EMPLOYMENT TRIBUNALS

Claimant: Mr Bamidale Iluyamade

Respondent: Bradford District Care NHS Foundation Trust

Heard at: Leeds **On:** 6, 7 and 8 July 2021

Before: Employment Judge D N Jones
Ms J Hiser
Mr M Brewer

REPRESENTATION:

Claimant: In person
Respondent: Mr N Thornsby, counsel

JUDGMENT having been sent to the parties on 14 July 2021 and written reasons having been requested by the claimant by email of 18 July 2021, in accordance with Rule 62 of the Employment Tribunals Rules of Procedure 2013 the Tribunal provides the following

REASONS

Introduction

1. This is a claim for unfair dismissal on the ground the claimant had made protected disclosures and under general principles, direct race discrimination and victimisation.

2. The issues were identified at a preliminary hearing by Employment Judge Davies on 12 February 2021.

Evidence

3. The tribunal heard evidence from the claimant. The respondent called Mrs Grainne Eloi, Deputy Director of Nursing and Professions, Mrs Susan Ince, deputy Director of Performance and Planning, Mr Thabani Songo, Operations Service Manager and Ms Lucy Rushworth, staff bank administrator.

4. The parties produced a bundle of documents of 707 pages. Some further documents were produced, without opposition on the first day of the hearing.

5. The claimant made an application for a witness order for two police officers and disclosure of documents from his former employer Cygnet. This related to the matter the respondent stated had been reported to them by the police. They said it concerned the claimant's former employment, of which they had been unaware until informed by the police that the claimant had left Cygnet following an allegation from a service user having been made against him.

6. The applications were rejected as they were not necessary to dispose of an issue in the proceedings. The claimant admitted that he had been employed by Cygnet and an allegation had been made against him and that, having taken advice, he chose to leave. The claimant took issue with a statement of the respondent that the police had said he had been dismissed, which was incorrect. The claimant was able to question the respondent's witnesses about this and it was not a central or significant issue.

Background/Findings of fact

7. The respondent is a provider of mental health, dentistry, community health and specialist disability services in Bradford, Airedale, Wharfedale and Craven.

8. The claimant was employed by the respondent as a Healthcare Support Worker on its bank staff from 7 July 2017. He was appointed to a permanent post on 1 January 2018. On 14 January 2019 the claimant became an Assistant Practitioner.

9. On 17 January 2020 the claimant was suspended. A disciplinary investigation was undertaken concerning a complaint made by service users that he had subjected them to verbal abuse and that he had failed fully to disclose his employment history to the respondent during the appointment processes in 2017 and 2019. The claimant was interviewed on 17 February 2020 and 12 March 2020.

10. He attended a disciplinary hearing on 30 April 2020 and 20 May 2020, conducted remotely because of the pandemic. Mrs Eloi dismissed the first allegation at the commencement of the hearing because she did not believe the evidence substantiated it. In respect of the second allegation, she found that the claimant had omitted and misrepresented information on three of his application forms to the respondent. She found that he had not declared his previous employment with Cygnet. He had stated his previous employer was Care Contact UK, a charity he had been registered with for work, but for whom he had not undertaken any shifts. She found that the omission was deliberate and was to avoid questions being asked of him about the circumstances in which he left employment with Cygnet, namely

that he left after he was suspended pending an investigation into an allegation from a service user.

11. Mrs Eloi concluded that the claimant had been culpable of gross misconduct and that this exposed the respondent to risks of which they should have been made aware. He was dismissed summarily.

12. The claimant appealed the decision. He complained that the decision had been racially motivated and was based on incorrect and misinterpreted information. Mrs Ince conducted the appeal remotely on 22 September 2020. She upheld the decision and rejected the allegation of discrimination.

The Law

Unfair dismissal

13. 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). In a case in which the employee contests the reason for the dismissal there is no burden on him to disprove it or positively to prove a different reason. If the employee identifies some evidence of a different reason, it is for the Tribunal to determine, on a balance of probabilities, what the reason for the dismissal was[1].

