EMPLOYMENT TRIBUNALS

Claimant: Ms Katsere

Respondent: Cambian Childcare Ltd

HELD AT: Manchester **ON:** 10, 11, 12, 13 and 14 May 2021

BEFORE: Employment Judge Ross
Ms C Clover
Ms A Ashworth

REPRESENTATION:

Claimant: Mr P Ihebuzor, Solicitor
Respondent: Mr C Khan, Counsel

JUDGMENT having been sent to the parties on 24 May 2021, oral reasons having been given at the Hearing and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant was employed by the respondent. She was dismissed for gross misconduct. She appealed against dismissal and was offered reinstatement. She declined reinstatement and brought a claim to the tribunal for race discrimination, unfair dismissal and in the alternative constructive dismissal and unlawful deduction from wages.

2. The claimant relies on the allegations 3 (a) – (w) set out in her Further Particulars document (p33-6) as allegations of direct race discrimination and relies on her dismissal as an act of race discrimination. She brings a claim for "ordinary" unfair dismissal and in the alternative a claim for unfair constructive dismissal. She relies on allegations 3 (a) – (w) set out in her Further Particulars document (p33-6) as breaches of the implied duty of trust and confidence for her constructive dismissal claim.

3. There was a case management hearing before Employment Judge Warren. She ordered a list of issues was to be to be agreed in advance of the hearing. This had not occurred, so a list of issues was drafted by EJ Ross at the outset of the hearing, agreed with the representatives and listed below.

4. It was agreed that the respondent owed the claimant £57.77 in respect of unpaid wages and a consent judgment was issued for that amount and no further action was therefore required in relation to the unlawful deduction from wages claim contained in the list of issues.

5. **List of Issues**

Direct race discrimination (section 13 Equality Act 2010)

1. The claimant describes herself as a Zimbabwe national for the purposes of s9 Equality Act 2010.

2. What is the unfavourable treatment? The claimant relies on the allegations 3 (a) – (w) set out in her Further Particulars document.(p33-6) and her dismissal by the respondent on 26.4.19 or her constructive dismissal (her verbal resignation in Sept 2019 or her written resignation on or around 1 Oct 2019.)

3. Has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances of a different race was or would have been treated? The claimant says she was treated less favourably than Nicola Oldfield and/or a hypothetical comparator.

4. If so, has the claimant proven facts from which the Tribunal could conclude that the less favourable treatment was because of race?

5. If so, has the respondent shown a non-discriminatory reason for the treatment?

6. **Unfair dismissal s95 and 98 Employment Rights Act 1996**

Dismissal on 26.4.19

1. The Respondent agrees it dismissed the claimant. The reason relied on is conduct.

2. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide, in particular, whether:

3. The respondent genuinely believed the claimant had committed misconduct

4. There were reasonable grounds for that belief;

5. At the time the belief was formed the respondent had carried out a reasonable investigation;

6 The respondent followed a reasonably fair procedure;

7. Dismissal was within the band of reasonable responses

7. In the alternative**: Constructive dismissal**

1. Was the claimant re-engaged by the respondent following her dismissal on 26.4.19?

2. If yes, was she constructively dismissed either when she resigned verbally in Sept 2019 or when she resigned in writing in or around October 2019.

3. In answering that question the Tribunal will consider - did the respondent breach the implied term of trust and confidence? The claimant relies on the allegations 3 (a) – (w) set out in her Further Particulars document. (p33-6) and her dismissal by the respondent on 26.4.19 as breaches of the implied term.

4. Taking account of the actions or omissions alleged in the previous paragraph, individually and cumulatively, the Tribunal will need to decide:

   a. whether the respondent had reasonable and proper cause for those actions or omissions, and if not

   b. whether the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

5. Was any breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

6. Was the fundamental breach of contract a reason for the claimant's resignation?

7. Did the claimant affirm the contract before resigning, by delay or otherwise?

8. Has the respondent shown the reason or principal reason for the fundamental breach of contract?

9. Was it a potentially fair reason under section 98 Employment Rights Act 1996?

10. If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

8. **Remedy for discrimination.**

1. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

2. What financial losses has the discrimination caused the claimant?

3. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

4. If not, for what period of loss should the claimant be compensated?

5. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

6. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

7. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

8. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

9. Did the respondent or the claimant unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

9. **Unauthorised deductions**

1. Did the respondent make unauthorised deductions from the claimant's wages when she was suspended as set out in her schedule of loss.? Did she receive less than the amount properly payable under her contract.

10. **Remedy Unfair Dismissal**

1. What basic award is payable to the claimant, if any?

2. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3. If there is a compensatory award, how much should it be? The Tribunal will decide:

4. What financial losses has the dismissal caused the claimant?

5. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

6. If not, for what period of loss should the claimant be compensated?

7. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

8. If so, should the claimant's compensation be reduced? By how much?

9. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

10. If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

11. If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

12. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion? Would it be just and equitable to reduce the basic award because of any conduct of the claimant?

Witnesses

11. The Tribunal heard from the claimant. For the respondent we heard from her manager Mr Karl Boddy "KB", the dismissing officer Leanne Woodings "LW", the appeal officer, Ash Mahmood "AH" and Sarah Lumb "SL" an HR officer. (The Tribunal noted that in some documents Mr Boddy's first name was spelt Carl, rather than Karl.)

12. We had a bundle of documents. A sketch of the room was made by the claimant during the first day of the Tribunal hearing and sent in, the respondent disclosed the Reg 40 referral document on Day 1 and the Information Record Sheet "IRS" on day 3 of the Tribunal Hearing**.**

Facts

13. The Tribunal has found the following facts. The claimant was employed by the respondent from 11 January 2016 as a Residential Care Worker. The respondent provides specialist care education and behavioural health services to children with a variety of complex care requirements and challenging needs. We find that the claimant worked at a solo caring home for one young person and her duties included providing care and support to the young person living there. We find there were always two members of staff on duty together, working a 24-hour shift. We find that before the events which

gave rise to these proceedings the respondent had no concerns in relation to the claimant.

14. On 13 December 2018 the claimant was on duty with a colleague, NO. We find that the two women had only worked together on a couple of occasions previously. We find they had worked together without any problems on those occasions.

15. We find that on the day in question the looked after young person was in a "high mood" as the claimant describes it and there had already been incidents with him during that afternoon which had been dealt with appropriately. We find that the claimant had contacted her manager KB about the incidents in the afternoon by telephone. We find there had been some tension between the two women colleagues about a phone during the shift. The claimant's mobile phone wasn't working that day and she had asked NO to send text messages to the manager KB on her mobile phone and NO wasn't willing to do this so the claimant used the house phone instead to contact KB.

16. The claimant told the Investigating Officer that she believed NO had gone behind her back because when the claimant asked her to call the manager KB she refused to do so but when the claimant called him, he told her that NO had already contacted him about what had happened during the afternoon. We find that manager KB told the claimant that she needed to learn how to manage the young person's behaviour and not telephone him. We find this occurred in the afternoon before the incident which gave rise to the claimant being suspended and dismissed.

17. We find that the incident with which we are concerned happened after Mr Boddy's shift was over. There is no dispute that the incident occurred on the evening of 13 December 2018.

18. We find what happened was the young person opened a drawer in the office in the home and took the communications book. That much is agreed. What happened next is disputed. There are varying accounts of the incident: the claimant's account is in her witness statement, in the notes of her meeting with the Investigating Officer, in the notes of the disciplinary hearing and of the appeal and the account she gave to us. We find that the claimant was not the best historian, and some of her evidence was contradictory.

19. We find the young person did not provide an account to the investigating officer and has never provided an account. We find NO provided an account to the Investigating Officer. We find she also provided an account in a document entitled "witness statement NO" but it is not signed, it is dated 14 December .We were told it was made following a discussion between KB and NO when A.Jacques was also present.

