EMPLOYMENT TRIBUNALS

Claimant: **Mr Antoine Azangisa**

Respondent: **The Salvation Army Trustee Company**

Heard at: **Cardiff** **On:** **19, 19, 20, 22 and 25 October 2021**

Before: Employment Judge R Brace
Ms K Smith
Mr B Roberts

Representation
Claimant: In person
Respondent: Mr J Hurd (Counsel)

JUDGMENT having been sent to the parties on 29 October 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This was a hybrid hearing with the Judge, clerk, the parties and witnesses in person and the non-legal members participating remotely by video (CVP).

Claims and Issues

2. Much time was spent on the first day of the hearing clarifying the claims and issues arising from the claims. The claims before the Tribunal were of unfair dismissal and race discrimination, the Claimant having been refused

permission to amend his claim to include a claim of direct discrimination in relation to religion or belief.

3. The issues for determination arising from the claims were discussed and agreed at the outset of the hearing and were as follows:

Unfair dismissal

4. What was the reason or principal reason for dismissal?

5. Was it a potentially fair reason?

6. Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

7. The Respondent says the reason was conduct. The Claimant asserts that it related to his asserted conduct in relation to medication to residents. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

8. If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

    a. there were reasonable grounds for that belief;
    b. at the time the belief was formed the Respondent had carried out a reasonable investigation;
    c. the Respondent otherwise acted in a procedurally fair manner;
    d. dismissal was within the range of reasonable responses.

Time limits

9. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 21 September 2019 may not have been brought in time.

10. Were the discrimination made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

11. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

12. If not, was there conduct extending over a period?

13. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

14. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

a. Why were the complaints not made to the Tribunal in time?
b. In any event, is it just and equitable in all the circumstances to extend time?

Direct race discrimination (Equality Act 2010 section 13)

15. Did the Respondent do the following things:

    a. Subject the Claimant to appear before a 'disciplinary panel' namely:

        i. The disciplinary hearing on 13 October 2017 in relation to allegations of use of phone during work hours/ignoring residents/ability to use Atlas/taking excessively long;

        ii. The disciplinary hearing on 27 September 2018 at Ocean Way regarding concerns that despite being trained, the Claimant was not meeting minimum standard of Atlas work and had not completed the required levels of practice;

        iii. The disciplinary hearing on 27 September 2019 regarding concerns that the Claimant had taken excessive breaks and did not respond to co-worker's calls for assistance;

        iv. The disciplinary hearing on 11 December 2019 in relation to dispensing medication without recording accurately/breaching safeguarding protocols.

    b. Subject the Claimant to aggressive behaviour from Matt Lewis in threatening disciplinary action if the Claimant did not complete training demo.

    c. Did Sally Anthony omit to take action about a resident putting the Claimant on social media;

    d. Did Sally Anthony omit to take action when a resident threw washing powder at the Claimant;

    e. Did Sally Anthony omit to take action when Claimant was assaulted by a resident?;

16. Was that less favourable treatment?

17. The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

18. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

19. The Claimant says s/he was treated worse than Sam Kear or has not named anyone in particular who s/he says was treated better than s/he was, other than to suggest it was his white co-workers.

20. If so, was it because of race?

21. Did the Respondent's treatment amount to a detriment? (if disputed)

Evidence

22. The Tribunal heard from the Claimant and from the following witnesses on behalf of the Respondent:

    a. Sally Anthony, Service Manager for Northlands Centre (2003-2019);
    b. Samantha Kear, Programme Co-Ordinator;
    c. Laura Carey; Service Manager;
    d. Matthew Smith, Assistant Regional Manager;
    e. Angharad Jones, Senior HR Business Partner.

23. The Tribunal also heard evidence from the Claimant and all witnesses sought to reply on statements that had been prepared and both parties had the opportunity to ask questions of the other party's witnesses. The Tribunal also asked questions.

24. There was a bundle of approximately 427 pages indicated by [] in these written reasons.

25. The Claimant was asked if he required an interpreter but he did not further indicating that he was himself an interpreter in any event.

Facts

26. The Respondent is the Salvation Army Trustee Company, a Christian Church and charity. Its work is diverse and includes running homelessness centres and drug and alcohol detoxification centres across the UK.

27. Northlands is a 'lifehouse'; a 26 bed hostel run by the Respondent in Cardiff, a residential centre that supports young people aged 16-21 to overcome the challenges of homelessness, offering a range of onsite support. Young people are referred to Northlands via the Cardiff Young People's Gateway for a variety of reasons: some have experienced relationship breakdowns, whilst others may be looking for a place to stay having left prison or care. Northlands has self-catered rooms, one of which is for emergency accommodation, and staff are on hand to provide 24 hours a day support.

28. The Claimant describes himself as being a black African man and a British citizen of the Democratic Republic of Congo. He has been living in the UK

since 2005 and is involved in a wide variety of volunteering. He is also a Community and Church Leader – a Pentecostal Christian Pastor.

29. The Claimant had been employed by the Respondent since August 2015 and had, since 2 November 2015, been in permanent employment based at Northlands as an Night Assistant Support Worker on terms conditions set out in a contract of employment signed in March 2016 [59] . His terms and conditions were subject to various employment policies including a Disciplinary Policy [380], Equality and Diversity Policy [401] and a Grievance Procedure [410]

30. As an Assistant Night Support Worker, the Claimant had to complete half hourly health and safety rounds of Northlands up to 2am, then hourly from 2am, checking fire extinguishers and doors and general building safety. Such staff also had to deal with residents, dealing with the range of matters that could arise when accommodating such vulnerable young people: from illness, to self-harm and fighting and drunkenness, to calling emergency services when necessary

31. The Claimant's initial employment was subject to a probationary period of three months which was extended in February 2016 for a further three months [77].