14. By section 103A of the ERA, the dismissal will be unfair if the reason, or if more than one the principal reason, for the dismissal is that the employee had made a protected disclosure.

15. 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.*

16. 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[2]. 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

[1] Kuzel v Roche Products Ltd [2008] ICR 799
[2] BHS v Burchell [1980] ICR 303.

it fell within a reasonable band of responses, the decision will be regarded as fair[3]. The 'reasonable band of responses' consideration includes not only the determination of whether there was misconduct and the choice of sanction, but will include the investigation[4]. 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[5]. With regard to any procedural deficiencies the Tribunal must have regard to the fairness of the process overall. Early deficiencies may be corrected by a fair appeal[6].

17. 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.

Qualifying Disclosure

18. By section 43B of the ERA, a qualifying disclosure is defined as a disclosure of information which in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more acts of wrongdoing as defined. Such wrongdoing includes that a person has failed, is failing or will fail to comply with a legal obligation to which he is subject and that the health and safety of an individual has been, is being or is likely to be endangered.

19. Information may include an allegation but a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a relevant failure[7].

20. If a disclosure relates to a matter where the interest in question was personal to the employee, it is still possible that it might satisfy the test that it was, in the reasonable belief of that employee in the public interest as well his own personal interest. That depends on factors such as the numbers of those affected by the interest, the nature of the interest affected, the nature of the wrongdoing, the identity of the wrongdoer and the extent to which interests were affected by the wrongdoing disclosed[8].

Protected disclosure

21. A qualifying disclosure will only be protected if it was made to a person as defined in the circumstances within sections 43C to 43H of the ERA. Section 43C includes an employer as such a person.

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[3] Iceland Frozen Foods v Jones [1983] ICR 17.
[4] J Sainsbury PLC v Hitt [2003] ICR 111.
[5] Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457.
[6] Taylor v OCS Group Ltd [2006] ICR 1602
[7] Kilraine v London Borough of Wandsworth 2018 ICR 1850,
[8] Chesterton Global Limited v Nurmohamed [2017] EWCA Civ 979

Discrimination

22. 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.

23. 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.

24. 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.

25. By section 9 of the EqA, race includes nationality or national origin.

26. 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.

Burden of proof

27. 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.

28. The courts have approved guidance to the application of the burden of proof under previous legislation which remain applicable to the EqA[9].

44.1 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.

44.2 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

[9] Wong v Igen Ltd [2005] ICR 931, Barton v Investec Henderson [2003] ICR 1205, Efobi v Royal Mail Group Limited [2021] UKSC 33

facts would lead to it concluding there was discrimination but that it could.

44.3 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.

44.4 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.

44.5 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.

44.6 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.

44.7 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.

29. 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.

30. In **Hewage v Grampian Health Board** and **Efobi v Royal Mail Group Limited** the Supreme Court stated that it was important not to make too much of the role of the burden of proof provisions: "*They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other*", per Lord Hope in **Hewage**.

Discussion, analysis and conclusions

31. All of the claims relating to the dismissal require the Tribunal to address why the respondent, in the form of Mrs Eloi and Mrs Ince, decided on that outcome. What mental processes led to the decision to terminate the claimant's employment? What did they take into account? Was the reason for the dismissal related to conduct, or if there was more than one reason was that the principal reason? Or was the reason or principal reason that the claimant had made protected disclosures? Did the claimant's protected characteristic of race, he being black African, influence in any material way, consciously or subconsciously, the decision? Did any expression of concerns of the claimant relating to discriminatory treatment, in the

form of protected acts, influence in any material way, consciously or subconsciously, the decision?

