EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr J Azemi	**v**	**(1) Rendall & Rittner Litd** **(2) Glowhurst Ltd**

Heard at: London Central
On: 25 – 28 May 2021

Before: EJ G Hodgson
Ms J Griffiths
Ms L Moreton

Representation

For the claimant: in person
For the first respondent: Ms B Omotosho, counsel
For the second respondent: Mr C Breen, counsel

JUDGMENT

All claims of direct discrimination fail and are dismissed.

REASONS

Introduction

1.1 The claimant filed a claim in the London Central employment tribunal on 31 December 2019. Various claims were brought, which will be considered below.

The Issues

2.1 There was difficulty identifying the issues clearly in this case. In a case management discussion from 12 March 2021, EJ Joffe recorded the claim of direct discrimination as follows:

> **vi) Has the first and/or second respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely**
> **a. Flawed investigation. Not advising him which resident had complained in July 2019 - flat 62, as assumed by the claimant, or flat 26, who had left then.**
> **b. Dismissing him without warning, in breach of the disciplinary procedure. A previous warning had expired in April.**
> **c. Lack of support from his line manager, Len Wade, as set out in the claim form. The treatment of Mr Wade complained of is as follows:**
> **- Mr Wade's failure to deal with the claimant's complaints / concerns about the residents of Flat 62 as described at para 2.1 of the claim form;**
> **- Mr Wade refusing to attend an investigation meeting with the claimant if he was being asked to speak: paragraph 2.3;**
> **- Instead of dealing with the claimant's complaint about the resident of flat 12, Mr Wade pursuing a complaint against the claimant, leading to the claimant receiving a written warning, despite the CCTV footage allegedly showing that the resident was abusive to the claimant: paragraph 2.5;**
> **- Mr Wade accusing the claimant of doing something wrong in relation to a contractor when he had not done so: paragraph 2.7;**
> **- Mr Wade subjecting the claimant to criticism and abuse as described at paragraph 2.9;**
> **- Mr Wade saying 'I don't know what you and Ken are doing, you guys need to work it out yourself' when the claimant raised with him Mr Murray's failure to pass on instructions about a resident: paragraph 3.0;**
> **- Mr Wade not dealing with the demands made by the resident of flat 17 or supporting the claimant but instead telling the claimant that the resident had caused a black employee to be dismissed: paragraph 3.1;**
> **- Mr Wade not replacing the claimant's chair with a suitable chair despite the effects on the claimant's back pain: paragraph 3.4**

2.2 The claimant was said to rely on Mr Ken Murray for a number of the allegations.

2.3 We accepted that there was an allegation that the dismissal was an act of race discrimination. The other allegations remained unclear, and we will consider further below.

2.4 We clarified that a number of allegations may be out of time and we would have to consider whether they were part of a continuing course of conduct and if not, whether it would be just and equitable to extend time.

Evidence

3.1 For the claimant we heard from the following; the claimant; Mr Francis Bennet; Mr Barry Burnett, and Mr Tamas Matusevics.

3.2 We received untested written evidence from Rob and Michelle Baird, Mr Ian Ling, and Mr P James Leeper.

3.3 For the respondent we heard from the following: Mr Leonard Wade; Mr Eli Reich; Mr Will Farrow; and Ms Sally Jackman

3.4 We received a bundle of documents.

Concessions/Applications

4.1 At the commencement of the hearing, we considered the issues in this case. I noted that EJ Joffe had drafted issues in her order of 12 and 17 March 2021. We noted it was not easy to reconcile those issues with the pleaded case. No party sought to suggest that the dismissal had not been alleged as an act of direct discrimination. It was less clear what was meant by "flawed investigation" as referred to at vi (a). Further, the matters identified at vi (c) where a mixed bag of contention and allegation. Many of the matters raised did not appear to be cited as allegations of discrimination in the pleadings. I invited the parties to consider the position, and noted that only those matters which were claims in the original pleadings could proceed. We did not adopt the issues as set out by EJ Joffe, as there were clearly difficulties with their clarity and accuracy.

4.2 We did clarify the dates of the allegations. The claimant alleges that he was dismissed on or about 9 September 2019. The claimant alleged that prior to then, the most recent act of discrimination was 19 July 2019. The only reference in the claim form to 19 July 2019 is at paragraph 2.2 which is a reference to a resident being attacked on 19 July.

