in para 16 LJ Elias noted as follows :"As I have said, since its origin in the judgment of Mr Justice Arnold in *British Home Stores v Burchell* [1980] ICR 303 at 304C-E, the range or band of reasonable responses test has been affirmed in numerous decisions. The most recent valuable summary of the relevant principles is contained in the judgment of Aikens LJ in the *Orr* case. As regards the fairness test in section 98(4), he summarised the position as follows (para 78):

> '…(4) In applying that subsection, the employment tribunal must decide on the reasonableness of the employer's decision to dismiss for the "real reason". That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of; and, thirdly, did the employer have reasonable grounds for that belief. If the answer to each of those questions is "yes", the employment tribunal must then decide on the reasonableness of the response of the employer.
>
> (5) In doing the exercise set out at (4), the employment tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.
>
> (6) The employment tribunal must not simply consider whether *they* think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable" employer might have adopted.
>
> (7) A particular application of (5) and (6) is that an employment tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.
>
> (8) An employment tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on

whether in fact the employee has suffered an injustice.

93 Ms Johnson referred the Tribunal to Iceland Frozen Foods Ltd v Jones (1082) IRLR 439 reminding it that it must bear in mind the following, which the Tribunal has done:

(a) The words of section 98 ERA;

(b) The reasonableness of the employers conduct and not simply the tribunal members own feelings;

(c) The Tribunal must not substitute its own decision for that taken by the employer;

(d) In most cases, the band of reasonable responses where an employer might react one way or another in quite a different yet equally reasonable way;

(e) It is up to the employment tribunal, acting as an industrial jury, to decide which side of the line the employer's decision fell.

94 Mr O'Odusany submitted Alvine Andrews had "woefully failed to show the sole or main reason for the dismissal was a belief that the claimant had tied a hoist in order to prevent a service user from leaving their room. The Tribunal did not agree, having accepted on the balance of probabilities Alvine Andrews' evidence that she initially accepted what the claimant had to say, and was concerned about the possibility of a conspiracy between the second, third and fourth respondent and only after this was investigated did she come to the conclusion that the claimant was not telling the truth.

95 With reference to the second issue, namely, whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss her the Tribunal found that it had, although it can be criticised for the failure on the part of Jayne Richard initially and then Alvin Andrews to record the date of the allegation correctly, although this made no difference to the final outcome as by the appeal hearing this corrected, and in any event the claimant would have been well aware that the allegation referred to took place when she had been on the same shift as Lilian Dim, and agency worker with who she irregularly worked and the last date before the allegation followed by suspension she had worked with Lilian Dim was 14 June 2018.

96 Mr O'Odusany in submissions maintained that Alvine Andrews "completely left the substance of the allegation and allowed her decision to be swayed by irrelevant considerations relating to tilted judgement [focusing on the bad elements of the claimant's performance record and turning a blind eye to the good bit] past conducts of the claimant that had no bearing on the allegation made against her." The Tribunal did not agree with Mr O'Odusany's analysis. Mr O'Odusany is incorrect in his assumption; Alvine Andrews did not focus on the bad elements of the claimant's performance and conduct that had no bearing on the alleged abuse of a service user, she investigated what the claimant had to say and concluded the claimant had not told her the truth about her performance and this brought into question her credibility when Alvin Andrews had to decide on the balance of probabilities, whether a permanent employee, Amy Fox, and an agency worker, Lilian Dim, were to be believed when they had reported serious allegations of abuse. Alvin Andrews was entitled to carry out a balancing exercise, weighing the evidence and in doing so it fell within the band of reasonable responses for her to take into account the claimant had not told her the truth about her work performance and she was not the "exemplary" member of staff the claimant had led her to believe. Alvin Andrews was entitled to take the word of the claimant's line manager on this, and as it transpired Shaunna Thompson had taken part in a number of

appraisals and supervisions which brought into question the claimant's capability on some issues, and her poor conduct on others, reflecting she was far from an "exemplary" employee, or in the words of the claimant at this liability hearing when being asked the question by Mr O'Odusany on re-examination, "perfect." The issue was not whether the claimant was a "good worker" and dealt with the service users well, but whether she had told the truth when she denied the abuse allegations, stating she was an exemplary worker.