32. The following factors are not in dispute:

35.1 The claimant was employed by Cygnet between May 2016 and 22 November 2016;

35.2 The claimant left the employment of Cygnet following an allegation of assault by a patient;

35.3 The claimant applied to work for the respondent on its standard application form, when he applied form bank work. He submitted two further such application forms for the posts he was later appointed to;

35.4 The standard application forms require the applicants to provide details of their employment history, both in respect of the current and most recent employer, from whom a reference would be sought and from the three additional previous employers.

35.5 The claimant did not include any express reference to Cygnet as his employer in the application forms. In respect of his most recent employer, in the application for the bank staff position, the claimant stated it was Care Contact UK, from July 2015 to January 2017. The claimant had not worked any shifts for that organisation. It was owned by his uncle;

35.6 The application included a declaration: "*The information in this application form is true and complete. I agree that any deliberate omission, falsification or misrepresentation in the application form will be grounds for rejecting this application or subsequent dismissal if employed by the organisation*".

33. At the disciplinary interview the claimant said to Mrs Eloi that he wished to sell himself when he completed the application form and did not wish to be put in a situation in which people started asking funny questions. He said that he had taken advice from the Citizen's Advice Bureau when he left Cygnet and had been told that he should forget about it. He said that a worker at the Job Centre had advised him to set it aside, when he made an application for a job, to put it behind him and never talk about it again. In his evidence the claimant said that he had not mentioned Cygnet on the application form because he did not think they would have given him a good reference.

34. Mrs Eloi and Mrs Ince made their decisions on the information which was before them and they cannot be judged by evidence the Tribunal heard but they did not. Upon consideration of the documentary materials before them, the answers provided by the claimant to them and the investigator and the evidence they gave to the Tribunal, we have no doubt that both concluded that the claimant had deliberately made no reference to Cygnet in his application form and that he had done so in order to enhance his prospects of obtaining the appointments he had applied for. This was because the circumstances in which his employment with Cygnet had come to an end would have potentially jeopardised his applications because there had been an allegation of an assault against the claimant by a patient. That would be a reason related to conduct, a potentially fair reason to dismiss within section 98 of the ERA.

Protected disclosures/victimisation - dismissal

35. The six alleged protected disclosures spanned a period from early 2017 to the beginning of 2020. The first three are also alleged protected acts. Mr Thornsby has challenged a number, insofar as he says they have not been made out, or do not constitute protected acts or protected disclosures.

36. All but one were concerns the claimant had raised with Ms Rushworth, within the context of a scheme run by the respondent to encourage members of staff to identify areas of concern. It is known as the Freedom to Speak Up policy (FTSU). There is an understanding that the concerns raised shall be confidential and although the subject matter will be addressed with relevant managers the identity of the complainant will not be revealed.

37. Ms Rushworth was an FTSU Champion, that is someone to whom a concerned employee could raise matters. She would then convey that to an FTSU Guardian, for the concern to be dealt with. Ms Rushworth said in evidence that the claimant had raised many matters with her which had been dealt with under the policy. She could not recall the details of them all. She had no cause to believe the confidentiality had been breached in respect of the claimant's concerns.

38. The first alleged disclosure was that *on 9 December 2017 the claimant sent an email to Ms Rushworth telling her that agency staff and bank staff were not being given keys and alarms and that this had a disproportionate impact on black staff, which tended to show a risk to health and safety*. No such email was produced. Nor was any reference made to it in the witness statement of the claimant. This had not been proven.

39. In respect of the second alleged disclosure, that *on 10 December 2017 the claimant sent an email to Ms Rushworth telling her that black staff were being marginalised, with an example of a staff member who had been accused of sleeping on duty when that was not true, demonstrating the breach of a legal obligation not to discriminate,* the email does not contain this material. There is no reference to such an accusation nor to black staff. In his evidence the claimant said the respondent should have known that is what he meant when he referred to bank and agency staff. We do not consider that would be apparent. The information does not tend to show the breach of any legal obligation. This disclosure was not established.

