



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr J McPherson**

**v**

**Empowerhouse Ltd**

**Heard at:** Watford

**On:** 24, 25, 26 January 2022  
27 January 2022 (in chambers)

**Before:** Employment Judge Manley

## **Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr M Cameron, Consultant

## **RESERVED JUDGMENT**

1. The claimant was not harassed on the grounds of race.
2. The claimant was not directly discriminated against on the grounds of race.
3. The claimant is not entitled to any further payment for his suspension period by way of unlawful deduction of wages.
4. The claimant is not entitled to notice pay as there has been no breach of contract.

## **REASONS**

### **Introduction and Issues**

1. By a claim form presented on 22 March 2019 the claimant brought complaints of unfair dismissal, race discrimination and unauthorised deduction of wages. At a preliminary hearing held on 20 January 2020 the claimant informed the judge that he intended to bring a wrongful dismissal (breach of contract) claim rather than one of unfair dismissal. In any event, the claimant's claim for unfair dismissal cannot proceed as the tribunal has

no jurisdiction to hear it, the claimant having had less than two years' continuous service with the respondent.

2. A response was not received by the tribunal and the details of what had occurred with respect to that is contained within the summary of the January preliminary hearing. At that hearing the respondent was allowed to send a draft response and a preliminary hearing on 13 March determined that the respondent would be permitted to resist the claims.
3. At that preliminary hearing the issues were discussed and set out in the summary. They are as follows:-

*“Section 26: Harassment on grounds of race.*

2. Did the respondent engage in unwanted conduct as follows:
  - 2.1 A service user, PH accused the claimant of telling PH to ‘go back to your own country’;
  - 2.2 After an investigation and hearing the outcome letter added the words, ‘racist’, ‘racist terminology’, ‘racist graffiti’ and ‘verbal teasing.’
  - 2.3 An entry of a minute of a meeting used the expression, ‘rassclart, go back to your country’, although that expression did not appear in NK’s statement.
  - 2.4 Suspending the claimant.
  - 2.5 Failing to deal with the incident and/or grievance about the incident of 9 May 2018 when a service user (JJ) called the claimant a ‘Pakistani’.
  - 2.6 Failing to deal with incidents of racism, i.e.:
    - 2.6.1 NK told PH to go back to his own country in about June 2018;
    - 2.6.2 Two weeks later NK again told PH to go back to his own country.
  - 2.7 On 19 November 2018 the claimant sent a ‘direct’ claim and unfair treatment letter to Christopher Brown and the respondent has not responded to that letter.
  - 2.8 Dismissing the claimant
3. Was the conduct related to the claimant’s protected characteristic?
4. Did the conduct have the purpose of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
5. If not, did the conduct have the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6. In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

***Section 13: Direct discrimination on grounds of race.***

7. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely:

Any of the treatment above not found to have been harassment.

8. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated actual or hypothetical comparators?
9. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
10. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

**Unauthorised deductions from wages.**

11. The claimant says that he was not paid while he was suspended.

**Breach of contract**

12. Was the claimant dismissed without notice?
13. If so, to how much notice was he entitled?
14. Was the respondent entitled to dismiss him without notice by reason of his gross misconduct?"

4. In summary, for the Equality Act claims, the tribunal is concerned to determine whether the claimant has shown which of the facts he complains about did occur. Of those matters which did occur, the tribunal must determine whether they amount to harassment under s.26 of the Equality Act 2010 (EQA) or direct discrimination under s13 EQA. The claimant clarified that he defines his race/ethnic origin as African-Caribbean. The claimant also claims for pay while he was suspended and his notice pay.
5. It is worth noting, at this stage, that there appears to be a question of the identification of the claimant's employment status which is not recorded in that list of issues and might well not have been raised by the parties. In any event, the respondent has not suggested that the claimant was not employed under the definition in EQA so there is no question that those matters can be determined. The respondent's case is that the claimant was self-employed and that his claims therefore for unauthorised deduction of wages and breach of contract cannot succeed. The claimant accepts that he was self-employed although that he argues that he became employed at the point the respondent suspended him and then began disciplinary

proceedings which seem to be those applicable to employees rather than self-employed contractors.

### The hearing

6. The matter was listed to be heard in person although two of the respondent's witnesses needed to attend by CVP. That led to some initial difficulties with CVP on the first day but we did then manage to allow those witnesses to attend and proceeded with the hearing. The tribunal had been handed a hard copy of a bundle of documents of 684 pages which had also been received electronically. On the morning of the first day of the hearing the claimant produced another document which is now numbered between pages 685 and 691 which is headed: "*Notes of disciplinary hearing meeting*". The claimant told us that this was a document, which is said to be the claimant's notes of the appeal hearing, was the same as that he had handed in at one of the preliminary hearings at the tribunal, albeit in a different format. There is no copy in the tribunal file and Mr Cameron was not aware of what had happened on any of those occasions. The respondent's notes of an appeal hearing are in the bundle starting at page 670. Mr Cameron did not object to the tribunal looking at the claimant's notes of the appeal hearing even though they appear to have been presented a little late.
7. The claimant also raised some questions about the history of the tribunal claim and the difficulties that he told us he had faced with getting information from the respondent, including late service of the witness statements which, apparently, took place in February 2020. In any event, the tribunal felt that we had all the documentation and witness statements that we would need and there had been sufficient time for everyone to be ready to proceed with the hearing.
8. The tribunal therefore heard from four witnesses as follows:  
  
The claimant;  
Christopher Brown, finance director;  
Ramina Soudabi, business development director;  
Samantha Dean, head of HR
9. We heard oral submissions in the afternoon of the third day and met on the fourth day to reach our judgment which is given in this reserved judgment.

