EMPLOYMENT TRIBUNALS

Claimant: Mr D Abdy

Respondent: North Yorkshire County Council

On: 17, 18, 19 and 20 May 2021

Before: Employment Judge D N Jones
Ms J Lancaster
Ms J Noble

This hearing was conducted remotely, by video.

REPRESENTATION:

Claimant: In person
Respondent: Mr A Webster, counsel

JUDGMENT having been sent to the parties on 21 May 2021 and written reasons having been requested by the claimant by email of 26 May 2021, as clarified on 28 June 2021, in accordance with Rule 62 of the Employment Tribunals Rules of Procedure 2013 the Tribunal provides the following

REASONS

Introduction and Issues

1. This is a claim for unfair dismissal and direct race discrimination.

2. At a preliminary hearing before Employment Judge Shepherd, on 17 December 2020, the claims and issues were identified and remained those to be determined.

Evidence

3. The Tribunal heard evidence from the claimant and Mr Daniel Maguire, his trade union representative. It had read a statement from Mrs Michelle Abdy, the wife

of the claimant and Ms Sarah Palfreyman, social worker and former registered manager of Dovedale. The claimant was not able to call Mrs Palfreyman to give evidence and the weight which could be attached to the statement was limited, because it had not been tested in cross examination. The respondent called Mrs Barbara Merrygold, Head of Early Help, Children and Young People's Services, who chaired the disciplinary panel, Ms Terri Owens, Team Manager in the Wrong Door Service, Mrs Sara Jeffs, HR Business Partner, and Mr Barry Khan, who chaired the appeal panel.

4. The parties submitted a bundle of documents of 377 pages and a bundle of medical records.

5. The names of the service users and another worker at Dovedale have been anonymised as the Tribunal was satisfied that a balance of the Convention rights under Articles 6, 8 and 10 did not warrant the identification of those individuals.

Background/Findings of fact

6. The respondent is a local authority with responsibility for providing care to young and vulnerable people. It operates a multi-disciplinary team which provides residential care and community outreach services for vulnerable children, which is called 'no wrong door' (NWD).

7. The claimant commenced employment with the Respondent on 14 August 2017 as Portfolio Lead in that service. He was based at Dovedale Children's Home, Harrogate, a home for children who have complex and significant emotional and behavioural needs.

8. On 24 November 2019 there was an incident at Dovedale House involving a young person, A, who was involved in a physical confrontation with the claimant. The claimant was placed on administrative duties on 28 November 2019 pending an investigation into the allegation that he may have acted in a way that harmed or could have harmed a child. The claimant was temporarily redeployed, but was signed off by his GP, on 9 December 2019, for work related stress.

9. In a letter dated 12 December 2019, the claimant was advised that a disciplinary investigation would be undertaken. The investigation was carried out in accordance with the respondent's disciplinary procedure by Teri Owens, Team Manager (NWD).

10. The claimant returned from sickness absence on 20 January 2020 on a phased return, into his redeployed duties.

11. On 24 January 2020 the claimant was offered a final written warning, in respect of the allegations. This was outside the formal disciplinary procedure. The claimant did not accept the offer.

12. The claimant was subsequently advised by way of letter dated 14 February 2020 that a decision had been made that the matter should progress to a disciplinary hearing.

13. On 31 March 2020 the claimant was again offered a final written warning which was communicated to through his union representative. Having discussed the matter with his representative he declined the offer.

14. The disciplinary hearing went ahead on 21 May 2020 in relation to the three allegations of misconduct, namely that a young person has or could have been harmed; that the appropriate recording and reporting was not completed; that language used towards the child was inappropriate and abusive.

15. The allegations were found proven and the claimant was dismissed for gross misconduct with immediate effect.

16. The claimant appealed the decision of the disciplinary panel by way of letter dated 4 June 2020. The claimant's appeal hearing against his dismissal took place on 13 August 2020. The appeal was not upheld.

The Law

Unfair dismissal

17. By Section 98(1) of the Employment Rights Act (ERA 1996) it is for the employer to show the reason for the dismissal and that it falls within a category recognised in Section 98(1) or (2), one of which relates to conduct, see Section 98(2)(b).