40. The third alleged disclosure was that *on 15 June 2018 the claimant sent an email to Ms Rushworth again telling her that black staff were being marginalised and that this information tended to show breach of a legal obligation not to discriminate*. The respondent accepts that this contained information which could be a qualifying and protected disclosure, but stated that this information was never shared with Mrs Eloi or Mrs Ince. We accepted that they would have no reason to have become aware that the claimant had raised this, which would have been a breach of the confidentiality of the FTSU policy.

41. The fourth alleged disclosure is that *on 6 November 2018 the claimant sent an email to Ms Rushworth telling her that recruitment issues were affecting staff and*

patient care and this information tended to show breach of a legal obligation (not to discriminate) and a risk to health and safety. In this email the claimant expressed his concern about the impact on bank or agency staff of repeated checks and he suggested the rewriting of policies to avoid this and to save money for the respondent. There was nothing in this document which tended to show the breach of a legal obligation. There was no reference to race. There was no evidence the confidentiality the FTSU policy had been breached and that Mrs Eloi and Mrs Ince were aware of it. We find they were not.

42. The fifth disclosure was that *on 4 and 8 July 2019 the claimant sent an email to Ms Rushworth telling her that the use of glass or ceramic cups on the wards was a safety risk and this information tended to show breach of a legal obligation to provide a safe place of work and a risk to health and safety*.

43. There was no email of 8 July 2019. The content of the email of 4 July 2020 did express concern about the use of glass on the wards and this tended to show the health and safety of an individual might be endangered and the claimant could reasonably have believed that and that the matter was one of public interest. The respondent took issue with it having been known of by those who dismissed the claimant.

44. Ms Rushworth sent an email about this matter for it to be considered to the FTSU guardian, Ms Greenwood. Ms Greenwood took the matter up with three others including Mrs Eloi, but without identifying the claimant. She said the concern had been raised by a staff member of the ward. This led to the removal of that type of pottery on the claimant's ward. The claimant suggested Mrs Eloi must have been aware he had raised the matter but Mrs Eloi said she had no idea he was the originator of the concern. There were 14 ward staff and many others who worked on that ward. We could find no sound basis to reject what Mrs Eloi said about this. The claimant criticised her for having used a smiley face on an email, after she had sought clarification that it was pottery and not glass, which was the term the claimant had used in his original complaint. He suggested this connoted sarcasm, and a negative view of him as a black person. We did not consider that emoji reflected a pejorative attitude. It was no more than a common place symbol used to end her communication to her colleague.

45. The sixth alleged public interest disclosure concerned an ongoing investigation into the death of a patient who had taken his life in early 2019. The claimant had been interviewed by the serious incident investigator. The solicitor of the respondent had posed a number of questions for the claimant to clarify and these communications were relayed through Mr Songo during the period of the claimant's suspension.

46. In their evidence both Mrs Eloi and Mrs Ince said that they had no knowledge of the content of the communications which formed the basis for the 3 alleged protected acts and 6 public interest disclosures. We could find no documentation to contradict that. They gave clear answers. Each gave consistent evidence.

47. We accepted they had no knowledge of what the claimant had communicated in respect of any of these matters. It follows that they could have played no part in the decision to dismiss the claimant. For a dismissal to be unfair on the ground that an employee had made a protected disclosure, that must have been the sole or principal reason for the dismissal. We are satisfied it had no part to play at all, as the decision makers were unaware of them.

48. In respect of victimisation the test is not as stringent, in that if the dismissal was in part because of the protected act, the claim shall be established. But that claim faces the same difficulty, in that neither Mrs Eloi nor Mrs Ince knew of the matters which the claimant says were protected acts, namely issues he raised about discrimination, of which only the third was made out.

Direct race discrimination – disciplinary investigation and dismissal

49. At the appeal the claimant said that he believed that race was a compound of events commencing with prejudice at Cygnet and he was continuing to pay the price for that. He believed the case was managed in a way which would have been handled differently, had he been white British and not Black African.