97 Mr O'Odusanya in submissions referred the Tribunal to the comment made by Andrea Roach that the investigation was a "right mess." The Tribunal has also criticised the investigation report. Mr O'Odusanya maintained that the appeal was an attempt to "shut the stable door after the horse has bolted." Mr O'Odusanya is correct that the investigation (both in the report itself and at the disciplinary hearing) should have set out the correct date of the alleged incident being the 14 June 2018, and not the 16 June 2018 when the incident was first reported. The claimant was correct that the allegation could not have taken place on the 16 June 2018 as the claimant was not on duty with Lilian Dim that night. Mr O'Odusanya is correct that the investigation report (and the disciplinary invite letter) should have set out a date for the allegations when it did not. It is fundamental that employees understand the allegations brought and that includes the date where possible. Clearly in the case of Amy Fox no date could be provided as she had not reported the incident on or soon after the event. However, the claimant was aware that the second alleged incident took place when she was on duty with Lilian Dim, and she had last been on duty with her on 14 June 2018 when the claimant had written in the diary having "commandeered it" as described by Lilian Dim and borne out by the transcript of the appeal hearing when the claimant admitted she was solely responsible for keeping the diary in contrast to the oral evidence before this Tribunal where the claimant attempted to suggest Lilian Dim could access it in the cupboard by the door. As indicated above, the Tribunal found the claimant a less than credible evidence, who contradicted herself on a close reading of the contemporaneous evidence.

98 Mr O'Odusanya further submitted that the appeal decision not to overturn the dismissal made it "Burchell unreasonable." The Tribunal did not agree. It is clear from the transcript covertly taken by the claimant that both parties were fully aware the relevant date was 14 June 2018 when the claimant was on duty with Lilian Dim and had exclusively completed the written records. Contrary to Mr O'Odusanya's submission, the claimant was not "very confused about the date" and Andrea Roach heard what the claimant had to say as an explanation in an objective and open-minded way, putting right the earlier errors made in the investigation report and at the disciplinary hearing.

99 There was no satisfactory evidence other than Mr O'Odusanya's say so, that the HR representative at the disciplinary hearing took charge and "remained the arrowhead who controlled the entire process and who successfully misguided the appeal panel to the position of prejudice against the claimant". There was no evidence whatsoever any HR representatives were the decision makers or manipulated the process to make certain the claimant was dismissed. The sole decision maker on the dismissal was Alvin Andrews and on appeal, Andrea Roach with HR providing guidance only. The evidence given by Alvin Andrews and Andrea Roach was persuasive, and the Tribunal was satisfied on the balance of probabilities that both objectively assessed the information before a decision was made, and neither were swayed by HR.

100 Mr O'Odusanya touched upon the photographic evidence maintaining "this was done by Amy supervised by Shaunna not by any of those charged with the investigation directly.

On top of that, there were several slings of different weight and thus lengths in the property and the claimant had stated during investigation that the sling will not fit in the manner described, whereas the investigator and the dismissing officers decided to take the photograph as a definitive evidence that the [or "A" sling] sling was used in that manner and that the claimant used it as such without any evidence as to whether consideration was given into the expandability or otherwise of any sling that may have been used." The problem for the claimant is that at investigation stage she stated that the "hoist sling wouldn't reach both bedroom doors." This evidence was tested and the sling was found to have reached, and a photograph was taken as part of the investigation. At no stage during the disciplinary process did the claimant indicate there were "several slings" and the photograph was not a true reflection of whether a sling could fit so as to lock both doors. It did not fall outside the band of reasonable responses for Alvin Andrews and Andrea Roach to rely upon the photograph, which undermined the claimant's evidence and confirmed the fact service users could be locked in their rooms using a hoist sling in direct contrast to the claimant's denial that this could be done.

