



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Salumah

**Respondent:** A2Dominion Housing Group

**Heard at:** Central London

**On:** 5 - 7 October 2021 & 8 October 2021 (In Chambers)

**Before:** EJ Brown  
**Members:** Ms C Ihnatowicz  
Mr R Baber

**Representation**  
Claimant: Mr G Agbi (Trade Union representative)  
Respondent: Mr P Gorasia (Counsel)

## JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The Respondent did not discriminate against the Claimant because of race.
2. The Respondent did not unfairly dismiss the Claimant.

## REASONS

1. By a claim form presented on the Claimant brought complaints of unfair dismissal and race discrimination against the Respondent, his former employer.
2. The List of Issues in the unfair dismissal claim, had been agreed as follows:
  - A. UNFAIR DISMISSAL (Section 98 of the Employment Rights Act 1996 (ERA))

Liability

1. What was the reason for the Claimant's dismissal?
2. Was the reason a potentially fair reason within Section 98 (2) of the ERA?

2.1 The Respondent relies upon the potential fair reason of conduct.

3. Did the Respondent act reasonably in treating that reason as sufficient for dismissal?

3.1 At the time the decision to dismiss was made, did the Respondent have reasonable grounds for its belief into the Claimant's misconduct;

3.1.1 The Claimant states there are no reasonable grounds as:

(a) there was a failure to provide appropriate training/ supervision/ support

(b) others were aware of the information but only he was dismissed

(c) there was a failure to provide adequate staff and training

(d) he was dismissed for an incident which occurred outside his normal working hours

(e) he was discriminated on the grounds of race

3.1.2 The Respondent denies these allegations.

3.2 Were those grounds based on a reasonable investigation?

3.2.1 The Claimant criticises the investigation as he states he not allowed a representative during the internal meeting and the outcome of that meeting was linked to the decision to dismiss.

3.2.2 The Claimant further states he was not given the opportunity to call witnesses.

3.2.3 The Respondent denies these allegations.

4. Was the dismissal procedurally fair?

4.1 The Claimant relies upon paragraph 3.2.

5. Did dismissal fall within the band of reasonable responses (Sainsbury's Supermarkets Ltd –v- Hitt)

5.1 The Claimant would argue no for reasons detailed at paragraph 3.1.1 and 3.2.1/2 above

6. Has the ACAS Code of Practice regarding disciplinary matters been followed?

Remedy (if applicable)

1. What is that period of future loss of earnings to be awarded?

2. Has the Claimant taken reasonable steps to mitigate his loss?

3. Did the Claimant's conduct contribute towards his dismissal such that the basic or compensatory awards should be reduced?

4. If there was a flaw in the dismissal procedure adopted by the Respondent, would a fair procedure have resulted in the Claimant's dismissal in any event such that the compensatory award should be reduced? (Polkey -v- A E Dayton Services Limited)

**B. RACE DISCRIMINATION (Equality Act 2010)**

Did the Respondent treat the Claimant less favourably than his comparators because of race when it dismissed him

The Claimant relies on his black African ethnicity and compares himself with 2 white colleagues, Colin Roe (CR) and Kelly Hienaux (KH)

3. The Tribunal heard evidence from the Claimant and from Rachel Manning, a fellow former employee at the Respondent. It heard evidence from: Joanna Evans, investigating officer; Fiona Meaden, Head of Care at the Respondent and disciplinary hearing manager; and Pam Vasir, appeal manager, for the Respondent.
4. There was a Respondent's Bundle of documents and skeleton arguments from both parties. Page numbers in this judgment refer to the Respondent's bundle. Both parties made submissions.
5. The Tribunal reserved its judgment.

### **Relevant Facts**

6. The Respondent Company builds, manages and sells housing, and is a housing association operating primarily in London and Southern England. It employs approximately 1,100 employees, with 240 of these working in its Care and Support division.
7. The Claimant, who is of black African ethnicity, was employed by the Respondent to work at its City Road project in Winchester. The Respondent had been commissioned by Hampshire County Council to provide supported accommodation Stage 1 (High Need, category 3/4) and Stage 2 (Medium Need, category 2/3) to Young People aged between 16 and 21. Its City Road building housed the Stage 1 clients pursuant to this agreement with Hampshire CC. At City Road, each young person was given a licence to a single room and access to a communal areas including a kitchen. The Respondent's service at City Road also provided a housing-related support package, to enable young people to become more independent, avoid eviction and repeated homelessness, engage in employment, education or training and access other services.
8. The Respondent is a housing provider rather than a care provider; it is not registered with the CQC.
9. The Claimant commenced employment at City Road on 19 October 2015, p46 – 61, as a Support Officer and Intensive Housing Management Officer. He was promoted to Senior Support Officer on 1 June 2018, p62.
10. The role profile for Senior Support Officer, p65, 67A - 67C, provided that the Claimant's Key Responsibilities included "Report any concerns relating to safeguarding of vulnerable people using the correct procedures, attending case conferences and other meetings as required", p65. The skills required for the role included "Knowledge of child protection requirements and reporting safeguarding concerns", p 66.
11. Ms Evans told the Tribunal that safeguarding is very important in the Respondent. It is legally required to have safeguarding processes and procedures in place. She was not challenged on this and the Tribunal accepted her evidence. She told also the Tribunal that the Respondent has a safeguarding strategy and an in-house central safeguarding team who are

available to advise and support staff when they raise a concern. Again, the Tribunal accepted that evidence.

12. The Respondent's relevant Safeguarding Children Policy, which applied in 2019/2020, was at Bundle p 114 - 125. Its Safeguarding Children Procedure was at p 126 - 133

13. The Safeguarding Children Policy provided, p115:

"2.4: It is the responsibility and obligation of all A2DBoard/Committee Members, staff and volunteers, under this Policy, to take action if they have any concerns, suspect or are disclosed information about the suffering or abuse of a child or children.

Staff will report concerns they have about a child immediately, or as soon as reasonably possible, within 24 hours (including weekends) to their Line Manager and/or Champion via the online incident form. After discussion an action plan will be agreed to refer to Children's Social Care where there are concerns of immediate significant harm. This may necessitate informing the police."

14. The Safeguarding Children Procedure provided, p126

" 1.1 These procedures set out the actions that must be taken, when and by whom, where there are any concerns relating to the protection of children from harm or abuse. They have been agreed and endorsed by the Executive Management Team and apply to all staff. Failure to comply with them is a disciplinary offence.