4.3 The parties did not seek to clarify the issues further.

4.4 The parties were not able to agree who was the claimant's employer. The first respondent alleged that it was an agent of the second respondent, but not the claimant's employer. The second respondent accepted it was a principal, within the meaning of section 110 Equality Act 2010, and its agent was the first respondent. However, it did not accept that it was the claimant's employer. Mr Breen was unable to clarify the basis on which it was alleged the second respondent was the principal but not the employer.

4.5 Both respondents accepted that there was a TUPE transfer from Macready House to the second respondent on or about 1 July 2019. It was accepted that any employees of Macready House were transferred to the second respondent.

4.6 During the third day, the second respondent conceded that it was the employer.

The Facts

5.1 The claimant was employed by Glowhurst Ltd, the second respondent, as a concierge at Macready House, in Crawford Street, London. Macready House consists of around eighty residential flats. Glowhurst Ltd is the entity which owns the freehold of the flats. The first respondent, Rendall and Rittner Limited, acts as agent for the second respondent, and had day-to-day responsibility for management of the claimant. Decisions in relation to the claimant's employment were taken by the first respondent, but approved, or ratified, by the second respondent, in board meetings.

5.2 Mr Leonard Wade was also employed by the second respondent and was the claimant's immediate line manager. Mr Reich was employed by the first respondent as a property manager and acted as Mr Wade's line manager.

5.3 The claimant was initially employed by Macready House Management Ltd from 16 October 2017. For tax reasons, there was a TUPE transfer from Macready House Management Limited to the second respondent, Glowhurst Limited on or about 11 July 2019.

5.4 The claimant was one of a number of concierges who provided cover around the clock.

5.5 The claimant was dismissed on 10 September 2019, and the dismissal was confirmed by letter of 17 September 2019.

5.6 During the course of his employment, a number of tenants complained about the claimant.

5.7 In August 2018, Mr Wade received a call from Mr Yaghi, the owner of flat 33. Mr Yaghi then sent an email on 31 August 2018 alleging the claimant had been "rude, aggressive, condescending and mean." He stated the claimant's behaviour "was just beyond repairable." He alleged this had not been the first incident.

5.8 Mr Wade spoke to the claimant and sought an explanation. It was clear there had been some exchange between the claimant and Mr Yaghi which concerned access to flat 33 at around 19:00 for the purpose of putting up a blind. Mr Wade concluded the claimant could have dealt with the situation better but decided not to escalate the complaint by reporting it to his own line manager. Essentially, he dealt with the complaint informally.

5.9 On 23 September 2018, the resident of flat 12 complained to Mr Wade about the claimant’s conduct. She alleged the claimant had shouted at her. She said he was frightening. Mr Wade requested her to put it in email. Prior to receiving the email from the resident, on 23 September 2018, the claimant sent his own email alleging the resident had become abusive and had screamed at him. The resident’s written complaint of 24 September 2018 alleged the claimant had been "impolite, nosy, and uneager to help." She stated she had been locked out of her flat and sought a spare key. She stated this led to the claimant starting "a tirade of

intimidation and blame telling me there was no details because I was 'illegally subletting my flat.'" She went on, more generally, to complain about his attitude and helpfulness.

5.10 During the course of this hearing, the claimant accepted that he had entered into an argument with this tenant.

5.11 Mr Wade reported the matter to the first respondent. This led to Mr Reich holding an investigation meeting on 2 October 2018. The claimant was invited to a disciplinary hearing on 19 October 2018. The hearing was chaired by Elizabeth Porter. She had the benefit of CCTV (which did not have audio). He accepted that the CCTV showed he had used inappropriate body language and that he pointed his finger and banged on the desk. (We reject any suggestion that he did not believe these admissions at the time he made them.) She stated that his language appeared aggressive and unhelpful.

5.12 The matter was discussed at the monthly management meeting. On 12 February 2019, the claimant was issued with a written warning, which was to remain on his file for 12 months. The claimant's appeal against this written warning was heard on 14 March 2019 by Ms Caroline Endacott, property team manager; she upheld the warning but reduced the period from 12 to 6 months. The warning expired on 23 April 2019.