18. Under Section 98(4) of ERA "*where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and (b) shall be determined in accordance with equity and the substantial merits of the case.*

19. There is no burden of proof in respect of the analysis to be undertaken under Section 98(4) of the ERA. Material considerations in a case where the reason for the dismissal was conduct, will include whether the employer undertook a reasonable investigation and formed a reasonable and honest belief in the misconduct for which the employee was dismissed[1]. It is not for the Tribunal to substitute its own view, but rather to review the decision-making process against the statutory criteria and if it fell within a reasonable band of responses the decision will be regarded as fair[2]. The 'reasonable band of responses' consideration includes not only the determination of whether there was misconduct and the choice of sanction, but includes the investigation[3]. A fair investigation will involve an employer exploring avenues of enquiry which may establish the employee's innocence of the allegations as well as those which may establish his guilt. That is of particular significance in the event the dismissal will impact upon the employee's future career[4]. With regard to any

[1] BHS v Burchell [1980] ICR 303.
[2] Iceland Frozen Foods v Jones [1983] ICR 17.
[3] J Sainsbury PLC v Hitt [2003] ICR 111.
[4] Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457.

procedural deficiencies the Tribunal must have regard to the fairness of the process overall. Early deficiencies may be corrected by a fair appeal[5].

20. By Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal, a Code of Practice issued by ACAS is admissible and any provision in the Code which appears to be relevant to any question arising in the proceedings should be taken into account in determining that question. The ACAS Code of Practice on Discipline and Grievance Procedures 2015 is one such Code.

21. If a claim of unfair dismissal is established, the Tribunal shall make a basic and compensatory award, if no order for re-instatement or re-engagement is sought, see section 118 of the ERA. Formula for calculating awards is contained in Section 119 and Section 123 of the ERA.

22. Under section 122(2) of the ERA, where the Tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, it shall reduce or further reduce that amount accordingly.

23. By Section 123(1) of the ERA, the compensatory award should be such amount as the Tribunal considers just and reasonable in all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. If the dismissal is unfair for procedural reasons, the Tribunal may reduce or extinguish any compensatory award, if the Tribunal concludes that the complainant would or might have been dismissed had the procedures been fair[6].

24. Under Section 123(6) of the ERA, where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to the finding.

<u>Discrimination</u>

25. By section 39(2) of the Equality Act 2010 (EqA):

> *An employer (A) must not discriminate against an employee of A's (B)—*
>
> *(a) as to B's terms of employment;*
>
> *(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
>
> *(c) by dismissing B;*
>
> *(d) by subjecting B to any other detriment*.

[5] Taylor v OCS Group Ltd [2006] ICR 1602

[6] Polkey v A E Dayton Services Ltd [1988] ICR 142.

26. By section 109(1) of the EqA, anything done in the course of a person's employment must be treated as done by the employer and by section 109(3) it does not matter whether the thing is done with the approval or knowledge of the employer.

27. Direct discrimination is defined in section 13 of the EqA:
A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourable than A treats or would treat others.

28. By section 9 of the EqA, race includes nationality or national origin by section 11 sex is a protected characteristic.

29. By section 23 of the EqA:
On a comparison of cases for the purpose of section 13, 19 there must be no material difference between the circumstances relating to each case.

30. By section 136(1) of the EqA, if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. Section 136(2) provides that does not apply if A shows that A did not contravene that provision.

31. The Court of Appeal has approved and revised guidance to the application of the burden of proof under previous legislation which remain applicable to the EqA[7].

31.1 In deciding whether the claimant has proved such facts [to discharge the burden] it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers will be prepared to admit such discrimination even to themselves.

31.2 The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead to it concluding there was discrimination but that it could.

31.3 In considering what inferences or conclusions can be drawn from the primary facts the tribunal must assume that there is no adequate explanation for those facts.

31.4 When the claimant has proved facts from which the inferences could be drawn, that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that he did not commit, or as the case may be is not to be treated as having committed that act.