50. The claimant drew attention to a number of well-known examples and instances of race discrimination of black people such as the recent case of the death of George Floyd. There is no doubt race discrimination exists, that it is often insidious and difficult to establish. In such cases the Tribunal takes especial care to examine all of the evidence and its findings of fact to determine if inferences can properly be drawn of such discrimination.

51. We are not satisfied, on all of the evidence, that there are facts from which we could conclude that the decision to subject the claimant to a disciplinary investigation and to dismiss him had any relation to his protected characteristic at all. The claimant's previous employment came to light because of an alleged hate crime made against him and PC Armstrong drew the attention of the claimant's history with Cygnet to the respondent's attention following a safeguarding meeting in respect of those complaints. The officer also referred to a number of aliases that she said the claimant had. He submitted that demonstrated an attitude of mind to him as a black person which would not have happened to a white person. This underlined his concern that the officer had not been summoned by the Tribunal.

52. It is not the background which shone a light upon the claimant's previous employment, nor why Cygnet or the police acted as they did which is the relevant focus of this claim. The claimant believes that justice would warrant an investigation into that history to clear his name. As the Tribunal explained during the hearing, we are only able to decide legal claims which the law prescribes and which in this case have been identified in the issues at the preliminary hearing. The conduct of Cygnet and the police are the background to what became material facts in a disciplinary hearing, but they were not the reason for it.

53. The disciplinary process was concerned with the claimant having misled the respondent in the application for his job. He held a job in which the protection of the

vulnerable imposes additional and stricter levels of vetting than in other occupations. That has been recognised by Parliament in the DBS procedure. The need for an employer to have confidence in its employees is of particular importance in regard to safeguarding those in their care. We could find no basis whatsoever to suggest that the respondent would have treated a white British employee in a different way, had the same employment history come to its attention, given the context of this type of employment.

Victimisation – disciplinary investigation

54. Similarly, there were no facts from which to infer that the decision to conduct the disciplinary investigation had anything to do with third protected act which was made in a confidential process, as previously described.

Unfair dismissal – general principles

55. Having concluded that the reason for the dismissal related to conduct we must consider whether dismissal for that reason was reasonable in all the circumstances of the case having regard to the size and administrative resources of the respondent and equity and the substantial merits of the case.

56. The claimant says there was a fundamental breach of the principles of natural justice and that the respondent was the accuser, the investigator and the judge.

57. That is a misconception of the basis upon which an employer must approach and handle any disciplinary allegation of misconduct. The ACAS Code of Practice recommends a separation of function to safeguard against the unfairness the claimant has raised. In this case the respondent complied with that Code and its own policy. A case manager was appointed when the allegations came to light. That case manager appointed an investigator who made enquiries and reported to the case manager. The case manager was satisfied there was a disciplinary case upon consideration of the investigation and this was processed to a hearing before an independent manager at deputy director level who had no previous involvement in the case. There was an appeal to another manager of similar seniority. Neither decision maker had previous knowledge of the claimant and had never met him.

58. The investigation was thorough. The information gathered was more than sufficient to enable the claimant to understand the basis of the case against him and respond to at both disciplinary and appeal hearings. Mrs Eloi required clarification from Cygnet in respect of the employment of the claimant and how it came to an end. The claimant says that was insufficient because there was a dispute between Cygnet and him in respect of whether he was dismissed or resigned which was not resolved and there was no information about the original complaint and how it had been processed. We disagree. Those were not necessary enquiries to determine the concern about the claimant's non-disclosure.

59. We are satisfied the belief in the misconduct was reasonable. On the admitted facts the information about employment with Cygnet should have been included on the application form. The reference the respondent obtained from the

owner of Contact Care UK enhanced the cause for concern. The claimant had not undertaken any shifts there, but the reference spoke in glowing terms of the claimant's performance of his job, time keeping and abilities as a team player and leader. Although the claimant had not, himself, produced this reference, it supported the impression he had given, incorrectly, that this had been his most recent employer who was able to provide a good reference about his recent work.