5.13 On 3 June 2019, Mr Wade received a further complaint from the resident of flat 26. This complaint alleged there had been numerous interactions with the claimant which had "become incredibly frustrating and unacceptable." She stated she had been laden with bags and struggling to get out of the door as he watched her. He did not help until she specifically requested his assistance. She also stated her mother had attempted to leave the flats and needed the claimant's help pressing the buzzer, but he had refused to assist and then had said, allegedly in a rude manner, "Do you need me to teach you how to open the door yourself in case I'm not around next time?"

5.14 Mr Wade escalated the complaint to Mr Reich and asked for guidance. On 4 July 2019, Ms Alexandra Nikolatou invited the claimant to an investigation meeting to answer the following allegations:

a. allegedly acting unprofessionally towards a resident and their guests

b. allegedly providing poor customer service to residents.

5.15 The claimant requested the hearing be rescheduled to 12 July 2019. The claimant was given a copy of the complaint, but it was redacted to anonymise the complainant. The claimant stated he believed it was the resident of flat 62 and concerned a dispute about newspapers and the resident not collecting them. He was not told that he had identified the wrong complaint.

5.16 On 2 September 2019, Elizabeth Porter informed the claimant by email that he had been referred for disciplinary action.

5.17 On 2 September 2019, the claimant was invited to a disciplinary hearing to be chaired by Mr Reich. The same two allegations were identified. The claimant was not told the identity of the complainant.

5.18 By email of 3 September 2019, the claimant requested Mr Wade to accompany him to the disciplinary hearing. He stated he did not know if Mr Wade was "familiar with the incidents." He stated, "I believe you're the best person that can help clarify the issues with regard to these incidents." Mr Wade agreed to attend the disciplinary hearing with the claimant. Prior to the disciplinary hearing, Mr Wade informed the claimant that the complaint was not from the resident of flat 62, but from the resident of flat 26.

5.19 Mr Reich chaired the disciplinary hearing. The claimant denied making the statement to the resident's mother. Mr Reich took the decision to dismiss and informed the directors by letter of 10 September 2019. On 17 September 2019 he wrote the claimant. He recorded that he found the claimant's explanation unsatisfactory. He noted that there had been several complaints of unprofessional behaviour. He recorded that the claimant "denied being unprofessional or rude to the residents." He noted the claimant alleged he had been "targeted" by the residents, particularly because of previous conflict. Mr Reich did not find the claimant's explanation satisfactory. The dismissal was confirmed to the claimant orally on 10 September 2019 and by letter of 17 September 2019.

5.20 The claimant appealed. The appeal was heard by Mr Will Farrow, the first respondent's property team manager. Following an appeal hearing, Mr Farrow sent the outcome on 25 September 2019. He refused the appeal and upheld the dismissal. This letter sets out the claimant's grounds of appeal which included the following: the allegations did not come from a tenant; there was insufficient evidence, particularly a lack of CCTV; the disciplinary process stages had not been followed; he had been unable to apply for a customer service course; and managers failed to give clear instructions to employees to protect them from unreasonable requests from residents.

5.21 Mr Farrow considered the claimant's appeal and investigated a number of matters. He was satisfied that there had been complaints made against the claimant. There had been a problem with the CCTV, and no footage was available. However, he believed there was sufficient evidence to demonstrate the incident occurred. He did not accept that it was necessary in all circumstances to have staged warnings. There was a right to dismiss without warnings and he considered the claimant's conduct to be unsatisfactory, particularly having regard to the length of his service and the number of complaints. He concluded the claimant had only sought customer service training when first informed of the complaint back in October 2018, and he partly upheld the appeal on this basis. He

found that to the extent that clear instructions had not being given, that did not excuse the claimant's behaviour.

5.22 Having considered all these matters he decided to uphold the dismissal.

5.23 We will consider the allegations as identified in the issues outlined by EJ Joffe and make any further finding of facts, as relevant, in our conclusions.

The law

6.1 There may be difficulty in any claim in identifying the issues to be decided. The issues identified prior to a final hearing may be inaccurate. The tribunal should have in mind that "issues" are a distillation of the pleaded case and are not in themselves a pleading or an amendment to the claim. A particular difficulty may arise if the issues, as identified during case management, have not been carefully and accurately drawn.