[7] Wong v Igen Ltd [2005] ICR 931, Barton v Investec Henderson [2003] ICR 1205, Ayodele v Citylink Ltd [2019 ICR 458

31.5 To discharge that burden it is necessary for the respondent to prove on the balance of probabilities that his treatment was in no sense whatsoever on the protected ground.

31.6 That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts proved by the claimant from which the inferences could be drawn, but that explanation must be adequate to prove on the balance of probabilities that the protected characteristic was no part of the reason for the treatment.

31.7 Since the respondent would generally be in possession of the facts necessary to provide an explanation the tribunal would normally expect cogent evidence to discharge that burden.

32. In **Madarassy v Nomura International plc**, the Court of Appeal held that a difference in status, namely that of the protected characteristic alone, was not of itself sufficient to discharge the burden of proof. In **Glasgow City Council v Zafar** the House of Lords held that because an employer acted unreasonably did not mean that it had acted discriminatorily. If the employer treated those with and without the protected characteristic equally unreasonably there would be no discrimination.

Discussion, analysis and conclusions

Unfair dismissal

33. The reason for the dismissal was conduct. The decision makers, in the form of the disciplinary panel chaired by Mrs Merrygold and the appeal panel chaired by Mr Khan, believed that the claimant had not adhered to the risk assessment, individual crisis management plan and appropriate use of TCI training in his interactions with A on 24 November 2019. The precise finding in the dismissal letter was "*this method of responding to a young person's challenging behaviour is not an appropriate technique"*. By way of further explanation, the panel stated that a member of staff dealing with a similar scenario minutes earlier had responded in the appropriate manner and that highlighted the fact that the claimant's response was excessive and unnecessary.

34. The claimant did not challenge the fact that the decision had been based upon the events of 24 November 2019 and had acknowledged from the outset that in swearing at A on two occasions he had acted inappropriately. He did query whether the sanctions imposed were influenced by his race or because he and his union representative had expressed dissatisfaction at the failures of the respondent to investigate the events relating to his life-threatening admission to hospital in July 2019 as a consequence of suspected poisoning by a resident, but he did not suggest that the principal reason for the dismissal was not conduct. We find it was.

35. Was the belief in that misconduct reasonable? That requires the Tribunal to identify what conduct the panel found the claimant to be culpable of. That is necessary to answer the question posed within Section 98(4)(a) of the ERA, namely whether the employer acted reasonably or unreasonably in treating it [that is the reason for the dismissal, namely conduct] as a sufficient reason for dismissing the employee.

36. Mr Webster said that the central finding of the panel was the claimant had not adhered to the risk assessment and individual crisis management plan of A. That is true, for the reasons we set out above. But that is too broad a definition to enable a sufficient assessment of whether dismissal for it was reasonable. The claimant's own acknowledgment, from the first investigatory interview in respect of his use of bad language, satisfied that definition. We must determine whether the panel's findings of what the misconduct had been was sufficient to justify dismissal.

37. The Tribunal had some difficulty in understanding what the findings were in respect of the culpability of the claimant's actions at the commencement of the confrontation. That is important, because it sets the context within which the remainder of the incident had to be evaluated. The Tribunal asked Mrs Merrygold about this. At Mr Webster's suggestion she was taken to the disciplinary letter. The first two pages of it summarised the evidence the panel heard, starting with the claimant's account. The findings in respect of each allegation are set out on page 3 and are not as extensive. They do not expressly address which account the panel preferred where there were differences, but it is implicit that Mrs McCready's version and interpretation of the events was preferred; but Mrs McCready could not assist with the first part of the confrontation which she did not witness.

38. Although at one part of her evidence Mrs Merrygold suggested the panel had accepted the account of the initial events as described by the claimant and that his actions would have been justifiable under the policies, '*by placing a hand up to stop A as he approached the claimant*', she added that the claimant should have talked him down: "*Having stopped the young person the claimant should have moved away whilst lowering the tone".* We concluded that evidence reflected the opinion of the panel.