### Facts

10. The tribunal will concentrate on those facts which are relevant to the issues which we need to determine, or those which assist us with the determination of those issues. As is common, we heard a number of allegations and pieces of information which do not touch directly or assist us with what we need to decide and these will not therefore be referred to in this judgment. These are the relevant facts.

11. The claimant began his work with the respondent on 2 April 2018. When he did so, he signed a document entitled "*Contract of Employment*" but which also states - "*You are an independent contractor in business on his/her own account as a sole trader and both parties acknowledge and agree that you are not an employee of Empowerhouse*". There are then a number of clauses which contain agreements made between the respondent and the claimant with respect to the work that he was to carry out, with an hourly rate stipulated but no hours or hours of work guaranteed. The contract says: "*You will provide the services on the days and the times agreed between the parties.*" There is reference to the claimant being an independent contractor and not an employee and a clause on termination which reads as follows:

*"The client shall be entitled upon written notice to you to suspend or terminate this agreement in the event of incapacity or default. Upon suspension or termination of this agreement the following provisions shall also apply... The client shall cease to be liable to pay you the fee during the period of suspension or after the termination date except for that which has already become due and payable."*

12. It goes on to state that termination can be with immediate effect in certain circumstances. There is also reference to company rules and regulations with respect to health and safety, safeguarding and so on and the claimant agreed that he read those policies.
13. The respondent is a relatively new small business having been set up in 2016. It is described as a "multicultural" employer, Ms Soudabi being of Iranian background and Mr Brown being mixed race. It provides residential accommodation and support to young people between the ages of 16 and 25 under the care of the relevant local authority, in this case London Borough of Brent. One of those properties providing housing for the young people was Tudor Gardens which is where the claimant was placed. As the tribunal understands it, the respondent has a total of five properties and all of them have young people from Brent placed in them at various times. The claimant has many years of working in caring for young people, many of whom are vulnerable and can exhibit challenging behaviour. There is a strictly enforced safeguarding policy and matters of concern must be reported to Brent's local authority designated officer (LADO). The young people also have social workers who support them to whom matters might well need to be referred.
14. In May 2018 there was an incident which the claimant witnessed where two young people (JJ and PH) were arguing loudly and threats of violence were being made. The claimant produced a report about the matter on 10 May and sent it to Mr Brown who was his line manager. The report gives some details of what happened between the two young people but also contains allegations of offensive remarks made to the claimant. It appears that there was some reference to the country where one of the young people comes from and the claimant recorded that he then told the young person that that comment was unacceptable. The claimant stated that the young person said

to the claimant something to the effect of: “*shut the ... up you*” and then what the claimant described as the “*P word for Asian*”. The claimant also recorded that one of the young people continued to shout out racial comments.

15. The matter was investigated and reported. It appears that Mr Brown believes that a warning would have been given to the young person who appears to have used the derogatory language, whether it was specifically about that used to the claimant is not known. The claimant was thanked for filling in the incident form but he now complains that he was not given support with respect to the racist abuse that he suffered. The claimant did not raise his concerns about that particular comment with the respondent again.
16. In the list of issues at issue 2.6 there is reference to one young person (NK) saying to another young person words to the effect that he should go back to his own country. No evidence has been produced about any such incident. No evidence was given of any complaint or formal process, nor did the claimant make any reference to it in his witness statement. The tribunal can make no factual findings on that matter.
17. On 10 September 2018 when the claimant was on duty there was an incident with one of the young people, “PH”. In summary there seems to have been an argument when PH came to the office where the claimant was. It began with PH asking for a fan and then voices were raised. After the incident PH complained to his social worker, who sent an email to Mr Brown the next day, September 11. The relevant part reads:

*“After my meeting with PH in the civic centre yesterday, he made an allegation that a support worker told him to go back to his country and was very disrespectful to him in which the residents witnessed. He also mentioned the support worker mocked his social worker. PH is unhappy with the support worker and it is felt the support worker needs to be professional.”*

She asked for an investigation.

18. It is possible that Mr Brown was aware of this matter the day before as it had been mentioned, presumably by PH, that he would be reporting matters to his social worker and that is something the claimant says PH did say to him. Also present in the office during the incident was another young person, NK. She had a discussion with PH at the bus stop after the event. In her statement she said that she heard the claimant “*muttering*” something to the effect of PH going back to his own country but she did not believe that PH heard that comment. PH said somewhat different things during the course of the investigation about this comment. He believes that he did hear the comment or was “98% sure” but it is possible that he only became aware of it when NK mentioned it to him. The claimant denies that he said any such thing.