6.2 In **Land Rover v Short UK EAT 496/2010** before, Mr Justice Langstaff, the EAT confirmed that where a dispute arises about the issues, it is for the tribunal to make a ruling. In **Price v Surrey County Council and another, UK EAT 450/2010**, Lord Justice Carnworth confirmed that the tribunal must exercise control over the form of the issues, even if agreed by the parties. In that case, the issues were described as a confused amalgam of factual allegation and major issues. The tribunal should not simply accept the issues provided by the parties, even if the parties agree them between themselves. It is part of the tribunal's role to exercise control over the way in which the issues are presented.

6.3 The point was re-emphasised by Langstaff P in the case of **Chandhok v Tirkey EAT 190/14**.

> **17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or**

> **statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.**
> **18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.**

6.4 Direct discrimination is defined in section 13 of the Equality Act 2010.

> Section 13 - Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

6.5 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> **"employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was." (para 10)**

6.6 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept that there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

> **9 This reasoning has been valuably amplified by Mummery J in *Qureshi v Victoria University of Manchester* (EAT 21 June 1996), a decision which Holland J in the present case in the Employment Appeal Tribunal understandably described as 'mystifyingly unreported'. It is therefore worth quoting at length from Mummery J's judgment.**
>
> > **'On the basis of (a) those authorities, (b) the experience of the members of this tribunal and (c) the experience of the parties, the advisers and the tribunal in this case, we tentatively add the following observations and thoughts to the guidance in Neill LJ's judgment in *King v The Great Britain-China Centre* [1991] IRLR 513 -**
> >
> > **The complainant**

The industrial tribunal only has jurisdiction to consider and rule upon the act or acts of which complaint is made to it. If the applicant fails to prove that the act of which complaint is made occurred, that is the end of the case. The industrial tribunal has no jurisdiction to consider and rule upon other acts of racial discrimination not included in the complaints in the originating application. See *Chapman v Simon* [1994] IRLR 273 at paragraph 33(2) (Balcombe LJ) and paragraph 42 (Peter Gibson LJ). In this case, the principal complaints made by Dr Qureshi were the decision of the FRC not to support a recommendation for his promotion to the post of senior lecturer in October 1992 and the decision of the Dean of the Law Faculty in October 1993 not to put his name forward to the APC with a favourable recommendation for promotion to senior lecturer. The considerations of the tribunal and their decision should, therefore, focus on those complaints and on the issues of fact and law which have to be resolved in order to decide whether the complaints are well founded or not.

The issues
As the industrial tribunal have to resolve disputes of fact about what happened and why it happened, it is always important to identify clearly and arrange in proper order the main issues for decision...

6.7 Section 23 refers to comparators in the case of direct discrimination.

Section 23 Equality Act 2010 - Comparison by reference to circumstances

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

6.8 Section 136 Equality Act 2010 refers to the reverse burden of proof.

Section 136 - Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

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

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

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to--

(a) an employment tribunal;
(b) …

6.9 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

> **Appendix**
> **(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.**
>
> **(2) If the claimant does not prove such facts, he or she will fail.**
>
> **(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases, the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.**
>
> **(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.**
>
> **(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.**
>
> **(6) 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.**
>
> **(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.**
>
> **(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.**
>
> **(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.**

> **(10) 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.**
>
> **(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.**
>
> **(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.**
>
> **(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.**

Conclusions

7.1 We will first consider those matters identified by EJ Joffe, at vi.(c) of her issues, as set out above.

Mr Wade's failure to deal with the claimant's complaints / concerns about the residents of Flat 62 as described at para 2.1 of the claim form;

7.2 The issue as drafted fails to identify what is alleged to be the claimant's complaint. It is necessary to go back to the claim form. Paragraph 2.1 is lengthy it is difficult to identify what is envisaged to be the claimant's complaint which it is alleged Mr Wade did not deal with. Unfortunately, the particulars of claim do not assist. To the extent there is any reference in the claim form, it states "I had reported to LW several times problems I was facing with them, but I was not aware he dealt with them and in what way." This appears to be a reference back to residents in flat 47. The claimant fails to set out what he reported and when. It is not possible to ascertain the date. Paragraph 2.1 starts with a reference to 12 July 2019 and the investigation meeting, but this seems to be unrelated to the claimants alleged reporting of problems.

7.3 The reality is there is no identifiable allegation of detrimental treatment. Moreover, in no sense whatsoever does paragraph 2.1 allege any specific action of Mr Wade was direct race discrimination. This matter should not have been included as an issue, as there is no pleaded allegation of race discrimination.

