EMPLOYMENT TRIBUNALS

Claimant: Mr K Bonsu

Respondent: Stockport Metropolitan Borough Council

Heard at: Manchester **On:** 16-20 August 2021

Before: Employment Judge Phil Allen
Mrs M T Dowling
Dr B Tirohl

REPRESENTATION:

Claimant: Mr M Pritchard, counsel
Respondent: Mr R Lassey, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not treated less favourably on the grounds of race in the respondent's decision to instigate an investigation.

The Judgment of the majority of the Tribunal (Dr Tirohl dissenting) is that:

2. The claimant was not treated less favourably on the grounds of race in either the outcome of the respondent's investigation or the decision made to dismiss the claimant (that is the decision to cease offering him shifts on the Bureau).

The Judgment of the majority of the Tribunal (Employment Judge Phil Allen dissenting) is that:

3. The claimant was treated less favourably on the grounds of race by the respondent in the conduct of the investigation undertaken.

REASONS

Introduction

1. The claimant was engaged by the respondent as a casual support worker, as part of the Bureau which it operated. He was first engaged in or around September

2005. The respondent made the decision not to give any more hours to the claimant on 21 February 2019. That decision followed an alleged incident on 28 January 2019. The claimant alleged that the following amounted to direct race discrimination: the decision to instigate the investigation; the conduct of that investigation; the outcome of the investigation; and the dismissal. The respondent denied discrimination.

Claims and Issues

2. Four preliminary hearings were conducted in this case, on: 22 August 2019; 9 December 2019; 9 April 2020; and 21 June 2021. At the preliminary hearing heard by Employment Judge Leach on 9 December 2019, it was decided that the claimant was not an employee (and therefore could not pursue an unfair dismissal claim) and that he would not be granted leave to amend his claim to include indirect race discrimination.

3. Following the preliminary hearing on 21 June 2021 there was an order for the parties to agree a List of Issues, based upon a draft version which had been prepared prior to that hearing by the respondent's solicitor. A list of issues was subsequently agreed and included in the bundle for the Tribunal (125m), dated 24 June 2021. At the start of this hearing it was confirmed with the parties that it remained the list of issues which needed to be determined.

4. In this Judgment the Tribunal has determined the liability issues only. The remedy issues were left to be determined later, only if the claimant succeeded in his claim.

5. The list of issues identified that: the claimant alleges that the following acts were acts of direct racial discrimination:

   a. the decision to instigate the investigation, the conduct of that investigation, and the outcome of the respondent's investigation; and/or

   b. the claimant's dismissal.

6. It then recorded that in relation to each allegation the Tribunal was invited to consider the following:

   1. Did the respondent treat the claimant less favourably than it treated or would have treated an actual or hypothetical comparator in either of the above ways?

   2. Who is the real or hypothetical comparator that the claimant wishes to rely on for each act of alleged less favourable treatment? The claimant relies on the real comparators of Nick Rushton, Gary Trimble, Nicky Ballance, Bob Clayton and the hypothetical comparator.

   3. Is the less favourable treatment because of the protected characteristic of race?

   4. Has the claimant proved primary facts from which an inference of discrimination could be drawn?

5. If the Tribunal concludes in the affirmative in 4 above, has the respondent shown that the treatment was not because of the protected characteristic of race?

6. If the Tribunal concludes that the alleged treatment (A and B) amounted to direct race discrimination what is the appropriate compensatory remedy?

7. In submissions the claimant's representative confirmed that Mr Rushton, Ms Balance and Mr Trimble were being relied upon as comparators for the decision to dismiss only. Mr Rushton and the hypothetical comparator was being relied upon for all four ways in which discrimination was alleged (as stated at paragraph 5a and 5b above).

Procedure

8. The claimant was represented at the hearing by Mr Pritchard, counsel. Mr Lassey, counsel, represented the respondent.

9. The hearing was conducted as a hybrid hearing. The Employment Judge, the respondent's representative, and the respondent's witnesses, all attended at the Tribunal in-person. The other members of the Tribunal panel, the claimant's representative, the claimant, and the claimant's witnesses all attended remotely. The hearing room was arranged so that those attending remotely could see the respondent's representative, the witness giving evidence, and the Employment Judge in the Tribunal room. Those present in the Tribunal room could see those attending remotely by CVP on a large screen.

10. An agreed bundle of documents was prepared in advance of the hearing. The bundle ultimately ran to over 600 pages. The respondent added eight pages to the bundle at the start of the hearing, to which the claimant's representative did not object. Where a number is referred to in brackets in this Judgment, that is a reference to the page number in the bundle.

11. All of the witnesses had prepared witness statements in advance of the hearing (with the exception of Ms McNulty). On the morning of the first day of hearing, the Tribunal read the witness statements and the documents in the bundle which were referred to in those statements, as well as some pages to which the Tribunal was directed by the representatives of the parties.

12. Prior to any evidence being called, the respondent's representative made an application that the Tribunal should determine to be inadmissible the witness evidence of Mr Maphosa and Ms Odumoso (the claimant's two other witnesses) as he contended that neither of their evidence was relevant to the issues to be determined. Reliance was placed upon an extract from Harvey's on Industrial Relations and Employment Law and the authority of **HSBC Asia Holdings BV v Gillespie [2011] IRLR 209**. Each of the parties made submissions and the Tribunal adjourned to determine the application. The Tribunal found that it would not determine either of the witness' evidence to be inadmissible. Ms Odumoso's statement included evidence about two named comparators, which therefore did

appear to be of sufficient relevance. For Mr Maphosa's evidence the argument was more finely balanced. The Tribunal accepted that **Gillespie** was clearly authority for the fact that the Tribunal could exclude evidence if it was considered to be irrelevant or only marginally relevant. However, particularly noting what was said in the extract from Harvey's provided, the Tribunal concluded that it would not exercise its discretion to exclude Mr Maphosa's evidence at a preliminary stage, particularly as caution needed to be exercised when determining whether to exclude evidence at a preliminary stage in a discrimination claim and, in this particular case at that stage. The decision was that the evidence would be admitted (albeit the Tribunal emphasised it was not deciding that the witness' evidence was relevant).

13. The Tribunal heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions by the Tribunal. Ms Ola Odumoso, a support worker, and Mr Darlington Maphosa, a Trainee Pharmacist and casual support worker (and formerly an employed support worker), also gave evidence having been called by the claimant. They were also cross-examined by the respondent's representative and asked questions by the panel where considered appropriate.

14. The following witnesses gave evidence called by the respondent, were cross examined by the claimant's representative, and were asked questions by the panel: Mr Charles Anthony Hoy, support worker and trade union representative (but not the representative for the claimant in his meetings); Ms Karen Chandler, support worker; Ms Christine Lomas, support worker; Ms Joan McNulty, trade union representative (being representative for the claimant in one of his meetings); Ms Emma Crewdson, Manager of the Support Worker Bureau; and Mr Michael Fenna, Assistant Team Manager. The arrangements for Ms McNulty differed slightly from the other witnesses as she had attended the hearing only because she had been Witness Ordered to do so (at the respondent's request) and therefore no statement was provided for her in advance of her evidence and she was asked questions in chief by the respondent's representative when giving evidence (before being cross-examined by the claimant's representative).

15. After the evidence was heard during the second and third days of the hearing, each of the parties made submissions on the morning of the fourth day. The respondent's representative provided a written submission document in advance of the start of the fourth day which was read by the Tribunal, and each representative made oral submissions.