19. Other comments which caused concern related to the claimant saying something about PH being a little boy and the claimant being either a grown man or a big man and making reference to PH's social worker being a young girl or a little girl. It appears that voices were raised and NK was not asked to leave the room so she witnessed the argument. The claimant was asked to prepare a statement about what had happened and he did so. This appears at pages 149 to 150 of the bundle. In that he says:

*"I told PH I'm a grown man for him and he needs to stop talking in the manner he was speaking.*

*PH said how are you a big man for me you are not big for my S/W.*

*My reply you are 17 that makes you a minor as a teenager and your social worker is in her 20s so I'm older for you so have manners and stop acting tough. And I am not scared of Social Services as I am only doing a job."*

20. The claimant also said in that statement that he had made other comments to PH about him not being a gangster and that he was being influenced by his videos and that *"I replied loudly for him to calm himself and stopping shouting."* At the end of that statement the claimant says that PH left and then returned and said: *"I'm going to tell my S/W you said I should go back to Albania"*.
21. The matter needed to be reported to Mr Brown and then to LADO and it seems he and possibly other management members looked at CCTV footage of the incident. This showed something slightly different from what the claimant had stated with respect to who was in the room and when. At some point, maybe as late as Saturday 15 September, Mr Brown rang the claimant and said that he had looked at the CCTV footage and thought that the claimant might need to reflect and prepare another statement as it did not quite accord with the CCTV footage. The claimant therefore amended his statement (pages 153-4) the relevant parts being changed related to NK's presence in the room and how many times PH left and returned again. It also recorded when the door appeared to be closed.
22. What the respondent had seen on the CCTV footage meant that there were concerns about the claimant's handling of this difficult situation. Its witnesses gave evidence that the claimant did not undertake what they recognised as de-escalation techniques which would have included asking the other young person to leave the room, closing the door and giving the young person time to calm down.
23. There had been a meeting with management and PH on 13 September where his relationship with the claimant was discussed and he gave his version of what had happened on 10 September. In large part it accorded with the claimant's statement in that the conversation began with questions about PH getting a fan, threats to get the claimant fired, that the claimant had said *"Your social worker is a little girl to me"* with reference to PH being *"a little boy"*. He also stated that he heard the claimant say *"go back to your country"*. When asked about that comment, PH responded: *"That is what*

*went into my ear but I cannot be 100% sure*". He then made a comment about *"Sometimes you have to do these things to teach people."* It is not clear what he meant by that. PH did say that the claimant had denied saying anything about going back to his own country.

24. At that meeting PH was then asked to leave the office and the claimant was invited in to discuss his relationship with PH. He was told that there would be a full investigation and that he would be suspended so that the investigation could be carried out. PH was asked to re-enter the office for he and the claimant to talk to each other. PH raised a number of concerns and they then shook hands.
25. On 14 September a witness statement was taken from NK about 10 September incident. She said that she was in the office sitting on the sofa waiting for a bus when she heard the claimant and PH arguing. She recalled that the claimant said that PH's social worker *"is a little young girl"* and that he said that PH was *"a little boy"*. She said that the claimant *"continued to speak under his breath and said go back to your country but PH could not hear Jason speaking under his breath."* She said that she then met PH at the bus stop and told him what she had heard. The claimant agreed, when cross-examined, that he had a good relationship with NK and could think of no reason why she would manufacture this, although he did say that vulnerable young people in care would often make allegations of this sort.
26. Also, on 14 September, a statement in slightly different format was taken from PH. This followed questions being put to him and it records what he had said when he was previously spoken to although on this occasion (page 168) PH said that he heard the claimant say: *"Go back to Albania"* and that he was *"90% sure"*. This statement appears to have been taken whilst viewing the CCTV footage. The tribunal has not seen the CCTV footage and the claimant seemed to suggest that he was not shown it, but there seems to be very little dispute about what it showed and it did not include any audio so what was said (or not said) could not be ascertained.
27. On 14 September Ms Soudabi also spoke to LADO about what should happen about this incident as the respondent had been informed by the social worker about the complaint. The claimant was told that the respondent would have to wait for LADO's response and that he would continue to be suspended.
28. On 18 September a report was sent over by the respondent to LADO and this appears at page 169 of the bundle. This gave a summary of the allegations with respect to the incident and what actions had been taken, including the meeting with PH on 13 September, the separate meeting with the claimant and his suspension, meetings with the witness NK and with PH's social worker. The claimant, in his submissions at this hearing, but at no other point complained that his ethnicity having been described in that report as *"Jamaican"*. As he asked no questions about that the tribunal do



not know why the decision was taken to describe him in that way and whether it was taken from any other documents.

29. On 20 September the claimant was sent an email which gave further details of the suspension, what the respondent had done with respect to meeting the claimant and so on. That document says: “As you are self-employed we will not continue to pay you during your suspension as per your contract” and that they were waiting for LADO’s advice. The respondent also chased LADO for a response on the same day.