7.4 In any event, we have considered whether the claimant has demonstrated that Mr Wade failed to deal with any of his specific complaints. It is clear the claimant complained to Mr Wade about the resident of flat 12. This occurred on 23 September 2018. Mr Wade dealt with this complaint by

forwarding it as part of the investigation which was undertaken independently and ultimately led to a disciplinary. To the extent any explanation could be called for, it is clear that Mr Wade passed on the claimant's complaints. That is an explanation which, on the balance of probability, has nothing to do with the claimant's race whatsoever.

7.5 The claimant says he is a a British citizen of Kosovar Albanian ethnic background.

7.6 The reality is that the alleged issue fails to identify the allegation of discrimination. To the extent it refers to paragraph 2.1, there is no ascertainable allegation of discrimination. More generally, it is clear that Mr Wade either discussed the claimant's complaints with him, or referred them to his line manager. There is no basis for saying that Mr Wade failed at any time to deal with the claimant's complaints. It follows, as the claimant has failed to prove any failure, the complaint, if made at all, fails at stage one as envisaged by paragraph 9 of **Anya.**

Mr Wade refusing to attend an investigation meeting with the claimant if he was being asked to speak: paragraph 2.3

7.7 This allegation is tolerably clear. However, what is said to constitute the refusal is not set out. Moreover, in no sense whatsoever does paragraph 2.3 indicate that any alleged refusal was an act of race discrimination. It follows that this matter should not have been included as an issue, as there is no pleaded allegation of race discrimination.

7.8 That said we have received the relevant evidence and we are able to make findings. Mr Wade was not asked to attend the investigation meeting. Mr Wade was asked to attend the disciplinary hearing in September 2019, as the claimant's companion. That request was made by email of 3 September 2019. Thereafter, Mr Wade agreed to attend. He discussed the disciplinary hearing with the claimant. Mr Wade told the claimant who the complainant was, i.e., the resident of flat 26. Mr Wade attended at the disciplinary hearing. There is nothing which constituted a refusal by Mr Wade to attend either the investigation or the disciplinary hearing. It follows that the claimant has failed to establish that there was any failure on the part of Mr Wade and to the extent this allegation has been brought at all, it must fail at the first stage. No refusal occurred; there is nothing for Mr Wade to explain. If an explanation were necessary, it would be that Mr Wade in fact attended when requested, and that is a complete answer to the discrimination claim.

Instead of dealing with the claimant's complaint about the resident of flat 12, Mr Wade pursuing a complaint against the claimant, leading to the claimant receiving a written warning, despite the CCTV footage allegedly showing that the resident was abusive to the claimant: paragraph 2.5

7.9 This is an unclear issue paragraph 2.5 of the particulars of claim refers to the claimant's complaint about "the lack of respondent's policy clarity" in relation to flat 12 and abusive behaviour towards him. The claimant's email of 23 September 2018 states the resident was screaming at him. The resident complained about the claimant by email of 24 September 2018, as described above.

7.10 We have noted that Mr Wade escalated this matter. This led to an investigation and disciplinary. At the disciplinary the CCTV was considered. The claimant's behaviour was considered to be aggressive and inappropriate. He was given a warning.

7.11 Paragraph 2.5 does not make any specific allegation against Mr Wade. It comes nowhere near to alleging that Mr Wade's action was direct race discrimination, and it should not have been included as an issue. In any event, to the extent that it is put as an allegation of race discrimination at all, the respondents' explanation is an answer to the allegation. Mr Wade considered the allegation to be serious. He did not consider it one that he should handle himself. He referred the matter to his line manager. In no sense whatsoever was that action race discrimination and the claimant's claim form and evidence does nothing to explain why Mr Wade's action could be seen as race discrimination. Moreover, there was ample evidence on which to find that the claimant's conduct was inappropriate, and the evidence fully justified the disciplinary action taken. It follows that Mr Wade's explanation is accepted. He escalated the complaint because there was a clear allegation of misconduct, this was not the first complaint, and it was sufficiently serious to warrant investigation and potential disciplinary action. There is no fact from which race discrimination could be inferred and the explanation is an answer to the allegation, in any event.