39. Evidence was provided at the disciplinary hearing from Mrs McCready, from Mr Hick, the resource hub worker who had to manage A's behaviour immediately prior to the claimant arriving on the scene, and from the claimant. Differences in the account of what Mrs McCready and Mr Hick saw or how they reacted and felt could be drawn out; for example the initial statement of Mrs McCready made no reference to the claimant saying "*come on, come on*" in a manner which could be construed as goading whilst he and A were locked together with hands on each other's shoulders. Mr Hick initially described, in his written statement, being fuming at the behaviour of A who had no thought for anyone else's safety. When giving his evidence to the panel said he had implemented the TCI's skill framework. There were differences in the claimant's account too, notwithstanding it remained consistent later as observed by Mr Maguire. The early written account of the claimant in the log book records one shove and the Reporting Incident Form (RIF), prepared on 28 November 2019, the claimant's next day on shift, referred to the claimant placing one hand on A to prevent him getting closer and physically pushing him back due to his persistence. The later account of the claimant has far more similarity to Mrs McCready's, with a description of the two pushing and shoving. These differences of account are commonplace when witnesses try to piece together their recollections of a traumatic and distressing situation which occurred over a very short period of time. These discrepancies raise challenges for the fact finder, who has no more reliable evidence than that of the witnesses' best but fallible memories.

40. The Tribunal did not have the benefit of listening to these witnesses nor did it hear the claimant's account to the panel. Although we heard evidence from the claimant, it would be wrong to judge the findings of misconduct of the panel by that. On a reading of the full transcript we conclude that a reasonable panel could have accepted Mrs McCready's assessment of that part of the incident she witnessed and her feeling that the behaviour of the claimant was inappropriate, subject to the qualification that her judgment was limited by having not seen what led up to the physical confrontation. She heard the language used and saw the particular movements of the claimant and A. She said the claimant seemed to be pushing A antagonistically rather than de-escalating matters. She had not reported the incident immediately, but mulled over it for four days because she believed the actions of the claimant to be wholly out of character, but concluded it was her duty to raise her concerns.

41. In respect to the first part of the incident, the panel had the account of the claimant, Mr Hick and the record of A, which was taken by Ms Owen on 20 November 2019. In addition, the panel had a report prepared that day by Mr Hick, X, their colleague, and the claimant. It was an overview of the shift and evaluation of the young person A. There is a consistency in the accounts in respect of the events of that day which led up to the confrontation between the claimant and A. The statement from Mr Hick, which reflects the other accounts was, "*A trying to goad staff and in staff's face and trying to be challenging towards staff, as he was most days. On this afternoon, between 2pm and 3pm, B put the living room window through with the chair and glass shattering and just missing the faces of staff at the other side. Shortly afterwards A, had got some glass bits and was trying to put these down the back of my top, I had to keep reminding him to stop and giving directive statements to put the glass down, and let us tidy it up. I was afraid of A and the situation as he was in close proximity and constantly trying to goad me for a reaction. As I was getting nowhere with trying to defuse the situation A followed me and continued to throw glass as I made my way to the office for my own safety. As I was heading into the office Danny came out of handover to take over on the shop floor, where broken glass and A was. I was now in the office and to be honest fuming at A's behaviour and no thought for anyone's safety".*

42. The events which followed are described only by the claimant and A. In his interview with Ms Owen, A stated that another resident had broken the door and MC pushed him and he knocked into the claimant. "*Then Danny fucking pushed me and said 'go on then' and got in my face. Then he pushed me down the corridor and called me a 'fucking little shit"*. A does not refer to throwing glass or acknowledge any responsibility for the difficulties which erupted that day. The panel did not reject the evidence that glass was thrown, no doubt because Mr Hick had described it at some length. The only credible account they had of the events immediately prior to the physical contact, seconds after Mr Hick had walked away, was that of the claimant.