30. On 26 September LADO sent an email which reads:

*“I have read all the documents that were sent to me and following the conversation held with Ramina on Friday 21 September 2018 it appears that the allegation is **Substantiated**.*

*Please let me know what will be your next course of action when dealing with this matter internally.”*

31. Ms Soudabi replied to that email on the next day, 27 September, after they apparently were trying to discuss matters. She said what their investigation had shown and said:

*“Inappropriate comments by a staff member will not be tolerated and is against our policies and procedures and duty of care to ensure the young person is safeguarding at all times.*

*For this reason, we have decided to terminate [the claimant’s] employment with us as of immediate effect. We feel that this is the best decision for PH as well as the dynamics of the home. It is a shame that he has got this, however we take the safety of the young people very seriously and we are notifying [the claimant] of this today.”*

32. It appears that there was then a telephone conversation with LADO and by email of 28 September, LADO appears to give some advice with respect to how matters should be followed. She writes:

*“In regards to termination of his employment please ensure the following:*

- (a) Termination of his employment should be in proportionate of the concerns raised against him*
- (b) You will need to inform him that the allegation made against him was **Substantiated**. There is sufficient identifiable evidence to prove the allegation*
- (c) Review his contract together with your policy and procedure around termination*

(d) *Please ensure any conversation you have is put in writing to him.*”

33. It is not known by the tribunal whether LADO was aware that the claimant was on a self-employed contract. In any event, this advice led to the respondent to take the view that it should consider matters under its disciplinary procedures.
34. The claimant was therefore invited to a meeting on 12 October. Present at that meeting was Ms Soudabi, a Mr Corneille, another manager, and Mr Brown as well as the claimant. The notes of this hearing appear between pages 197 and 208 of the bundle. On page 197 it is said that the agenda is to *“Discuss the outcome of the Allegation of Verbal/Emotional bullying, made on 11.09.2018 by SW/PH about Jason McPherson Support worker and prepare for Final Disciplinary hearing”*. The tribunal understands that this meeting was recorded, perhaps on Ms Soudabi’s phone. In any event the allegations were discussed in some detail as well as what LADO had said about it. The claimant was told that LADO had decided it was substantiated and the claimant asked for a copy of the report by LADO which the respondent said they did not have.
35. The claimant was told that LADO was not *“happy to continue working with you”* but one of the managers went on to say they want to be fair and try and explain each point. The claimant was told that Brent’s *“conclusion is that your behaviour justifies gross misconduct and the YP involved felt bullied and there is enough evidence to prove this.”* He was also told, *“as a council they are no longer willing to place any YP within your care”*. There was then reference to a number of matters which appear in the respondent’s zero tolerance policy about what is not acceptable such as *“verbal-name calling, sarcasm, spreading rumours, persistent teasing, etc, emotional-tormenting, threatening ridicule, humiliation, exclusion from groups or activities”*. The claimant asked a number of questions including about what appeared on the CCTV footage and he was told what the concerns were of the respondent. These included the fact that there were opportunities for the claimant to defuse or de-escalate the situation, that his statement was not in line with what had been seen on the CCTV footage and that he had accepted making some inappropriate comments.
36. It was at this stage, that it was put to him that the word *“Rasclart”* had been alleged as having been said by the claimant. Mr Brown’s evidence was that this was something that NK said had been said, but it did not appear in her witness statement nor in PH’s. The claimant says, before this tribunal, that this is a particularly upsetting Jamaican swearword to use and he found the fact that this was mentioned in this meeting particularly upsetting. He denies using the word. The claimant accepts that he said that he was *“a grown man”* and that he was older than the social worker but explained that he was trying to explain and give PH some advice. In that meeting there is reference to a complaint but that seems to be a separate matter that the claimant was complaining about which we do not need to go into. The claimant disputed that he said anything about going back *“to your own*

country". He was told that this was a meeting to provide the claimant with information before a formal disciplinary hearing.

37. By email of 22 October the claimant was reminded that he had been invited to a disciplinary meeting on 26 October. He had also been sent various policies as well as the young persons' statements. The claimant could not attend on 26 October and the disciplinary hearing was relisted for 1 November. In the event, that did not go ahead, the claimant having produced a sick note on 23 October which said that he was away from work because of stress at work. That sick note ran from 15-30 October.

38. On 29 October the claimant sent a letter about his health. He repeated that he did not make any "racist or other inappropriate remarks" to PH but went on to say:

*"I admit that a discussion took place with the young person in question. I also admit the manner in which I spoke to him was out of character for me but I would submit in my defence that this was because of problems I am experiencing with my physical and mental health. I am seeking help with my mental health difficulties, specifically stress and hope this will be taken into consideration when considering my case."*

39. He went on to mention that his mental health had been negatively affected by his experience of being a young person in care who had himself been racially abused and that the respondent should keep that in mind when assessing whether he would be likely to have used that language to a young person. He asked for the allegations against him to be dismissed.

40. On 30 October the respondent, through Mr Corneille responded that the disciplinary hearing would be "put on hold" as the respondent were concerned about the claimant's emotional wellbeing. A number of communications then followed with the claimant asking that a member of staff, Ms Thompson-Brown, should be allowed to attend the meeting to accompany him and checking whether he had been able to download the documents. The respondent checked in on the claimant's health a number of times. The claimant himself raised some issues about the minutes of the meeting of 12 October. The claimant then sought advice from the Citizen's Advice Bureau.

41. On 19 November he sent a letter addressed to Mr Brown (page 466 and 467). This is headed: *Subject – Direct Discrimination/Unfair Treatment* and says "Please accept this letter as a formal grievance". The claimant then referred to the meeting of 13 September which he said was: "In relation to my race and cultural beliefs and in regards to being labelled a racist" and said that there was an impact on him because he felt he was "being discriminated". He referred to the fact that he was deliberately isolated and placed on unpaid suspension, that he was unable to access witnesses and so on. He made reference to the meeting on 12 October but complained that those conversations "were not logged". He repeated that he felt he had

been treated unfairly and asked that the matters be raised through a formal grievance in line with the company's grievance procedure.