Mr Wade accusing the claimant of doing something wrong in relation to a contractor when he had not done so: paragraph 2.7

7.12 This allegation lacks clarity. We have considered paragraph 2.7 carefully. The background is that there was a contractor's visit. The contractor needed a key; responsibility for signing the key out fell to the concierge on duty. That concierge was Mr Ken Murray. The claimant's complaint was that in the second week in January 2019 Mr Wade, allegedly aggressively, asked the claimant who was on duty on 8 January 2019. The claimant stated he was on duty. The relevant logbook was checked, and it appeared a key had not been signed out. Two weeks later, Mr Wade stated that in fact Mr Murray had recorded the contractor's visit on that day.

7.13 It is difficult to understand what the claimant's complaint is. Even on the claimant's own pleaded case, it is difficult to ascertain what is alleged to be the allegation made by Mr Wade against the claimant. At best, it is possible to infer that he was suggesting the claimant had made a mistake. The claimant does say "it became clear to me that LW had come with the

objective to catch me to have done something wrong, but it was Ken, a White British, who did it, and was now defending him." It is just possible to interpret this as an allegation of direct discrimination. It is possible that these circumstances are alleged to be a false allegation made against the claimant. However, we find there was never any allegation made against the claimant, and the allegation must fail factually. In any event, Mr Wade's explanation is an answer to any potential allegation of discrimination. There was a specific problem. He was entitled to make enquiries. He did no more than make proportionate enquiries. He satisfied himself that, in fact, Mr Murray had signed the key out, correctly. There was never an allegation against the claimant. The claimant was informed, ultimately, that the matter had been resolved. In no sense whatsoever was Mr Wade's action an act of race discrimination against the claimant.

Mr Wade subjecting the claimant to criticism and abuse as described at paragraph 2.9

7.14 This allegation lacks clarity. Paragraph 2.9 of the claim form is concerned with events in the summer of 2018. The claimant alleges that he was subject "to abuse, spoken loudly, and criticised" because he "did not see a contractor had parked his car slightly incorrectly." It is clear from the claimant's own evidence that he had failed to spot the incorrectly parked car. It is difficult to read into the claimant's pleaded case that this is an allegation of discrimination. He does say that a white European colleague looked at him sympathetically. However, that in itself is not an allegation that Mr Wade treated the claimant less favourably because of his race. There is no discernible allegation of race discrimination, and it should not have been included as an issue.

7.15 Mr Wade does not specifically remember this incident. We have not found the claimant to be a reliable witness. His general position before the tribunal was that he behaved appropriately at all times. However, he admitted to us that he argued with residents. Such behaviour is clearly inappropriate. Moreover, there is clear evidence of his behaving aggressively, as illustrated by the first written warning and the claimant's own admission that the CCTV demonstrated the aggressive nature of his interaction. The reality is that the claimant does not appear to have reasonable insight into his own interactions.

7.16 There is a clear explanation for Mr Wade raising with the claimant his concern. That concern related to the parking of a contractor's vehicle. It was appropriate for Mr Wade to raise that matter. It is not surprising that he has little or no recollection of it. It was, essentially, a trivial matter. It did not result in any specific complaint. There was no reason for Mr Wade to remember the incident specifically. It appears to have been a routine exchange. There is no fact which could turn the burden. The claimant's own explanation for the treatment, namely the claimant's failure to observe or deal with the incorrectly parked vehicle, is on the balance of probability a complete answer to his own potential claim.

7.17 For the removal of doubt, we do not accept that Mr Wade acted aggressively to the claimant. We do not accept the claimant's evidence on this. We should add we do not accept that Mr Wade over a period of time behaved aggressively to the claimant. It is clear Mr Wade went out of his way to help the claimant. This is illustrated by Mr Wade telling the claimant that the complaint had come from flat 26. The claimant asking Mr Wade to attend at the disciplinary is inconsistent with an alleged negative relationship. We also accept Mr Wade's evidence that he took the claimant for food and drink on several occasions and was sympathetic to the claimant's personal situation. Mr Wade's actions to the claimant were generous and supportive.