20. So far as the contemporaneous documents are concerned the Tribunal was informed that normally when an incident occurs at the home, several documents are completed.We were informed there is a log book and a journal also usually completed each day, recording events which have happened, an information record sheet "IRS" (sometimes referred to as an

incident report form) for a specific incident, an accident report form when an accident occurs and a “body map” if there is an injury, showing where it occurred.

21. The logbook and journal for the shift were not provided to the Dismissing Officer or to the Tribunal. The Dismissing Officer said she had the accident form and there is an extract of that document in the investigation report (p92) but LW said in evidence to us she had the whole form. She informed us she believes she did not have the IRS and we find that probably correct because the IRS is not contained in the investigation report and was not produced until part way through this Tribunal Hearing. The Dismissing Officer did not have the Regulation 40 form which was produced to the Tribunal during these proceedings, but she did have the allegation recording form which details the referral to the local authority designated officer or LADO.

22. We find what happened occurred as follows. The young person went into the office and took the communications book. He ignored requests from the claimant to give the book back. It was evening in December and so it was dark outside. We find, as set out in the claimant’s sketch, that the office is a very small room. We find the young person was reading the communications book. We find the book is for communications between the staff. We find the claimant told the young person he wasn’t to read anything in the book. We rely on her account to the Investigating Officer at page 83 in relation to her turning the lights in the room off and then back on. We rely on her account to the disciplinary officer that she switched the light off. p103. The claimant disputed she did this at the Tribunal hearing but we think her earlier versions closer in time to the incident are more likely to be accurate. It is consistent with NO’s unsigned account to KB which mentions the lights being switched on and off.

23. We find the claimant tried to grab the book from the young person and we find it is likely he lost his balance as she grabbed the book. The claimant said to the Investigating Officer, when asked is there a possibility he fell down when she was trying to grab the book, that it was a possibility. We entirely accept the claimant’s evidence that she did not at any time touch or attack or assault the young person. In this respect the claimant has been entirely consistent throughout: “I didn’t hurt anyone.” p103.

24. There is no dispute that the young person fell and banged his head behind his ear , probably on the bedside cabinet and there is no dispute that he was offered and declined a cold compress and declined to go to the hospital A and E and that no other external medical attention was sought. It is also agreed that the injury was a bump.

25. We find aspects of the version given by NO in her account to the Investigating Officer and in her account to KB to be implausible. We did not hear from NO in person.

26. There is no dispute that the young person was aged 13, male and in height came up to the claimant’s shoulder. NO told the Investigating Officer that the claimant “grabbed him, grabbed his wrists, put his arm under his leg so she

grabbed from the other side, picked him up and threw him on the bed." She said the young person was "off the ground" as the claimant did this. She also stated that the claimant grabbed both sides of the book when the young person was holding it and "he come off the ground" and she put him back down and he hit his head. P87.

27. In the unsigned witness statement to KB NO says the claimant "grabbed the young person by the arm, forced his arm under his leg". She then "picks up the young person by the arm that is under his leg and throws him onto the staff bed in the office" and later on she stated "whilst the young person was on the floor she pulls the comms book upwards and the young person comes off the floor into the air as he is still holding onto the book, he is about 15 inches off the floor," and she said the claimant" lets go of the book and young person drops onto the floor, bangs his head on the bottom drawer of the bedside cabinet." P71.

28. We noted NO was not interviewed by the dismissing officer and declined to be interviewed by the Appeal Officer. We find those accounts, particularly in relation to the claimant being physically able to throw a teenage boy onto the bed or the account that the action of the claimant holding the comms book when he also held it, it could raise him 15 inches off the floor causing him to fall when let go to be implausible.

29. We have also taken into account that the claimant has always denied hurting the boy. We have taken into account that we consider it unlikely that the claimant would pursue a claim at an Employment Tribunal, particularly when she has been offered reinstatement if she had assaulted the boy in the way that was suggested.

30. We find the claimant did not complete all relevant documentation at the end of her shift, which concluded the following morning. She agreed that was the case. We find she did not seek external medical assistance and she agreed that was the case. We find there is a lack of clarity about which forms or documents should have been completed, when and by whom.

31. We find it likely that all the documents referred to should have been completed by the claimant and/or NO: the incident repo sheet "IRS", the logbook, the journal, the accident form and the body map.

32. We find it is unclear as to how NO came to report the incident. To the Investigating Officer she said she went to her "normal house" to report it and when asked who the manager was, she said it was KB p89. In the unsigned typed statement dated 14 Dec 2018 NO gives an account to KB when A Jacques is also present. P71. However in his evidence to Tribunal KB suggests NO came in to report the matter to another manager and KB just happened to be there.

33. There is no dispute the claimant was suspended by telephone the day after the incident, later on in the morning of 14 December and that was confirmed in writing.

34. It is also undisputed that KB completed the report document to the Local Authority Designated Officer ("LADO") fairly promptly, either on 14 or 16 December p72A-E.

35. The main section of that form appears to be details taken from NO's unsigned statement to KB. We find a LADO meeting took place on 20 December and LADO directed the matter be referred to the Police

36. The claimant was interviewed by the Police at the end of January 2019. The Police confirmed that they would close the criminal file due to the young person's unwillingness to speak to them and on 11 February 2019 the Police informed LADO that the file was closed, the LADO then indicated to the respondent that a disciplinary investigation was advised.

37. The claimant was invited to an investigation meeting to give her account for the first time, to take place on 7 March 2019. NO was interviewed by the same Investigating Officer on 18 March 2019. The claimant was invited to a disciplinary hearing which took place on 5 April 2019, she was dismissed by letter on 26 April, she made an appeal on 6 May and the appeal was heard on 29 May but she did not receive the appeal outcome until 6 September 2019, some three months later. We know that during the course of her suspension the claimant's own child was also interviewed by social services as standard procedure in an allegation of a safeguarding failure concerning a "looked after" young person because of the complaint made to the Police and LADO.

38. The respondent offered the claimant reinstatement following her successful appeal, both by letter and by telephone but the claimant declined the offer to be reinstated by telephone on 12 September 2019(p141) and later confirmed that in writing(p142,143). We find it unsurprising that she refused that offer of reinstatement given the length of time which had elapsed and the nature of the dismissal.

39. In reaching our finding of what happened on 13 December 2018 the Tribunal had regard to the contemporaneous documentation. Unfortunately, the Tribunal found that the documentation was limited and rather confusing and it was also frustrating to have some of the information piecemeal during the course of the hearing itself.

40. Turning to the documentation relevant to the incident with the young person there is a lack of clarity about what documentation should have been completed, what documentation was actually completed and by whom and which documents were before the dismissing officer.

41. The claimant was unclear in relation to the documentation. She gave the Investigating Officer, when asked if she had completed an information record sheet also called an IRS, an ambiguous answer "I didn't write an IRS, I did an IRS I can't remember, what I remember I didn't write is an incident form". At the disciplinary hearing the claimant said that she did complete the incident form and the form of the image of the body. Later on in that meeting she said she started the IRS but didn't complete it and added "I know Nicola did and

she said she would do that, I am slow on computer typing and we said we would do it together and we did".

42. At the Tribunal the claimant said she did start the IRS. To add to the confusion the IRS is not included in the investigation report completed by the Investigating Officer. See p76 to 94. The Dismissing Officer said she didn't have the information report sheet (IRS). However, in the minutes of the investigation meeting with NO which forms part of the investigation report NO was asked "did you complete an IRS report" and NO replied "no", she couldn't find anything on the computer. The Investigating Officer then said, "there is an IRS report we have here it's an IRS you completed but you said you didn't complete any". P89

43. The IRS was produced partway through the Tribunal hearing by the Appeal Officer. That document is undated and it has no signature on it but in the column 4 signature it has NO's full name printed. It gives a detailed timed chronology of events happening on 13 December 2018 which appears to be consistent with the account NO gave to the investigating officer in the sense that she said to the investigating officer she completed a chronology, but some of the events that are mentioned in that chronology are events which have otherwise been agreed to have occurred earlier in the day and not in relation to this incident.