...

1.1.3 All children are entitled to protection from harm or abuse. You may become aware of the possibility of abuse through any number of means. If you see, hear or are told anything that makes you concerned that a child may be at risk of abuse or is being, or has been, abused you must share that concern with the designated person and the Safeguarding Team as set out in this procedure.

....

1.2.6 It is essential that you share any concerns you may have immediately with your Line Manager and the Safeguarding Team following these procedures along with the Policy. You must not wait to see whether there really is a problem, nor should you make enquiries to determine whether abuse has happened. The protection of children is a complex area, which requires specialist skills and knowledge and any actions you may take could affect the outcome of any subsequent legal process.

....

3.1.1, Where staff are concerned about a child or young adult being abused by any of the definitions detailed in the Policy.. you must report concerns you have about the child as soon as is reasonably possible and within 24 hours (including weekends) to the Safeguarding Team via the Online Safeguarding Form, and to your Line Manager."

**Case No: 2205798/2020**

15. The Policy defined abuse as follows, p116 – 119: “Abuse includes physical abuse, sexual abuse, emotional abuse, neglect, domestic abuse, and self-harm, amongst other forms of abuse.” It said, “**Historical Abuse** There may be occasions when an adult will disclose abuse (either sexual or physical) which occurred in the past, during their childhood. This information needs to be treated in exactly the same way as a disclosure or suspicion of current child abuse. ..”.
16. The Policy also defined self harm. “Self-harm is when somebody intentionally damages or injures their body. It’s usually a way of coping with or expressing overwhelming emotional distress... “.
17. The Claimant undertook a 6 month probationary period at the start of his employment. During that time, he was required to complete the Respondent’s mandatory induction training.
18. In his application for the Senior Support Officer role in 2018, p61e, the Claimant stated that he had received training in safeguarding. He gave an example of having completed a safeguarding form.
19. In evidence, the Claimant agreed that he knew the safeguarding procedure and had followed it. Between 2015 – 2020 the Claimant had completed 19 safeguarding referrals.
20. The Respondent completed an audit at its City Road premises in January 2019. The audit had been conducted over a three-month period starting in October 2018. The audit reported that the service met its contractual obligations and noted that all staff were clear on safeguarding policies and procedures and that all safeguarding reports were up to date.
21. On 20 January 2020, a resident of the City Road project (KW) attempted to take her own life by hanging herself in her room. She was admitted to hospital and very sadly later died on 25 January 2020.
22. The Claimant was present in the City Road building at the time. He found KW and called the emergency services.
23. At the Tribunal hearing, the Claimant and Ms Manning, his witness, who was a former colleague, said that a number of employees had resigned from their employment at the City Road project before the sad events concerning KW.
24. The Respondent agreed that staff, including Ms Manning, had resigned. Ms Evans said that, at the time leading up to KW’s death, the Respondent had been covering staff shifts by using agency workers and by overtime worked by existing staff.
25. Ms Evans told the Tribunal that City Road was not understaffed and that the Respondent provided sufficient staff for every shift, as required under its contract with Hampshire County Council. She said that some of the agency staff which the Respondent used were long term agency staff. This included Rachel Chawana, KW’s key worker.
26. The Respondent’s witnesses drew the Tribunal’s attention to documents in the Bundle which showed that the occupancy rate at City Road was only

about 50% in January 2020 and December 2019, p472. This meant that the contracted staffing levels at City Road would actually have been more than adequate for the number of residents.

27. The Claimant's line manager, Sandra Price, was off work on sick leave for 9 weeks at the end of 2019 and in January 2020. She returned to work on 20 January 2020. In her absence, Benn Kiley acted as the Claimant's line manager.
28. The Claimant contended, generally, that the training provided by the Respondent was inadequate. However, he did not give evidence regarding any way in which the Respondent's safeguarding training was inadequate. He did not say at the Tribunal that he did not know how to make a safeguarding referral.
29. The Claimant contended that it had been Kelly Hiernaux's responsibility to make the safeguarding referral for KW. He also said that it had been "everyone's responsibility" to raise the safeguarding referral. In particular, the Claimant said that Benn Kiley, who was his manager, should have raised the referral.
30. The Claimant also told the Tribunal that he and Ms Hiernaux had done everything that needed to be done – that essentially, they had safeguarded KW. He said, " I felt that the officers who had done the investigation were focusing on safeguarding. We had done things to safeguard but we had not raised the internal safeguarding . Even if we didn't do the safeguarding form we did everything to do with safeguarding"
31. The Claimant was suspended on full pay on 21 January 2020 whilst the Company carried out an investigation.
32. At the Tribunal hearing, the Claimant's skeleton argument said that the Claimant was not told that suspension was not a disciplinary act. However, the Claimant did not give oral evidence that this was the case.
33. In the Claimant's suspension letter, he was told that he was not permitted to "contact staff members, contractors, clients and suppliers, or use any of the facilities of A2 Dominion without prior permission from your Line Manager", p201A.
34. The Respondent's Disciplinary Policy and Procedure p96, states that suspension is not a disciplinary act, p98. The letter of suspension, dated 29 January 2020, attached the disciplinary policy to it, p201A-B. The investigation letter said that there would be an investigation into the Claimant's conduct on 20 January 2020 in relation to a resident who was in need of medical assistance and the Claimant's conduct whilst working with the resident before 20 January 2020.
35. Joanne Evans was appointed as the Investigating Officer. Ms Evans told the Tribunal that she had 13 years experience in similar organisations, including at a senior level. She said that she had also worked on the front line in hostels. She said that the circumstances relating to KW were an unusual and very serious situation and that she consulted with HR and agreed that with HR it was appropriate for Ms Evans, rather than the Claimant's line manager, to

conduct the investigation. Ms Evans told the Tribunal that she considered that she had the necessary experience to carry out the investigation.