7.18 For all these reasons, the allegation, to the extent any allegation has been made at all, must fail.

Mr Wade saying 'I don't know what you and Ken are doing, you guys need to work it out yourself' when the claimant raised with him Mr Murray's failure to pass on instructions about a resident: paragraph 3.0

7.19 This allegation arises at paragraph 3.0 of the particulars of claim. In December 2018 the claimant "flagged up" his concern that a resident in a flat may be suspected of using the building to sell drugs. The claimant states a colleague spoke to Mr Wade. Mr Wade then instructed the colleague and Mr Murray to make a record in a specific notebook. The claimant's concern is that Mr Wade did not speak directly to the claimant. It is clear the claimant knew something of the instruction because he telephoned Mr Wade to complain that Mr Murray had not passed on the instructions to himself, and another colleague, Ali. Mr Wade explained to us his expectation was that the concierges would talk to each other as part of the general handover at the end of a shift. It should not be, and was not, necessary for him to discuss the minutiae of each instruction with each concierge.

7.20 Mr Wade does not remember the incident, specifically. The claimant complains that Mr Wade used words to the following effect "I don't know what you and Ken are doing, you guys need to work it out yourself." It is clear that the claimant alleges that this was an act of "racial and or religious discrimination." It is right for it to be included as an issue.

7.21 It is not surprising that Mr Wade has little or no recollection of this incident. It is essentially innocuous. There was a minor concern. The concierges were directed to make notes. Mr Wade was reasonable in believing that they should communicate with one another when handing over at the end of the shift. He accepts he may have used those words, or similar words. Essentially, he was saying that the concierges should communicate with one another.

7.22 We find that he did use those words, or essentially similar words. However, there is nothing at all which turns the burden. His explanation is

that he was simply asking the concierges to communicate effectively with each other. We accept that explanation. On the balance of probability, that explanation is, in no sense whatsoever, because of race or religion. (The claimant has not pursued an allegation of religious discrimination before us – but the relevant analysis of the explanation is exactly the same as for the race claim.) This allegation fails.

Mr Wade not dealing with the demands made by the resident of flat 17 or supporting the claimant but instead telling the claimant that the resident had caused a black employee to be dismissed: paragraph 3.1

7.23 This allegation refers to events in January 2018. The standard policy was that deliveries would be left at the concierge's desk and would be collected by residents. The resident of flat 17 objected and wanted the delivery company to take the parcels to her door. She had an exchange with the claimant and he alleges she said to him that he must convince the relevant authorities to change the policy or he could lose his job "just like this". The claimant alleges he she "flicked" her fingers. She referred to the board of residents employing him.

7.24 The claimant discussed this matter with Mr Wade and alleges Mr Wade said "she is horrible, and a racist woman, she has made me sack a black guy who worked here before, and she is an immigrant herself." It is this exchange that the claimant now appears to say was an act of race discrimination against him by Mr Wade. It is less clear whether the claimant envisages it is the use of the words which was the act of discrimination, or some form of veiled threat against him. In any event, there is no clear indication at paragraph 3.1 that anything is alleged to be an act of race discrimination, and it should not have been included as an issue.

7.25 Nevertheless, we have heard the relevant evidence. Mr Wade evidence to us was that he never said those words. He is certain he never said them, because he never "sacked a black guy." Moreover, there was no such sacking at the instigation of the resident. He had rejected at least one agency worker, but that person was white. He denies using the words. We accept his explanation. It follows that this allegation, to the extent it is brought at all, must fail factually. The words were not used. It follows, as the words were not used, they could not be a veiled threat.

Mr Wade not replacing the claimant's chair with a suitable chair despite the effects on the claimant's back pain: paragraph 3.4

7.26 We have considered this allegation. The claimant alleges for over one year he had been asking Mr Wade to replace the concierge's chair. There is only one concierge station. The chair is used by all. The claimant has produced no single text, email, or other writing which would support his claim that he made any request at all. We accept Mr Wade's evidence that no request was made. It follows that this allegation fails factually. In any event, in no sense whatsoever is this allegation put as an act of

discrimination in the pleaded case. There is reference to the claimant having severe pain in his knees and back pain, but no reference to race. The claimant states the chair was, in fact, replaced around May 2019, albeit he complains that the replacement was equally poor. To the extent that there is any allegation of direct race discrimination it must fail. The claimant fails to prove he asked at any time for a replacement. He fails to prove any failure or refusal to replace the chair. His own evidence is the chair was replaced. This allegation, to the extent it has been made at all must fail factually.

7.27 Finally, we come to the claimant's allegations set out at (vi)(a) and (b) of the issues.

7.28 We will deal with allegation (a) first.

Flawed investigation. Not advising him which resident had complained in July 2019 - flat 62, as assumed by the claimant, or flat 26, who had left then.