44. The other issue of concern for the Tribunal is that NO told the Investigating Officer when trying to explain why an IRS had her name on it when she didn't complete it "that I had to write it down but I had to leave it for Carl for him to write something else, I went to my normal house and told them what happened and they wrote it down on paper and then I had to write a bit on computer and then leave it for Carl, I think he wrote that he had one but he didn't". She described Carl as her manager. So there is a great deal of confusion about the terminology used for these documents and who completed them and which documents were before the investigating officer.

45. The other document is the accident report form. This document was seen by the Dismissing Officer and an extract from it is in the management investigation report. The claimant said she didn't complete an accident report form at the investigatory meeting, see page 82 and in her evidence at Tribunal. She wasn't specifically asked about the accident report form and the failure to complete it at the disciplinary hearing.

46. The accident report form does not have a section to indicate when the accident was reported which seems surprising to the Tribunal applying its knowledge as an industrial jury. It just has the date of the accident. The name on the form, of the person completing it, is NO and again this is puzzling because when asked about the accident report form at the investigation interview she said she didn't know an incident report form existed. We find it is possible that NO was confusing the two forms-accident form and incident report sheet- but the panel has doubts about who completed the forms and when.

47. The panel finds it highly unlikely to have been NO who completed the accident form, because a section of that form has the wrong initials on it. We find that there is another Nicola (NH) employed by the same organisation but of course although a third party might confuse the initials of two employees with the same first name, one doesn't confuse one's own initials with someone else's initials when completing a form. NO's evidence to the Investigating Officer seemed to suggest that the accident form was completed by her manager and she said her manager was KB. KB told us the accident form was completed by JK, a member of staff to whom he said the claimant handed over at the end of their shift.

48. The Tribunal finds this explanation from KB is unlikely. Firstly, there is no explanation why JK would complete the form and put someone else's name on it as the person who completed it. Secondly, the claimant told us that JK did not turn up for work that day and somebody else she did not expect arrived.

49. In addition, there is a section in the form which NO says is untrue. The accident form states that the young person had a cold compress and that NO applied it. However NO told the Investigating Officer that the young person refused the cold compress and "my manager at the time, he did put down that he had a cold compress, I did say he declined but my manager said it doesn't look good so he put it down. I don't actually know who wrote that up."p89

50. There was no suggestion that JK whom KB now says completed that form was NO's manager and it is unclear why JK would put down something which is untrue.

51. The evidence before the Tribunal was that JK either was not a regular member of staff or that he did not attend work that day. The Tribunal finds it is more plausible that the manager referred to by NO was KB and that KB completed the form, not NO. In reaching this finding we have also borne in mind that the other contemporaneous document i.e. Notification recording form p72A-E has an account of the incident clearly cut and pasted from the document entitled "witness statement" provided by NO to KB the day after the incident.p71-2.

52. The claimant attended a disciplinary hearing on 5 April 2019(p103-6). She was sent a letter dated 26 April 2019(p107) informing her she was dismissed.

53. She appealed. An appeal hearing took place on 29 May 2019 (p111) but the claimant was not informed her appeal had been successful until a letter dated 6 September 2019 was sent to her.p137.On 12 September 2019 the appeal officer spoke to the claimant confirming the offer of reinstatement and to make arrangements for her return to work (p141) but the claimant declined the offer and later confirmed that in writing.(p142,143)

54. So, having made these factual findings we turn back to the issues and the law.

The Relevant Law

Unfair Dismissal

55. The relevant law is s95 and s98 Employment Rights Act 1996. The Tribunal is guided by the principle in BHS -v- Birchall 1980 ICR 303 and the principle in Salford Royal Foundation Trust v Roldan CA 2010ICR 1457.

Unfair (Constructive) Dismissal

56. The relevant statute in a constructive dismissal case is found at Section 95(1)(c) of the Employment Rights Act 1996 "an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

57. The relevant principles are found in Western Excavating –v- Sharp 1978 IRLR 27 CA where Lord Denning stated "if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed".

58. The claimant relied on a breach of the implied duty of trust and confidence. In Malik –v- BCCI HL 1997 ICR 606 it was stated "an employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".

59. In determining whether the respondent has acted in such a way so as to breach the implied term of trust and confidence the Tribunal is to apply an objective test. In Courtaulds Northern Textiles Limited –v- Andrew 1979 IRLR 84 Browne/Wilkinson J stated "to constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

60. In Western Excavating –v- Sharp it was established that there must be a fundamental breach of contract. In Morrow –v- Safeway Stores Plc 2002 IRLR 9, it was established that the breach of the implied term of trust and confidence is inevitably fundamental.

61. The claimant must resign in response to the breach and must not delay too long in terminating the contract or he will have been deemed to have affirmed the breach: "the employee must make up his mind soon after the conduct of which he complains for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged". See Western Excavating –v- Sharp.

62. In Buckland –v- University of Bournemouth 2010 EWCA Civ 121 it was held that a repudiatory breach of contract cannot be "cured" by the employer. If the claimant has resigned for a number of reasons the Tribunal must ask itself whether the employer's repudiatory breaches played "a" part in the employee's resignation: Wright –v- North Ayreshire Council 2014 ICR 77 EAT.

63. Both limbs of the test as espoused in Malik must be satisfied, conduct which destroys trust and confidence is not in breach of contract if there is a reasonable cause (Hilton –v- Shiner Limited Builders Merchants) 2001 IRLR 727. In Omilaju –v- Waltham Forest LBC 2005 ICR 481 it was held that where the resignation follows a "last straw" (where cumulative conduct is replied upon to form the breach of the implied term), the last straw does not have to be of the same character as the earlier acts and nor must it constitute unreasonable or blameworthy conduct but it must contribute, however slightly to the breach of the implied duty of trust and confidence. An entirely innocent act on the part of the employer cannot be a last straw.

Direct Race Discrimination Claim

64. For the direct discrimination claim the relevant law is s.13 Equality Act 2010. The burden of proof provisions at s136 Equality Act 2010 are relevant. The Tribunal reminded itself the established authorities demonstrate there is a two-stage process in a direct discrimination case. We must consider whether the claimant can adduce facts which could suggest the reason for the treatment is discriminatory. If so the burden shifts to the respondent to show there is a non-discriminatory reason for the treatment. These authorities include Igen Ltd v Wong 2005 3 ICR 931, Madarassy v Nomura International plc 2007 IRLR 246 and Efobi v Royal Mail Group Ltd 2019 2 All ER 917

65. The Tribunal reminded itself that a difference in treatment and a difference in protected characteristic are not sufficient to shift the burden of proof. There must be "something more". See Mummery LJ in Madarrassy v Nomura International plc.

66. We also reminded ourselves that it is necessary to explore the alleged discriminator's mental processes. We took into account Lord Nicholl's guidance in that bias may be unconscious. See Nagarajan v London Regional Transport 1999 ICR 877.

67. We turn back to the first claim and the list of issues.

Applying the law to the facts

Unfair Dismissal

68. We turn to the list of issues. The respondent agrees it dismissed the claimant. The reason relied on is conduct. That is a potentially fair reason.

69. We turn to the next issue. Did the respondent act reasonably in all the circumstances in treating that reason as the reason for dismissal? The Tribunal will decide, in particular, whether:

    69.1 The respondent genuinely believed the claimant had committed misconduct.
    69.2 There were reasonable grounds for that belief.
    69.3 At the time the belief was formed the respondent had carried out a reasonable investigation.