101 In oral submissions Mr O'Odusanya argued that the appeal did not put right the procedural deficiencies of the dismissal when it came to the first respondent failing to provide the correct date of the alleged incident, and when the 14 May 2018 date was referred to at the appeal hearing instead of the original date of 16 May 2018, this was a new piece of evidence and "the appeal body is not there to replace its own findings with the employer. It is there to look at what was done at the material time of the disciplinary." The Tribunal did not agree with Mr O'Odusanya who was asked to provide supporting case law and was unable to point to any. It is clear that an appeal hearing can put right any procedural and substantive unfairness that takes place during an investigation and disciplinary hearing, which the Tribunal found was the case when Andrea Roach heard what the claimant had to say and carry out additional investigation.

102 Ms Johnson referred the Tribunal to two EAT decisions, the first in Adeshina v St Georges Hospitals Trust [2017] EWCA CIV 257 in which the tribunal held that the flaws at the first stage of the disciplinary process were remedied on appeal, notwithstanding the fact that the appeal itself did not fully comply with the Acas Code. The Tribunal is aware if the appeal hearing itself was fundamentally flawed (which was not the case for the first respondent and Andrea Roach) earlier defects cannot be remedied. In the EAT decision Khan v Stripestar Ltd EATS 0022/15 it was held that there is no limitation on the nature and extent of the deficiencies in a disciplinary hearing that can be cured by a thorough and effective internal appeal. In relation to Andrea Roach the Tribunal found the appeal to have been effective, thorough and objective taking into account of, in the round, the similar grievance points raised, Andrea Roach looked at the rotas to see when the claimant was working and was clear about the date of the allegation. She was open-minded and careful in her approach, recognising it was a serious allegation that needed a fair approach, and the 14 June 2018 diary entries made exclusively by the claimant raised a real issue of how the vulnerable male adult was cared for on the night in question, for example, he was doubly incontinent and yet had not been checked for a substantial period of time. Andrea Roach was entitled to take the contemporaneous documents into account and prefer the witnesses evidence to that given by the claimant, who could have asked for witnesses to be called and yet she never made the request, despite being legally advised at the time.

103 Ms Johnson submitted that throughout the disciplinary process including at appeal stage the claimant did not give a satisfactory answer about the sling, and at no stage did she

inform the investigating officer, Alvine Andrews, Andrea Roach or anyone else that there was more than one sling, asking for a demonstration of the slings that did not fit. The claimant did not ask which sling hoist was used in the test, and this would have been a pertinent question had she been innocent. The Tribunal agreed.

104 The Tribunal is required to take into account the whole disciplinary process, including the appeal, to determine fairness and apply the band of reasonable responses. At the appeal hearing Andrea Roach discussed the correct date with the claimant, and the transcript reflects the claimant agreeing that the last date she worked with Lilian Dim was 14 May 2018 and not 16 May 2018. In short, the confusion in dates was put right on appeal and the claimant in any event would have understood the allegation related to a shift she had worked with Lilian Dim. The claimant had worked very few shifts with Lilian Dim as she was an agency worker, and the claimant would have realised that as she had not worked with Lilian Dim on the 16 May 2018 it must have been the earlier date of 14 May 2018 when she had worked with her.