7.29 We remind ourselves that there is no allegation of unfair dismissal. It is unclear to us where it is alleged that the claimant deals with this in his claim form. The claimant refers to it at paragraph 3.0 of his statement. In paragraph 2.4 of his claim form, the claimant does refer to not being told that the complaint was from the lady in flat 26. However, the claim form does not state that the failure to inform him was an act of race discrimination. Instead, his claim form goes on to say, "I believe there was a conspiracy among Len Wade, Eli Reich, and Elizabeth Porter; all involved in the same site, that have been working together to dismiss me." He does not say that was an act of discrimination. It follows that this allegation has not been clarified adequately, nor has it been pleaded as an act of direct discrimination. It should not have been included as an issue.

7.30 Nevertheless, we have heard the relevant evidence we will consider the allegation generally. It is arguable that the approach of the respondent was in breach of the ACAS code on disciplinary and grievance procedures. Paragraph 5 of the code emphasises the importance of carrying out necessary investigations. It is at least arguable that failing to tell the claimant who had complained undermines the investigation. However, prior to the disciplinary hearing, the claimant did know who had complained because Mr Wade told it. Whether that was part of the formal process is, for the purposes of race discrimination, essentially irrelevant, at least insofar as Mr Wade is alleged to have been involved. Mr Wade essentially cured any potential defect by telling the claimant who the complainant was. It follows that the claimant was able to deal with the disciplinary hearing effectively.

7.31 The respondent's explanation, particularly given by Mr Reich, was that there was a need to protect residents. It is alleged that anonymity was appropriate in order to prevent any retaliation.

7.32 It does not appear that there is any specific complaints procedure, and that is unfortunate. It may be beneficial for the respondent to have a procedure which can be given to managers, the concierges, and the residents. Such policy could then set out what the expectations were. It could state when anonymity would be appropriate, and when it would be necessary for it to be waived. At least then there would be certainty. That lack of certainty is unfortunate

7.33 However, the question for us is whether any failure was because of race discrimination. The reality is there is no evidence which could suggest anybody of a different race would have been treated in a different way. We accept Mr Reich's explanation that anonymity was designed to protect residents. There is no evidence which would suggest that any concierge of a different race would have been treated differently. It follows that we accept the respondent's explanation. In no sense whatsoever was race any part of the reason for the respondent's approach to the investigation or the disciplinary. That is an answer to any claim of discrimination.

Dismissing him without warning, in breach of the disciplinary procedure. A previous warning had expired in April

7.34 Whilst it is not absolutely clear that the claimant sets out in his pleaded claim that the dismissal was an act of discrimination, we have made it clear throughout that we will treat this as a pleaded claim.

7.35 The claimant's main complaint is that the respondent did not go through a system of warnings.

7.36 We have considered the disciplinary policy. It is not essential for the respondent to go through warnings.

7.37 In any event, we are concerned with the actions of Mr Reich, who dismissed the claimant. Even if he were mistaken about the nature of the procedure, which he was not, that could be an answer to the claim.

7.38 Essentially the claimant alleges that the breach of the policy is evidence on which we should infer discrimination. We decline to do so. We accept Mr Reich's explanation. That explanation is founded on a number of key elements as follows: the claimant had been employed for less than two years; he had been subject to a number of complaints by various residents; it was unusual for concierges to have that number of complaints; he was aware the claimant had been disciplined previously; he did take into account the cumulative effect of the complaints;[1] he believed the claimant's conduct on the final occasion to have been inappropriate; he considered this constituted a pattern of inappropriate behaviour; he was not satisfied that the claimant had recognised the difficulties, or would improve; and he took the view that the claimant's

[1] This could be problematic for a unfair dismissal claim, but it is not irrational. Even if unreasonable, it is clear he took the history into account because it was a predictor of future action, and this is a clear and rational explanation which explains any unreasonableness.

conduct was unprofessional and could not be tolerated. We accept that he believed all that. We have to ask on the balance of probability whether any part of his reason was race discrimination. We find that no part of his reason had anything to do with the claimant's race. This allegation fails.

7.39 As all claims and potential claims fail on their merits, we do not need to consider if any are out of time or if time should be extended.

7.40 It follows that all claims of race discrimination fail.

Employment Judge Hodgson

Dated: 02/08/2021

Sent to the parties on:

02/08/21..

For the Tribunal Office