16. The Tribunal adjourned and reached its decision in chambers during the rest of the fourth day and the morning and early afternoon of the fifth day. The Tribunal delivered its Judgment and reasons verbally on the afternoon of the fifth day. The claimant's representative requested written reasons, and therefore the Tribunal provides the Judgment and reasons outlined in this document.

17. At the end of the afternoon on the Friday, the fifth day, (after Judgment and reasons had been explained) the Tribunal proposed to determine remedy on the Monday, being the sixth day for which the case had been listed. Both representatives requested that the issue of remedy instead be adjourned and considered at a later date, after the written reasons had been provided and once the parties had been given the opportunity to consider those written reasons in more detail. In the light of

the parties' consistent view, the Tribunal adjourned the hearing and confirmed that it would be listed for a one day hearing to determine remedy (to be conducted by CVP remote video technology). Accordingly, the Tribunal has not yet determined issue six in the agreed list of issues (as reproduced above). This document addresses liability only and not remedy.

Facts

18. The claimant worked for the respondent as a casual support worker from 19 September 2005. In his role he supported service users in the place where they lived.

19. The claimant contended that he was less favourably treated because of his African/black origin and ethnicity in his grounds of claim (17) and identified himself as black Ghanaian in his further particulars (42). His counsel informed us in submissions that English was not his first language.

20. We were referred in evidence to a lengthy policy for safeguarding adults at risk (502), which emphasised the importance of individuals being treated with dignity at all times (511). That policy included a procedure for responding to and reporting allegations, concerns or suspicions of adult abuse (544). That emphasised (555) that the receiver of information about a suspicion of the abuse of an adult at risk, known as the alerter, had a duty to report their concerns immediately once a suspicion, allegation or disclosure had been made. There was no dispute in this case that all support workers had a duty to be an alerter. The policy also contains a detailed procedure once an alert has been raised. There was an obligation for such matters to be clarified and the facts established.

21. The Tribunal was provided with some evidence about historic issues which had occurred during the claimant's engagement. The respondent's case was that the decision reached to cease providing him with shifts on the Bureau arose only from the events of 28 January 2019 (and the subsequent meetings). As a result, the Tribunal has not needed to consider further those historic matters.

28 January 2019

22. On 28 January 2019, the claimant was engaged to support a specific service user at the residence in which the service user lived on a shift from 3 pm to 10 pm. For reasons of confidentiality the Tribunal will not refer to the service user by name or indeed in any way which may mean that he can be easily identified from the Tribunal's Judgment. The claimant had supported that service user in a support worker role since 2005 and knew the service user well. The service user was a vulnerable adult, who was supported on a one to one basis by a support worker. He has, amongst other things, downs syndrome, a learning disability, and onset dementia. Mr Fenna described the service user as a very sociable man who loves going out and spending time with other people. Both the claimant and Mr Fenna explained that he enjoyed spending time in the communal area. Mr Fenna described him as having a good sense of humour and will often laugh, wink, smile and give the thumbs up to people.

23. The Tribunal was provided with a copy of the service user's care plan which described his complex needs and the risks associated. It was also provided with information about his dietary needs. Amongst other things, the care plan recorded (419e) that his coat and bag should not be left on show for him to see, as this would lead to the service user believing he would be going out – something he enjoyed and wished to do more frequently. The Tribunal also noted (419c) that the care plan identified: the need for staff to follow a consistent approach (419g); the need to firmly outline clear boundaries; the importance of routine (419f); addressed the benefits of the use of auditory stimulation; and addressed also included elements on techniques of re-direction (419l). There was some dispute about the care plan for the service user and the adherence to it. The claimant's evidence about what was in it, differed from what the document recorded. Mr Maphosa's evidence was that care plans were only updated periodically and that the practice on the ground might differ slightly from what the care plan document recorded. The Tribunal also accepted that, on occasion, the interpretation of what is said in a care plan may differ.

24. What occurred at the start of the claimant's shift on 28 January 2019 was an issue in dispute between the parties. It was not in dispute that the claimant arrived five minutes late for his shift.

The claimant's account

25. The claimant's evidence was that an agency personal support worker was with the specific service user in the communal lounge. His evidence was that Ms Mathuthu was also in the lounge, as was another unnamed female support worker who was a permanent member of staff. His evidence was that there were no other persons in the communal lounge and, in particular, Mr Hoy was not there. After accepting items by way of hand over from the agency personal support worker, the claimant's evidence was that he asked the specific service user to go to his flat, so that he could do the mandatory checks (that is the checks required to be undertaken for all service users during a shift). The claimant's evidence was that he tried to persuade the service user by saying "*let's go to your room, I'll give you some crisps, coke and put music on*". This was unsuccessful. The claimant said he asked Ms Mathuthu to watch over the service user while he collected coke and crisps from the service user's flat. When the claimant returned, and after giving the service user the coke and crisps, the service user still declined to move, and so the claimant collected the service user's coat from the flat and told the service user that he would take him out after he had done the hand over checks. The service user followed the claimant to the flat. The claimant did the checks, which he emphasised were important (the checks related to finances, medication, diaries, clothing and the need for shopping). As it was raining when the checks were completed, the claimant told the service user they would need to wait until it stopped raining before they could go out. The trip was ultimately postponed due to rain and then the need for the claimant to have tea at the required time.

The respondent's account

26. Mr Hoy, Ms Chandler and Ms Lomas all gave evidence which conflicted with the claimant's evidence. Their evidence was that they were together in the communal lounge on 28 January 2019, sat together with the service user, when the claimant arrived. Mr Hoy had taken responsibility for the service user from the

personal support worker fifteen minutes prior to the start of the claimant's shift, as Mr Hoy was employed that day as Building Cover, providing general support to the residents and covering other staff members when required. The evidence of the three was that the first thing the claimant said to the service user was "*come*". Mr Hoy's evidence was that he explained to the claimant that the service user had a cup of tea, was enjoying the company of others, and was fine where he was until he was happy to leave.

27. On the respondent's witnesses' account, the claimant then left and went to the service user's apartment and returned with a packet of his favourite crisps. The claimant went to hand the crisps to the service user, but the evidence of the respondent's witnesses was that, as the service user went to take them, the claimant pulled them away. Mr Hoy said that he challenged the claimant's behaviour. The claimant then revisited the apartment, returning with the service user's coat and asked the service user if he wanted to go out. The service user stood up and the claimant put one of his arms in his coat and wrapped the rest of the coat around him before walking him out of the communal area. Mr Hoy noted later that the service user did not leave his apartment again during the shift (which was recorded in the service user's diary and was not in dispute). All three of the respondent's witnesses explained in their evidence why they believed this was concerning and inappropriate in their view. Mr Hoy also stated that it was well known that the claimant often took the specific service user to his apartment and he didn't come out again for the remainder of the claimant's shift. Ms Chandler's evidence was that whenever the claimant was working as his care worker, the service user would not be seen during the shift.

The contrasting accounts

28. In his evidence, the claimant emphasised very strongly that he believed those who made and supported the allegation were lying because the three named people who made the allegations (and gave evidence at the Tribunal hearing) had not been present in the lounge at the start of the relevant shift. It was never explained how the claimant believed that those who gave the accounts could have been aware of parts of the claimant's and the service user's interactions at the start of the shift on 28 January 2019, it not being in dispute that crisps had been collected from the apartment and used unsuccessfully to persuade the service user to return to his flat, and that, ultimately, the service user's coat had been used. Where the accounts differed most significantly was in the manner in which the claimant approached the service user and the way in which the crisps and the coat were used, with the respondent's witnesses describing a coercive approach to the service user, which they stated to be undermining of his dignity.