70. This is the principle in British Home Stores v Birchall.

71. We reminded ourselves that it is not for us to substitute our own view, it is not what we would have done that counts. It is whether a reasonable employer of this size and undertaking in this line of business with this claimant on these facts could have dismissed her fairly.

72. So we turned then to look at the reasons relied upon by the respondent for the dismissal which are set out clearly in the dismissal letter ,p107:

    - "Failure to appropriately safeguard a Young Person by not using de-escalation techniques to calm a young person down. No physical restraint was used as taught by the company; an inappropriate intervention was used with a child which resulted injuries to the child's head and no medical assistance was obtained.

    - On your own admission at the meeting on the 5'" April 2019, failed to appropriately report and record the incident as per company policy."

73. Accordingly, one reason related to the incident itself in terms of the young person and the second was the claimant's failure to document it correctly

74. The respondent said the first reason was a failure to appropriately safeguard a young person by not using de-escalation taught by the company and inappropriate intervention was used with the child which resulted in injuries to the child's head and no medical assistance was obtained. In her statement the Dismissing Officer said, "I believe the injuries sustained by the young person supported the events given by the witness" and she made it clear in evidence that the key to her decision to dismiss was the injury to the young person and that she preferred the evidence of the witness NO as to how that injury had been received.

75. There was no dispute that the only witnesses to the incident were the claimant, NO and the young person. The young person declined to give an account so the only versions were those of NO and the claimant.

76. The dismissing officer realised that there were two completely different version of events, she said “we have two words against each other”.

77. On the face of it, at first, it might be thought that the Dismissing Officer did have reasonable grounds for her belief about how the claimant had behaved because she had the statement from NO to the investigating officer and the other unsigned typed document which was said to be from NO.

78. However the Tribunal reminded ourselves that in these circumstances where a dismissal for this type of safeguarding issue is likely to be a career damaging or a career ending occurrence the case law tells us- see Salford Royal Foundation Trust v Roldan CA 2010 ICR 1457 -that there is a requirement that the more serious the allegation, the greater the need for a respondent of this size and undertaking to conduct an investigation which is thorough.

79. We find the Dismissing Officer was faced with conflicting versions of events which by now had taken place months previously. NO had been asked for a account soon after the event but it is not signed.Her account to the investigating officer was in March 2019, months after the incident occurred in December 2018. The claimant was not asked for her account of what happened in the incident until the investigating officer spoke to her also in March 2019, months later. In her investigation meeting the claimant had raised a concern about the phone issue which appeared to have caused tensions between the women. The Investigating Officer did not go back and seek NO’s views on this, nor did the dismissing officer.

80. The dismissing officer did not go back and seek clarification on aspects of NO’s evidence which appear implausible-in particular the account that the action of the claimant holding the comms book when the young person also held it, saying it it raised him 15 inches off the floor and then cause him to fall as the claimant let go, or that the claimant would have been able to physically throw him onto the bed.p71,87.

81. In addition, given the length of time after the event the claimant and NO were interviewed by the investigating officer, a reasonable dismissing officer would have sought all the contemporaneous documentation. LW agreed there would have been a log book, journal, an accident report form, an incident report sheet “IRS” and a body map.

82. Despite the fact the investigation report refers to the information report sheet “IRS” at page 89 the Dismissing Officer admitted she hadn’t seen it or asked for it. The Tribunal finds a reasonable employer would have sought this document, particularly as in the minutes of the meeting with NO on page 89 it states “there is an IRS you completed, you said you didn’t complete any” and in response NO appears to suggest either that Karl Boddy, her manager, has completed the IRS, despite the fact the investigating officer suggests NO

completed it or that her manager “wrote down he had one but he didn’t”. A reasonable dismissing officer with an open and enquiring minded would have been alert to those concerning contradictions and investigated them.

83. The other concern about a document not appearing to be genuine is the accident report form. The Dismissing Officer says she did have this document. She admits she failed to notice that although the document records in several places it was completed by NO, see p72G,72H, different initials, NH, rather than the initials NO are used in the description section. As she had not noticed the different initials, it did not occur to the dismissing officer that it was implausible that a person completing the form would get their own initials wrong. Again, a reasonable, open minded investigating officer would have concerns about this document.

84. The dismissing officer did not notice or make any further enquiry into the fact that NO had said at the investigatory meeting that a section of the accident form was untrue. When asked; “I understand that you tried to help KK, he refused to go to hospital and did you apply cold compress to his head?” NO replied “He refused. My manager at the time, he did put down that he had a compress. I did say that he declined but my manager said it doesn't look good so he put it down. I don't actually know who wrote that up.”p89.

85. Lastly NO referred in the investigation meeting minutes to a chronology that she completed(p89) but the dismissing officer admitted she didn’t have that document and she did not look for it. NO seemed confused in the information we have about the forms; “IRS and stuff I am not clued up on that as I don’t get to do paperwork”.p89. Despite this her name appeared as the person completing the accident form. The dismissing officer did not make any enquiries about these discrepancies.

86. The dismissing officer had incomplete documentation.NO the only other witness to the incident suggested that a section of a contemporaneous document which the dismissing officer did have was deliberately falsified-both in the content and in the name of who had completed the document. NO appeared to suggest a manager, KB, had been responsible. KB was the manager who reported the claimant to LADO.

87. In these circumstances the Tribunal is not satisfied, given the very serious consequences to the claimant of a finding of safeguarding failure against her that the respondent had a genuine belief based on reasonable grounds following a reasonable investigation on the first ground for dismissal.It was not disputed that was the most serious ground.

88. Having failed to meet the Burchell test in these particular circumstances the Tribunal finds that the dismissal was unfair.

89. In so far as it is relevant to consider the second ground for dismissal, the claimant accepted she had not completed the correct paperwork. However the dismissing officer said this of itself was not a dismissible offence as it did not amount to gross misconduct

90. We therefore find the claimant was unfairly dismissed.

Unfair (Constructive) Dismissal.

91. We turn briefly now to the claimant's alternative claim of constructive dismissal claim. The first issue is: was the claimant re-engaged by the respondent following her dismissal on 26.4.19?

92. We find that the answer to the question is no. We find the claimant was dismissed by letter with effect from 26 April 2019.Although the claimant successfully appealed against her dismissal, we find she was offered re-instatement but she declined the offer so we find that she was never re-instated or re-engaged by the respondent. We find she told the appeal officer she was no longer comfortable working with the respondent. She also blamed the delay in contacting her for her decision: "I waited for someone to contact me and no one did so I took advice and it has gone to tribunal".p140. She set out her reasons for rejecting the opportunity to return to work for the respondent in greater detail at p142 and p143.

93. As we find she was not re-instated or re-engaged her claim for constructive dismissal fails at this point and there is no need for us to consider the next question: was she constructively dismissed either when she resigned verbally in Sept 2019 or when she resigned in writing in or around October 2019 or the other issues in relation to constructive dismissal.

Contributory Fault.

94. The Tribunal agreed at this stage we would consider contributory fault.

95. Was there a culpable or blameworthy conduct which caused or contributed to the dismissal? In this part the Tribunal is required to make its own findings of fact, rather than consider what a reasonable employer might have done. The claimant admitted she hadn't completed the paperwork for the incident which happened on 13 December. She was contradictory in terms of which paperwork she had completed but she accepted that she had not completed the accident report form. The respondent didn't clearly identify to the Tribunal which documents should have been completed in terms of any policy however the claimant appeared to accept that she should have at least completed an accident report form and an IRS and did not do so.

96. She also accepted that she didn't seek external medical assistance for the young person whom she agreed had bumped his head. The Tribunal wasn't shown any policy which indicated what type of external medical assistance she should have obtained. The Tribunal notes the claimant was first aid trained and that a cold compress was offered to the young person as was the suggestion that he should go to A and E, both of which he refused.