42. It appears that there was no formal response to that grievance although an email at page 491 sent by Christopher Brown may well refer to it obliquely where he says *"thank you for your email"* but then goes on to discuss a meeting to be held on 22 November.
43. It seems that that meeting was specifically to talk about the claimant's health concerns and the notes of that meeting appear at 663 of the bundle. It is said to be a meeting about the claimant's health and wellbeing and the notes were audio-recorded by Ms Soudabi, the tribunal believes, on her phone. The claimant's letter of grievance of 19 November was also discussed. For instance, there is clear reference to it at page 663 with Ms Soudabi stating that *"I understand how it may have felt for you however any staff member in that situation with an allegation of racial comments would have been treated exactly the same"* to which the claimant replied: *"I understand that"*. Ms Soudabi then went on to say that: *"In the eyes of LADO and a fair investigation it doesn't hold any weight as you could be from any background and still be racially inappropriate."* She said that generalisations could not be made and that it couldn't be said that someone from a mixed background cannot be racially inappropriate. Again, the claimant replied: *"I understand that but that is how I felt. To me it felt personal."*
44. Mr Brown explained that discrimination means treating him differently to other employees and the claimant responded that he was being treated differently because he was at home with no contact with the team. There was further discussion about the alleged comments and the claimant said that he did not make those comments and that he thought - *"I'm a victim of a race card."* He took offence that it was suggested that he would make such comments. The claimant then sought to give an explanation for his written statements saying that he wasn't in the right frame of mind, that he *"couldn't really express himself"*.
45. Later, after an explanation was given about the need for the claimant to show a difference in treatment with another person, the claimant simply said: *"I think I have been treated differently but do you have anyone to compare that to how many disciplinaries have you had?"* Mr Brown replied that they had no such comparison and that they follow policies and procedures and that they feel they have been fair. Ms Soudabi questioned whether the claimant was suggesting that his statement was inaccurate because, if so, he could amend it and it could be forwarded to LADO. Ms Soudabi also reminded the claimant he was *"on a self-employed contract"* and went on to explain that they should not be holding a formal disciplinary hearing but they wanted to be fair and *"provide you with an opportunity to have you heard and allow you to bring new information to the forefront."*
46. The claimant raised issues then about his health and he was asked by Ms Soudabi if there is anything that impacted on his work. The claimant then

replied by giving an example of how he was feeling at the incident in question. He said that he *“couldn’t move, I was dizzy and felt like I was going to pass out”*. Ms Soudabi reminded the claimant that this was not in his statement. He said that it was difficult and there was further discussion about that aspect. Later in the meeting the claimant gave an explanation about what he said he was feeling on the day in question. In essence the claimant repeated that he was *“having some strange experiences”*, feeling dizzy and disorientated, having a bad time, his heart was going, he had a twitch in his ear. He agreed that some of the conversations were out of character and said *“But yes, the conversation wasn’t the best, it wasn’t my best performance”*. He denied making the racially inappropriate comment about PH going back to his own country.

47. Towards the end of the meeting, it was suggested that the claimant could put in a further statement if he wanted to, which could add what he said about the health issues. After that meeting the claimant did respond with a document (page 508). The document is dated 23 November and it repeats many of the aspects of the incident in relation to PH coming into the office and NK being there. What the claimant added was a number of issues about his breathing, his heart racing, dizziness, twitching in his neck and palpitations. The claimant said that he felt *“sluggish and dizzy”* and explained about having a pacemaker. He asked for this to be considered at any meeting.
48. Following further correspondence, Ms Soudabi sent the claimant an email on 27 November which confirmed the various discussions that had been held as well as communications sent by the claimant between 22 and 27 November. She said that the respondent was trying to deal with all those matters and that minutes would be sent to him soon. By letter also of 27 November the claimant was invited to a disciplinary hearing. It reads:

*“The Formal Disciplinary hearing is to discuss the outcome of the allegation of Verbal/Emotional bullying made on 10.09.18 by PH a resident of 12 Tudor Gardens and reported on 11.09 by a social worker, RA. It is for this reason we have called for the hearing on Tuesday 4.12.18 for 3pm at ...”*

49. That letter confirmed that LADO had found the allegations to be substantiated and that Brent have concluded that the allegations are justified as Verbal/Emotional bullying. The letter says: *“As a council they are no longer willing to place any YP within your care.”* There are then quotes from the policy as follows:

**“verbal  
name calling  
sarcasm, spreading rumours, persistent teasing etc  
Emotional tormenting,  
threatening ridicule, humiliation, exclusion from groups or activities”**

50. The claimant was told he could be accompanied by a work colleague or Trade Union representative and that the people attending would be Mr Corneille, Mr Brown acting in an HR capacity, and Ms Soudabi as minute taker. There was then an explanation about the need to send any documents as well as explanation about what documents would be considered.
51. The disciplinary hearing on 4 December 2018 proceeded. The tribunal has seen the claimant's notes of the hearing (542 & 543) which the claimant explained were made as notes after the hearing and then typed up. The respondent's notes are at pages 671-672. The significant difference between the two sets of notes is that the claimant recollected that he was told at the commencement of the hearing that he was found to have committed gross misconduct and that the decision was to terminate his employment. The respondent's notes show that there was considerably more discussion before that decision was reached. There was also some discussion after that time about what LADO had decided and questions of their independence and so on. The respondent's note of the claimant being told that he was dismissed reads as follows:

*Mr Corneille "said as JM is aware the LADO has found the investigation to be substantiated and based on all the information we have including all the additional information we do not feel that anything has come to the forefront which would change the outcome or investigation, although we appreciate JM was not feeling well he had many opportunities to raise this before the incident and after however did not and that is what has been provided would not change LADO's substantiated outcome, based on this we are left with no choice but to dismiss JM."*

52. The claimant raised some matters after that. That was essentially the outcome. The respondent sent a letter the following day confirming the decision. This was sent in Mr Corneille's name. The letter informs the claimant that his employment was to terminate immediately and then reads:

*"Through our internal investigation and Brents internal process and investigation of the allegation, the LADO have found your actions to be substantiated, which means that is sufficient identifiable evidence to prove the allegation to be true.*

*Our conclusion is your behaviour justifies gross misconduct for the following reasons:*

- **Verbal – name calling, sarcasm, spreading rumours, persistent teasing etc.**
- **Emotional – tormenting, threatening ridicule, humiliation exclusion from groups or activities**
- **Racist and racial taunts, graffiti gestures etc.**

*An allegation of gross misconduct is extremely serious and is not made lightly. Gross misconduct is regarded as a fundamental breach of contract that makes it impossible for Empower House to continue employing the employee. Where an employee is dismissed for gross misconduct the dismissal is normally summary, ie without notice.”*

53. The claimant was informed of his right to appeal and it then says: *“Please keep in mind that you have signed the self-employment contract and have agreed to the confidentiality policy.”*
54. By letter of 14 December the claimant appealed. He gave five grounds for the appeal. He said that he admitted that the discussion on 10 September was *“out of character”* for him but referred to his physical and mental health. The second point is that his mental health has been negatively affected by being a young person who was in care and has faced racial abuse and that it would be unlikely that he would use that language. The third point is that he felt the company did not follow due process in that he could not give his version of events before he was dismissed, that he could not challenge the respondent’s or LADO’s findings. The fourth point he made was that he had been working on a self-employed basis and therefore does not know why he needed to attend disciplinary hearings and he could not be dismissed on these grounds. Fifthly, he referred again to the question of whether he was an employee and could be dismissed in accordance with their disciplinary procedures. The claimant made no suggestion that there had been racial discrimination or harassment of the respondent towards him in the decision that was taken. Nor had he raised that at the disciplinary hearing.
55. There was a delay before the appeal hearing was arranged but it was then arranged for 6 March 2019. It was to be heard by the newly appointed head of human resources, Ms Dean, and Ms Thompson-Brown attended to accompany the claimant. Again, we have two sets of notes with respect to this. As mentioned earlier, the claimant submitted a document at the commencement of this hearing which were said to be his notes and we also had notes from the respondent at pages 570-573 of the bundle. Neither set of notes is particularly useful. Ms Dean could not remember much about the appeal hearing at all when asked. She did not know what documents she had before her and could not recall whether she had the claimant’s grievance of 19 November. It does not appear from either version of the minutes that the claimant made reference to that document or that he raised, except very briefly, any question of discrimination. The note in the respondent’s document is simply *“I have been discriminated against”* with no further discussion.
56. In the claimant’s notes the claimant made specific reference to the alleged Jamaican swearword said to have been mentioned at the meeting of 12 October. He recorded that he said that he finds this *“discriminating and racially profiling”* but there is no further discussion on that topic.
57. The meeting was apparently well over two hours so neither set of minutes can really encapsulate all that was said during the discussions there. It

appears that there were a few adjournments for other documents to be gained.

58. Ms Dean took the decision that the appeal could not succeed and that she agreed with the outcome of dismissing the claimant. She saw no reason to overturn his dismissal. Ms Soudabi wrote on Ms Dean's behalf in a letter which sets out what had been considered during the appeal and then says simply:

*"I am now writing to inform you of the decision taken by Sam Dean who conducted the appeal meeting, namely the decision to end your self-employed contract with Empowerhouse stands."*

59. The claimant had concentrated at that appeal hearing on issues about procedure as he has done in his cross-examination during this hearing. For instance, he has criticised the respondent for having Ms Soudabi involved at the investigation and the disciplinary hearing stage; that there was no response to his grievance of 19 November and that the minutes did not always include what had been said. When the claimant cross-examined the respondent's witnesses, they all agreed that they had no specific training on disciplinary processes.

### **Law and submissions**

60. The discrimination matters are brought under the provisions of sections 13 and 26 of the Equality Act 2010 (EQA). The relevant parts of the sections which apply here are as follows:-

13 Direct discrimination

- (1) *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
- (2) -

26 Harassment

- (1) *A person (A) harasses another (B) if—*
- (a) *A engages in unwanted conduct related to a relevant protected characteristic, and*
- (b) *the conduct has the purpose or effect of—*
- (i) *violating B's dignity, or*
- (ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*



- (2) -
- (3) -
- (4) *In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
  - (a) *the perception of B;*
  - (b) *the other circumstances of the case;*
  - (c) *whether it is reasonable for the conduct to have that effect.*
- (5) *The relevant protected characteristics are—*
  - *race;*

136 *Burden of proof*

- (1) *This section applies to any proceedings relating to a contravention of this Act.*
- (2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
- (3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*
- (4) -
- (5) -
- (6) *A reference to the court includes a reference to—*
  - (a) *an employment tribunal;*

62. In relation to the race discrimination and harassment claims, taken with the burden of proof provisions, we look first to see whether the claimant has shown primary facts from which we could conclude there was discrimination or unwanted conduct related to race. If the burden of proof does shift to the respondent, we look to it for an explanation for any difference in treatment or unwanted conduct.