43. The claimant stated, consistently, that he had seen A throw glass at Mr Hick who went into the office and that he then approached him. He was carrying some of the broken glass and throwing it at the claimant towards his face. The claimant

repeatedly warned him not to throw glass and accepted that in doing this he swore, saying, "*don't fucking do that"*. Although she did not witness this, Mrs McCready recalled hearing the words, "*don't do that is fucking dangerous"*. In his account to the panel, the claimant said, "*I gave him a number of instructions that his actions with the glass were dangerous words to that effect and I think he continued to break off the glass and I think he turned to face me while I was stood by the dining door and then he threw the glass from a distance towards me yet again so I said don't do that and admittedly I started to get kind of anxious now. I used the words that I don't tend to use and he then came towards me again and he was doing what was explained in the handover and he came towards me and came into my space and he threw glass again which did hit me at that point. I did forcefully push him out of my personal space, I think that Lauren had actually heard the commotion and come to the door… so there was pushing and always admitted this right from the beginning. I have had time to reflect this professionally as he is a young person but he wasn't stopping, he was in my personal space and I think unfortunately I felt right that I need to move this person out of my space but wrongly I did push the young person I think again that's a lot of potential anxiety coming on to me. Then, so he was kind of approaching towards the corridor this was literally a metre and a half wide… there was pushing and always admitting this right from the beginning… we are pushing and shoving… I did the wrong thing and called him a little shit. Completely wrong my background is in care and from the same situations he was right so if I understand the problem my words are more harmful than probably any potential harm that could come to me".*

44. The finding of the panel that the claimant could and should have conducted himself in the same way as Mr Hick is one we have concluded was not reasonable. The circumstances they had heard about, of A goading Mr Hick and placing broken glass pebbles down his top, was not comparable to the events which confronted the claimant. He faced an imminent physical attack; a young man who had already thrown glass, threatened to do so again, then threw more glass which hit the claimant as he moved towards him. The claimant knew A had a history of making violent threats and had carried a knife. The claimant was in a doorway and although he could have moved backwards or left the scene, he could not know how events might then unfold. A could have pursued him. He is criticised for saying that he was concerned about the safety of other staff and residents when he did not know where they were and it is certainly true that he did not made reference to his concern for residents until the appeal. Nevertheless, the claimant was faced with a dangerous situation in which he could have suffered serious injuries in an attack with broken glass, albeit safety glass in pebbles not shards. He acted instantaneously and instinctively, in the moment, to protect himself. The threat was immediate and significant. The claimant reacted by putting out his hand and shoving A backwards, whereupon A then took hold of the claimant and put his hands on his shoulders, the point at which Mrs McCready witnessed the events. The panel's conclusion that the claimant could have removed his hand and moved away carried its own potential for harm to the claimant and Mrs McCready, as it could not be known how A would react. The sequence of events which preceded Mrs McCready witnessing the confrontation were highly significant in the evaluation of the potential for harm from A. Her assessment of the threat level lacked the benefit of having seen the preceding events.

45. Part of the finding of misconduct was reasonable, insofar as the panel accepted the version given by Mrs McCready from the point at which the claimant and A were locked together by shoulder grasp with the admitted use of inappropriate language and the failure to complete the RIF on the day. Those actions could have been categorised by a reasonable employer as gross misconduct.

46. The difficult question in this case is whether it was within a reasonable band of responses to impose a sanction of dismissal for that misconduct, that is the aspects which founded a reasonable belief. The employer is best placed to know what disciplinary actions are required for its workplace and a Tribunal will be slow to conclude that such a decision was outside a reasonable range.

47. In this case, however, the determining factor between dismissal or a lesser sanction was the claimant's statement to the panel that he would act in the same way again. In the dismissal letter it was put in this way: "*Of equal concern is that having had time to reflect on your actions of 24 November you still describe that should a similar scenario arise in the future and you felt threatened, you would react in the same way as a justified form of self-defence. A requirement of your role as portfolio lead is the ability to 'regularly reflect on practice'. Despite hearing colleagues' concerns, their describing how they responded in line with TCI to de-escalate the situation and going through the Authority's disciplinary procedure for use of inappropriate physical techniques you are still unable to reflect on your actions and understand how you might have responded differently. Given the nature of the post you hold and of the challenging and complex nature of the client base you support, incidents like this are not unusual and it is highly likely that similar scenarios could arise on a day-to-day basis*".