97. The Tribunal has taken into account that the claimant agrees she didn't complete paperwork which is a matter which the Tribunal finds is culpable conduct and was a contributory factor in her dismissal. The Tribunal finds the claimant agrees she didn't seek any further external medical assistance for

the looked after young person and the Tribunal is satisfied that this is culpable conduct which was a contributory factor in the first ground of her dismissal.

98. The Tribunal finds it just and equitable to make a deduction for 20% for contributory fault. This is a modest deduction for contributory fault. For the avoidance of doubt the Tribunal accepts the claimant did not assault or hurt the young person and makes no deduction in relation to that aspect of the allegation.

99. In making the deduction, we have taken into account that the claimant herself accepted she should have completed at least some paperwork in relation to the incident on the night it occurred. We have taken into account that in terms of seeking medical advice or assistance, for example from NHS 111, that the young person was a looked after person and even if he declined assistance, the staff on duty which included the claimant were responsible for checking he received any necessary medical attention after a bump to the head.

100. In reaching the decision to make the deduction in the modest amount of 20%, we have taken into account the fact that the Dismissing Officer said failure to complete paperwork of itself would not have been a dismissible offence and there was no suggestion that failure to obtain an external medical opinion was of itself a dismissible offence

Polkey Deduction

101. The Tribunal then turned to the principle in Polkey -v- A E Dayton Services Limited that well known principle that in an unfair dismissal case where the failings are essentially procedural the Tribunal must go on and consider whether if the respondent has dealt with the matter properly the outcome would have been any different.

102. It is very difficult for the Tribunal to determine this because if the Investigating Officer had gone back and interviewed NO and/or KB about the discrepancies in the documents we do not know what she would have found in terms of who actually completed them and whether there was any falsification of them and whether it would have changed her view of NO as a credible witness or the reliability of what she said to the investigating officer.

103. Neither do we know whether, if the dismissing officer asked NO about the phone incident if she would have been affected by the view of the credibility of NO or any motivation for the version of events she gave to KB and to the investigating officer. We do not know if witness NO would have agreed to speak to the dismissing officer at all because we find NO declined to speak to the Appeal Officer.

104. Even if the Dismissing Officer had gone back and found all the documents and sought clarification from NO and possibly KB , we find there must have been a risk that she still would have preferred the evidence of NO that the claimant assaulted the young person and we think there is a 50% chance that that would have happened and that is why we say that the compensatory

award should be reduced by 50% because there was a 50% percent chance the respondent could have fairly dismissed the claimant.

ACAS Code

105. The other issue the Tribunal has to consider is whether there should be any uplift under the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Tribunal finds that the only part of the Code which has been breached is in relation to the timing of the appeal. The ACAS Code says that an appeal should be communicated in good time: "Employees should be informed in writing of the results of the appeal as soon as possible", see paragraph 29. The Tribunal finds a delay of three months in communicating the appeal means that the Code was breached.

106. We find that the breach of the ACAS code was unreasonable because of the length of delay in communicating the outcome of the appeal to the claimant. We considered whether it is just and equitable to award any uplift and if so, how much.

107. We took into account that there was no clear explanation for the delay other than the matter had been overlooked by the respondent's HR department when there was a change of personnel. We had regard to the fact the error was negligent, not intentional but also took into account that the respondent is a national organisation with a professional HR department which can be reasonably expected to have systems in place to identify outstanding matters when one of their team leaves. We have taken into account the worry caused to the claimant by the delay but also noted she did not appear to have chased the matter.

108. Taking all these factors into account we find it is just and equitable to uplift the compensatory award by 10%.

109. We have reminded ourselves that the order for uplift and deductions of the compensatory award is Polkey deduction, ACAS uplift then contributory fault.

110. For the avoidance of doubt we clarified there was no deduction for contributory fault to the basic award. The culpable conduct we have referred to in the compensatory award section is potentially relevant but we are not satisfied it is just and equitable under s 122 ERA 1996 to also reduce the basic award, for the same conduct. Neither do we consider, as our findings of fact show, that the claimant acted unreasonably refusing the offer of reinstatement given the length of time that had elapsed since the appeal hearing and the nature of the dismissal, where a colleague had reported events which the claimant considered false and which had a variety of consequences including the claimant's daughter being interviewed by social services.

111. We turned to the claimant's claim for race discrimination.

The issues

Direct race discrimination (section 13 Equality Act 2010)

Applying the law to the facts

112. We turn now to the race discrimination claim. The claimant is a Zimbabwe national and claims unlawful discrimination on grounds of her nationality, race and colour. The first issue is what is the unfavourable treatment? The claimant relies on the allegations 3 (a) – (w) set out in her Further Particulars document.(p33-6) and her dismissal by the respondent on 26.4.19 or her constructive dismissal (her verbal resignation in Sept 2019 or her written resignation on or around 1 Oct 2019.)

113. The Tribunal reminded itself of the burden of proof provisions and the well-known case law and guidance set out above in the "law" section of this judgment which reminds the Tribunal that there is very rarely direct evidence of discrimination. We reminded ourselves that discrimination can be unconscious and that there are occasions where the Tribunal is entitled to draw adverse inferences from the evidence which causes the burden of proof to shift. We also reminded ourselves that a difference in treatment and a difference in protected characteristic isn't enough to shift the burden of proof, there must be "something more" to shift the burden before we look at the explanation for the treatment.

Unfair dismissal-race discrimination

114. The Tribunal turned first to consider whether the claimant's dismissal by the respondent on 26.4.19 or her constructive dismissal (her verbal resignation in Sept 2019 or her written resignation on or around 1 Oct 2019.) was an act of unlawful direct race discrimination.

115. The Tribunal relied on its findings above that the claimant was dismissed by the respondent on 26.4.19.

116. So, the Tribunal must consider whether the claimant could adduce facts to suggest that the claimant's dismissal on 26.4.19 could have been an act of direct discrimination. If so, then the burden shifts to the respondent to show a non-discriminatory explanation for the dismissal.

117. The Tribunal finds we did not hear any evidence which could suggest that we could draw an adverse inference: there wasn't anything to suggest that the reason for the treatment potentially was discriminatory other than an assertion by the claimant that she thought it was. She also relied on the fact that there was a difference in treatment between herself and the comparator NO, who was described as white British.

118. We are not satisfied that the claimant has relied on the correct comparator because the comparator must be a person in the same set of circumstances as the claimant but of a different colour or ethnic group or nationality. We find NO was not in the same set of circumstances as the claimant because the

claimant was facing an allegation that she had assaulted a young person and no such allegation had been made against NO. Therefore she is not the appropriate comparator. The correct comparator is a hypothetical comparator in the same circumstances as the claimant, facing a safeguarding allegation who was white British.

119. We heard evidence that the Dismissing Officer had attended regular equal opportunities training as indeed did the Appeal Officer and of course the Appeal Officer reinstated the claimant.

120. We find the reason the claimant was unfairly dismissed was because the Dismissing Officer had focussed exclusively on the respondent's statutory safeguarding obligations and failed to approach the disciplinary hearing with an enquiring mind in terms of the detail and we find she accepted what was written in the investigation report without questioning it and investigating further. We are not satisfied there was anything to shift the burden of proof to the respondent so the claimant's claim for discrimination in relation to her dismissal fails at this stage.

121. If we are wrong about that and the burden of proof has shifted, we are satisfied that a hypothetical white comparator in the same set of circumstances would have also been dismissed. The reason for the unfair dismissal was that the Dismissing Officer had focussed exclusively on the respondent's statutory safeguarding obligations and failed to approach the disciplinary hearing with an enquiring mind in terms of the detail and we find she accepted what was written in the investigation report without questioning it and investigating further.

Unfair Constructive Dismissal-race discrimination

122. Turning to the claimant's allegation that her constructive dismissal (her verbal resignation in Sept 2019 or her written resignation on or around 1 Oct 2019.) was an act of race discrimination, the Tribunal relies on its finding that the claimant was not re-engaged so could not have been constructively dismissed so there is no requirement to consider this allegation further.