Atlas

32. At some time in 2016, the Respondent introduced a new information management software, 'Atlas'. It contained folders for each young person referred to the Respondent, and was used to communicate and inform about the residents. This included safety-critical information for the young people that arrived at Northlands. If anything of note happened, it needed to be recorded in the shared system, including risks and triggers to help minimise risk of serious incident as young people the Respondent helped were vulnerable and at risk of harm including drug use, suicide and self-harm. This meant that at times night staff could be required to put safety critical information into Atlas.

33. A demonstration site was created to assist with the learning process, where staff could practise offline. After getting used to the system, staff would move online using the system to up date client information and inform staff of client needs.

34. Some staff struggled to use it. The Claimant struggled use it and struggled to do the basic tasks. He made basic errors resulting in close supervision of the Claimant by his line manager, Matt Lewis and Sally Anthony. Whilst he was assisted with the learning process, he had still not mastered the software by the middle of 2018 [218] and as a result, the Claimant was not required to add new residents to the system but was required to write up incident reports.

First investigation report 18 of February 2016

35. In February 2016, the Claimant was subject to an investigation carried out by Karen Curtis, Programme Coordinator, following allegations that he had touched a relative resident on the shoulder and waist [78].Staff were interviewed and documentation was reviewed including CCTV footage .

36. Her conclusion was that misconduct had not occurred and the allegations were unsubstantiated. No further action was taken on these allegations.

37. The Claimant confirmed at this hearing that he had no issue with the matter having been investigated.

Febreze Incident 15 October 2016

38. On 15 October 2016, the Claimant and a work colleague were sprayed by a young resident with the fabric refresher, 'Febreze'. The police were called and the young person was arrested for assault. An incident report form was completed which reflected that the Claimant was the target of the resident's behaviour [245].

39. The Claimant claims that Sally Anthony took no action on this incident and that her omission was an act of discrimination.

40. When cross-examined, the Claimant declined to indicate what steps he asserted Sally Anthony could and should have taken, indicating that he could not say what she should have done, but that she had a duty of care when there was an assault and that it was for her, as service manager, to intervene.

41. When asked by the Tribunal what the he says Sally Anthony should have done, the Claimant responded that she should have '*gone to him to show that she cared'* and that she did not.

42. Sally Anthony in her witness statement (paragraph 70—77) gave evidence that she did not recall doing an immediate debrief with the Claimant, but did recall speaking to him about it, as she knew he was concerned about the incident. She also explained that she had met with the young person in question and had given him a warning and that she had met that young person multiple times subsequently as their behaviour continued to be challenging.

43. The Claimant was asked on cross-examination whether Sally Anthony had spoken to him about the incident, after the incident. The Claimant responded that he could not remember or recall. In contrast, Sally Anthony was clear that she recalled that she had several conversations with the Claimant regarding the matter and recalled the Claimant being angry.

44. We preferred the evidence of Sally Anthony and found that she did speak to the Claimant after the incident on several occasions and that she was aware that the Claimant's line manager had also contacted the Claimant.

45. We also found that Sally Anthony had also provided feedback to the young person and had deliberated whether they could stay at Northlands, taking steps to warn them of the consequences of their behaviour

46. We also accepted her evidence that she had also noted follow up on the Young Person's report and typed up points on reflective practice for future reference.

Second Investigation Report 6 November 2016

47. The Claimant was subject to a further and second investigation in November 2016 [82]. This was conducted by Matt Lewis, Specialist Support Worker. The allegations were that the Claimant had shouted at residents, had acted in a rude and aggressive manner, grabbed a resident's arm, offered the resident to 'go outside' to fight and had turned off the TV in the middle of the film causing unnecessary conflict.

48. Again staff were interviewed and documents reviewed included excerpts from handovers, CCTV, the Claimant's training and performance and the written complaint from the resident.

49. The conclusion was that an altercation had arisen between the Claimant and a resident where the Claimant had raised his voice; that he had failed to follow the organisation's Working with Challenging Behaviour Policy and that the Claimant's gestures, in pointing and wagging his finger during the altercation, could be perceived as aggressive [91]. There was a concern with the way the Claimant has handled the situation and that in turning off the TV during a film which the two residents were quietly watching, led to unnecessary conflict.

50. The investigation concluded that there was insufficient evidence to support the claim that the Claimant had offered to go outside for fight but CCTV had revealed the Claimant had used the physical gesture of pointing at a resident which was challenging them on their behaviour. However the investigation also revealed that the Claimant had been the target of harassment from the resident for some weeks.

51. On cross examination the Claimant accepted that it had been reasonable for Sally Anthony to have decided to ask Matt Lewis to investigate these allegations.

52. Following the investigation, Sally Anthony wrote to the Claimant by way of letter confirming that his line manager, Sam Kear, would draw up a performance management plan outlining the standards expected from him and the support that the Respondent would put in place.

53. In April 2017, the Claimant reported that Sam Kear his line manager had not been available for support and advice when a work colleague had childcare issues, an issue the Claimant raised again in March 2019 [332] and again during this hearing. The matter was investigated and the

Claimant indicated that he did not wish to pursue a complaint regarding this.