36. The Respondent's Disciplinary Policy and Procedure, p96, provides "Where an allegation or complaint has been made which may be a disciplinary matter it will be necessary to carry out preliminary investigations in order to decide whether a formal investigation is necessary. These will generally be conducted by the line manager and may include a review of documentary evidence or discussion with witnesses." p97.
37. Ms Evans invited the Claimant to an investigatory meeting on 24 January 2020. Before the meeting, Ms Evans viewed the CCTV footage of 20 January 2020. She noted to see that the footage appeared to show the Claimant opening KW's room, but not going in himself, but instead allowing another resident to enter the room in front of him and, as a result, to find KW. She saw that the footage appeared to show the Claimant then closing the door but reopening it to allow 2 other residents, who were both aged under 18, to enter or look into the room, pp184 - 185.
38. Ms Evans also reviewed KW's contact sheet, pp162 - 176. The contact sheet recorded the conversations or discussions which workers had with KW and also contact with external agencies regarding KW.
39. The entries included the following records. On 16 December 2019, by Kelly Hiernaux, Bank Support Worker: "SM [another resident] told staff today that [KW] had attempted to take her own life a few weeks ago. I have asked [KW] into the office this evening and we had a good chat about what may have led her to feel like that....She told me that [the Claimant] has already given her the Samaritans number and I told her she could also ring 999 at any time and she can always wake the security guard up too". P169.
40. On 19 December 2019, by the Claimant: "I caught up with [KW] in front her bedroom door and sort of to find out how she was doing. The underlying issues are still there such as depression, anxiety and suicidal tendencies. She had been to the GP and was referred to CAHMS. [KW] believes it will take more than six months to be seen by CAHMS. I said to [KW] I don't believe it will take that long but advised [KW] strongly to sit down with a staff member to ring the GP together to push for an urgent appointment with CAHMS. I have also advised [KW] to be referred to in house counselling which Kelly kindly did with her yesterday. In writing this note, I will give Samaritan's Leaflet to [KW] to contact if she is feeling overwhelmed". Pp 170 -171.
41. Other notes in KW's file included a counselling referral form completed by Kelly Hiernaux, which recorded that the reason for the referral was the fact that KW had been experiencing suicidal thoughts and self-harms and had tried to take her own life within the past month, p178.
42. Ms Evans conducted an investigatory meeting with the Claimant on 24 January 2020, pp 192 - 199.
43. The Respondent's disciplinary procedure states, 26.1 "Whilst employees do not have a statutory right to be accompanied at investigation meetings, if this will aid the investigation process by making the employee feel more comfortable, the Investigating Officer may allow it".

44. The Claimant did not ask to be accompanied at this investigation meeting. Ms Evans told the Tribunal, however, that if the Claimant had asked to be accompanied and had explained his request, she would have considered it.
45. During the investigatory meeting, the Claimant said that on 20 January 2020 he had finished his shift but remained on site as he was waiting to see another resident. A resident, SC, told the Claimant that she was worried about KW as she had not heard from her and could not contact her. The Claimant obtained the master key for KW's room and asked the security guard to join him. Along with SC, they went to KW's room. The Claimant said that he had opened the door, but instead of entering himself, he allowed SC to enter. SC found KW hanging from the wardrobe door. The Claimant told Ms Evans that he went in and shook KW and the security guard called 999.
46. Ms Evans observed, during the investigatory hearing, that the CCTV did not show him going into the room at all. The Claimant responded that he just shouted out. Ms Evans asked him why he had permitted another resident go into the room. The Claimant said that he was not thinking rationally.
47. Ms Evans also asked the Claimant whether staff knew of concerns relating to KW. She specifically referred to the contact the Claimant had had with KW on 19 December 2019. Ms Evans asked the Claimant whether he had raised a safeguarding referral, internally or externally. The Claimant replied, "No, because I believed there was no reason to raise because these are the issues. How can she be safeguarded? How can those professionals do anything? She sees those professionals already. Fine, safeguarding is going on, but making the referral isn't going to help her. If anything will help, it's the GP or the counselling. I'd asked for her risk assessment to be updated" p197.
48. Ms Evans checked with the Claimant whether he was aware of the Respondent's internal safeguarding procedure and whether he had had training. He confirmed that he had, p198.
49. She also asked the Claimant whether he had made a decision not to refer KW to safeguarding because he had referred another resident to safeguarding previously and had been disappointed with the outcome. The Claimant replied "yes", p197.
50. The Claimant added later, p199, "I don't think there's anything else we could have done. Safeguarding – I don't know if that could have improved the situation. I think everyone that could be involved was already involved".
51. Ms Evans advised the Claimant that he could use the Respondent's Employee Assistance Programme if he needed to speak to anyone, p199.
52. Ms Evans told the Tribunal that Sandra Price, the Claimant's line manager, maintained contact with the Claimant and arranged counselling sessions for him.
53. Ms Evans sent the notes of the investigation meeting to the Claimant, who added, at the end, that although the safeguarding referral was not raised internally or externally, it wasn't a decision he took not to do, p202.



54. Ms Evans told the Tribunal, however, that, in her view, the examples the Claimant used during the investigation meeting indicated he had actively made a decision not to make the referral because he did not believe it would have made a difference. Ms Evans told the Tribunal that this was not the Claimant's decision to make.
55. Ms Evans also interviewed the security guard, pages 200 to 201. He confirmed that no one went into KW's room to check for signs of life.
56. The Respondent's Keys, Room Inspections and Access Procedure, pp 68 - 77 provides "3.6.1 If there is no response to the intercom or the doorbell or knock and the SSO/CCO/SW has real concern for the safety of the resident, they may enter the flat using the master key. Whenever possible the SSO/CCO/SW should ask a responsible witness to be present unless there is reason to believe that immediate entry is necessary." P 71.
57. The Respondent's Dealing with a Death Procedure, pp89 – 95, provides
- "3.1.1. Upon finding a resident who appears to be deceased (unless the resident has a DNACPR in place) use basic first aid training to ascertain whether there is a pulse or if the person is breathing. First aid and resuscitation should be administered as appropriate, if feel confident and competent in doing so".
- "3.1.2 The flat/room should be kept locked and secure until the ambulance/GP confirm that the resident is dead and the body is removed". P90.
58. Ms Evans prepared an investigation report, pages 210 to 220. She set out her conclusions at pp217 – 219. Ms Evans stated that the Claimant had been aware of disclosures made by KW relating to suicide attempts and self-harm. She stated that there was evidence that the Claimant had breached the Respondent's Safeguarding Children Procedure and Professional Boundaries Policy in that he had failed to make a safeguarding referral when concerns came to light in December 2019 regarding KW's depression, anxiety and suicidal thoughts. She said that it appeared that the Claimant had breached Keys, Room Inspections and Access Procedure in that, when concerns regarding KW's welfare were raised, he had allowed another vulnerable resident to enter KW's room before him, even though he had another member of staff present as a witness. She also said that there was evidence that the Claimant had breached the Respondent's Dealing with a Death Procedure, in that he had failed to check KW for signs of life or perform basic first aid; and he had then allowed another vulnerable resident to access the room after he was aware that they would see KW hanging.
59. In her investigation report, Ms Evans said that the following staff were interviewed following the incident: the Claimant, along with the security guard on the night, Kelly Hiernaux, Colin Roe, Rachel Chawana, Sandra Price and Benn Kiley. p212.
60. Ms Evans said that only the Claimant and the security guard's statements were used in the investigation.