Allegations a – w. (p33)-race discrimination.

123. We turned to the claimant's other allegations. We will consider each allegation carefully in turn but having done so and reached a conclusion we have noted but the overall picture is that either the allegation was factually incorrect or if the allegation was factually correct there was no evidence to shift the burden of proof and if we were wrong about that and the burden had shifted there was a non-discriminatory explanation for the treatment. Therefore none of the allegations succeeded.

Allegation (a). KB failed to provide guidance and support and prohibited the Claimant from contacting him when she telephoned him on 13 December 2018 to seek assistance during the incident.

124. We find that this is not the incident with the young person which led to her dismissal. We rely on our findings of fact that this is the telephone call which

the claimant made earlier on 13 December to KB. We are not satisfied that KB "prohibited the claimant from contacting him". We relying on our findings of fact to find that he did say that the claimant must learn to manage the young person herself so we find there is a basis for our factual finding that he did not provide guidance and support to the claimant because suggesting that C must learn to manage the young person herself we find suggests he is discouraging the claimant from contacting him.

125. We must consider the correct comparator. That must be a person in the same set of circumstances ie who was on duty, also telephoned and was told by KB that she must learn to manage the young person herself. We know that the comparator NO also telephoned KB but we do not know what she was told. We therefore rely on a hypothetical comparator. There is no evidence to suggest that KB would have behaved any differently to a hypothetical white British comparator. We find there is no evidence to shift the burden of proof and so the allegation fails at this stage.

Allegation (b). KB discussed the 13 December 2018 incident informally in his office with Nicola Oldfield and others but not the Claimant.

126. We find it is true that Mr Boddy discussed the incident (which occurred on 13 December) on 14 December with NO. We find it was not discussed with others but we find that there was another manager,AJ, present whom we were told was a note taker. We find that it is not appropriate to use NO as the comparator here because she was not in the same circumstances as the claimant.NO made an allegation of assault against the claimant in relation to a young person. We find the reason KB asked NO about what happened was because KB said he heard NO make an allegation of assault against the claimant so that is why they were having the discussion. We find KB would have spoken to any member of staff regardless of colour or nationality if they made an allegation of assault against another employee in relation to a young person in the respondent's care. We find was no suggestion of less favourable treatment of a hypothetical comparator on the grounds of race and so there is nothing to shift the burden of proof. Even if we are wrong and the burden shifts, there is a non-discriminatory explanation, KB was taking details from NO of an alleged assault against a young person in the respondent's care and he was obliged to do so under their safeguarding policies.

Allegation (c) Following the informal discussion, KB telephoning the Claimant on 14 December 2018 (prior to being suspended) and threatening the Claimant on the telephone that "*this is a serious thing you have done.... Not taking the child to hospital and did the Claimant want him sacked and sent to jail… and that If the child died in bed the Claimant would not know and that the Claimant was supposed to report it*. . .". Karl Boddy had therefore, by his conduct, assumed that the Claimant was guilty of misconduct without a prior fair investigation and/ or establishing prima facie facts. The Respondent therefore failed to comply with its duty to carry out appropriate enquiries before deciding to suspend the Claimant and the Claimant suffered a detriment as a result.

127. We find KB telephoned the claimant on 14 December, the day after the incident. We find that it is likely that Mr Boddy did say those words written in italics, to the claimant. However we are not satisfied that those words mean his assumption was that the claimant was guilty of a misconduct without a fair investigation and/ or establishing prima facie facts and that the Respondent therefore failed to comply with its duty to carry out appropriate enquiries before deciding to suspend the Claimant.

128. We find that those words in italics suggest he had concerns that the incident had not been documented properly and we find that is factually correct- the claimant had told him that she hadn't filled in any forms. We find the words in italics suggest KB was also concerned the claimant had not taken the child to hospital, which is also factually correct. We find the remarks also suggest KB was concerned what the repercussions may be for his own position.

129. However, there is then an assertion there was a failure of KB to investigate and/or to establish primary facts. We find this is a misunderstanding of the respondent's procedure. We find once KB had received an allegation of a safeguarding concern in relation to a young person in the respondent's care, in accordance with the respondent's safeguarding policies, as the Tribunal was told repeatedly by the respondents witnesses, an employee accused of the allegation was to be suspended immediately pending an investigation into the matter and a report was to be made to the LADO. Only once the investigation by LADO and any police investigation was concluded was here to be an internal investigation. That investigation was not conducted by KB.

130. We find again there is no evidence to shift the burden of proof. We find a hypothetical comparator in the same circumstances of a different race, colour, nationality or ethnic group, also accused of the same safeguarding concern would have been treated in the same way.

131. Even if we are wrong and the burden of proof has shifted we find there is a non-discriminatory explanation, namely the respondent was following their safeguarding procedure when an allegation had been made against a member of staff in relation to a young person in their care.

Allegation (d): Suspending the Claimant by telephone notification on 14 December 2018 but not taking the same action against Nicola Oldfield on 14 December 2018 or subsequently (even though Nicola Oldfield was jointly responsible for the care of KK on 13 December 2018).

132. We find when considering whether the claimant can adduce facts to show she was less favourably treated than a real or hypothetical comparator, NO is the wrong comparator because no allegation of assault was made against her. We considered a hypothetical comparator in the same set of circumstances but of a different race, colour, nationality or ethnic group, also accused of the same safeguarding concern would not have been treated any differently.

133. Even if we are wrong and the burden of proof has shifted we find there is a non-discriminatory explanation as described above, namely the respondent

was following their safeguarding procedure when an allegation had been made against a member of staff in relation to a young person in their care.

Allegation (e): Suspending the Claimant on 14 December 2018 in that the Respondent had proceeded to suspend without carrying out any preliminary investigation of the allegation against the Claimant.

134. We rely on the same reasoning as above. We were informed by the respondent's witnesses and we find that suspension without any preliminary investigation is required when they are alerted to a safeguarding concern relating to a child or young person in their care.

135. We therefore find when considering whether the claimant can adduce facts to show she was less favourably treated than a real or hypothetical comparator, NO is the wrong comparator because no allegation of assault was been made against her. We considered a hypothetical comparator in the same set of circumstances but of a different race, colour, nationality or ethnic group, also accused of the same safeguarding concern. We find that comparator would not have been treated any differently.

136. Even if we are wrong and the burden of proof has shifted we find there is a non-discriminatory explanation as described above, namely the respondent was following their safeguarding procedure when an allegation had been made against a member of staff in relation to a young person in their care.

Allegation (f): Mounting an investigation based on false accusations and fabricated evidence against the Claimant (despite the Claimant's protestations that the allegations were false).

137. So far as this allegation is concerned the Tribunal finds that the respondent is obliged to investigate any account of breach of safeguarding duty in relation to a child or young person in its care. We find that the respondent will not know until the investigation is complete whether or not such an allegation might be false or such evidence might be fabricated. We therefore find that mounting an investigation at this stage cannot amount to unfavourable treatment, but even if it can, we find there there is no evidence to suggest the claimant was less favourably treated than a hypothetical comparator, nor any evidence to suggestion any difference in treatment was race.

138. Even if we are wrong and the burden of proof can shift we find the respondent can rely on a non-discriminatory explanation- the requirement of their policy that they conduct an investigation once an allegation of breach of safeguarding has been made.

Allegation (g): Failure to formally interview key witnesses in a timely manner (e.g. NO not interviewed until 18 March 2019).

139. We find that allegation (g) is not factually entirely correct because the respondent appears to have taken a statement from NO the day after the incident although we find that given it was unsigned it was not a formal statement. However, it is correct that the respondent did not interview the claimant or NO until moths after the incident, in March the following year.