105 Applying the band of reasonable responses test to the entire disciplinary processes from the inadequate investigation to appeal outcome which put right the deficiency regarding the date, the Tribunal concluded the first respondent acted reasonably, it held a genuine belief the claimant was guilty of serious misconduct and had reasonable grounds for that belief. Objectively assessed, the dismissal fell well within the band of reasonable responses. The alleged abuse was very serious; it deprived two vulnerable adults of their liberty. The male vulnerable adult was prone to epileptic fits and needed changing as a result of double incontinence and as borne out in the notes handwritten by the claimant herself, it appears the vulnerable male service user was not checked from the late hours of the 14 July to the early hours of the 15 July. The respondent was entitled to accept Lilian Dim's evidence that the service users had not been checked overnight. It is notable that Lilian Dim could not be specific about the times, referring to the possibility of 11.10/11.15pm but nothing hangs on this as it was a long time ago and no records were taken by Lilian Dim at the time. It is sufficient for the purposes of the disciplinary proceedings that the alleged incident took place whatever the period of time the two vulnerable adults were locked in the room, hence the immediate report made by the first respondent to safeguarding and the police.

106 In conclusion, the dismissal was within the range of reasonable responses and a fair procedure was followed, having regard to the reasons shown by the first respondent including the size and administrative resources of its undertaking, the first respondent acted reasonably in treating it as a sufficient reason.

107 Having found the dismissal was fair and fell within the band of reasonable responses which "a reasonable" employer might have adopted, there is no requirement for the Tribunal to consider the issues relating to remedy contribution or the "Polkey" no difference rule. The Tribunal does not intend to make any findings in relation to the issue of blameworthy conduct and contribution, however, had it done so the basic and compensatory award would have been extinguished in their entirety taking into account the issues of credibility on the part of the claimant and factual matrix as set out above. It was referred to Grange Whitefield Care Services v Joseph (UKEAT/005/18/BA, RSPCA v Cruden (1986) IRLR 83, and Steen v ASP Packaging Ltd UKEAT/0023/13 by Ms Johnson.

Direct race discrimination

108 The claimant self-identifies as being Irish-Nigerian. Relevantly for the purposes of this claim, she says she is black and of Nigerian ethnic origin.

109 As indicated above, Mr O'Odusanya confirmed the claimant was relying on Amy Fox and Sandra Murray as her comparators for the claims brought under section 13 and 26, and a hypothetical comparator for the section 27 complaint. For the avoidance of doubt the Tribunal also considered the section 13 complaint against a hypothetical comparator given its findings that Amy Fox and Sandra Murray were not appropriate comparators given neither were facing disciplinary proceedings for serious abuse of a service user in direct contrast to the claimant. Failing to report the claimant's alleged misconduct on the part of Amy Fox cannot be equated to carrying out the misconduct, and the first respondent put forward a cogent explanation untainted by race discrimination as to why Amy Fox, who feared she would be disciplined, was not. It was entirely credible that the fact Amy Fox came forward and made a protected disclosure involving the claimant against a background of mental health issues, concern over reprisals and a whistleblowing policy, was not subjected to a disciplinary procedure. The Tribunal also accepted there was no basis for any disciplinary proceedings to be brought against Sandra Murray who had reported to the alleged incident when Lilian Dim refused to do so.

110 The claimant compares herself to a hypothetical comparator. The circumstances of the claimant and comparator need not be identical in every way, what matters is that the circumstances "which are relevant to the [claimant's treatment] are the same or nearly the same for the [claimant] and the comparator:" Para 3.23 of the EHRC Employment Code. In short, a hypothetical comparator in the same or similar circumstances as the claimant who did not share the claimant's race or colour, would have been treated in the same way given the seriousness of the safeguarding offences alleged. The fact Amy Fox and Sandra Murray were not disciplined does not assist the claimant when considering a hypothetical comparator as their situations were wholly dissimilar.

111 Turning to the specific allegations of less favourable treatment alleged, the Tribunal found the claimant has not discharged the burden of proof set out in section 136 of the EqA. The claimant has not satisfied the Tribunal on the balance of probabilities that there are primary facts from which inferences of unlawful discrimination can arise and the burden has not shifted to the respondents. Had the burden shifted, the Tribunal would have found the explanations given were untainted by race discrimination.