Third Investigation Report 21 August 2017

54. In August 2017, Matt Lewis undertook a further investigation into concerns raised regarding the Claimant of:

    a. using his phone public tablet during work hours to the detriment of resident care;
    b. ignoring resident requests due to being occupied with his own electronic devices and allowing his colleague to deal with the resident;
    c. His ongoing lack of ability still to use the Atlas software; and
    d. taking excessively long breaks and, on one occasion, not responding to his colleague asking for assistance via walkie-talkie, he was found asleep in the staffroom.

55. Interviews were again undertaken with the Claimant and work colleagues, and documentation was reviewed as reflected within the Report [95].

56. The Report reflected that the Claimant had not denied that he had been on the telephone in front of resident. He also acknowledged that he had remained on his phone when the resident turned up at reception where the Claimant was and that at that point, he should have put his phone away. The Claimant also admitted that whilst he had not fallen to sleep on the night in question, he did sometimes sleep on his breaks and that he did sometimes doze off but that he always responded to the walkie talkie.

57. The Claimant accepted on cross examination that it was reasonable for the complaints to have been investigated but challenged that the resident had not actually been speaking to him and that other work colleagues had also been on their phones that night.

58. Whilst he initially gave evidence on cross-examination that he had not seen the disciplinary report prior to this litigation, on further questioning the Claimant indicated that he could not recall if he had seen the report.

59. The Claimant was invited to a disciplinary hearing on Friday 13 October. The letter of invite [107] enclosed a copy of the Respondent's Disciplinary Procedure and the Investigation report together with the 18 appendices.

60. Despite the Claimant not recalling whether he had received the Report prior to this litigation, we found that the Claimant had been sent a full copy of the Report together with a copy of all the evidence relied upon by the Respondent by way of letter dated 29 September 2017.

61. At that disciplinary hearing, the Claimant expressed the view that the allegations and investigation had been racially motivated on the basis that he was the only person about whom complaints had been made and that management had escalated the matter to a disciplinary hearing. He did

not give any examples which might support that belief and on that basis the panel concluded there was no evidence of a racially motivated factor within that particular process.

62. By way of letter dated 26 October 2017, the Claimant was notified of the outcome of the hearing, which was that he was given a final written warning [109]. The panel was satisfied that the evidence before them demonstrated that the Claimant:

    a. had used a mobile phone in the presence of a resident, albeit he had not ignored the resident,
    b. he had not made the minimum effort to learn the new Atlas computer system; and
    c. Whilst there was insufficient evidence to conclude that the Claimant was asleep on shift, there was evidence to show that the Claimant had failed to respond to a colleague's request for support.

63. The Claimant was provided with a right of appeal. He did not appeal. On cross-examination he gave a variety of reasons for not appealing:

    a. That he preferred not to;
    b. That he was not familiar with the type of law;
    c. That he did not have union representation;
    d. He was still an employee and that it was not the right time;
    e. That he was not used to the administration of an appeal.

Complaint regarding Sam Kear

64. Just prior to that disciplinary hearing, the Claimant raised a concern regarding the conduct of Sam Kear, his line manager, with regard to the manner in which she had dealt with a colleague's request for assistance in the previous April.

65. A meeting had been arranged to discuss those concerns but the Claimant had failed to attend and on 16 October 2017 indicated that he wanted to drop the matter [253] speaking of 'drawing a line and forgiveness'. Whilst on dross-examination the Claimant could not recall failing to attend that meeting and gave evidence that he did not purse this as he did not believe that there would be any 'positivity' as he termed it, we considered that the contemporaneous documentation reflected that which the Claimant communicated and likely felt at that time, which was that he did not wish to pursue the matter.

Fourth Investigation Report 12 July 2018

66. Throughout 2017 and 2018, the Claimant still continued to struggle with the Atlas software and during this period both Sally Anthony and the Claimant's then line manager, Matt Lewis, took steps to ensure that he did use the system properly. The Claimant was placed on a performance management plan but, by July 2018, management concerns were such regarding the Claimant's work performance that an investigation was

conducted into his failure to meet the minimum standards of Atlas work and his failure to complete the required levels of practice directed in his performance management plan.

67. The Claimant has accepted that this was a serious concern genuinely held by the Respondents and that it was legitimate for their concerns to be investigated.

68. The investigation was conducted by Matt Lewis and again the Claimant was interviewed, in July and again on 11 August 2018. The documentation supporting the performance management of the Claimant was also reviewed. The outcome of the Report was that the Claimant should be subject to formal capability proceedings with regard to his failure to meet the required standards and that disciplinary proceedings should be considered given his lack of compliance with regard to the performance management plan.

Complaint against Matt Lewis

69. During the investigation the Claimant raised a concern with Sally Anthony regarding Matt Lewis and he was asked if he wished to raise a formal grievance [255]. He confirmed he would come back to her. He did not. The Claimant's evidence on cross examination was that he didn't wish to pursue the matter as he didn't have trust in Sally Anthony.

70. On 17 September 2018, the Claimant was invited to a disciplinary hearing held on 27 September 2018 [235] before a panel chaired by Richard Sayer, Service Manager of Logos House in Bristol.

71. At that hearing the Claimant raised concerns that he was being brought before a disciplinary panel again and queried whether it was because of the colour of his skin raising that others did wrong and were not brought before disciplinary panels, giving the example of Sam Kear not being available for a work colleague.

72. By way of letter dated 15 October 2018 the Claimant received the outcome to the disciplinary hearing [242], the content of which is incorporated into this judgment.