29. For the purposes of the issues which it needs to find (as outlined in the list of issues), it is not necessary for the Tribunal to determine what occurred on 28 January 2019. This was confirmed by each party's counsel during their respective submissions.

Events after 28 January 2019

30. In early February 2019 Mr Fenna spoke to Mr Hoy, as he understood that he wished to raise an issue. When Mr Fenna initially spoke to Mr Hoy, Ms Lomas was

also present and expressed her views about what had occurred, saying it was disgusting. Mr Fenna asked Mr Hoy to provide a statement about what had occurred. On 13 February 2019 Mr Hoy emailed Mr Fenna and provided an account of the events, reflecting that given in evidence to the Tribunal by him (261). The email started by explaining that it was given "*as requested*".

31. In the light of the policy's emphasis on the need to report matters immediately, there was a notable delay between the events and Mr Hoy providing his statement by email. In cross-examination and when challenged about the delay in providing the statement, Mr Hoy apologised and confirmed that it should have been provided more quickly. Mr Fenna's delay was also contrary to policy. The Tribunal finds that the delay in providing the statement, in part, reflected the lack of seriousness with which the issue was viewed. If the events had been viewed as serious abuse, the statement would have been provided more quickly. The delay may also have impacted upon recollections.

The investigation and 15 February 2019 meeting

32. In an answer to a question in cross-examination, the claimant agreed that, once the report had been made, the respondent did have a duty to investigate it.

33. The claimant's undisputed evidence was that he received a call from Ms Crewdson when working about a week after the 28 January shift. She requested a chat in relation to the 28 January shift. The claimant asked "*what have I done*?". He was told it was not a safeguarding issue and there was nothing to worry about.

34. On 15 February the claimant was interviewed by Mr Fenna and Ms Crewdson. The claimant's evidence was that he went to the Bureau office not knowing what the issues were.

35. Mr Fenna's evidence to the Tribunal was that he made a professional judgement prior to 15 February meeting. He had spoken to Mr Hoy, who he clearly considered to be a trustworthy employee, and he believed him. He was also aware that three people had said the incident had taken place. He accepted that he had formed the view that it was highly likely the events had occurred as alleged, prior to meeting with the claimant. In his view, the meeting was an opportunity to help, as it gave the claimant the opportunity to understand what had occurred. Mr Fenna's evidence was that if the claimant had been a contracted worker (that is an employee), the process would have been different. Mr Fenna said that his aim in the 15 February meeting, was to support the claimant to reflect.

36. Aside from the statement from Mr Hoy, no other statements were provided to the Tribunal from the internal investigation. The evidence from Ms Lomas and Ms Chandler was confused in terms of whether they provided statements at the time, but Mr Fenna's clear evidence was that they did not do so. In answering questions in the Tribunal, Mr Fenna referred to the fact that taking written statements would have extended the process, and he believed the outcome would probably have been the same.

37. There was CCTV in the lounge where the events occurred. That CCTV was not viewed as part of the internal process, nor was it shown to the Tribunal. Mr

Fenna's evidence was that it was never used for these type of matters (and he said it was only used on occasions such as when the Police were involved). No relevant policy was shown to the Tribunal.

38. The Tribunal was provided with notes of the interview on 15 February 2019 (257). The notes are headed "*Fact finding meeting*". The Tribunal finds that the meeting was in no real or genuine sense a meeting which had been arranged to, or endeavoured to, find the facts. Mr Fenna, as he confirmed in evidence, had already determined his view about what had occurred before the meeting started. That is, he had decided that he believed the account of Mr Hoy. The meeting was one which gave the claimant the opportunity to apologise for what it had already been determined had occurred, it was not one to find out what occurred.

39. Ms McNulty's evidence was that the respondent differed from other engagers of casual workers by undertaking a fact-finding process before making decisions to cease using casual workers.

40. The notes record that, at the start of the interview, the claimant was shown the statement made by Mr Hoy. It wasn't entirely clear whether or not he was shown the full email, but both Ms Crewdson and Mr Fenna's evidence was that Mr Hoy's name appeared at the bottom of the statement shown to the claimant. The claimant said that he did not see the name (which is clear from the questions he asked in the meeting).

41. The first thing the claimant asked on 15 February was "*who said I did this?*". It was explained that another two people had said the same thing. The claimant emphasised that he needed to do all his checks at the start of the shift. After some discussion, Mr Fenna said to the claimant (258) "*you are defending these things like they didn't happen and I'm confident that this did happen as they are facts and not opinion. They are on an official email as facts. You need to think very carefully about what happened and why you are here*". The claimant responded that he didn't deny that he took the service user drinks and crisps and explained he had been "*in charge*", something he then asked to be disregarded when the phrase was challenged (as the role was one of support). Following this part of the discussion, Mr Fenna challenged the claimant to explain what the role of support meant.

42. When asked what he had done wrong, the claimant explained that he had told the service user that they were going out when they didn't. Mr Fenna responded (258) "*I want you to understand, I would want you to think that you'd made a mistake, read it again*". The claimant denied saying "*come*" as alleged. Mr Fenna than told the claimant that he was not doubting the statement made (by Mr Hoy) because it was very specific and therefore explained that he wanted the claimant to see what he had done. He stated that he wanted him to understand the mistakes he had made and wanted to be sure that the service user was safe in the future.

43. Later in the meeting Mr Fenna said "*If this is how you do your job, after all these years, then you do your job wrong. You shouldn't be justifying what you've done wrong, you should be looking at yourself, this is disgusting behaviour*". The claimant responded that he understood what Mr Fenna had to say. Mr Fenna responded that it worried him that he was coming to that conclusion fifteen minutes after the start of the meeting. He explained that the claimant's role was under threat.

44. There was a discussion in the meeting about the need for checks. Mr Fenna is recorded in the notes as stating that they could be done at any time in the seven hour shift. In the evidence before the Tribunal there was a difference in the evidence about the checks: the claimant and Mr Maphosa said that checks must be undertaken at the start of the shift (they believed they were mandatory); Mr Hoy stated that the claimant could have left the service user with him in the communal area and undertaken the checks in the flat; and Mr Fenna's evidence was that the checks could be done at any time during the shift and, indeed, that the wishes of the service user were the most important thing, and what they wanted to do (such as remaining in the communal area) should not be overridden by the need for checks.

45. The notes (259) record the claimant as having apologised. He said he was "*sorry*", and stated: "*it won't happen again when I'm on shift*".

46. The respondent submitted that the claimant did not show any remorse in this meeting. Based upon what is recorded in the notes, that was not correct as the notes record him as having apologised. What the claimant did not do in the meeting, however, was to show any insight or learning from the incident. His focus was on challenging the account, and questioning who had made the complaint. The Tribunal does find that was not the response which Mr Fenna was seeking from the claimant.

47. The Tribunal also find that Mr Fenna in the meeting on 15 February was critical of the claimant for his responses to the questions asked, based upon the precise terminology used (in charge rather than servicing or responsibility for).

Events following 15 February meeting and the outcome/decision

48. On 18 February (263) Mr Fenna sent the notes of the meeting to his manager Mr Bentley (and one other), copied to Ms Crewdson. The brief email included the following: "*Sadly the minutes speak for themselves*"; "*he was unable to present any evidence of any value base*"; "*From my point of view, which I believe Emma would support, There was negligible acceptance of any wrongdoing from*" the claimant; "*I have serious reservations about the suitability as a support worker on the bureau*".