63. It is unusual for there to be clear, overt evidence of discrimination and the tribunal should consider matters in accordance with S136 EQA. In addition, the tribunal accepts the guidance in Igen v Wong [2005] IRLR 258. The task of looking at the evidence for discrimination may be considered through a staged process. We first have to make findings of primary fact and to determine whether those show less favourable treatment and a difference in race. The case of Madarassy v Nomura International plc 2007 EWCA Civ 33

makes it clear that the claimant must show more than a difference in the protected characteristic and difference in treatment. In essence, the claimant must show more than the mere possibility of discrimination before the burden shifts. The tribunal should ask itself, are we satisfied, on the balance of probabilities, that this respondent treated this claimant less favourably than it treated or would have treated an applicant in a similar situation and of a different race/ethnic origin? When establishing whether there has been less favourable treatment, comparisons between two people must be such that the relevant circumstances are the same or not materially different. There may be facts from which inferences can be drawn and the EHRC Code of Practice in Employment may assist. The employer's explanation may be considered at the first or second stage as the tribunal considers all evidence presented.

64. As far as the unlawful deduction of wages claim is concerned this is brought under the provisions of part 11 of the Employment Rights Act 1996 (ERA). Section 13 provides that an employer shall not make deductions of wages unless they are required or authorised by a statutory provision or the worker has previously signed his agreement. The section covers, "*Workers under the definition appearing in s.230 Employment Rights Act as well as employees*". The question for the tribunal is whether the claimant was entitled to be paid during a period of suspension. There is no statutory provision to that effect so it would only be if the contract made such provision.
65. The claimant also brings a claim for breach of contract for the failure to give notice of dismissal. For these purposes the claimant relies on s.86 ERA which provides for employees to be entitled to a minimum notice of not less than one weeks' notice if the period of continuous employment is more than one month but less than two years, which is the situation here. That minimum notice is not required to be given where conduct by the employee amounts to gross misconduct entitling the employer to summarily dismiss. In some employment contracts, the notice period is longer but there is no such period in the claimant's contract so that is not relevant.
66. Both parties made short oral submissions. Neither referred us to any cases but we are of course aware of leading cases which assist us with our deliberations. There is no dispute on the legal tests to be applied and, in essence, the respondent submitted that the claimant could not show that any of the conduct as found related to his race or that he was less favourably treated. He could also not show that he was entitled to the sums claimed.
67. The claimant said that he believed that he had been discriminated against on a number of occasions. He referred to the procedural failings and was particularly concerned that the respondent did not respond formally to his grievance. He pointed specifically to the Jamaican swearword which had caused him to be upset and said that the flawed process showed that he had been discriminated against. Although he was aware of the LADO processes, he said that the respondent did not necessarily need to follow what LADO had found. He also pointed to a number of matters which

concerned him about the tribunal process with there being no response, a late acceptance of the response and lateness with bundles and witness statements. He said that he had been self-employed but he believed that he might well have been an employee when he was suspended when the respondent began to follow their own disciplinary processes.

## Conclusions

68. The tribunal has decided that it makes sense to attempt to answer the list of issues in the order in which they have been summarised although they do not follow in chronological order. We look first then at the facts which arise under issue 2 which relate both to the claims of harassment and direct discrimination. Our findings of fact show the following:-

69. Issue 2.1

69.1 PH did accuse the claimant of telling him to “go back to your own country”, but that is not conduct that the respondent itself engaged in. It was an accusation that was made to it which it proceeded to investigate.

70. Issue 2.2

70.1 The outcome letter (that is the dismissal letter at page 547, paragraph 52 above) adding the words ‘racist’, ‘racist terminology’, ‘racist graffiti’ and ‘verbal teasing’. It is true that the outcome letter does appear to add some matters from the respondent’s policies but not quite as quoted here. The quote appears at paragraph 52 and that was conduct which the respondent did engage in.

71. Issue 2.3

71.1 This relates to the notes of the meeting of 12 October, and, in particular, the additional word, which is said to be a Jamaican swearword and is quoted above at paragraph 36. It appears at three points in notes of that discussion and was something that was mentioned.

72. Issue 2.4

72.1 Suspending the claimant. This did of course occur as set out above.

73. Issue 2.5

73.1 The failure to deal with the incident in May 2018 when a service user called the claimant a racially abusive term. This was reported and appears to have been followed up in terms of reporting and so on, although it is not known how the respondent dealt with that particular aspect of the incident. The claimant has slightly changed his concerns about that to say that he felt that the respondent did not give him appropriate support.

74. Issue 2.6

74.1 The respondent failed to deal with incidents of racism set out at 2.6.1 and 2.6.2 both of which relate to one of the young people saying to the other young person that he should go back to his own country. No evidence has been provided of this whatsoever. There is nothing in the documents nor in the claimant's witness statement and the tribunal can make no findings with respect to that. It cannot be said that it occurred.