60. The claimant disputed that he had omitted his employment with Cygnet from the application forms, in his evidence. He said that he had included what training he had undertaken during 2016 and had referred to training in restraint and management of aggression elsewhere in the application. He said this was training that took place whilst he was at Cygnet and would not have been required if not working in the mental health field. He said that if the interviewer asked him about this, he would have told him that the training had been given by Cygnet, where he had worked. One question in the form asked for the number of months since his recent employment, to which he responded 2016. He said this was deliberately answered in this way, not addressing the question correctly, to put the interviewer on notice of a line of enquiry which would have led to the revelation, if pursued at interview, that he had been employed by Cygnet. He went as far as to say he wanted someone to ask him about this in the interview. Although these were not arguments the claimant had advanced at the disciplinary hearing, he suggests these were matters a reasonable employer would have been alive to and should have considered without it having been expressly raised.

61. It is clear from the undisputed facts that the claimant had omitted his most recent employment. We agree with Mr Thornsby that the application form was not a puzzle for the respondent to solve at interview. There were two sections of the form in which the claimant could have referred to Cygnet, both in respect of who his recent employer had been and who his previous 3 employers had been. He chose not to do so.

62. The claimant says that there was a breach of procedure in failing to comply with paragraph 19 of his contract of employment. Under the heading of DBS checks it provides that a failure to provide information, amongst other things, may constitute fraud and will therefore be reported to the Trust's local counter fraud specialists which may result in a criminal investigation. He says that had this been done he would have been vindicated.

63. We reject this argument. Firstly this part of his contract concerns the DBS process. The dismissal of the claimant did not concern that. Secondly it is not a part of the disciplinary policy, but supplemental to it. It does not preclude an employer from conducting a disciplinary investigation without also investigating a potential criminal offence. Thirdly, there is no basis for suggesting such an investigation would have vindicated the claimant for the misconduct he was found culpable of, regardless of whether this may have also constituted fraud, by obtaining pecuniary advantage by deception. Fouthly, even if this were a contractual breach, that would only be one consideration within section 98(4) of the ERA to which we should have regard in deciding whether the dismissal is fair or unfair. In this case, it would not

have led us to conclude the decision was unreasonable and therefore unfair in the light of the admitted facts and the importance of trust in this type of employment.

64. The sanction was one which fell within a reasonable band of responses. The finding was permissibly categorised as gross misconduct. It fell within one of the illustrations in the policy, namely, "*Deliberate misrepresentation as to personal information required by the Trust eg. date of birth, qualifications, falsification of records, experience and health, where the information has been relied upon by the respondent*". The misconduct led to the respondent obtaining a reference from an entity which had not been the claimant's employer, from which false and misleading information about his having discharged duties was provided. The misconduct prevented the respondent from exploring the circumstances in which his employment had ended at Cygnet, shortly after it had occurred and before they engaged him. Trust and confidence in an employee is important in any job, but especially so when the employee is entrusted with the care of the vulnerable. The claimant's behaviour had given genuine cause for concern. He suggested in closing argument that he had relied on advice from the CAB and the Jobcentre and should not be criticised for their suggested approach. The account he has given of the motive for why he had completed the form in this way, to avoid 'funny' questions, and the reference subsequently received was sufficient to undermine the confidence his employer had in him.

65. We wish to add that the claimant was good at his job and well regarded by his managers, other than for the circumstances which led to his dismissal. He undoubtedly has many qualities and has cared for patients in a difficult and demanding job. Notwithstanding that, we cannot find that in deciding to dismiss him the respondent acted outside a reasonable band of responses in the light of the issues of trust to which we have referred.

Unanimous decision

66. All members of the tribunal agree on the above findings and conclusions.

Employment Judge D N Jones
Date: 27 July 2021