112 In determining whether any alleged treatment was because of the protected characteristic(s) the Tribunal must ask itself if the treatment was inherently discriminatory and it concluded it was not, what were the facts that the discriminator considered to be determinative when making the relevant decision, and if the treatment was not inherently discriminatory what were the mental processes, conscious or subconscious, of the alleged discriminator and what facts operated on his or her mind; R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors [2010] IRLR 136, SC.

113 The Tribunal found as follows:

(a) There was no satisfactory evidence Ms Pritchard went out of her way to "fill in the gaps in the evidence" of the claimant's accusers, and the Tribunal found this did not happen relying on the factual matrix above noting Jayne Prichard was not challenged directly about this, as submitted by Ms Johnson who pointed out the claimant did not

provide any particulars as to how the gaps were filled in, or how this conduct related to her race, and Miss Pritchard's role was just to determine whether the matter should be progressed to a disciplinary hearing. The Tribunal agreed.

(b) The decision to take disciplinary action against the claimant. Here the claimant compares her treatment to the way in which the first respondent actually treated Aimee Fox. The claimant was invited to a disciplinary meeting and Ms Fox was not. The Tribunal has dealt with this above having found against the claimant.

(c) With reference to the decision to dismiss the claimant, the Tribunal took into account the conscious and sub-conscious mental processes of Alvine Andres and concluded the claimant's race played no part in her decision to dismiss, and she was entitled to prefer the evidence of Lilian Dim who shared the same protected characteristics as the claimant, Amy Fox and managers in comparison to the claimant who she concluded, had not told her the truth. Alvine Andrews would have reached the same decision had the claimant not had any protected characteristics.

(d) The first respondent did not refuse to investigate her grievance, it was dealt with at the claimant's appeal hearing and at no stage did she object when the appeal grounds and grievance were dealt with at the same hearing given the fact that they covered the same ground, namely, the disciplinary process, whistleblowing and dismissal.

(e) As recorded by the Tribunal in its findings of facts, Andrea Roach did not deal with the claimant's appeal with a "dismissive attitude." Andrea Roach was careful and independent, she objectively considered what the claimant had to say and followed it up before rejecting the appeal and the claimant's protected characteristic played no part in the treatment of her, either consciously or sub-consciously.

114 In conclusion, on the balance of probabilities the Tribunal found that the claimant was not treated as she alleges; and the investigation, dismissal and rejection of her appeal were not influenced in any way by the fact claimant is black and/or of Nigerian origin. The claimant was investigated and dismissed because of serious safeguarding issues which amounted to gross misconduct.

<u>Harassment related to race</u>

115 In order to succeed in her harassment claims it must be established the claimant was subjected to unwanted conduct; the unwanted conduct related to race and colour; and that it had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant ("the offending purpose / effect"). In considering the 'effect' the Tribunal is entitled to consider whether it was reasonable for the conduct to have the stated effect. The conduct relied upon by claimant is set out below.

116 The EHRC Employment Code provides that unwanted conduct can be subtle, and include 'a wide range of behaviour, including spoken or written words or facial expressions' para 7.7. As indicated earlier, the Tribunal considered the decision-making process, closely analysing the evidence before it as set out in the detailed findings of facts, and found subjecting the claimant to a disciplinary process did not have the purpose or effect of (i) violating the claimant's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

117 The word 'unwanted' conduct means conduct that is unwanted by the employee assessed subjectively, and there is no doubt the claimant did not want to be subject to disciplinary proceedings, and at the relevant time believed the allegations for which she was being disciplined were linked to her allegedly having made protected disclosures.