49. Mr Bentley responded by email later on the same day (264) "*Having had the discussion before and now reading the attached I am definitely in the mind we no longer use* [the claimant]". Both Ms Crewdson and Mr Fenna in evidence confirmed that they were part of the decision, but Mr Fenna's evidence was that the decision was ultimately Mr Bentley's. The respondent submitted that the decision was made between the three individuals. The Tribunal did not hear evidence from Mr Bentley.

50. The claimant also gave evidence that he spoke to others between the meetings. One of the other staff told him that the people who had raised the complaint were Ms Chandler and Ms Lomas. The claimant also spoke to Mr Maphosa and was told by him that white workers were trying to find a way to remove him.

21 February 2019 meeting

51. A further meeting took place with the claimant on 21 February 2019. The meeting was attended by the claimant, Ms McNulty (his trade union representative),

Mr Fenna and Ms Crewdson. Ms McNulty's evidence was that she met with the claimant briefly prior to the meeting and he was antagonistic when they first met. She was not provided with any documents prior to the meeting.

52. The Tribunal was provided with notes from the meeting (265) which described it as an "*Outcome meeting*". Ms McNulty's evidence was that the notes were a reasonable representation of what said in the meeting. When the meeting commenced, Ms Crewdson explained that the investigation was concluded (as the claimant had been told on the phone) and the outcome was that the respondent would not be offering the claimant work on the Bureau anymore.

53. The notes record Ms McNulty as being provided with a copy of the statement and the notes of the previous meeting, during the 21 February meeting. In the Tribunal, Ms McNulty confirmed that she had been provided with the email containing the statement of Mr Hoy, but could not recall seeing the notes of the previous meeting.

54. The notes of 21 February meeting record the claimant's initial response as being to assert that this was racial discrimination. He stated he knew the two people who complained. In evidence to the Tribunal the claimant explained this was Ms Chandler and Ms Lomas. He stated in the meeting that they weren't there. He said "*This is racial hatred*". Mr Fenna replied "*I am not questioning the integrity of the alerters*". Ms McNulty, that is the claimant's trade union representative in the meeting, stated that "*no-one at* [the particular location] *is racist*". The notes record that the claimant subsequently shouted. The claimant questioned what he had done wrong, and denied that staff had raised the issue at the time. He stated it was "*all lies, you are planting something*". Ms McNulty is recorded as saying that she could assure him that was not what happened.

55. Ms McNulty, told the claimant that what she had read was bad practice and described it as "*carrot and stick*". She asked if he would be put on the register. She said that she had sat in meetings with the Bureau and contracted staff over the years, and people had been removed for less.

56. Ms McNulty's evidence to the Tribunal was that the claimant was shouting and at one point in the meeting he stood up and she found him quite intimidating.

57. Towards the end of the 21 February meeting, the claimant said that those raising the complaint weren't present in the lounge and he said that Ms Mathuthu was there.

58. As the outcome had been confirmed at the start of the meeting, what was said in the meeting did not in practice have any bearing upon why the decision to cease using the claimant was made.

Events following 21 February meeting

59. Following the meeting, Ms McNulty's evidence was that she would normally have spoken to her member about what had occurred. Her evidence was that the claimant left the meeting and left her there with Mr Crewdson and Mr Fenna, so she was not able to do so. At some point following the meeting the claimant visited the

Union offices and spoke to Ms McNulty, when he completed the forms to be sent to the regional office so that he could be advised by someone with more experience of discrimination issues.

60. The claimant's evidence was that he put in a letter of appeal, but no appeal letter was provided by either party, and the respondent gave no evidence that he had done so.

61. Following 21 February meeting, no one spoke to Ms Mathuthu. There was no Statement from Ms Mathuthu provided to the Tribunal. Ms Mathuthu did not give evidence. She was not called by either party.

62. Nothing whatsoever was done in response to the claimant's allegation of race discrimination. This is something which has been considered carefully by the Tribunal. It would have expected those attending the meeting to have considered such allegations to be potentially very serious and to have taken some steps after the issues were raised.

Witnesses

63. Mr Maphosa's statement included no evidence about any of the comparators relied upon by the claimant. The Tribunal found his evidence to be informative about the feelings of black workers and, in particular, the black workers engaged by the respondent as casual support workers. It was clear from his emails and evidence, that he had identified a number of workers who felt it was beneficial to join together with him to raise issues about how black workers believed they were treated. There were twenty four names listed as being those engaged with Mr Maphosa in raising concerns (456c). After he met with the relevant managers, an action plan was identified (456f).

64. An element of Mr Maphosa's evidence, which the Tribunal also found to be relevant, was his explanation about how he perceived that agency support workers were not fairly treated in comparison to contracted employees. This adversely impacted statistically upon a significant proportion of those engaged by the respondent; the evidence being that a substantial proportion of the casual agency workers were black (457), whereas a very small percentage of the contracted employees were black (458). Mr Maphosa particularly highlighted that those casual support workers for whom English was not their first language sometimes struggled to advocate for themselves in meetings (such as fact finding meetings) and sometimes did not have the language skills to address nuances in the correct terminology when addressing issues around service users. He gave this evidence about some of the black workers, but illustrated his point by referring to Polish workers who he believed had often been in the same position. The evidence of Ms Crewdson, which was corroborated by Mr Maphosa both in emails and in his evidence before the Tribunal, was that things had changed at the respondent (he believed following his meeting with management) and the evidence before the Tribunal was that the respondent had taken steps to engage more workers as contracted employees and this has resulted in some improvement in addressing the statistical inequality of black workers between those employed and those engaged as casual support workers on the Bureau. The last email from Ms Maphosa, sent on

23 November 2020 before a change in role, thanked the correspondent at the respondent for what she had done in a short time (458h).

65. Ms Odumoso's evidence about named comparators, provided the Tribunal with little assistance as from her answers in cross-examination it was clear that her evidence was not based upon a detailed understanding of what had occurred in other cases. It was also her evidence that she had never worked at the residence where the events of 28 January 2019 occurred. Her evidence did, however, provide the Tribunal with an account of a black workers experience whilst working for the respondent.

66. The Tribunal gave little weight to the evidence of Ms Lucas and Ms Chandler in the absence of any contemporaneous statements obtained as part of the internal investigation and in the light of the confusion in their evidence about whether statements had been prepared at the time. In practice, their evidence was relevant to the issue which the Tribunal did not need to determine – that is what occurred on 28 January 2019. The Tribunal accepts Mr Fenna's evidence that he believed there were two others who corroborated Mr Hoy's account (and who they were), whilst noting the absence of any attempt to take statements from them as would appear to have been the appropriate approach in accordance with the respondent's safeguarding procedure.

67. Ms McNulty attended the Tribunal as a result of being witness ordered to do so. The respondent submitted that her evidence, and what she said in 21 February meeting, had additional significance and should be afforded additional weight, as a result of who she was (that is the claimant's trade union representative and someone released by the respondent on secondment to undertake trade union duties full time). Her evidence was that she did not believe that there was any race discrimination at the claimant's place of work and she explained that she would be the first person to call any racism out. She thought the claimant's actions with the service user, as reported by Mr Hoy, were wrong. In answer to a question from the Tribunal, she said that she thought that what was alleged was something which she expected to result in the end of his engagement on the Bureau, based upon her experience of being a support worker in the past and what she would expect the respondent to do in the light of what was alleged. The Tribunal has carefully considered both her evidence and what she said in the meeting on 21 February. The Tribunal does not understand why a trade union representative would not endeavour to understand more about her member's complaint of race discrimination when it was raised, rather than telling her member that there was no such discrimination. The Tribunal also notes that Ms McNulty's evidence about the experience of black workers within the respondent's Learning Disability service, was not consistent with the experience evidenced by Mr Maphosa and Ms Odumoso, suggesting a lack of understanding of those issues. Ms McNulty did emphasise that she was not a person with experience of addressing issues of race discrimination. In the light of her responses to what was said by the claimant in the meeting and the other factors identified in this paragraph, the Tribunal has given little weight to Ms McNulty's evidence. The Tribunal did not find her to be someone who demonstrated any awareness of, or genuine understanding about, potential race discrimination.