73. Richard Sayer and the panel concluded that no sanction was warranted. They concluded that:

    a. the job description for the Assistant Support Worker was not sufficiently clear that there was an expectation for Assistant Support Workers to complete risk assessments and booking-in procedures;
    b. As a result the panel felt unable to uphold that part of the allegation against the Claimant that related to the Claimant not meeting the minimum standard of Atlas work;
    c. Data entry could however fall within the duties set out in the JD for the Assistant Support Worker and data entry was not an

unreasonable expectation of an Assistant Support Worker. They were unable to reach a conclusion on the extent the Claimant's performance in relation to data entry specifically had been unsatisfactory

74. The panel recommended that the Claimant's line manager reviewed their expectations regarding the Claimant's use of Atlas against the job description for the role of night Assistant Support Worker.

75. After the hearing, the Claimant was still required to use Atlas. He believed that it was wrong for management to ask him to use Atlas in light of Richard Sayer's decision and believed that management had ignored the disciplinary outcome.

76. We found that the Claimant was still required to use Atlas following that disciplinary outcome and that there was nothing in the decision letter from Richard Sayer that prevented management from asking the Claimant to use Atlas once their expectations had been clarified with the Claimant.

77. After the hearing Sally Anthony sat down with the Claimant and informed him of the expectations that the Respondent had and that he was expected to update Atlas. The Claimant could not recall this discussion.

78. We accepted the evidence of Sally Anthony and found that

    a. the Claimant was required to update Atlas;
    b. that nothing in the outcome of that disciplinary hearing prevented the Respondent from asking the Claimant to update Atlas; and
    c. whilst he does not now recall the conversation, the Claimant was informed by Sally Anthony after that outcome that he was expected to update Atlas.

Soap Powder attack 20 October 2018

79. On 20 October 2018, an incident took place involving the Claimant and a young resident. The incident report reflects that at around 04.08 on the morning of 20 October 2018, the Claimant and a work colleague needed to force their way into a resident's room as the shower had been running for several hours and they had failed to get a response from them [259].

80. The incident report reflects that the resident, a young person under the age of 18, appeared to have reacted angrily to this, swearing and throwing a box of washing powder at the Claimant. The box did not impact on the Claimant but covered his trousers. The Claimant suggested calling the police.

81. He was advised that this was not necessary but that the incident should be recorded and the day staff and management would deal with the matter; that if the resident returned and was still being aggressive, not to allow him into the building. As the door had been broken by the resident, it could not be secured closed. The resident's father was contacted and

staff were advised to contact 101 as the resident was under 18 years' of age.

82. The Claimant requested time off as a result of the incident, and took a week annual leave, approved by Sally Anthony. He was telephoned by his line manager that week to check he was ok and, on his return to work on 11 November 2018, his line manager, Matt Lewis, met with him and did a back to work meeting. Sally Anthony also followed up on the incident when the Claimant returned to work.

83. In cross examination, the Claimant was unable to recall:

    a. whether Sally Anthony permitted the Claimant to take leave straight away,
    b. whether he was contacted by telephone that week; or
    c. whether he had a discussion on his return to work with Matt Lewis, but accepted it was possible.

84. However, taking into account the Claimant's inability to recall and the contemporaneous documentation including the email string of 1 November 2018 [257-259], we accepted the evidence from Sally Anthony which we considered was clear and unequivocal. We found that whilst it was more likely than not Sally Anthony did not have a personal conversation with the Claimant regarding this incident after the incident, Sally Anthony ensured that the Claimant was given leave at short notice and that the Claimant's line manager made contact with the him during his absence and undertook a back to work interview.

Filming

85. At around this time, the young residents had also adopted a practice of filming staff on their smart phones and uploading content onto the internet, including various social media sites. This understandably upset the Claimant and gave rise to him being concerned how such filming impacted on his integrity and what was being said about him in his community.

86. It was accepted by the Respondent that there had been a spate of such behaviour towards all staff and that Sally Anthony had spoken to the young people to prevent and reduce such behaviour although she did not speak personally to the Claimant.

Fifth Investigation report - March 2010

87. In March 2019, a colleague of the Claimant's raised a concern that the Claimant had gone on a break at 00.45 and had not returned until 3.20 resulting in the colleague having to do three of the health and safety rounds on their own. Sam Kear was asked by Sally Anthony to investigate the allegation, together with a complaint by a resident that the Claimant had ignored them, playing on his phone when they were had tried to talk to him [273].

88. Her report reflects that in the course of her investigation she interviewed the Claimant, the Claimant's work colleagues and a resident and reviewed CCTV footage over the course of the Claimant's shifts from February through to March 2019 before preparing her report [280].

89. The CCTV indicated that for around 2-3 hours each shift the Claimant would enter and remain in the staff room.

90. The Claimant admitted to taking breaks longer than hour on the basis that he did so in order to recharge and pray. He admitted that breaks were to be of a maximum of an hour but argued that he had agreed this extended break with colleagues.

91. Sally Anthony recommended that the Claimant should be subject to a formal disciplinary hearing and a copy of the Report was sent to the Claimant by way of letter dated 25 May 2017 [428]. This recommendation was not progressed at that time as in July a further concern was made about the Claimant.

Sixth Investigation Report

92. On 6 July 2019, the Claimant attended a further investigation meeting with Sam Kear following a new allegation, this time from an agency worker, that the Claimant had been taking excessive breaks and on the night of 27 June 2019 had not responded to their call for support when they had radioed the Claimant for support and that she had ended up calling the police.

93. Again Sam Kear reviewed the CCTV for the night in question and interviewed the Claimant and the agency worker.

94. The CCTV indicated to her that:

    a. the Claimant went on a break at 00.30 and did not return until 02.46
    b. that the light in the staff room went out at 00.43 and did not come back on again until 02.40;
    c. that residents were awake and that there was an unauthorised visitor with them;
    d. There was an incident where the agency worker had given a staff fob to a resident and it was not returned.