61. Ms Evans was asked about this at the Tribunal hearing. It was put to her that Ms Hiernaux, who had discussed KW's disclosures about self harm and abuse with the Claimant, would clearly have had relevant evidence to give to the investigation and that her interview should not have been excluded.
62. Ms Evans told the Tribunal that everything that Ms Hiernaux had said in her interview had already been recorded in KW's contact sheet. KW's contact sheet was included in the investigation report and was therefore provided to the Claimant. She said that there was nothing additional which Ms Hiernaux had said in the investigation. She also said that the other witnesses did not give any additional evidence which was relevant to the investigation into the Claimant's actions.
63. The Claimant did not tell the Tribunal about what Ms Hiernaux might have said, different to the matters recorded in the contact sheets, which would have been relevant to the investigation and should have been included in the investigation report.
64. The Claimant said at the Tribunal, on a number of occasions, that there were inaccuracies in Ms Evans investigation report, but he did not say what these inaccuracies were.
65. The Claimant told the Tribunal that Colin Roe was also aware of KW's issues because he would have seen KW's contact sheet in the course of his work. The Tribunal accepted that Mr Roe may well have seen KW's contact sheet, but the Tribunal also accepted Ms Evans' evidence that Mr Roe was not a key worker and had not spoken directly to KW about her disclosures of abuse and self harm, so did not have a complete picture.
66. The Respondent's disciplinary policy and procedure sets out examples of gross misconduct offences, p104. These include "serious breach of the Company's rules", and "gross negligence".
67. Ms Evans decided to refer the allegations against the Claimant to a disciplinary hearing.
68. Ms Evans also investigated the actions of Kelly Hiernaux, who had also failed to make a safeguarding referral in respect of KW. Ms Evans referred Ms Hiernaux to a disciplinary hearing for potential gross misconduct.
69. In addition, KW's assigned support worker, Rachel Chawana, had failed to make a safeguarding referral for KW. She was an agency worker. The Respondent told the agency that they should no longer supply her to the Respondent.
70. Kelly Hiernaux was invited to a disciplinary hearing on 19 May 2020, p224. The allegations against her were that she had failed to observe the Group's Professional Boundaries Policy in that she did not act upon information relating to safeguarding issues raised to her by KW on 16 and 19 December 2019, and that she had failed to follow the Group's Safeguarding children Procedure, in that she failed to report safeguarding concerns relating alleged abuse, attempted suicide, suicidal thoughts and self harm, p224, .

71. Fiona Meaden, Head of Care at the Respondent, conducted Ms Hiernaux's disciplinary hearing.
72. During the disciplinary hearing, Ms Hiernaux confirmed that KW had reported to her that she had tried to take her own life and Ms Hiernaux had noted this in the contact form. She said she had also asked KW's key worker to read the contact form and to support KW with attending her GP, p226.
73. Ms Hiernaux said that she agreed that she did not implement the safeguarding procedure fully, p226. She said that she had raised KW's disclosures with her line manager, the Claimant, within 24 hours, but had not completed the safeguarding referral form, p226. Ms Hiernaux said that the Claimant "always told me you didn't need to raise safeguarding form for historical events... I was operating under the false assumption from the guidance of my senior that safeguarding was not needed for historical abuse" p226.
74. Ms Hiernaux said, on several occasions in her disciplinary hearing, that she accepted that she ought to have completed a safeguarding form "I take everything you're saying on board.. I take everything you said on board, I admit the mistake." P227.
75. Ms Meaden decided to give Ms Hiernaux a Final Written Warning.
76. In the disciplinary meeting, Ms Meaden told Ms Hiernaux that the safeguarding breach was a serious breach under the group's disciplinary procedure. She noted that Ms Hiernaux had taken numerous steps to safeguard KW, referring her to her GP, Counselling and Samaritans, p228.
77. In the letter to Ms Hiernaux confirming the sanction, dated 21 May 2020, p230-1, Ms Meaden said that Ms Hiernaux had not followed the Group's procedure in ensuring that an internal and external referral was made, so that the Group had failed in its statutory duty. Ms Meaden said that this was a serious breach of the Group's rules and could result in dismissal.
78. Ms Meaden, however, noted the actions Ms Hiernaux had taken, including reporting KW's disclosures to her line manager, the Claimant, within 24 hours, p231.
79. Ms Meaden also told the Tribunal that she took into account that Ms Hiernaux had only been employed since October 2018 on a zero hours contract as a bank member of staff and therefore had considerably less experience than the Claimant.
80. The Claimant told the Tribunal that it was everyone's responsibility to make a safeguarding referral. He said that Ms Hiernaux sent KW's counselling referral form to Benn Kiley on 19 December 2019, who was the Claimant's line manager. The form said that the reason for the referral was that KW had been experiencing suicidal thoughts and self harm and had tried to take her own life in the past month. It also said that she had had a traumatic childhood and was abused emotionally and physically by family members, p178.
81. He said that Mr Kiley would therefore have been aware, in December 2019, that KW had disclosed both self harm and historic abuse. The Claimant said

that, if the Claimant was culpable for failing to make a safeguarding referral when he became aware of these matters, Mr Kiley was also culpable as the Claimant's line manager, when he became aware.