140. We turn to consider whether the claimant can adduce facts to show she was less favourably treated than a real or hypothetical comparator. We relied on a hypothetical comparator because there was no evidence of a real comparator in the same circumstances as the claimant.

141. We find the claimant has failed to adduce facts which could show she was less favourably treated than a hypothetical comparator and that the reason for the treatment could be race.

142. The evidence we heard was that the respondent's policy was that any safeguarding allegation required suspension of the alleged assailant, referral to LADO and/or the police and only when those enquiries had been concluded could the mater be investigated internally.

143. Such a delay in investigation might well amount to less favourable treatment but there is no evidence to suggest any comparator of a different race would have been investigated sooner or any differently.

144. Even if we are wrong and the burden of proof shifts, we find the respondent has a non-discriminatory explanation- the application of their policy of suspension, report to LADO and/or police and only then a formal internal investigation.

Allegation (h): Giving Nicola Oldfield an assurance during the March 2019 investigative interview that "she was not in trouble" before the investigation was complete against the Claimant and / or before investigating NO's role in the incident. No such assurances were given to the Claimant.

145. We turn to consider allegation h. Once again, we find it is not appropriate to rely on NO as a real comparator as she was not in the same circumstances as the claimant because no allegation of assault or failure to safeguard had been made against her.

146. So far as a hypothetical comparator in the same set of circumstances as the claimant is concerned the Tribunal finds there is no evidence to suggest that assurances they "were not in trouble" would have been given to an individual of a different race also accused of assault or failure to safeguard a young person in the respondent's care and so the burden of proof does not shift and the allegation fails at this stage.

Allegation (i:) Continuing with the investigation despite the police and social services concluding that there was no case to answer on or around 17 December 2018.

147. We find this allegation fails to take into account that the standard of proof and requirements for a criminal investigation are completely different to the burden of proof and requirements for an employer in an internal disciplinary investigation. In a criminal investigation the police will consider whether a criminal offence has occurred and if the case proceeds to a criminal court, it will be necessary to prove beyond reasonable doubt that such an offence took place.

148. By contrast, an employer considering disciplinary action is considering whether an employee has committed conduct which merits a disciplinary sanction, up to and including dismissal. It will consider whether there is a genuine belief, based on reasonable grounds, following a reasonable investigation of such conduct. It does not have to be satisfied beyond reasonable doubt that the conduct occurred. It is therefore a lower threshold to meet.

149. We rely on our finding of fact that the LADO had specifically advised that the respondent should investigate the matter internally.We find there is no evidence to suggest a hypothetical comparator of a different race would have been treated any differently in terms of an internal investigation continuing after a criminal investigation had been dropped.

150. Even if we are wrong about that we find there was a non-discriminatory explanation-the requirement to follow LADO's advice.

Allegation (j) Failure to disclose the investigation report and witness statements or evidence gathered prior to the disciplinary hearing.

151. We find that this allegation is factually incorrect because the claimant agreed when she was cross examined that in fact she did have the investigation report and the supporting information which included her own and NO's witness statement and the other information in the investigation report, prior to the disciplinary hearing. She also confirmed in the minutes of the hearing that she had received a copy of the investigation report and had read it (p103). There is therefore no need for us to consider this allegation any further.

Allegation (k) Unreasonable and unexplained delays in the investigation process including notifying the claimant of the outcome of her disciplinary and appeal hearing.

152. So far as the unreasonable and unexplained delays in the investigation process are concerned the only unreasonable delay we have found is in relation to the appeal because there was a delay of some three months from the appeal being heard on 29 May 2019 and the outcome being communicated to the claimant by letter dated 6 September 2019. The extent of that delay was unreasonable, particularly in circumstances where the claimant had been dismissed in relation to a safeguarding incident so her career as well as her immediate livelihood were at risk.

153. However we find the claimant has adduced no evidence to suggest that the delay was in any way related to the claimant's race and therefore we are not satisfied that the claimant has been less favourably treated than a hypothetical comparator in the same circumstances because of her race.

154. Even if we are wrong about that and the burden of proof has shifted, we are satisfied there is a non-discriminatory explanation for the treatment. We accept the evidence of Ms Lumb whom we found to be a clear and cogent witness, to find there had been administrative error in the respondent's HR department. We find the HR employee dealing with the claimant's case had

left the respondent's organisation and failed to make it clear an outcome letter had not been sent to the claimant. We find an incorrect date had been entered onto the respondent's computer system and it was only when Ms Lumb, a new employee with the respondent's HR department, started looking into the case that she realised the claimant had not been sent an outcome letter.

155. Having found that even if the burden of proof has shifted, there is a non-discriminatory explanation, this allegation fails.

Allegation (l) Predetermined decision to dismiss before the outcome of the appeal hearing by forwarding the Claimant her P45 on 13 July 2019.

156. The Tribunal found it difficult to make sense of this allegation from a factual point of view. We find there is no dispute that the claimant was dismissed by letter dated 26 April 19 and we accept her evidence that her P45 was sent on 13 July 19. There is no dispute her appeal was successful, and she was offered reinstatement, although that was not communicated to her until September 2019. The Tribunal finds it is unsurprising a p45 was sent out after the claimant was dismissed because it is a document sent after termination of employment. Sending the P45 on 13 July 2019 does not suggest the dismissal was prejudged because it post-dated it. It does not suggest the appeal was prejudged because the appeal was found in favour of the claimant and she was re-instated.

157. Accordingly, the Tribunal finds the claimant cannot show any less favourable treatment in relation to what she alleges and the claim fails at this stage.

Allegation (m) Failure to take disciplinary action against those witnesses who notified Reg 40, 4 months later and completed IRs forms containing errors with wrong initials and wrong dates (falsification of documents)

158. We turn over now to the next allegation M. We find it was Mr Boddy who completed the Regulation 40 document and we find it was done in December 2019, so it was notfour months later so that is factually incorrect. So far as the rest of the allegation is concerned, the Tribunal has expressed doubts about the integrity of the documentation and who completed it but we have insufficient information to find that these documents were deliberately falsified, although there is some information to suggest they may have been in parts.

159. However even if these documents were falsified, and failure to take disciplinary action against someone else can amount to less favourable treatment of the claimant, there was no evidence to suggest that any such less favourable treatment of the claimant was on the grounds of race.

160. If we are wrong about that and the burden of proof has shifted we find there is a non-discriminatory explanation for the failure to take any action in relation to the documents. The reason these matters were not investigated was because the Dismissing Officer failed to approach the claimant's disciplinary hearing with an enquiring mind.

Allegation (n). Reporting the Claimant through LADO to the police and social services before carrying out an internal investigation to establish primary facts

161. We rely on our previous finding of fact the respondent's internal procedures required any safeguarding issue relating to a young person in the respondent's care to be referred promptly to LADO after the alleged perpetrator had been suspended. We are not satisfied there was any evidence to suggest that the claimant was treated less favourably than a hypothetical comparator of a different race.

162. If we are wrong about that and the burden of proof has shifted, we are satisfied the respondent has shown a non-discriminatory explanation-the application of their internal safeguarding procedures.

Allegation (o): Failure to follow Company disciplinary procedure and ACAS Code of Practice on disciplinary and Grievance Procedure by not adhering to reasonable time table; not explaining the delays in the investigation; reformulation of allegations of misconduct without prior notice to the Claimant; not allowing an ex-employee of the Respondent to accompany the Claimant at her disciplinary hearing.

163. The only delay we have found is in relation to failure to notify the outcome of the appeal and we have dealt with that already at allegation k and rely on our findings above.

164. We find there was no reformulation of allegations of misconduct in this case so that is factually incorrect. We also find that it is factually incorrect to state that an ex-employee of the respondent wasn't permitted to accompany the claimant. We find it was explained to the claimant in the invitation to the disciplinary hearing that she was entitled to have somebody with her. We find the claimant was offered to have someone attend with her at the disciplinary hearing itself and was specifically asked whether she was content to proceed in the absence of a representative. We therefore find this allegation to be factually incorrect so there is no need to consider any further issues in relation to it.