95. She was unable to confirm from CCTV whether the colleague had radioed the Claimant for assistance.

96. She had also checked the CCTV from 22 June – 30 June and concluded that for all the shifts that the Claimant had worked, the Claimant had longer than an hour break for four of them. She also found that management had informed staff that breaks should not be taken until at least 2am (if staff started at 9pm) and 1am if they had commenced at 8pm and that in March 2019 Sally Anthony had clarified that whilst staff were entitled to two

twenty minute breaks, Sally Anthony had confirmed that they could take two half hour breaks [300].

97. The agency worker informed Sam Kear that they had called the Claimant on the walkie talkie and that he had not responded but had turned up 10 minutes later. The worker believed he had been sleeping.

98. During his interview with Sam Kear on 6 July 2019, the Claimant admitted taking a break for longer than an hour. He said he felt unwell with a sore throat, cough and a fever [298]. The Claimant confirmed that he had shown the agency worker how to use the radio. He denied sleeping.

99. At his later interview on 22 July 2019, the Claimant confirmed his understanding of breaks and that he agreed the time of breaks with colleagues. He confirmed he did sometimes take longer than an hour as being a preacher he prayed and read the word of God.

100. When asked about the number of times that he took a break of longer than an hour, the Claimant responded that he prayed and recharged himself in reading the word of God. He denied that he slept and that he had a radio so could help if needed.

101. In her Report [291-308] Sam Kear recommended that the Claimant should be subject to a formal disciplinary hearing to answer allegations of breach of break procedure with the Claimant taking more than the allocated time allowed for breaks and that he did not respond to co-workers calls for help.

Suspension

102. During the continuance of this investigation and on 10 July 2019, the Claimant was also suspended on full pay pending further investigation following an entirely separate allegation that he had not followed the Respondent's medication policy. This suspension was unrelated to the ongoing investigation by Sam Kear.

Disciplinary Hearing 22 September 2019

103. By way of letter dated 11 September 2019, the Claimant was invited to a disciplinary hearing [289] in relation to the allegation that he had been taking excessive breaks and on the night of 27 June 2019 he had not responded to his co-worker's calls for support therefore compromising the safety of colleagues, residents and the building. He was informed that if the allegations were upheld sanctions up to dismissal would be considered.

104. The hearing was chaired by Laura Caret, Service Manager. A copy of the Respondent's disciplinary procedure and Report was enclosed and the Claimant was advised that he could call witnesses or provide statements to support his case.

105. The Claimant attended at that disciplinary hearing which was eventually took place on 27 September 2019. He was accompanied by Mr Malcolm Marshall his trade union representative. Notes of the disciplinary hearing were provided in the bundle which we accepted were an accurate record of that meeting.

106. These reflect that

a. Sam Kear also attended and presented her report;
b. The Claimant raised his concern that this was the third time that he was being invited a disciplinary hearing and that he believed that it was due to the colour of his skin;
c. He raised concerns that Matt Lewis had threatened him that if he did not complete his Atlas supervision, he would be subject to further disciplinary;
d. The Claimant confirmed that he had not been praying on 27 June, but had been unwell.

107. Notes of the disciplinary hearing reflect that the Claimant was given the opportunity to present his case. He raised for the first time that he had type 3 Diabetes but that he had not been asleep but that his religion required him to pray every night. He also raised that if he was praying, the motion sensors in the room would not turn on; that he was not well that night and was relaxing listening to a topic that he wished to pray about. He confirmed that normally he would pray from midnight to 3am.

108. He considered that it was safe to leave an agency worker on their own for over 2 hours as they could contact him if there had been a problem,

109. The hearing was adjourned and by way of letter dated 8 October 2019 the Claimant was notified that he had been dismissed with immediate effect for gross misconduct [319] on the basis that it had been found that the Claimant had not supported a colleague by taking an unofficial break for an inordinate period of time during his night shift and in doing so had breached the Respondent's polices.

110. The dismissal letter reflected that the panel had taken into account that the Claimant had admitted to taking long breaks with the explanation that this was his time to pray and that this could take up to 3 hours. The panel concluded that this was a safeguarding concern, particularly on the night in question as he was unavailable for a period of over two hours and the colleague had needed to call the police in his absence.

111. The panel was satisfied that the Claimant was aware that staff were to take two breaks for half an hour each and concluded that the Claimant had not provided to them satisfactory mitigation.

112. The panel did not believe the Claimant's explanation regarding the motion sensor and concluded that as the motion sensor was not triggered

and as the Claimant had failed to answer the radio call, that it was more likely than not that the Claimant had been sleeping.

113. The Claimant was provided with a right of appeal which he made by way pf letter dated 13 October [321]. In that letter, the Claimant stated that the basis of his appeal was that he believed he had been discriminated against, relying on the number of times he had been before panels previously questioning why only he was disciplined. He raised that he had complained about Sam Kear but had never received a response.

114. He believed that the panel had been racially motivated in not being prepared to listen to his explanations on his health and that he was praying and watching videos

Appeal – 1 November 2019

115. On 1 November 2019, the Claimant attended an appeal meeting and was again accompanied by his TU representative. He again raised that he considered he was being racially discriminated against and that other employees had not been disciplined or 'gone to a disciplinary panel' as he termed it. The Claimant again raised the concerns regarding Sam Kear and that this had not been dealt with in the same way as his disciplinary.

116. The Claimant was asked if he had other examples of staff sleeping on duty where no action had been taken. The Claimant did not know.