48. The claimant's remarks about how he would react again are summarised in the disciplinary hearing: "M*y response was, it was self-defence, after I had given various warnings. If I felt threatened for my safety or another member of staff's safety, I will react proportionally to what's going on and I feel that I was threatened again and there was no positive response from that person then yes I would. I like to think, and definitely on reflection that I would not use that kind of language and how much it may cause emotional upset. I feel I responded by purely my anxiety from prior to the shift so as you mentioned I would do again if someone was within my personal space, I feel that's my right but to use language like that no I wouldn't".*

49. The claimant had twice been offered a final written warning provided that he reflected and took responsibility for what had happened and underwent a period of training. He was told by Ms Owen that the service had considered that would be an appropriate sanction. That had been authorised at assistant director level. The reason a final written warning was discounted at the disciplinary and appeal hearings was because of the claimant's statement that he would act in a similar way if a situation of that type arose in the future.

50. We recognise that the actions of a worker in this environment require very different standards to the norms elsewhere. Dealing with emotionally vulnerable young people demands a level of acceptance of antisocial behaviour which would be addressed very differently in another workplace. The level of risk the claimant was

confronted with, however, was such that his instinctive response to use force could not reasonably be criticised. It was to oversimplify the circumstances to suggest that he could have implemented the TCI in the same way as Mr Hick and easily and safely disengaged from contact, for the reasons we have given.

51. We find that the disciplinary panel fell into error in its criticism of the claimant that he would have acted in the same way and that this reflected no insight, notwithstanding his recognition of the inappropriateness of his language. The panel did not regard any of the claimant's behaviour as reasonable self-defence, save for holding up his hand to prevent A's advance. It therefore found his entire response posed an unacceptable risk in the future to service users, when in fact, the panel had itself understated the risk the claimant faced. We do not find that conclusion was one that any reasonable employer could have reached. Mr Webster suggests that the claimant himself could have distinguished between the different aspects of the event, such as to say that he would not have behaved in the same way in the latter part of the physical contact. That overlooks the fact that the panel did not regard any of the conduct of the claimant as having been acceptable in self-defence. In those circumstances the decision to dismiss fell outside a reasonable band of responses.

52. We have considered whether the respondent undertook a reasonable investigation, because this is part of the claimant's case. In respect of the preparation of the materials for the disciplinary hearing, the appropriate witnesses had been spoken to and prepared statements and the claimant had been interviewed in the presence of his union representative. There was a detailed consideration of the allegations at a disciplinary and an appeal hearing. To this extent, the enquiry had been a thorough one. The claimant says that Mrs Merrygold should have made further enquiries of comparable cases before making the decision to dismiss. At the appeal he raised the case of X in which a colleague with the same level of seniority had used profane language in front of service users and had manhandled a service user out of the kitchen. He too had failed to complete the risk assessment form. He had been given an offer of a written warning which he accepted.

53. We accepted the evidence of Mrs Merrygold that she was not aware of this case and had relied upon the human resources adviser. We would not say this fell outside a reasonable band of responses, although appraising oneself of similar cases is good practice.

54. In respect of the appeal, Mr Khan and the panel relied on the professional assessment of Ms Owen and Mrs Merrygold. During the appeal hearing the claimant drew attention to the case of X. Mr Khan made further enquiries and a summary of the case of X and the claimant was prepared by Ms Owen. Mr Khan concluded it had significant differences, including that the LADO did not consider the case of X sufficiently serious to refer to the Disclosure and Barring Service in contrast to the case of the claimant. The comparison of cases in respect of sanction is a difficult exercise because no cases are on all fours. Whilst we have concerns about the presentation of the two cases by Ms Owen, there was no good reason for Mr Khan to dig deeper on what he saw and the differences he identified would enable a reasonable employer to uphold the dismissal, in respect of the differential treatment question.

55. The claimant says the dismissal was also unfair because of a failure to take into account his exemplary work record, the fact this was wholly out of character and the threats he and his family had received from another resident and his friends, including the suspicion that he might have been poisoned by one of the residents of Dovedale.