82. Ms Meaden told the Tribunal that that she considered that Ms Hiernaux did take some action by informing her manager, the Claimant, and had shown some duty of care, even though she had less experience. Ms Meaden said that she noted that Ms Hiernaux had been thoroughly remorseful about her actions and her failure to make the safeguarding referral.
83. Ms Meaden said that these were the reasons that she issued a final written warning. She denied that this was anything to do with Ms Hiernaux's race. Ms Hiernaux is white.
84. Fiona Meaden also conducted the Claimant's disciplinary hearing on 26 May 2020, p232. The hearing had been delayed while the Local Authority Designated Officer and Police investigations were concluded. No charges were brought by the Police.
85. The allegations against the Claimant were as follows:
  - 85.1. Failing to raise a safeguarding referral;
  - 85.2. Did not act appropriately on the night of 20.1.20 when accessing KW's room;
  - 85.3. Did not act appropriately on the night of 20.1.20 in checking for signs of life of KW;
  - 85.4. Did not act appropriately on the night of 20.1.20 by allowing further access to the room by clients.
86. Each allegation was discussed during the disciplinary hearing,.
87. The Claimant said, regarding Allegation 1, that he was not aware that KW had attempted to self-harm as, when he spoke to KW, she had denied it. Ms Meaden referred the Claimant to an entry in KW's Contact sheet, pp170-1, where he had referred to KW's 'suicidal tendencies'. Ms Meaden said that KW had said on more than one occasion that she had self-harmed and tried to commit suicide. She observed that KW had disclosed important safeguarding information which the Claimant had a responsibility to report. The Claimant responded that the information was for everyone and it was for her key worker to raise a safeguarding referral - and if one was not raised he would not know it, p235. He repeatedly said that the information was available to the whole team. He denied that he had responsibility to make a referral as senior support officer, p235.
88. Ms Meaden asked the Claimant, "So what is your role as the senior in leading the team and managing safeguarding?" The Claimant said that, as a senior working with a team of 3, if they reported safeguarding matters to him, he then reported to his own line manager.
89. The Claimant was asked if there was anything else he wished to add on allegation 1 and he said no.
90. Regarding allegation 2, the Claimant said that he was following common sense as he had been told that no staff member should go into a room on their own. He said that, if the resident was female, he should be accompanied

by a female member of staff. He said that he should have received more training on how to access a room appropriately.

91. Regarding allegation 3, Ms Meaden said that the CCTV and the security guard's statement showed the Claimant did not enter the room and therefore did not check for signs of life. The Claimant said he had not been trained to deal with what he had witnessed. He said that he was not confident and competent to deal with the situation.
92. Regarding allegation 4, the Claimant said that he was traumatized and could not think properly.
93. Ms Meaden checked when policies had been drawn to staff's attention. She told the Tribunal that she had found that, on 22 December 2016, staff had been sent an update on the Dealing with a Death procedure and the Keys, Room Inspections and Access Procedure, p242. She said that, on 8 February 2019, the Keys, Room Inspections and Access policy had been further updated, as staff had not been following the guidance in respect of room inspections, p244-5. On 21 May 2019, a further reminder had been sent out about the Keys, Room Inspections and Access procedure, p247.
94. Ms Meaden also spoke to Benn Kiley, Service Manager, and Sandra Price, Team Leader, about whether it was correct that the Claimant had been told that a staff member should never go into a room on their own and, if the resident was female, there should be a female member of staff present. Both confirmed this was not correct and that the practice would be impossible to implement because the service was often staffed by lone workers who might be male. Both agreed the Keys, Room Inspections and Access procedure was the correct procedure, p 249.
95. Ms Meaden wrote to the Claimant on 3 June 2020, dismissing him for gross misconduct, p250.
96. In her letter she said that, regarding allegation 1, during the investigation meeting, the Claimant had seemed to indicate that he did not make a safeguarding referral because he did not think it would help. However, later, he had said that he had not made a conscious decision not to make a referral. Ms Meaden said that his responsibility was to make a referral. She also said that the Claimant was aware of the procedures, but failed to report the matter internally to his line manager, or externally to the Local Authority Safeguarding Team. She said that the Claimant had made referrals previously but had not taken responsibility for ensuring that a referral was made for KW and that the Company's statutory obligations were therefore complied with. She said that the Claimant had a responsibility to lead the team to ensure that policies and procedures were adhered to. She said that failure to report a safeguarding issue was a serious breach of the Groups rules and that this was gross misconduct, p251
97. Ms Meaden told the Tribunal that she considered the appropriate sanction in relation to allegation 1. She said that she felt that the Claimant's failure, either to make the safeguarding referral, or to ensure that it had been made, amounted to gross misconduct. Ms Meaden said that the Claimant knew how to make the referral but had not done so. She also told the Tribunal that she was concerned that, despite being the Senior manager, he had refused to

accept any responsibility. She therefore considered the appropriate sanction to be summary dismissal.

98. In her dismissal letter Ms Meaden also found allegation 2 to have been proven against the Claimant. She said that the Claimant had failed to follow the Keys, Room Inspections and Access Procedure by allowing another resident to enter the room before entering himself. He had therefore allowed a young resident to enter a room, when he knew that the wellbeing of the person inside was in question. She said that his comment about not entering alone, or entering with a female staff member, had not been corroborated.
99. However, Ms Meaden said that she noted the mitigation the Claimant had put forward about preserving KW's dignity. She said that she had therefore concluded that the appropriate sanction was final written warning.
100. Ms Meaden also found allegation 3 to be proven. She said that, contrary to the Dealing with Death Procedure, the Claimant had failed to enter the room and check for signs of life. She said that she accepted that this had been a traumatic situation, but decided it was negligent of the Claimant not to have checked for a pulse, or signs of life, by attempting to touch KW or shake her. Ms Meaden said that she had taken the fact that it was a traumatic situation into account and had therefore concluded that the appropriate sanction for this allegation was a first written warning.
101. Regarding allegation 4, Ms Meaden said that she had decided that the Claimant had opened the door and allowed another resident to enter the room where KW was hanging. Whilst Ms Meaden said that she accepted the Claimant's assertion that he was not thinking as he was traumatised, she said that she considered that the Claimant was guilty of gross negligence in opening the door to a vulnerable minor, knowing that they would face a traumatic scene. Ms Meaden said that, not only did the Claimant fail to secure the room, he also granted access to the room. She said that this was gross misconduct, for which the appropriate sanction was summary dismissal.
102. Ms Meaden dismissed the Claimant for gross misconduct. She informed him of his right to appeal, pp 250-4. In evidence, Ms Meaden denied that the reason she dismissed the Claimant, when she did not dismiss Ms Hiernaux, was anything to do with the Claimant's race.
103. Ms Vasir, who heard the Claimant's appeal, was asked at the Tribunal whether the Respondent had scapegoated the Claimant because he was a young black man. She said, "I do not accept that as a reason for the decision. It was decision taken on the basis of fact – the procedures require a safeguarding referral to be made and it was his responsibility. He could have escalated it but he did not."
104. Ms Meaden was asked in cross examination about whose responsibility it had been to raise a safeguarding referral. She said, "It was Ms Kiernaux's initially because she had received the information. It was also the Claimant's because he was made aware of the disclosure. He did not guide [Ms Hiernaux]. He did the contrary and he didn't refer it himself. The Claimant is fully aware of procedures and has had training and has made referrals as I

would expect him to have done. It became clear that he had made decision not to refer to refer for safeguarding. That is not his decision to make.”