117. By way of letter dated 12 October 2019, the Claimant was informed of the outcome of his appeal which was as follows:

a. The Claimant was reminded that whilst he had been suspended for matters relating to medication, the disciplinary hearing had not related to that and the panel had disregarded this information in reaching their decision;
b. The Claimant had been unwilling to provide similar examples which had not led to disciplinary action;
c. The panel investigated the Claimant's concerns that Sam Kear had not been disciplined and were satisfied that the matter was investigated at the time and that the Claimant had indicated that he had not wished to pursue a formal grievance against Matt Lewis. They were unable to understand how this amounted to racial discrimination.

118. That appeal panel were concerned that the Claimant seemed unaware of the risks posed of taking extended breaks and the Claimant's appeal was dismissed.

Post termination appeal

119. Following that appeal hearing, and after the Claimant's employment ended, the Claimant was invited to a further hearing on 4 December 2019 to consider allegations that:

a. he had dispensed medication without accurate recording;
b. had breached safeguarding protocols by dispensing unnecessary medication to a vulnerable resident; and
c. had allegedly worked for another organisation whilst the investigation had been postponed due to sickness.

120. The invite was accompanied by a copy of the investigation report dated 18 October 2019 which again indicated that the investigation involved interviewing the Claimant, work colleagues and a review of documentary evidence [337]. He was warned that if upheld there may be a referral to the barring service.

121. The Claimant attended the hearing on 11 December 2019 and was again accompanied by his trade union representative [359]. The allegations related to:

a. Resident D was given co-codamol that had not been recorded. The Claimant admitted issuing the medication and that this had been a mistake;
b. Resident K had been issued ibuprofen and paracetamol which the Claimant had claimed they had taken from him. The Claimant had not reported this or contacted the duty manager but that he had pleaded with the resident to return the medication as soon as he realised that the medication was intended for disposal. He was aware that the resident had threatened to take her life. The Claimant said he was confused. He raised concerns that he had not seen medication marked up for disposal before The resident had also been issued with Mirtazapine. This had been recorded correctly.

122. The outcome was confirmed by way of letter dated 13 December 2019 that if the Claimant had still been employed by the Respondent he would have been summarily dismissed for breaching the medical dispensing policy and dispensing unnecessary medication to a vulnerable resident[366]. It was accepted that there was a level of confusion to where disposal medical was stored but it was concluded that it was clear that the Claimant understood that resident K was at a high risk of overdosing and that the C did not seek advice when he realised his mistake.

123. On 21 December 2019, the Claimant contacted ACAS and commenced early conciliation that ended on 23 December 2019 [1] and on 19 January 2020 the Claimant issued his ET1 [2].

124. The Claimant was invited to an appeal hearing on 18 December 2019 [372] and the decision on that appeal was communicated by way of letter dated 10 February 2020

Issues and the Law

Unfair Dismissal

125. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the Respondent under section 95, but in this case the Respondent admits that it dismissed the Claimant (within section 95(1)(a) of the 1996 Act).

126. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

127. In this case the Respondent asserts that it dismissed the Claimant because it believed he was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). In this regard, the Respondent bears the burden of proving on balance of probabilities, that the Claimant was dismissed for a reason that related to one the potentially fair reasons set out in section 98(2) Employment Rights Act 1996 (ERA 1996).

128. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

129. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **Burchell 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827**. When considering the fairness of the disciplinary process as a whole, the Tribunal also considered the employer's reason for dismissal as the two impacted on each other (**Taylor v OCS Group Ltd 2006 ICR 1602 CA**).

130. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide

whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited** v **Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563**).

131. If the Tribunal concluded that the dismissal was procedurally unfair, it should consider what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in **Polkey** v **AE Dayton Services Ltd** [1987] UKHL 8; **Software 2000 Ltd** v **Andrews** [2007] ICR 825; **W Devis & Sons Ltd** v **Atkins** [1977] 3 All ER 40; and **Crédit Agricole Corporate and Investment Bank** v **Wardle** [2011] IRLR.

132. The Tribunal also agreed with the parties that if the Claimant had been unfairly dismissed, we would address the issue of contributory fault, which inevitably arises on the facts of this case.

133. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996. Section 122(2) provides as follows:

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

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

<u>Direct Race Discrimination – s.13 Equality Act 2010</u>

135. In the Equality Act 2010 direct discrimination is defined in Section 13(1) as follows:

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

136. Race is a protected characteristic. The concept of treating someone "less favourably" inherently requires some form of comparison. Section 23 provides that when comparing cases for the purpose of Section 13 "*there*

must be no material difference between the circumstances related to each case."

137. It is well established that where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes, conscious or subconscious, of the individual(s) responsible; see the decision of the Employment Appeal Tribunal in **Amnesty International** v **Ahmed** [2009] IRLR 884 and the authorities discussed at paragraphs 31- 37. The protected characteristic must have had at least a material influence on the decision in question. Unfair treatment by itself is not discriminatory; what needs to be shown in a direct discrimination claim is that there is worse treatment than that given to an appropriate comparator; **Bahl** v **Law Society** 2004 IRLR 799. 47.

138. Section 136 provides that:

> (2) If there are facts from which the court (which includes a Tribunal) could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provisions.

139. Guidance as to the application of the burden of proof was given by the Court of Appeal in **Igen** v **Wong** 2005 IRLR 258 as refined in **Madarassy** v **Nomura International Plc** [2007] ICR 867. The Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the respondent. They are not, without more, sufficient material from which a Tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an act of discrimination.