56. The panels' paramount concerns were for the welfare of the residents. We are satisfied both disciplinary and appeal panel did reflect on these mitigating factors, but they could not assuage their concern about a recurrence. As we have concluded that the panels' approaches to that issue were flawed, the mitigating material may have carried much greater weight, had the assessment or recurrence been viewed differently.

Contributory conduct

57. For this purpose, the Tribunal does not review the decision of the employer and consider whether it was a reasonable one. The Tribunal must determine its own findings on the evidence presented.

58. We find that the claimant used inappropriate language on two occasions. On the first, he was instinctively reacting to a situation in which A was throwing glass and his profanity had little influence on the fast-moving events which were driven by A. The claimant instinctively reacted to a threat of violence upon him, having already been assaulted by flying glass. He pushed A backwards. A then took hold of the claimant shoulders and the two were locked, with the claimant holding the shoulders of A as well to contain him. There following a period of pushes and shoves. It was difficult for the claimant to disengage from the hold without knowing what A might do. This involved very careful decisions in the moment, none of which were free of risk. Although the scene must have looked shocking to Mrs McCready, she had not witnessed glass being thrown at the claimant and the risk to health that had posed.

59. The claimant called A 'a little shit' towards the end of this struggle. That reflected a loss of control on the part of the claimant. In other circumstances, with a physical confrontation of this type, that might be regarded as an understandable human reaction. In this situation the claimant's job and role demanded that he maintained a level of self-control which reduced the potential for further violence. He recognises that this was a failing. It has to be seen in the context of extending the potential for further combative physical interaction. It led to a reaction in A, who was seen shortly afterwards by Mrs McCready in tears and distressed by the claimant's language. It is no mitigation that A himself uses such language and the claimant never suggested as such.

60. There is no doubt that this conduct contributed to the dismissal and it is just and equitable to have regard to it in evaluating any compensatory award. The claimant fell short of the important standards of a role model and let down this vulnerable teenager, even acknowledging how challenging and difficult he was. In addition, the claimant failed to complete the RIF form which had to be considered within 24 hours of the event. Although this was not as grave, because he had made an entry in the logbook and this was an oversight other senior staff were guilty of, it

was nevertheless a factor which contributed to the dismissal and for which the claimant was culpable.

61. These are significant matters in the context of a role in which the safeguarding of young people is critical. We consider an appropriate reduction to the compensatory award to be 50%.

62. For the basic award, we make the same deduction. It is not necessary for that to contribute to dismissal, but it is not material to this adjustment.

63. We do not increase the award as a consequence of any failure to comply with the ACAS Code of Practice on Discipline and Grievance procedures. There was a thorough enquiry and all the basic principles of procedure in the Code were complied with.

Direct discrimination

64. The claimant is mixed-race, of partial Afro Caribbean origin. He believes the dismissal was less favourable treatment because of his race. That belief is principally based upon the comparable circumstances of X, a white worker and colleague who was faced disciplinary matters to which we have referred above which led to the offer of a written warning outside the formal disciplinary process. In addition, the claimant points to a request by his managers to remove the reference to race in respect of a criminal investigation into an incident of racial harassment and racially aggravated assault including personal damage to the claimant's car by one of the young people in the respondent's care. The claimant was upset, understandably, that he was asked to remove reference to race by his employer. This request was also confirmed in the statement of Mrs Palfeyrman, who did not give evidence. The offence was compounded by a denial at paragraph 22 of the response which suggested the question had been posed as to whether race was a relevant factor by the claimant's manager, but no evidence was adduced on this. We were prepared to accept the claimant's account on the information available.

65. The claimant did not contest the evidence that Mrs Merrygold and Mr Khan were not aware of any request to remove the reference to race from the police statement. We can understand why that request and the different treatment of a white worker raise questions as to whether there is an underlying culture and attitude within the respondent with respect to black employees. The claimant posed the rhetorical question, is a physical confrontation with a black worker seen as more serious and negative to that or a white worker. This is an organisation with very few employees of an ethnic minority; 2.7% in a county where the ratio in the population there is 2.6%.