105. Ms Vasir was also asked about the Claimant’s responsibility to raise a safeguarding referral. She said, “[The Claimant] was the person who it was alleged did not make safeguarding referral. This was addressed in the disciplinary and on appeal. He was the senior manager on site with interface with the vulnerable young person. The responsibility lay with him as senior officer on site.”
106. Ms Meaden was also asked about staffing levels at City Road and the impact of these on the Claimant’s actions. She said of staffing levels, “It was not raised as part of the hearing. I gave [the Claimant] numerous opportunities to say anything else to ensure that I had not missed anything. Staffing was not discussed and raised. With regard to staffing levels – the service was staffed per the contract . . . . Staffing did not affect his ability to make a safeguarding referral; he was doing one in relation to another person. He never gave me an answer about why he failed to make the referral. In fact he said it was not his responsibility.”
107. The Claimant appealed against his dismissal 10 June 2020, pp 255-7. In relation to allegation 1, he said there was no reason for him to suspect that KW was in imminent danger, because she had dismissed the claim of being suicidal when he had discussed the matter with her. He said that he had referred KW to her GP, had signposted her to the Samaritans and had checked on her attendance at college. He said that he had followed the safeguarding policy in accordance with the training he had received.
108. In relation to allegation 2, he said that he allowed the other resident to enter the room in order to protect KW’s dignity. He said that there were shortages of staff and a lack of supervision at City Road.
109. Regarding allegation 3, he said the trauma of the night had damaged him permanently. He said he had not been trained to deal with a death and therefore could not ascertain if KW was alive.
110. In relation to allegation 4, he said he had not willingly opened the door for the other resident to enter; he had done so in the heat of the moment. He said that, if he had been given training, he would have acted better.
111. The Claimant asked that all the circumstances of the incident be considered, including that he was not trained to deal with such a situation. He asked that the Respondent reconsider the decision to dismiss him and consider a written warning.
112. The appeal hearing was conducted on 2 July 2020 (via Zoom) by Pam Vasir, accompanied by Laura Wooster, Senior HR Business Partner, p 264 - 271.
113. At the appeal hearing, the Claimant said that he had been working for 24 hours and had experienced trauma, but had then been asked to attend an investigation meeting without a representative. He said that leading questions had been asked to incriminate him. He said that he believed he had been

treated unfairly, especially as he had stayed beyond his working hours on the night in question. He said, if he had not been at the hostel on the evening of 20 January 2020, he would not have been dismissed.

114. The Claimant denied that he was the decision-maker for the purposes of making the safeguarding referral. He said that four members of staff had been aware of KW's reported self harm, including Mr Kiley, his line manager, but only the Claimant had been disciplined. The Claimant said that the contact sheet would have been read by Colin Roe, who therefore also knew about the concerns, as well as agency staff, and they all had equal responsibility for raising the referral.
115. The Claimant said that, when Ms Hiernaux had come to him with concerns about KW, he had met with KW, who had dismissed the concerns and the Claimant had therefore raised it with Benn Kiley when he emailed him in December 2019.
116. The Claimant relied on a statement from Rachel Manning who had worked at City Road before the sad events in question, pp 272 - 273. Her statement said that the service was under pressure and, whilst policies and updates were sent to staff, no one had time to read them.
117. Ms Vasir dismissed the Claimant's appeal by letter dated 9 July 2020, pp 274 - 277.
118. Regarding allegation 1, Ms Vasir said that the Claimant had been made aware by his direct report (Ms Hiernaux) of the concerns regarding KW. Ms Vasir said that it had therefore been the Claimant's responsibility, as Ms Hiernaux's line manager, to either guide her to make the safeguarding referral, or to make it himself.
119. Ms Vasir told the Tribunal that she considered that the Claimant had not satisfactorily explained why he did not take either action.
120. In her appeal outcome letter, Ms Vasir said that this was a serious breach and a finding of gross misconduct was appropriate.
121. Ms Vasir reduced the sanction for allegation 4 but said that she had decided that, as one allegation of gross misconduct had been established, the decision to dismiss was appropriate.
122. At the Tribunal Ms Vasir agreed that in December 2019 Ms Hiernaux had sent a counselling referral form for KW, setting out KW's history of self harm and historic abuse, to Benn Kiley, the Claimant's manager, for his approval.
123. The Respondent's witnesses were asked in some details about Mr Kiley. It was put to them that Mr Kiley was also culpable in not making a safeguarding referral for KW, when he had seen the counselling referral form. Ms Vasir told the Tribunal that Mr Kiley is a Service Manager, 2 levels up the hierarchy from the team leader, and occupies a strategic, rather than operational, post. She said that the process for a safeguarding referral is for the safeguarding concern to be reported to the line manager and the referral then made. She said that it would not have been Mr Kiley's responsibility to



make the referral - he would normally have expected this to have been done by those to whom KW had raised concerns directly. Ms Vasir said that the same would have applied to Colin Roe, who was copied into emails about the counselling, but had not had the concerns specifically reported to him.

124. The Respondent's witnesses told the Tribunal that Mr Kiley had not been asked, at any time, about a safeguarding referral; nor had he been or asked for advice about whether KW's reports of self harm and historic abuse should be referred.

125. Ms Meaden was cross examined about the counselling referral sent to Mr Kiley. She said, "This was a referral for counselling rather than referral for safeguarding. It was reasonable on what was in front of me to decide that Benn Kiley did not have full facts in front of him but [the Claimant] and Ms Hiernaux did. Benn Kiley is in a strategic role. He is not involved day to day. The people on the front line are the support workers and seniors. Those people should have made the safeguarding referral."

### **Relevant Law**

#### **Equality Act 2010**

126. By s39(2) *Equality Act 2010*, an employer must not discriminate against an employee by dismissing him.

127. The shifting burden of proof applies to claims under the *Equality Act 2010*, s136 *EqA 2010*.

128. Direct discrimination is defined in s13(1) *EqA 2010*:

"(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."

129. By s9 *EqA 2010*, race is a protected characteristic and race includes colour; nationality; ethnic or national origins.

130. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," s23 *Eq A 2010*.