Conclusions

Unfair Dismissal

140. In applying our findings to the issues identified at the outset, we needed to initially consider the reason for dismissal and whether it was potentially a fair reason for dismissal.

141. The Claimant contended that the Respondent dismissed for the medication errors and not the stated reason asserted by the Respondent. He relies on the fact that he was suspended in July 2019 for the medication issues as supportive of this position.

142. Whilst we did find that the Claimant was suspended for the medication issues and not for the excessive breaks, we were not persuaded that the reason for the dismissal was the medication issues. Had the medication issue been the true reason for the dismissal, we concluded that the Respondent would have had no good reason for misrepresenting that and would have moved to discipline and / or dismiss for that reason.

143. We were satisfied that the reason for dismissing the Claimant was his conduct in taking excessive breaks and not responding to a co-worker's calls for support, thereby compromising safety of colleagues, the residents and the building. That this was a reason related to his conduct and was a potentially fair reason for dismissal.

144. Moving on to assessment of overall fairness, in considering the section 98(4) test in the context of **BHS** v **Burchell** requirements outlined earlier, we deal with these in reverse order, dealing first with the investigation before moving on to the grounds and the belief

145. With regard to the investigation, the range of reasonable responses test applies to the scope of the investigation undertaken by the employer, as it does to the dismissal decision as established in **Sainsbury plc** v **Hitt**. We were ultimately satisfied that the investigation, in terms of the overall processes adopted by the Respondent, fell within the range of reasonable responses and was a sufficient independent investigation for the following reasons.

a. The Respondent provided the detail of the allegations to the Claimant;
b. interviewed relevant witnesses; and
c. considered relevant documentation including emails and CCTV as reflected in both the March 2019 and July 2019 investigation reports from Sam Kear.

146. We concluded that the investigation in July, was carried out without unreasonable delay and, as emphasised by the ACAS Code, established facts and those allegations were put to the employee promptly before his recall faded.

147. The Claimant was provided with the investigation evidence including the results of the CCTV and statements from the work colleagues and was given the opportunity to respond to those allegations and the evidence that was available. The Claimant was accompanied at both the hearing and the subsequent appeal that he was afforded.

148. In conclusion, we considered that the Respondent had carried out a fair and reasonable investigation which would reach the standard required of a reasonable employer.

149. Turning to the issue of whether the Respondent's belief was held on reasonable grounds, we find that it was.

150. The dismissing panel had evidence from the co-worker, evidence from CCTV and email communication regarding length of breaks. The Claimant admitted the length of break but argued that he was ill and was resting.

151. We concluded that it was reasonable for the Tribunal panel to conclude that the Claimant was more likely than not, sleeping during the hours that the Claimant was in the staff room, on the basis that the motion sensors did not get triggered, and not accept the Claimant's explanation. We also concluded that the panel was entitled to accept the evidence from the co-worker that the Claimant had appeared '*blearly'*. It was compelling that the Claimant had accepted that he took breaks regularly in excess of that given on management instruction.

152. We also concluded that it was reasonable of the panel to take the position that, regardless of whether the Claimant was sleeping, the Claimant had left a work colleague without support and having to deal with an incident on their own leading to them contacting the police. It had also been reasonable of the panel to conclude that the Claimant had left insufficient communication open to the agency worker.

153. In those circumstances, the Tribunal is satisfied that reasonable grounds had been made out for the belief in the gross misconduct.

154. Finally, on the issue of genuineness of the Respondent's belief, did the Respondent reasonably believe that the Claimant committed the misconduct, i.e. that he had been taking excessive breaks and that he did not respond to his co-worker's call for support, the Tribunal finds that they did.

155. The Tribunal was therefore satisfied in overall terms that the **BHS** v **Burchell** test was made out and that there were grounds following a reasonable investigation to lead to a genuine belief that the Claimant had been guilty of the gross misconduct alleged.

156. As regards procedure generally, we concluded that the procedure followed was reasonable. The Claimant was notified in a letter in advance of the allegations against him; he was advised he could bring a companion; a hearing was held at which he was able to put his case; he was informed of the outcome and his right of appeal.

157. Finally, the question is whether dismissal was a fair sanction. Could a reasonable employer have decided to dismiss for the conduct complained of? We concluded that they could. Although the Claimant had a long record, this was a serious offence. As an organisation that provides support and care for some of the most vulnerable people in our society, the Respondent was entitled to expect and trust their night staff to carry out their checks and be available if required by both residents and co-workers alike.

158. Turning to the issue of sanction, and the need to consider the range of reasonable responses test as set out in **Iceland Frozen Foods** v **Jones**, bearing in mind the conduct related to the Claimant's failure to be available for residents and co-workers alike, and the nature of the service, it could not be said that dismissal was outside the range of reasonable responses.

159. In overall terms therefore the Tribunal's unanimous conclusion was that the dismissal was not unfair and the Claimant's claim for unfair dismissal should be dismissed.

Race Discrimination

160. With regard to time, we were persuaded that the Claimant was relying on conduct extending over a period of time and that his discrimination complaints were therefore brought in time.

161. In any event, even if were wrong about that, we accepted the Claimant's evidence, that he was not familiar with the type of law that applied and not used to the administration of cases and more particularly that he was concerned about the impact of bringing a claim whilst he was still employed and would have extended time on a just and equitable basis.