66. The less favourable treatment alleged is the dismissal. The question we must address is whether race played any part in the decision of either panel, consciously or subconsciously. Because there is no evidence either panel knew of the request to retract the racial aspect to the allegations, it is not appropriate to impute that knowledge to them. It does not assist on the question therefore of what motivated the decision makers to dismiss the claimant.

67. Similarly, there is no evidence the disciplinary panel had any knowledge of the disciplinary case of X. The claimant says Mrs Merrygold should have made a more detailed enquiry about other cases before deciding on his. As we have indicated, that would have been good practice, but we have no basis on which to infer she did not make those enquiries because of the claimant's race.

68. In respect of the appeal, Mr Khan was presented with an analysis of the two cases prepared by Ms Owen. In his witness statement Mr Khan identified the different circumstance that the case of X was not considered serious enough to refer it to the DBS. In his cross examination he referred to some other features which he thought distinguished the cases. The bad language used by X had not been directed at a service user but was overheard and on a separate occasion to the application of force. X had physically ejected the young person from the kitchen in circumstances in which it appeared he was about to throw boiling sugar water on to others and his colleague had not given effect to the TCI to remove the risk in time.

69. The Tribunal had reservations about whether these differences were of any real significance. It is true that the LADO had not referred the matter to the DBS, but both incidents of physical intervention arose at a point of risk of injury. There appeared to be an attempt to minimise that in the case of the claimant, described as A flicking glass. That did not accurately reflect the threat the claimant was confronted with.

70. Mr Khan did not consider it necessary to require more information of the case of X, but took the report at face value. The issue of race being a material factor in the disciplinary action had not been raised. We are satisfied he genuinely believed the case of X was in a different category because of the LADO's decision. This would not appear to be anything to do with race. The LADO has a statutory safeguarding obligation to assess the risk independently. In these circumstances, we can find no evidence and facts from which we could draw the inference that the appeal panel was influenced in its decision by the claimant's race. Even if we had been satisfied that there were facts from which the dismissal could have been influenced by the claimant's race, because we accept the cases of the claimant and X are comparable, we accept the evidence of Mrs Merrygold and Mr Khan that race had no relevance at all. In Mrs Merrygold's case because she knew nothing of the X matter and in Mr Khan's case because he genuinely believed the LADO's assessment distinguished the safeguarding risks.

71. It follows that the race discrimination case is not established.

Postscript

72. We had reservations about the use of the informal procedure to offer sanctions which an employee may accept to avoid a disciplinary hearing in a safeguarding case. The Tribunal had never experienced such an alternative disciplinary procedure. It is not recognised in the ACAS Code of Practice or Guidance on Discipline and Grievance Procedures. Neither Ms Jeffs, as a human resources professional of some years, nor Mr Maguire who has 20 years as a union official had come across such a process in any other organisation. Its informality and use, which we heard involves aspects of negotiation, for example in the

claimant's case of backdating the start of the operational period of the warning, may not adequately prioritise safety.

73. In respect of the question of acknowledgment of fault, Mr Webster said that this was no different to what happened in the disciplinary hearing. We had doubts about that. The requirement of the claimant as expressed by Ms Owens was to '*reflect and take responsibility for what happened*'. His acceptance of what he had done by swearing in this volatile situation and not completing the RIF would have met all three allegations and we suspect that would have sufficed for that purpose. The matters would not have been explored in nearly the same depth as at a disciplinary hearing with the focus on whether he would act in the same way again. We did not find it necessary to resolve the difference in account between Mrs Jeffs and Mr Maguire about what had been said about the benefits of seeing an early return to duty because of the pandemic, because nothing turned on this. But it illustrates the dangers in this type of alternative approach, where conversations carrying offers or incautious remarks can easily be misconstrued. We were not reassured that the confirmatory record to be signed by the employee who accepts the offer will overcome these concerns.

Employment Judge D N Jones

Date: 14 July 2021