131. The requirement for comparison in the same or not materially different circumstances applies equally to actual and to hypothetical comparators, *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.

132. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgement.

133. In *Madarassy v Nomura International plc*. Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, and confirmed that the burden of proof does not simply shift where M proves a difference in sex or race and a difference in treatment. This would only

indicate a possibility of discrimination, which is not sufficient. At para 56 – 58 Mummery LJ said,

134. “**56** The court in *Igen v Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. 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.”
135. By s94 *Employment Rights Act 1996* an employee has the right not to be unfairly dismissed by his employer.
136. s98 *Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under s 98(2) *ERA*.
137. Conduct is a potentially fair reason for dismissal.
138. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under s98(4) *Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.
139. In considering whether a conduct dismissal is fair, the Employment Tribunal is guided by the principles set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379, affirmed by the Court of Appeal in *Post Office v Foley* [2000] ICR 1283.
140. Under *Burchell* the Employment Tribunal must consider whether or not the employer had an honest belief in the guilt of the employee of misconduct at the time of dismissal. Second, the Employment Tribunal considers whether the employer, had in its mind, reasonable grounds upon which to sustain that belief. Third, the Employment Tribunal considers whether the employer, at the stage at which he formed the belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.
141. The Employment Tribunal also considers whether the employer's decision to dismiss was within a range of reasonable responses to the misconduct.
142. The band of reasonable responses test applies as much to the Respondent's investigation as it does to the decision to dismiss: *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23, LJ Mummery, giving the judgment of the Court, para 30.
143. It is not for the Employment Tribunal to substitute its own view for that of the employer, but to consider the employer's decision and whether the employer acted reasonably, *Morgan v Electrolux Ltd* [1991] IRLR 89, CA, *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, CA.

144. A decision to dismiss an employee may be unfair if it is inconsistent with the practice or policy of the employer with regard to other employees, but only in limited circumstances. In *Hadjoannou –v- Coral Casinos Limited [1981] IRLR 382*, at paragraph 25, the Employment Appeal Tribunal stated that Tribunals should scrutinize arguments based upon disparity with particular care. It is only in the following limited circumstances that the argument is likely to be relevant:

144.1. that an employee has been led by the employer to believe that such conduct will either be overlooked or at least not dealt with by the sanction of dismissal;

144.2. the evidence supports an inference that the purported reason is not the real or genuine reason for the dismissal or;

144.3. evidence as to the decision made by an employer in truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable on the part of the employer to dismiss the employee for that misconduct.

145. The EAT commented there will not be many cases in which the evidence shows that there were other disciplinary cases at the same employer which were truly similar or sufficiently similar to allow an employee to argue unfair inconsistency in dismissal decisions.

## **Discussion and Decision**

### **Race Discrimination Claim**

146. The Tribunal took into account all the facts in coming to its decision.

147. The Tribunal considered, first, whether the dismissal was an act of race discrimination. It considered whether the Claimant had shown facts from which the Tribunal could conclude that the Respondent had discriminated against the Claimant because of race when it dismissed him.

148. The Claimant contended that his comparators, Colin Roe and Kelly Hiernaux had had the same knowledge of KW's disclosures of self-harm and/or were guilty of the same misconduct, but were not dismissed. He also drew the Tribunal's attention to Mr Kiley and said that he was not dismissed.

149. The Tribunal found that the comparators were not in the same circumstances as the Claimant.

150. The Tribunal considered that Ms Hiernaux was in some similar circumstances to the Claimant. KW had directly disclosed her account of self-harm and historic abuse to Ms Hiernaux. Ms Hiernaux was therefore under a duty to make a safeguarding referral report, but she failed to do so. Ms Hiernaux was disciplined and found to have breached the Respondent's policies by not making the referral. She was told that she could have been dismissed, but was given a Final Written Warning.

151. However, the Tribunal considered that, on the facts, there were material differences between the Claimant and Ms Hiernaux's actions. In her disciplinary hearing, Ms Hiernaux admitted that she had a responsibility to

make a referral and that she had made a mistake. She also reported KW's disclosures to her line manager.

152. The Claimant, by contrast, failed to report KW's disclosures to anyone, including his line manager. The Tribunal rejected the Claimant's contention that he reported the matter to Benn Kiley. Mr Kiley was sent a counselling referral form, not safeguarding concern. Mr Kiley was not asked for advice on safeguarding.
153. Furthermore, there was a material difference between the Claimant and Ms Hiernaux in that the Claimant was the more senior officer, who gave advice to Ms Hiernaux as her manager. He was more responsible, in the circumstances, than Ms Hiernaux. In addition, the Tribunal accepted the Respondent's contention that, during the disciplinary process, the Claimant did not show insight into his failure to comply with safeguarding procedures.
154. However, even if the Claimant and Ms Hiernaux were in the same material circumstances, the Tribunal accepted that the reasons the Claimant was dismissed and she was not were: that the Claimant did not, at any time during the disciplinary procedure, admit his mistake; the Claimant was the more senior officer and was Ms Hiernaux's manager; Ms Hiernaux had escalated the matter to the Claimant; the Claimant decided not to make the referral and that was not his decision to make. None of these matters were anything to do with the Claimant's race.
155. The Tribunal noted that Ms Hiernaux was given a Final Written Warning, a very serious sanction. Her actions were also taken very seriously by the Respondent. There was, however, significantly more mitigation in Ms Hiernaux's case than in the Claimant's. This was nothing to do with race.
156. The Tribunal also decided that Colin Roe was not in the same circumstances as the Claimant. Mr Roe was not KW's support worker and the matters were not reported to him. While the relevant policy says that everyone is responsible for safeguarding, the Respondent reasonably viewed the Claimant and Kelly Hiernaux as the employees who received the information and therefore had the primary responsibility to take action. Mr Roe, who would only have seen KW's contact form, was significantly less culpable than the Claimant and Ms Hiernaux.
157. The Tribunal also found that Mr Kiley was not responsible for raising a safeguarding referral. He was only sent a counselling form and safeguarding was never raised with him. The Tribunal accepted the Respondents' witnesses evidence that the officers on site, to whom the disclosures of self-harm and historic abuse were made, were clearly the officers who were primarily responsible for raising a safeguarding referral under the Respondent's policies. The Respondent's failure to dismiss any other member of staff was nothing to do with the Claimant's race. It was entirely due to the fact that he was a member of staff to whom the minor had disclosed abuse and was also the manager to whom a member of staff had reported these safeguarding issues. He was the person with most responsibility for reporting. When no report was made, the Claimant was primarily responsible.
158. The Respondent did not subject the Claimant to race discrimination when it dismissed him.