Allegation (p): On 1 March 2019, failure to specify the precise company policies rules and standards alleged to have been breached by the Claimant or on what date.

165. We turned to the 1st March 2019 letter which invited the claimant to the disciplinary hearing. p96. We find the letter did make it clear which policies the claimant had breached. It refers to "Breach of code of conduct and safeguarding policy in relation to an alleged assault on a YP and Failure to report and record the incident as required as per company policy"

166. We find the claimant had the Investigation Report where the specific policies the claimant was alleged to have breached are referenced: "Policies Breached: 1. Code Of Conduct 4.3, 4.4, 5.1, 5.2, 6.1, 6.2, 6.3, 6.4, 6.5, 6.6 2. Safeguarding Policy."p94.

167. The Tribunal notes the Code of Conduct and Safeguarding policy were not included in the Tribunal bundle or in the Management Investigation Report and there was no evidence when or if the claimant had been sent copies of those policies.

168. However the Tribunal finds it was made very clear to the claimant from that letter what it was she was accused of-namely the assault of the young person on 13 December 2018 and we find the claimant has never suggested that she didn't understand the accusation against her. We are therefore not satisfied the claimant was subjected to less favourable treatment.

169. However, if we are wrong about that and she was subject to less favourable treatment, she has not adduced any evidence which could suggest she was less favourably treated than a hypothetical comparator because of race. The allegation therefore fails at that stage.

Allegation (q): Failure to notify the Claimant within 7 days (as promised) the outcome of disciplinary hearing held on 5 April 19 and / or failure to provide reasons for the delay.

170. We find there was a delay in failing to notify the claimant of the disciplinary outcome. The claimant attended the disciplinary hearing on 5 April 2019 and the outcome letter was dated 26 April 2019. The claimant was told at the disciplinary hearing that she would receive an outcome in 7 days. p106.

171. The respondent's disciplinary procedure does not give a precise timescale for communicating an outcome. It states: "As soon as possible after me conclusion of the disciplinary proceedings. the manager leading the hearing will inform the employee of the panel's decision and will also inform the employee what disciplinary action, if any, is to be taken, The decision will be confirmed In writing". p59.

172. The dismissing officer said at Tribunal that the reason for the delay was she was weighing up the appropriate sanction.

173. We find that the claimant could regard the delay of approximately 2 further weeks to communicate the decision, given she had been told she would receive a decision in 1 week, as less favourable treatment.

174. However, there was no evidence to suggest a hypothetical comparator in the same situation of a different race would have been treated any differently and so the burden of proof does not shift.

175. However if we are wrong about that and the burden has shifted we are satisfied there is a non-discriminatory explanation namely that the Dismissing Officer said she was taking time to think about the decision given that she knew it was a serious matter for the claimant, should she decide to dismiss her.

Allegation (r): Failure to communicate and / or explain the delay of the appeal outcome until 6 September 2019 (having previously been promised by

Ash Mahmood that he would write to the Claimant within 7 days from 29 May 2019).

176. This allegation refers again to the appeal. We rely on our findings at allegation k. The Tribunal finds that there was a serious and unacceptable delay of 3 months in notifying the claimant of the outcome of the appeal.

177. However, we find the delay was not an act of race discrimination for the reasons set out at allegation k.

Allegation (s): Pursuing the investigation in a highhanded manner notwithstanding that the police and social services had concluded on or soon after 28 January 2019 that there was no case to answer.

178. We find that this is essentially the same as allegation (i) above and we rely on our reasoning in response to that allegation. In short, there is no evidence to suggest the claimant was treated less favourably than a hypothetical comparator of a different race but even if we are wrong about that and the burden of proof has shifted, we find there is a non-discriminatory explanation for the treatment: the respondent's policy and indeed the LADO (p74) required the respondent to conduct an internal investigation into the claimant because of the allegation of assault. Therefore, this allegation fails.

Allegation (t): failure to give the Claimant a fair investigative / disciplinary hearing and not allowing her to put forward her case and / or ignoring points raised by and / or not investigating matters raised by the Claimant during the disciplinary hearing.

179. We rely on our findings of fact that the respondent failed to give the claimant a fair disciplinary hearing because it failed to investigate concerning errors and discrepancies in the documentary evidence and the dismissing officer failed to notice some of these issues and failed to notice she had incomplete documentation. We find the dismissing officer failed to interview the key witness NO in the light of these errors and in the light of the claimant's reference to a motivation for why NO might be saying theses things in her interview with investigating officer SM. See.p 84 "Is there any reason that this chain of events has been explained this way? SK — I think so yes. SM — Why is that? SK — Because there was something that went on that day." The claimant, SK, went on to explain an issue with a mobile phone. We also find the dismissing officer failed to put to NO implausible parts of her evidence described in our findings of fact above in this judgment at paragraph 80.

180. However, we are not satisfied that other parts of this allegation are factually correct. In particular we find no evidence that the claimant was not permitted to put her case forward.

181. In considering the allegation that failure to give the Claimant a fair investigative / disciplinary hearing and / or ignoring points raised by and / or not investigating matters raised by the Claimant during the disciplinary hearing was an act of direct race discrimination, we find the claimant has not adduced evidence to suggest she was treated less favourably than a

hypothetical comparator of a different race. It is not sufficient to show less favourable treatment and a difference of protected characteristic, there must be "something more" "to shift the burden of proof. The allegation therefore fails at this stage.

Allegation (u): Requiring the Claimant to undergo further training notwithstanding the fact that the summary dismissal decision had been rescinded in its entirety with no findings upheld against her.

182. Firstly, we find there wasn't a requirement, it was a recommendation and secondly, the tribunal is not satisfied this amounted to less favourable treatment. The claimant like all employees in the respondent organisation was required to undergo regular training. Furthermore, the training was at least in part in relation in relation to a failure by the claimant to complete documentation. That was something the claimant had admitted.

183. Even if the recommendation to undergo training was less favourable treatment, we find the claimant has not adduced evidence to suggest she was treated less favourably than a hypothetical comparator of a different race and so that allegation cannot succeed.

Allegation (v) Failure to apologise to the Claimant following the rescission of her summary dismissal.

184. We find it is true the respondent did not apologise to the claimant, but we are not satisfied there was any obligation on them to do so. We find once an allegation had been made by NO to suggest the claimant had assaulted the young person, the respondent was obliged to report the incident to LADO and subsequently investigate it internally.

185. However, if the failure to apologise amounts to less favourable treatment, the claimant has not adduced facts which could suggest that a hypothetical comparator in the same circumstances would have been treated any differently. Therefore the burden of proof des not shift and the allegation fails at that stage.

Allegation (w): Respondent's manager's failure to contact the Claimant following her re-instatement.

186. The Tribunal finds the reference is to the claimant's manager, KB. The Tribunal finds matters never progressed sufficiently for KB to contact the claimant because although the appeal officer offered reinstatement and rang the claimant to discuss her return to work, the claimant made it clear to him that the trust and confidence was broken, for various reasons including the long delay in receiving the appeal outcome,p94 and so she never returned to work.

187. We find the claimant has not adduced facts which could suggest that a hypothetical comparator in the same circumstances would have been treated any differently. Therefore, the burden of proof does not shift and the allegation fails at that stage.

188. However, if we are wrong about that and the burden of proof has shifted there is a non-discriminatory explanation for the treatment-KB, the claimant's manager did not contact the claimant because the claimant declined to be reinstated both verbally and in writing.

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Employment Judge Ross

29 June 2021

REASONS SENT TO THE PARTIES ON

1 July 2021

FOR THE TRIBUNAL OFFICE

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