118 With reference to the section 26 complaint the claimant relies on a number of allegations which amount to unwanted conduct. S.26(4) EqA states that, in determining whether conduct has the proscribed effect, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect, and in the claimant's case the Tribunal found there was no basis for the allegations as follows:

(a) "On three occasions between April 2018 and 13 June 2018, when Ms Dim worked alongside the claimant, Ms Dim refused or failed to carry out tasks and left them for the claimant to do. The third occasion was on 13 June 2018". There was no satisfactory evidence before the Tribunal that these events had ever taken place and the Tribunal found they had not. Ms Johnson correctly submitted the Claimant's witness statement makes no reference to any dates or times of these incidents nor does she detail any specifics and does not mention the 13 June 2018. Furthermore, Ms Johnson submitted, Lillian Dim is of the same race as the Claimant, namely Nigerian and black.

(b) "A couple of times (on dates to be clarified), Sandra Murray worked alongside the claimant and behaved in a similar way towards her. On one of these occasions Ms Murray was meant to take a service user for an appointment but failed to do so." There was no satisfactory evidence before the Tribunal that even if this event had taken place, it is difficult to see how Sandra Murray engaged in unwanted conduct related to the claimant's race, and how failing to take a service user to an appointment on an uncertain date about which the claimant never raised a complaint, violated the claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for her. Ms Johnson submitted that at point 9.2 of the case management summary, the claimant refers to, "a couple of times" where the Claimant was allegedly subject to harassment on the grounds of her race by Sandra Murray. The claimant has not provided any dates or specifics about this allegation, despite requesting full disclosure of the logbook, so that she could clarify this aspect of her claim. The Tribunal found the claim has never been clarified, concluding this was due to the alleged incidents never taking place. With reference to the claimant being taken off the WhatsApp group allegedly by the fourth respondent and this amounted to a continuing act according to the claimant, there was no evidence the fourth respondent took the decision, she was not the administrator of the WhatsApp group and could not have removed the claimant. The claimant has failed to show taking her off a Christmas WhatsApp group as she was unable to attend the staff Christmas party in 2017 arranged through WhatsApp communications had any connection to race, and there is no causal link to the fourth respondent.

(c) The investigation report, the dismissal and the appeal outcome were the natural progression of the disciplinary process following which the claimant was fairly dismissed, and did not fall under the definition of section 26(1)(b) purpose or effect of (i) violating B's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment. The purpose was to follow the first respondent's disciplinary procedure in relation to serious safeguarding allegations

raised against service users, and there was no causal link between this and the claimant's protected characteristic.

(d) "At one or more meetings during the investigative and disciplinary process, the claimant pointed out that she had not been at work on the date of the alleged misconduct. She received the answer, "It doesn't really matter whether you were there or not." In submissions Mr O'Odusanya made the point that the insistence by the officials of the company not to take seriously as a factor in her defence that the claimant persistently informed them that she was not in fact on duty at the time and date the incident is alleged to have occurred and the fact that the relevant officers persistently advised the claimant without doing anything to right this wrong amounts to harassment. The Tribunal did not agree; it is clear from the appeal hearing transcript that the "officials" including Andrea Roach was concerned about whether the claimant was in work with Lilian Dim on the night in question, and the claimant admitted that she was. The Tribunal found on the balance of probabilities the claimant did not suffer any detriment, and the confusion as to whether the incident alleged had taken place on the 14 or 16 May 2018 arose as a result of the date when safeguarding was report, it had no causal connection with the claimant's protected characteristics., and did not have the purpose or effect of (i) violating the claimant's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant taking into account the evidence given by Alvine Andrews and Andrea Roach.

Victimisation

119 S.27(1) of the EqA provides: 'A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.' By virtue of S.27(4), the victimisation provisions apply only where the person subjected to a detriment is an individual.

120 A claimant seeking to establish that he has been victimised must show two things: first, that she has been subjected to a *detriment*; and, secondly, that she was subjected to that detriment ***because* of a protected act**. Contrary to Mr O'Odusanya's reliance on a hypothetical comparator there is no need for the claimant to show that her treatment was less favourable than that which would have been afforded to a comparator who had not done a protected act. The claimant relies on the following as a 'protected acts' for the purpose of S.27(1)EqA:
•doing any other thing for the purposes of or in connection with the EqA, and
•making an allegation (whether or not express) that A (the alleged victimiser) or another person has contravened the EqA — S.27(2).