68. Ms Crewdson in her evidence said that she believed the complaint because it was from a very experienced member of staff who she believed. When explaining

the outcome and decision made regarding the claimant, she emphasised what she perceived to be his lack of understanding and her view that he had no awareness of what he had done wrong. The latter was consistent with the evidence of Mr Fenna, who also emphasised that a key component of the outcome and the decision, was that he believed that the claimant had no understanding of why the approach he had taken with the service user (including as explained in the meeting) was wrong.

Comparators and others

Ms Ballance

69. The claimant gave no evidence personally in his witness statement about Ms Ballance. Ms Odumoso's evidence was that Ms Ballance was dismissed, but was reinstated on appeal. Mr Fenna gave evidence about Ms Ballance. In summary, Ms Ballance was summarily dismissed for an incident involving a service user which was found to be gross misconduct. She appealed and was reinstated following the decision of the Members Appeal Committee (with a final written warning being substituted). Ms Ballance was an employee and not a casual support worker and therefore the respondent's Employee Relations Policy applied to her.

Mr Clayton

70. Mr Clayton was a casual support worker, for whom an allegation was made involving a service user. Both Ms Crewdson and Mr Fenna gave evidence that he was removed from the Bureau/not offered work in the future after the incident. The Tribunal was provided with notes of his fact finding meeting (242) and an outcome letter of 7 August 2018 (253). The decision was that Mr Clayton was removed from the Bureau on 21 August 2018, following the safeguarding investigation.

Mr Rushton

71. Mr Rushton was a casual support worker engaged by the respondent. The claimant alleged that he was not dismissed after serious safeguarding issues.

72. Ms Crewdson gave evidence about Mr Rushton. The Tribunal was also provided with notes of fact finding meetings conducted by a Ms Pickering on 27 March 2013 (196) regarding a medication error, and by a Ms Wren on 12 August 2014 regarding Mr Rushton oversleeping when undertaking a sleep in shift (that is he started late in working with the other staff to support the service users in the morning). Ms Crewdson's evidence (which was consistent with the notes of the meeting) was that Mr Rushton self-reported, realised the practice issues and confirmed he understood the concerns raised, with the medication errors. Mr Rushton completed training before being allowed to work single shifts again. The notes of the meeting regarding oversleeping, show that this was an error and not a deliberate action and Mr Rushton acknowledged wrong-doing and was advised to ensure that he had a good alarm to avoid oversleeping in the future. In both cases, the notes demonstrate a fact finding meeting which was conducted in an open and fair way, with facts being obtained without undue pressure, and with the responses provided being discussed with the individual.

Mr Trimble

73. Mr Trimble was a contracted employee. The claimant alleged that he was neither suspended nor dismissed after an incident involving a service user absconding. Mr Fenna gave evidence about Mr Trimble and the Tribunal was shown the strategy meeting notes from a safeguarding strategy meeting (230). Mr Fenna's evidence was that when the service user absconded there were several other support workers who were on site who could have prevented the incident. He also distinguished that incident from issue considered for the claimant, as it involved an oversight in which responsibility was acknowledged.

Mr Ellis

74. In his evidence the claimant contrasted the conduct of Mr Fenna in meetings with the claimant, with his conduct in other meetings (with white workers) such as that with Mr Ellis. The claimant says Mr Fenna would have spoken to the claimant in a more polite and sympathetic manner if he had been white. Mr Ellis was a casual support worker who was removed from the Bureau on 8 October 2020 after he had left his sleep in shift to go home and sleep. The Tribunal was provided with the notes of the fact finding meeting conducted with him on 5 October 2020 (458e) and the decision letter (458g). That meeting was conducted by Mr Fenna and Ms Crewdson. The notes record a meeting which began with open questions and what appeared to be an even-handed approach to obtaining Mr Ellis' account. Later in the meeting (458f), Mr Fenna is, however, recorded as saying "*This job holds a great deal of responsibility and your judgement is totally off. You have accepted responsibility, it's pretty obvious that your actions should have been hugely different. You have put 2 and 2 together and got it wrong*". That is, Mr Fenna made clear his views during the meeting. At the end of the meeting Mr Ellis was told that he would be informed of the outcome, which was that he would be removed from the Bureau.

The Law

75. The claimant claimed direct discrimination because of the protected characteristic of race. The claimant relied upon four named comparators and also a hypothetical comparator.

76. Section 13 of the Equality Act 2010 provides that:

> **"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."**

77. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur in the employment context, which includes the employer dismissing the employee or subjecting the employee to any other detriment.

78. In this case, the respondent will have subjected the claimant to direct discrimination if, because of his race, it treated him less favourably than it treated or would have treated others. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the

circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different (**Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285**). It is not a requirement that the situations have to be precisely the same. The existence of a different decision maker does not prevent the comparison being a valid one (**Olalekan v Serco Ltd [2019] IRLR 314**). Neither party relied upon any specific case law regarding when there would, or would not, be a material difference between otherwise comparable circumstances.

79. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(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 sub-section (2) does not apply if A shows that A did not contravene the provision".**

80. In short, a two-stage approach is envisaged (for which the respondent relied upon **Constable of Hampshire Constabulary v Bullale [2012] EWHC 1549** as authority). The two stages are:

i. at the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that he has been treated less favourably than those identified or than he hypothetically could have been (but for his race); there must be something more.

ii. The second stage is reached where a claimant has succeeded in making out a prima facie case. In that event, there is a reversal of the burden of proof: it shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

81. The respondent emphasised that the initial burden of proof is on the Claimant to show facts from which an inference of discrimination can be drawn (**Ayodele v Citylink Ltd [2017] EWCA Civ 1913**). The respondent also highlighted that simply because a claimant insists that the treatment is disadvantageous is not enough; it is a determination for the Tribunal, for which it relied upon **Burrett v West Birmingham Health Authority [1994] IRLR 7**.

82. In **Johal v Commission for Equality and Human Rights UKEAT/0541/09** the Employment Appeal Tribunal summarise the question as follows:

> **"Thus, the critical question we think in the present case is the reason why posed by Lord Nicholls: "Why was the claimant treated in the manner complained of?""**

83. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867**. In order for the burden of proof to shift in a case of direct race discrimination it is not enough for a claimant to show that there is a difference in race and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation. Mummery LJ stated in Madarassy:

> "**The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination**"

84. The respondent in its written submissions relied upon an extract from the decision of the Employment Appeal Tribunal in **London Borough of Islington v Ladele [2009] IRLR 154** (upheld in the Court of Appeal) which set out the following commentary on direct discrimination claims:

> **"The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:**
>
> **(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572, 575*— "this is the crucial question". He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.**
>
> **(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in Nagarajan (p 576) as explained by Peter Gibson LJ in *Igen v Wong [2005] EWCA Civ 142*, *[2005] ICR 931*, *[2005] IRLR 258* paragraph 37.**
>
> **(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in *Igen v Wong*.…**

> **(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. …**
>
> **(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test: see the decision of the Court of Appeal in *Brown v Croydon LBC [2007] EWCA Civ 32, [2007] IRLR 259* paragraphs 28–39. …**
>
> **(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in *Anya v University of Oxford [2001] EWCA Civ 405, [2001] IRLR 377* esp paragraph 10.**
>
> **(7) As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in *Watt (formerly Carter) v Ahsan [2008] IRLR 243, [2008] 1 All ER 869* … paragraphs 36–37) …**"

85. Both parties placed reliance upon **Efobi v Royal Mail Group Limited [2019] IRLR 35**. The second stage of the test only comes into play if the claimant has satisfied stage one. For the second stage, the respondent is required to show that he did not do the unlawful act. The respondent emphasised that the burden cannot shift to the respondent simply because there is a difference in treatment, relying upon **Madarassy v Nomura International plc [2007] IRLR 246 CA.**

86. The respondent also highlighted that the respondent behaving unreasonably or unfairly would not, by itself, be enough to shift the burden of proof, relying upon **Bahl v The Law Society [2004] IRLR 799. Zafar v Glasgow City Council [1998] IRLR 36** is also authority for the fact that unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment.