## Unfair Dismissal Claim

159. The Tribunal decided that the Respondent had shown that the principal reason for dismissal was the Claimant's conduct in failing to make a safeguarding referral concerning KW.
160. This was one of the allegations which considered during the disciplinary process. It was explored during the investigation meeting, pp192-199, disciplinary hearing pp232-241 and appeal hearing pp264-271. The dismissal and appeal outcome letters both stated that the failure to make a safeguarding referral was gross misconduct and that the appropriate sanction was dismissal.
161. The Tribunal found that the Respondents' witnesses were entirely credible when they said that the reason for dismissal was the Claimant's failure to make a safeguarding referral. It accepted their evidence.

### Reasonable investigation

162. The Claimant contended that it had been unfair not to permit him to be accompanied at the investigatory meeting. The Tribunal noted that there is no statutory duty to allow an employee to be represented in an investigatory meeting. On the facts of the case, the Claimant did not ask to be accompanied. The Tribunal considered that it was within the broad band of reasonable responses for the Respondent to proceed with the investigatory meeting when the Claimant did not have a representative. While Ms Evans was aware that the Claimant had experienced recent traumatic events, he did not indicate that those events were having an effect on his ability to participate in hearing.
163. The Claimant was accompanied at the disciplinary meeting, in accordance with his statutory rights and the ACAS Code of Practice.
164. The Claimant also contended that he was not given the opportunity to call witnesses. In the Claimant's suspension letter, he was told that he was not permitted to "contact staff members, contractors, clients and suppliers, or use any of the facilities of A2 Dominion without prior permission from your Line Manager", p201A.
165. On a correct interpretation of the suspension letter, the Claimant was not banned from contacting staff; he had to obtain the permission of his line manager first. There was no evidence that the Claimant had asked to contact fellow employees, or that he asked to call witnesses, but this was refused.
166. On the facts therefore, there was no evidence that the Claimant was prevented from calling witnesses. The Tribunal noted that the Claimant did rely on a witness statement at the appeal hearing.
167. The Claimant also contended that relevant evidence had been excluded from his investigation, in that Ms Hiernaux's interview had been excluded from the investigation report provided to him. However the ET accepted that Ms Hiernaux's evidence was contained in her contact sheet notes. Furthermore, the Claimant did not say what relevant evidence Ms

Hiernaux might have given, which would have affected the outcome of the disciplinary hearing, but which had been excluded. The Tribunal concluded that the Respondent acted reasonably in excluding Ms Hiernaux's witness statement from the investigation report when it did not contain any additional evidence. All her relevant evidence was contained in KW's contact sheet which was included in the investigatory report.

Reasonable evidence

168. The Tribunal concluded that the Respondent had reasonable evidence for its decision that the Claimant was guilty of gross misconduct and that dismissal was the appropriate sanction.
169. Ms Meaden had KW's contact sheet, recording the Claimant's interactions with KW and the fact that he was aware of her reports of self harm and historic abuse. The Claimant had been interviewed in the investigation, p192-199 and had accepted that he did not follow the safeguarding process. In his investigatory interview, the Claimant's explanation for not following the Respondent's process included that making a referral would not have assisted KW.
170. The Claimant contended -issue 3.1.1(a) & (c) - that the Respondent did not have reasonable evidence of misconduct, or that dismissal was not a reasonable sanction because (a) there was a failure to provide appropriate training/ supervision/ support (c) there was a failure to provide adequate staff and training.
171. However, as Ms Meaden confirmed, the Claimant did not say, during the investigatory and disciplinary hearings, that he failed to follow the safeguarding procedure due to a lack of training/supervision or support on the safeguarding procedure. Equally, he did not say that he would have made a referral if there had been more staffing or supervision.
172. The Tribunal accepted Ms Meaden's evidence that the Claimant had made many referrals and, indeed, was making a referral for another resident on the night in question. Furthermore, the Tribunal accepted the Respondent's evidence that City Road was not understaffed at the relevant time. It was staffed according to the Respondent's contract with Hampshire CC and, in any event, was only 50% full of residents.
173. The Tribunal considered that, on the facts, the Respondent acted reasonably in disregarding a lack of training or supervision, and staffing levels, when considering the evidence and the appropriate sanction. On the facts, the Claimant had had appropriate training and staffing numbers and these had no influence on his actions.
174. The Claimant also contended that 3.1.1.(b) others were aware of the information but only he was dismissed.
175. The Tribunal concluded that the Respondent acted fairly in treating the Claimant differently to other staff. As the Tribunal has found, there were material differences between the Claimant and other employees. Ms Hiernaux received a final written warning because she had shown insight and contrition and she had raised the matter to the Claimant, who was her line manager, in

accordance with the Policy. Her failing was that she had not also completed an online referral form. All these mitigating factors were absent in the Claimant's case.

176. As stated above, Mr Roe was not in the same position as the Claimant. He only had partial information from KW's contact sheet and he was not a senior support worker with first-hand knowledge of KW's issues.

177. The Claimant also contended that 3.1.1.(d) he was dismissed for an incident which occurred outside his normal working hours.

178. This was factually incorrect. He was not dismissed for his actions on the night of 20 January 2020. The Claimant was dismissed for his failure to make a safeguarding referral earlier, during his normal working hours.

#### Dismissal a Reasonable Sanction

179. The Respondent's procedure gave examples of gross misconduct which included, p104, "serious breach of the Company's rules", and "gross negligence".

180. The Tribunal decided that it was reasonable for the Respondent to consider that the Claimant's failure to make a safeguarding referral was a serious breach of an important procedure. This was particularly the case where the failure meant that the Respondent failed to comply with a statutory duty. The safeguarding procedures are clearly there to protect vulnerable young people in need and failure to follow them is obviously a serious matter. The Claimant was the senior support worker and ought to have made the referral or have guided his more junior colleague to do so. It was within the broad band of reasonable responses for the Respondent to dismiss the Claimant for his failure to follow this important procedure.

181. While there is sympathy for the Claimant who witnessed the very sad and traumatic events on 20 January 2020, his dismissal was fair.

182. The Claimant's claims are dismissed.

Employment Judge Brown

Date 11 November 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

11/11/2021.

FOR THE TRIBUNAL OFFICE