Subjecting the Claimant to appear before a 'disciplinary panel'

162. The Claimant had not proved primary facts from which we could find or infer discrimination in relation to each of the four 'disciplinary panel' hearings relied on. On each occasion, the Respondent had demonstrated a reason for the treatment in any event as reflected in our findings of fact.

a. In relation to the 13 October 2017 allegations, there was no evidence that complaints had been made about other support workers using mobile phones in front of residents and the Claimant did not rely on any specific comparators and the Respondent had demonstrated the reason for the treatment i.e. the disciplinary action, in any event, which was unrelated to race. The Claimant had not appealed that outcome of a final written warning.

b. In relation to the 27 September 2019 disciplinary in relation to Atlas, there was little dispute that the Claimant had struggled with Atlas and that he had not been performing in that regard. The Respondent had again demonstrated the reason for the treatment i.e. performance issues, which were unrelated to race. had not been disciplined.

c. In relation to the 27 September 2019 and 11 December 2019 disciplinary hearings in relation to excessive breaks and medication issues, again the Respondent had demonstrated the reason for treatment in any event, which again were unrelated to race but related to the Claimant's own conduct.

163. Whilst the number of disciplinaries in itself, no less than four occasions, including a hearing which took place post-employment may have drawn an inference of discrimination, we are also reminded of the CA guidance in **Madarassay,** that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the Respondent. They are not, without more, sufficient material from which a Tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an act of discrimination.

164. We did not consider that the number of disciplinary hearings that the Claimant had been subjected to, was a primary fact from which we could find or infer discrimination. We were not satisfied that the Claimant had demonstrated less favourable treatment. Rather, we concluded that the reason for the high number of disciplinary hearings was due to the number of incidents and concerns that had been reported, concerns that the Claimant conceded had been appropriate to investigate.

165. The Claimant did not provide names of any other real white comparators, in relation to any specific disciplinary but relied on the treatment that had he asserted been afforded to Sam Kear. We concluded that she was not an appropriate comparator in any event as the Claimant did not, for reasons of his own, put forward a complaint regarding her conduct that he wished to pursue. The complaint that he had submitted, he withdrew and, on that basis, we concluded that this amounted to a material difference and Sam Kear was not an appropriate comparator under s.23 Equality Act 2010.

166. We concluded that had a white comparator, an Assistant Support Worker, who also had similar concerns or complaints levelled against them, they too would have been subjected to the same number of disciplinary hearings and the Claimant had not proven that he had been treated less favourably than a hypothetical white comparator.

167. We also considered the schedule of other employees at [49] of the bundle which set out a schedule of employees who had been employed at Northlands during the period that the Claimant had been employed and whose employment had ended and who the Respondent had disciplined and imposed sanctions of either dismissal or first written warning. This did not appear to be a complete schedule of all disciplinary action as it did not refer to the Claimant's earlier disciplinary hearings. This indicated that employees who were white British were also subjected to disciplinary action and were subjected to dismissal or written warnings following allegations that they had taken extended breaks, in addition to other issues.

168. Whilst it was conceded by Sally Anthony [SAWS§25] that the Claimant had been disciplined more than other colleagues, we accepted the Respondent's evidence that this was due to the number of incidents

that had been reported and also concluded that it had been appropriate for each to have been investigated. We were also mindful of the fact that following a number of investigations, not just the Richard Sayer disciplinary, that disciplinary sanctions had not been imposed but that further time and support had been given to the Claimant.

169. It was the unanimous decision of the Tribunal that the claim of direct discrimination on the basis of subjecting the Claimant to appear before a 'disciplinary panel' on the four occasions is not well founded and is dismissed.

Aggressive behaviour by Matt Lewis in threatening disciplinary action if the Claimant did not complete training demo.

170. We were not persuaded that the Claimant had demonstrated facts from which we could make findings that the Claimant had been subjected to aggressive behaviour by Matt Lewis. There were no primary facts from which we could find or infer discrimination.

171. We accepted the submission from the Respondent's representative that all we had was an unspecific allegation. The evidence from the Claimant was unclear and vague. He had not pursed an internal complaint or grievance against Matt Lewis personally – rather made general complaint that Matt Lewis was not satisfied with his performance on Atlas and had sought to performance manage him.

172. We concluded that even if Matt Lewis had threatened to performance manage the Claimant this was not unreasonable and the treatment was unrelated to the Claimant's race.

173. It was the unanimous decision of the Tribunal that this claim too was not well founded and should be dismissed.

Omission by Sally Anthony

174. We deal with the three allegations against Sally Anthony collectively. The Claimant was unable to clarify what action he asserts Sally Anthony should have taken. He accepted on cross examination that if she had given the him permission to take immediate leave, this would have been supportive action, but also asserted that there must also be a follow up. He could not recall whether she had however, and maintained that to his knowledge, she had done nothing.

175. On the basis of our findings that:

a. the Claimant was given permission to take immediate leave, was contacted whilst he was off and again on his return with welfare checks, and had a follow-up meeting with Sally Anthony on his return to work, we concluded that action had been taken by her in relation to the Febreeze incident;

b. Sally Anthony spoke with the residents regarding their use of their cameras to film staff, that this was an issue that was not specific to the Claimant and was dealt with by her;
c. Sally Anthony was aware that the Claimant's line manager had spoken to the Claimant regarding the washing powder incident and had spoken to the young person regarding the consequences of their behaviour

we came to the unanimous conclusion Sally Anthony had not omitted to take action and the claims fail.

176. In conclusion it is the unanimous decision of the Tribunal that neither the unfair dismissal claim nor the claims of direct race discrimination are well founded and are dismissed.

Employment Judge R Brace

Date: 5 January 2022

& REASONS SENT TO THE PARTIES
ON 13 January 2022

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FOR EMPLOYMENT TRIBUNALS Mr N Roche