87. The Tribunal noted what was said by Lord Browne-Wilkinson in **Glasgow City Council v Zafar**:

> "**Claims [of race and sex discrimination] present special problems of proof for complainants since those who discriminate on**

> **grounds of race or gender do not in general advertise their prejudice"**

88. The claimant's representative in submissions relied upon **Amnesty International v Ahmed [2009] IRLR 884**. In that case it was held that:

> "**In other cases—of which *Nagarajan* is an example—the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in *James v Eastleigh*, a benign motive is irrelevant"**

Conclusions – applying the Law to the Facts

89. In reaching its decision the Tribunal first considered the allegations as they applied to each of the named comparators, before going on to consider the allegations based upon a hypothetical comparator.

Ms Ballance and Mr Trimble

90. Both Ms Ballance and Mr Trimble were employed under an employment contract and were not casual support workers. For both comparators what the claimant ultimately alleged was only that he was less favourably treated by being dismissed. The contractual and statutory rights which apply to employees differ significantly to those which apply to casual support workers and it was very clear from the evidence that the respondent approached the dismissal of employed staff very differently to the way in which it approached, and made, the decision to cease giving shifts to casual support workers. In those circumstances, the difference in status or engagement is a relevant and material difference between the claimant and these two named comparators, when considering the alleged less favourable treatment of dismissal. That comparison is not one which is like with like.

91. The Tribunal finds that the relevant circumstances when comparing the claimant with both of these named comparators was materially different, so a valid comparison cannot be made. In addition, in Ms Ballance's case, the precise difference only arose because she was employed and not a casual support worker. That is, Ms Ballance was, like the claimant, dismissed for the issue identified. The difference in treatment arose from her reinstatement on appeal. Whether or not the claimant appealed, he was not reinstated. However, the procedure under which Ms Ballance appealed and the method by which the appeal was considered (a panel of elected members independent of the line management structure), was something which applied to her as an employee and not to the claimant as a casual support

worker. That difference is relevant and material and means the circumstances were clearly such that a valid comparison cannot be made as required by section 23(1) Employment Rights Act.

Mr Clayton

92. Mr Clayton was also identified as a named comparator only in respect of the dismissal. Mr Clayton was a casual support worker who the respondent ceased to offer further shifts to. That is, he was treated in exactly the same way as the claimant by being dismissed. The claimant was not treated less favourably than Mr Clayton.

Mr Rushton

93. Mr Rushton was the named comparator upon whom the claimant relied in alleging that he had been treated less favourably in all four respects (decision to instigate the investigation, conduct of the investigation, outcome of the investigation, and dismissal). He had also been a casual support worker. The Tribunal was shown evidence of two issues raised with Mr Rushton. Fact finding meetings were conducted for both allegations. Mr Rushton remained on the Bureau and was able to work shifts after the outcome of each of the investigations.

94. There was no evidence presented to the Tribunal which showed that the claimant had been treated less favourably than Mr Rushton in the instigation of the investigation (in respect of either of Mr Rushton's investigations).

95. The first investigation concerning Mr Rushton arose from a medication issue. What was clear from the interview notes provided, is that Mr Rushton had self-reported the issue and was apologetic and contrite about what had occurred. He identified learning points and took responsibility for the error. When considering the conduct and outcome of the investigation and the decision made following the investigation, the Tribunal finds that the circumstances were materially different and therefore a comparison cannot be made. Where Mr Rushton raised the issue himself and apologised for it, the circumstances were materially different and that was relevant to how the investigation was conducted, as well as its outcome and the decision made. Even had the Tribunal not found that the claimant was unable to rely upon Mr Rushton as a comparator because the circumstances were materially different, the Tribunal would have found that the respondent had proved a reason for the difference in treatment other than race. The respondent's evidence placed significant emphasis on contrition and learning from mistakes, something which it was perceived the claimant had not shown. Those were the reasons why Mr Rushton was treated differently (in respect of the medication).

96. The second investigation concerning Mr Rushton arose because he overslept during a sleep in shift and was late commencing work with service users in the morning of his sleep in shift. The Tribunal finds that allegation to not be comparable with the allegation made against the claimant in terms of either gravity or nature. Oversleeping and commencing duties late is materially different to the abusive conduct towards a service user, which the respondent considered for the claimant. The alleged oversleeping was accidental and involved failing to set an alarm successfully. When considering the conduct of, and outcome to an investigation, the difference in the nature and gravity of the allegations means that the circumstances

were materially different such that a valid comparison cannot be made. In any event, even had the Tribunal needed to determine the further issue, the Tribunal would have found that the respondent had proved a reason for the difference in treatment other than race, being the contrast between the two allegations and the gravity of what was being considered/addressed.

Comparators and other evidence and their impact on the hypothetical comparator

97. Having determined that the claimant's claim did not succeed based upon the actual comparators relied upon, the Tribunal did nonetheless consider the evidence available from how the real individuals were treated when considering how a hypothetical comparator would have been treated. The Tribunal, in particular, noted the way in which the fact finding interviews were conducted with Mr Rushton as relevant evidence (albeit they were conducted by a different manager). As well as the evidence relating to the named comparators, the Tribunal found the evidence from the fact finding interview with Mr Ellis to be useful evidence, demonstrating as it did the same managers' approach (being Mr Fenna and Ms Crewdson) to a different fact finding meeting involving an employee whose race differed from that of the claimant.

The hypothetical comparator

98. An important part of considering how a hypothetical comparator would have been treated, is the identity of that hypothetical comparator. The Tribunal has carefully considered this issue and concluded as follows:

a. The comparator must be someone who had the same complaint made about their conduct – that is a complaint in exactly the same terms as was made by Mr Hoy and is recorded in his email (261);

b. The alerter would also still be Mr Hoy – that is someone who Mr Fenna considered to be a trusted employee. During the hearing the claimant's representative on a number of occasions emphasised that the complaint was made by three white employees about a black employee. In constructing the hypothetical comparator, what must be considered is someone of a different race to the claimant who is subject to the same complaint. It is not a necessary or appropriate part of the comparison to also change the race of the alerter. Similarly, the complaint would also have been perceived to have been supported by two others (albeit that there was a lack of evidence);

c. The complaint would be about abuse of the same service user, with his specific vulnerabilities;

d. The comparator would have the same length of service as the claimant on the Bureau, being effectively fifteen years;

e. For the elements of the alleged less favourable treatment to which it was relevant, the comparator would also be someone whose focus in the meeting or meetings was denying wrong-doing and identifying the alerter. The comparator would also have been someone who had not

shown the contrition, acceptance, and wish to learn from the incident, that Mr Fenna sought (or expected), or at least would be perceived by Mr Fenna as not having done so;

f. Inasmuch as it was a factor, the comparator would also use the same language as the claimant in the meeting. That is, he would refer to being in charge rather than taking responsibility, being terminology which Mr Fenna perceived to demonstrate a lack of understanding about how services to service users should be provided. In a direct discrimination claim the hypothetical comparator must be someone who explained their actions in the same terms as the claimant and who had been able to advocate as effectively (or not) as the claimant; and

g. The hypothetical comparator must also be a casual support worker, that is someone treated by the respondent as being able to have their shifts ended without the full process or consideration which would apply to the dismissal of an employee.