121 It is common ground that the claimant did two protected acts by complaining of race discrimination in her grievance letter and dismissal appeal letter. The Claimant dropped her victimisation claim that relates to her allegedly doing a protected act during the disciplinary hearing victimisation claim. In relation to the two protected acts, the issues are:

(1) Did the first respondent subject the claimant to a detriment by not investigating her grievance? The Tribunal found for the reasons stated above that it had not and the claimant was not subjected to a detriment. The claimant did not object to her grievance being dealt with at the appeal meeting given the fact the appeal against dismissal and grievance was very similar, both dealing with the disciplinary process. The claimant has not set out what the first respondent failed to look at in relation to

her grievance and this point was not brought out under cross-examination of the first respondent's witnesses.

(2) Did the first respondent subject the claimant to a detriment by dealing with her appeal in bad faith and simply confirming the original dismissal decision? The Tribunal found for the reasons already given, the claimant's appeal was not dealt with in bad faith, and the original dismissal was not overturned because Andrea Roach who carried out additional investigations including contacting Shaunna Thompson, held a genuine belief the claimant was guilty of serious misconduct. Mr O'Odusanya submitted Andrea Roach should have "discharged the dismissal or conduct a fresh hearing" and her failure to do so was her prejudice towards the claimant "for the things she said in her appeal and grievance letter." Mr O'Odusanya is correct to state Andrea Roach was not happy with the claimant's threat to take matters further if matters were not found in her favour, however, something more is needed for the claimant to establish a causal connection between the allegations of race discrimination and appeal outcome, bearing in mind all of the evidence against the claimant and her credibility. The rejection of her appeal by Andrea Roach had no causal connection with the fact the claimant had raised the issue of race discrimination in her appeal and grievance letters. Andrea Roach had not found against the claimant because of the protected act, or the threat. The claimant's appeal failed because of the strong evidence pointing towards a serious act of misconduct, and Andrea Roach held a genuine belief based upon a reasonable investigation that the claimant was guilty which had nothing to do with race or the protected act.

(3) In conclusion, the Tribunal was satisfied on the balance of probabilities there was no causal connection between the two allegations made by the claimant and the fact that she had complained of race discrimination in the grievance and appeal letter, Andrea Roach took the view that there was no basis for the claimant's allegations of race discrimination and whistleblowing detriment. The fact the claimant had raised allegations of discrimination played no part in Andrea Roach's decision-making process. Andrea Roach was concerned with the seriousness of the allegations and overwhelming evidence before her that the claimant was guilty and this had nothing to do with her race, colour or protected act.

Time limit issues

122 Allowing for the effects of early conciliation, it appears that the claim form was presented within the time limit for any contravention of EqA that was done (or must be treated as having been done) on or after 11 September 2018. For anything done before that date, the tribunal must consider:

(1) Whether the alleged contravention formed part of an act extending over a period which ended on or after 11 September 2018; and

(2) If not, whether or not it would be just and equitable to extend the time limit.

123 Mr O'Odusanya confirmed the claimant as relied on the dismissal and a continuous act leading up to it. He conceded with reference to the WhatsApp group that the alleged incident took place before 11 September 2018 and on the face of it is out-of-time, however, the claimant believes it was linked to events that took place before the 11 September 2017 and is connected.

124 Ms Johnson submitted that the Claimant has made a number of allegations which are out of time. The Claimant's witness statement does not deal with time limits as an issue, nor why is would be just and equitable for the Tribunal to extend time. The allegations made by the Claimant are out of time and are not continuous in nature. They involve several different people over differing periods of time. There are significant gaps in those periods of time, and as such, they cannot be said to be continuous. The Claimant bears the burden of satisfying the Tribunal for the purposes of an extension of time and has failed to meet that burden in this case. The Claimant, whilst she could not recall the precise dates and times, accepted that she had solicitors by the time of the investigation.

125 The Tribunal's starting point is the unfair dismissal complaint which was lodged within the statutory time limits, the effective date of termination was 28 September 2018 and ACAS early conciliation completed by 9 January 2019 following which proceedings were lodged on the 2 February 2019. The problem with assessing time limits in this case is the fact the claimant was unable to clarify dates, and in respect of the alleged discriminatory actions taken by Lilian Dim, Amy Fox and Sandra Murray when they reported the claimant on the 16 June, 18 June and 2 July 2018 these fall outside the primary limitation period, as does the claimant's suspension by Sandra Murray, the investigation and the invitations to the disciplinary hearing. Mr Johnson correctly points out that the claimant, who was in receipt of legal advice, has provided no evidence as to why she failed to instigate proceedings within the statutory time limits.

126 The Tribunal took the view that it was theoretically possible for the commencement of the disciplinary proceedings from the instigation of the process, suspension through to dismissal could amount to an act extending over a period ultimately leading to the dismissal, and the reports provided by the second, third and fourth respondent concerning the claimant's alleged conduct formed part of that process and it was just and equitable to extend the time limit to a date when that process was completed, namely, when the claimant was dismissed following the complaints raised and disciplinary investigation leading to a disciplinary hearing.

127 Clearly, the allegation raised by the claimant concerning being taken out of the WhatsApp group, which was not included in the list of issues agreed at the preliminary hearing dealing with case management held on the 7 May 2019 reproduced at this final hearing, was lodged outside the limitation period and there is no evidence of a continuing act, contrary to Mr O'Odusanya's submission. That allegation is out-of-time and there is no basis for a just and equitable extension of time to be ordered. Had the extension of time been granted and had the removal from the WhatsApp group been a stand-alone claim, which it was not, for the avoidance of doubt the Tribunal would have gone on to find the claimant failed to discharge the burden of proof as there was no evidence before the Tribunal to the effect that the claimant was taken off the WhatsApp group at the request of the first respondent and/or a unnamed colleague and the decision to do so was tainted by unlawful discrimination. It appears as the claimant had taken the decision not to attend the Christmas party, she was taken off the WhatsApp group arranging the Christmas party in 2017 as there was no reason for her to take part.

128 The race discrimination complaint relating to the WhatsApp group Christmas 2017 was not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done). The complaint is out of time and in all the circumstances of the case, it is not just and equitable to extend the time limits. The Tribunal has no jurisdiction to consider the complaint, which is dismissed.

129 The race discrimination complaints relating to the disciplinary process starting from the reports made by the second, third and fourth respondent on the 16 June 2018, 18 June 2018 and 2 July 2018 through to dismissal on 28 September 2018 formed part of a continuing act, and in the alternative, in all the circumstances of the case it was just and equitable to extend the time limit and the Tribunal has the jurisdiction to consider the complaints.

130 In conclusion, the claimant was not treated less favourably because of her protected characteristic of race by the first, second respondent, third and fourth respondent, and her claims of direct discrimination brought under Section 13 of the Equality Act 2010 are dismissed against all respondents. The first, second, third and fourth respondent did not engage in unwanted conduct related to the protected characteristic of race and the claimant's claim of harassment brought under section 26 of the Equality Act 2010 is dismissed against all respondents. The claimant was not subjected to a detriment for raising a protected act and her claim for victimisation brought under section 27 of the Equality Act is dismissed against all respondents. The first respondent did not unfairly dismiss the claimant and her claim for unfair dismissal is not well-founded and is dismissed against the first respondent.

8.6.2021
Employment Judge Shotter

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

10 June 2021

FOR THE SECRETARY OF THE TRIBUNALS