99. For the conduct of the investigation (extending as the allegation did to the entire investigation), the hypothetical comparator would also be someone who conducted himself in the same way at the second meeting on 21 February as the claimant did, where the Tribunal considered the conduct later in the process. The conduct in that second meeting was not relevant to the allegations relating to the instigation, outcome or decision; the outcome and decision clearly having already been made prior to the second meeting as they were conveyed to the claimant at the start of the second meeting.

100. Where the hypothetical comparator differs from the claimant is in respect of race. The claimant's representative's position was that a white worker would have been treated differently. The Tribunal has considered the hypothetical comparator to be white British for the comparison. The claimant's further particulars (42) explained that that the claimant relied upon the contended readiness or uncritical acceptance of the allegations or facts as proven, and (44) the alleged predisposition to believe that the claimant had acted as alleged, providing part of the basis for his assertion that a comparator would have been treated differently.

The instigation of the investigation (and the hypothetical comparator)

101. The first allegation was that the claimant was treated less favourably than a hypothetical comparator would have been, in the decision to instigate the investigation. The Tribunal does not find this to be the case. Irrespective of the race of the person about whom the complaint had been made, the Tribunal has no doubt whatsoever that an investigation would have been instigated. Indeed, in cross-examination, the claimant agreed that, once the report had been made, the respondent did have a duty to investigate it. Even had the Tribunal not made this finding, it would in any event have found that the respondent had proved the reason why it instigated the investigation, which was not the claimant's race. That is, because of the complaint made and the need to instigate an investigation once it had been raised.

The Judgment and majority findings

102. Up to this point in the Judgment, what has been recorded and found both in respect of the facts, and in the decisions made when applying the law to the facts, was the unanimous view of the Tribunal panel. However when applying the law to the facts in considering whether the claimant was treated unfavourably when compared to a hypothetical comparator in respect to the conduct of the investigation, the outcome and the decision, the Tribunal has not reached unanimous agreement and, as explained below, what has been decided is based upon the majority view of the Tribunal panel.

The outcome of the investigation (and the hypothetical comparator)

103. The Tribunal determined the issues arising from the outcome and decision first, before reaching a determination on the conduct of the investigation.

104. When considering the hypothetical comparator, as outlined at paragraphs 98-100 above, the majority of the Tribunal (Dr Tirohl dissenting) finds that the claimant was not treated less favourably in respect to the outcome, than a hypothetical comparator would have been. That is, Mr Fenna when considering a white British worker in the same circumstances as outlined, would also have reached the same conclusion contained in his email of 18 February (263) and proposed that the comparator should be offered no more shifts on the Bureau. Someone who was also the subject of a complaint made by Mr Hoy in the same terms, who attended the first meeting and argued against the complaint rather than being perceived as showing the contrition and learning sought, would also have been given the same outcome.

105. The minority (Dr Tirohl) disagrees. She finds that the outcome for a hypothetical comparator would have been different.

106. In addition, the majority (Dr Tirohl dissenting) finds that even had the claimant been treated less favourably than a hypothetical comparator would have been, the respondent has proved that the reason for the treatment was not because of race. The basis for that finding is the same as the factors relied upon in identifying the hypothetical comparator and explained in detail at paragraphs 98 a-c and d-f above. The respondent has proved, with those factors, that the reason for the treatment was the matters explained and it was in no sense whatsoever because of the claimant's race.

107. As with the issue of the comparator, Dr Tirohl disagrees and does not find that the respondent has proved that the reason for the treatment was not because of race. She does not find that the respondent has proved that the treatment was in no sense whatsoever because of the claimant's race.

The decision to dismiss (and the hypothetical comparator)

108. During submissions there was some disagreement about whether there was any difference between the outcome of the investigation and the decision to dismiss. The respondent's representative submitted there was no difference. The claimant's representative submitted that there was. On the basis of what he said, the respondent's representative suggested there was in practice no difference between

the conduct of the investigation and the outcome. The Tribunal accepts that the allegations do raise three different elements of alleged unfavourable treatment. The conduct of the investigation applied, in particular, to Mr Fenna and Ms Crewdson's approach to, and conduct of, the so-called fact finding meeting and the outcome meeting. The outcome of the investigation is contained in the email from Mr Fenna to Mr Bentley (263), that is his recommendation about what should be the decision to be made based upon his investigation. The decision to dismiss was evidenced by Mr Bentley's response later that day (264), that is the decision which the respondent contends was made collectively between Mr Fenna, Ms Crewdson and Mr Bentley, and which is stated in Mr Bentley's email.

109. Having identified that there are differences, for the purposes of considering how the hypothetical comparator would have been treated in practice, the relevant and material evidence and considerations were exactly the same for the allegations of outcome and decision. The decision made, whether collectively or by Mr Bentley individually, was entirely informed by, and reliant upon, the outcome of the investigation as recorded in Mr Fenna's email and the notes of the first meeting. There were no additional factors which applied. Therefore, the Tribunal's decisions as they applied to the outcome of the investigation also applied to the decision to dismiss, for the same reasons that are explained above. That is that the majority (Dr Tirohl dissenting) finds that a hypothetical comparator would have been treated in the same way in the decision to dismiss. The minority (Dr Tirohl) finds that a hypothetical comparator would have been treated differently. Similarly, the majority (Dr Tirohl dissenting) also finds that the respondent has proved that the reason for the difference in treatment in dismissal (if difference in treatment had been established) was not because of race, the minority (Dr Tirohl) does not. Whilst the collective decision makers may have included an additional individual decision maker in Mr Bentley and/or he may have ultimately made the decision to dismiss, the reasons for that decision in the view of the majority have been proved by the respondent to be in no sense whatsoever because of the claimant's race, for the same reasons as explained in respect of the outcome of the investigation.

The conduct of the investigation (and the hypothetical comparator), generally

110. In considering the conduct of the investigation, the Tribunal has considered the evidence available about other investigations, when considering the hypothetical comparator. The investigations undertaken for Mr Rushton, another casual support worker subject to the fact finding process, demonstrated a far more even-handed approach, genuinely consistent with a fact finding exercise. That was evidence of the approach of this respondent, albeit demonstrating the approach of a different manager. Also of assistance were the notes of the approach of the same managers (Mr Fenna and Ms Crewdson) to a fact finding meeting with a casual support worker, Mr Ellis (458e). Those notes were also of a meeting which led to the worker ceasing to be offered shifts on the Bureau. Notably that meeting began in a more even-handed way which was not indicative of a pre-conceived decision in the same way as Mr Fenna's meeting with the claimant was on 15 February. However, the notes do record, later in the meeting with Mr Ellis, that Mr Fenna took a similar approach in which he challenged the attendee robustly from a position of having decided what had occurred.

111. The Tribunal unanimously found that the conduct of the investigation was neither fair nor even handed. The so called fact finding meeting did not endeavour to find the facts, the facts having already been determined in the minds of the managers conducting the meeting. The Tribunal is also unanimously of the view that the absence of any identification of the seriousness of the race discrimination allegations made in the second meeting, and the lack of material steps undertaken to consider or address the concerns, was: surprising; not good practice; and demonstrated a lack of regard for discrimination issues. The absence of engagement with what was being alleged, and the failure to investigate further following the meeting, fell short of what would be expected of a reasonable employer (even when considering a casual worker who was not an employee).

112. Whilst agreeing on these matters, the Tribunal panel did not however agree on the determination of the claimant's direct race discrimination claim that the conduct of the investigation was less favourable treatment (based upon a hypothetical comparator) as explained below.

The decision of the Tribunal on the conduct of the investigation and the hypothetical comparator (the majority view)

113. The majority find (Employment Judge Phil Allen dissenting) that a hypothetical comparator would have been treated differently in the way in the which the investigation was conducted. The majority places particular weight upon the evidence of fact finding meetings for other staff and, in particular, Mr Fenna's approach to the meeting with Mr Ellis, particularly the start of that meeting. The conduct of the meeting with the claimant on 15 February from the start, was aggressive towards the claimant and demanded full acceptance of the alert from Mr Hoy. The claimant expected to be coming to a meeting which Ms Crewdson had informed him was not about a serious matter. Instead he faced serious allegations of misconduct from the start.

114. The majority (Employment Judge Phil Allen dissenting) also find that the claimant has shown the "something more" required to reverse the burden of proof, in respect of the claimant's allegation that the conduct of the investigation was less favourable treatment on grounds of race. That "something more" is considered in the circumstances of the pre-determined and unreasonable way in which Mr Fenna and Ms Crewdson conducted the meeting which was stated to be one to find the facts, including closing down the claimant when he endeavoured to explain things and taking no notice whatsoever of the apology offered by the claimant at the end of the meeting – that is the claimant expressing the very thing which Mr Fenna said that he sought. The majority have considered the "something more", in the light of the difficulties for claimants and the correct approach outlined in **Amnesty International v Ahmed** and **Glasgow City Council v Zafar**. They find that the lack of any measured response by Mr Fenna or Ms Crewdson to the raising of serious allegations of race discrimination and the contention that there had been collusion by people who were not present at the time of the stated events, was the "something more" required to inform the decision about the conduct of the investigation (even though occurring after much of the investigation had been conducted). The attendees neither investigated what the claimant said by speaking to the witness he referred to nor checked the CCTV system which was available, nor took any steps to report or record the allegation made. The attendees were being told something very

important, but did nothing to establish the details of what was being alleged or the facts. This act of omission and the closing down of the claimant when raising race discrimination, in the decision of the majority provides the "something more". The attendees blamed the claimant for getting angry and shouting and did not stop to ask themselves if there could be a reasonable basis for that anger which warranted investigation, before the decision not to use the claimant again was implemented.

115. The majority (Employment Judge Phil Allen dissenting) also find that, the burden of proof having reversed, the respondent has not shown that the treatment of the claimant in the conduct of the investigation was in no sense whatsoever because of race. The shutting down of the second meeting and the dismissal of the fact that race could be a factor was indicative of closed minds.

The dissenting/minority view on the conduct of the investigation and the hypothetical comparator

116. Having carefully considered the evidence and taking account of the factors which applied to a hypothetical comparator in not materially different circumstances as highlighted at paragraphs 98-100 above, the minority of the Tribunal (Employment Judge Phil Allen) finds that the claimant was not treated less favourably than a hypothetical comparator of a different race would have been. The conduct of Mr Fenna later in the meeting with Mr Ellis was noted, which appeared to be the way in which Mr Fenna conducted the meeting from the point in that meeting at which he had made up his mind about what occurred. Taking into account Mr Fenna's approach to the so-called fact-finding meeting with the claimant, his evidence about what he had already determined ahead of the meeting with the claimant and why, and his stated view about what he was doing in the meeting (that is giving the claimant the opportunity to understand what had occurred and in practice demonstrate contrition and lessons learned), the minority find that a hypothetical comparator would have been treated in the same way.

117. The minority (Employment Judge Phil Allen) also does not find that the claimant has demonstrated the "something more" required to reverse the burden of proof. That decision is based upon consideration of the meeting, the conduct of it in the context of all the circumstances, and the factors already explained in respect of the outcome of the investigation. The minority has considered the way in which Mr Fenna and Ms Crewdson reacted to the allegation of race discrimination in the second meeting and the woeful lack of any attempt to formally address that allegation or give such a serious complaint the consideration and gravity it deserved. However, the minority finds (which differs from the majority) that such lack of awareness about the appropriate way to respond to serious discrimination complaints was a further extension of the same unreasonable and unfair conduct that was demonstrated by Mr Fenna in the first meeting and therefore did not constitute the "something more" required to demonstrate that the unreasonable conduct was on grounds of race. As explained in **Bahl v The Law Society** and **Zafar v Glasgow City Council** the respondent acting unfairly and unreasonably is not sufficient to show the "something more", particularly in a situation such as this where the unfair and unreasonable process was one applied to a casual support worker who had no statutory unfair dismissal rights and to which the respondent did not apply the full and detailed procedures and consideration which it would apply to employees. A failure to be attuned to the seriousness of complaints of race

discrimination (and alleged collusion) was not "something more" which showed that the reason for the initial treatment was the claimant's race. In addition, the minority has also taken into consideration that the second meeting arose where the claimant's own trade union representative stated that the discrimination complaint had no basis and did not make any attempt to persuade the respondent's attendees that the matter was a serious one and should be addressed, and has accordingly found that the failure to do so did not shift the burden of proof.

118. For similar reasons to those outlined in respect of the hypothetical comparator and the outcome of the investigation, the minority (Employment Judge Phil Allen) also finds that the respondent has proved that the reason for the treatment in the conduct of the investigation was in no sense whatsoever because of the claimant's race. The basis for that finding is the same as the factors relied upon in identifying the hypothetical comparator and explained in detail at paragraphs 98 a-c and d-f above. The treatment (unreasonable and unfair as it was), was not because of the claimant's race, it was, in summary, because of Mr Fenna's and Ms Crewdson's pre-determined decision about the complaint made and the credibility of the account given by Mr Hoy (perceived as being corroborated by others), when undertaking an investigation involving a casual support worker with no employment rights and to which the respondent's employee procedures did not apply.

Other matter

119. The Tribunal would highlight that it entirely understands and appreciates the importance of alerters in a service being provided to vulnerable adults. People feeling free and able to alert is of the utmost importance in such an environment and it is important that alerters must not be discouraged. Alerting should be encouraged, even where the alert may be wrong or incorrect, to ensure that an alert is raised on the very occasion when it does bring to light and stop the potential for abuse of a vulnerable adult. The Tribunal has considered the claimant's claims for direct race discrimination and has explained the reasons for the decisions reached. However, nothing in what has been said, should be read as being critical of people for alerting where they perceive that there is a risk to a vulnerable adult, or to limit the need for such alerts to be appropriately investigated.

Summary

120. For the reasons explained above, the Tribunal has found that the claimant was directly discriminated against on grounds of race contrary to section 13 of the Equality Act 2010 in the conduct of the investigation undertaken by the respondent into the events of 28 January 2019. The claimant's other claims have not been found and are dismissed.

Employment Judge Phil Allen

23 August 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

25 August 2021

FOR THE TRIBUNAL OFFICE

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