75. Issue 2.7

75.1 This relates to the claimant's grievance of 19 November. Although it was discussed at the meeting on 22 November, the tribunal finds that the respondent did not provide an outcome letter in writing about concerns raised there.

76. Issue 2.8

76.1 Is the dismissal of the claimant on 4 December 2018 which of course did occur.

77. Issue 3

77.1 The next question therefore appears at Issue 3. The tribunal has to decide whether such of the conduct as found above related to the claimant's protected characteristic. That is, is it connected to the claimant's description of his race as African Caribbean? The tribunal cannot find that there is any such connection. The burden of proof rests on the claimant to show that that treatment did relate to his race. Of course, it is obvious that things were said, or may have been said, which do appear to relate to various persons' race or nationality at the time. Some of them might have been directed towards young people and some of them towards the claimant. It was also discussed with the claimant whether he had used a Jamaican swearword which he very strongly denies. However, the tribunal does not find that means the conduct he complains about related to his race. Just because those matters were discussed, as indeed they had to be, did not mean that it related to his race. Much of the discussion, if not all of it, related to what was said and whether or not that might itself amount to racial language. Of course, the tribunal accepts that it was in large part unwanted conduct. Generally, people do not like having allegations levelled against them, particularly of a nature such as this which suggests, at the least, an element of racially derogatory language.

Issues 4 and 5

77.2 Even if it had related to race, the tribunal cannot find any of the unwanted conduct had the purpose of violating the claimant's dignity. The respondent had to investigate the allegation and did so to the

best of its abilities. Given that Brent had decided not to place children in homes where the claimant would work and the respondent's own concerns about the claimant's behaviour on 10 September, the purpose was not to violate his dignity nor create an intimidating etc environment for him.

78. Issue 6

78.1 The tribunal accepts that the claimant may have felt that the allegations, the suspension and dismissal did have the effect of violating his dignity. The tribunal must consider under Issue 6, whether it was reasonable for it to have that effect. The tribunal does have some sympathy with the claimant. It is clear that he has himself been subjected to racial abuse and was particularly upset that there was an allegation that he had used language which might be similarly abusive. However, the allegation was made. It was not reasonable for the claimant as a senior support worker, working with vulnerable and challenging young people where he accepted that things were said which were often inappropriate, for the conduct to have that effect. The harassment claim cannot succeed.

79. Direct discrimination on the grounds of race – Issue 7 - 10

79.1 Again, we are looking at the matters between 2.1 and 2.8 as set out above. We have found none of those matters amounted to harassment. We now look to see, under Issue 8 whether the claimant can show that he was less favourably treated than a hypothetical comparator. The hypothetical comparator must be someone who is in similar circumstances and it is likely to be not of African Caribbean heritage but who has had a similar allegation levelled against them. The claimant has simply been unable to point to any steps that the respondent took which would allow us to draw that inference. There is really nothing between what happened during the course of this investigation and the decisions taken to indicate that it was because of the claimant's race.

79.2 Even if we are wrong about that, we would consider the respondent's explanation. This is partly because the matters raised did involve a number of allegations with respect to racial language being used and that always makes it possible that there was some connection between what is said and the claimant's or another's race. We do not find it here but for completeness we consider whether the respondent, if the burden of proof had shifted to it, has provided a non-discriminatory reason. The respondent has provided such a non-discriminatory reason. First, it is of some relevance that the respondent is a multi-cultural organisation working in a multi-cultural environment. Secondly, it is clear from all the evidence the tribunal has heard that the respondent had to take guidance from LADO as to how to proceed. Once LADO had indicated to them that they could not place young people in a property where the claimant was working, the respondent had very little choice.

- 79.3 We think it is wise to deal here with a number of relatively significant procedural difficulties that the respondent faced. The first problem that they face is that Ms Soudabi, in an email to LADO, said that the decision had been taken to terminate the claimant's employment. Secondly, it is also not entirely clear to the tribunal why, if the claimant and the respondent agreed that he was self-employed, they needed to go through the disciplinary process which is primarily for employees. However, we do accept the respondent's explanation which was also given to the claimant at the time, which is that LADO had suggested a process and that the respondent thought it was being fair to give him the opportunity to say whatever he needed to say about the incident in question.
- 79.4 Although the respondent tried to follow a fair process there were some difficulties with it. The tribunal accept that the claimant did have the opportunity to attend meetings, but it would have been preferable for better minutes or notes to have been written and agreed with the claimant. The notetaking seems to have led to some inconsistencies and contributed to the difficulties for the claimant of engaging with the process. It is true that Ms Soudabi had considerable involvement throughout and it might well have been better for the respondent to try and have different people dealing with different aspects of the case. Importantly, the respondent did not provide an outcome letter to the claimant's grievance. It is also clear that managers had little or no training on disciplinary procedures which might well have led to some of the mistakes that were made.
- 79.5 As far as the appeal process is concerned, the tribunal were concerned by Ms Dean's evidence. She seemed to have an extraordinarily poor recollection of what had happened at the appeal meeting. Although the tribunal accepts that it was some time ago it is surprising that Ms Dean had not thought to remind herself by looking at the bundle of documents so that she could see if she could remember what she had in front of her. The notes do not make it clear what was discussed over a lengthy hearing. It does not show what was addressed and what was not addressed, nor does the outcome letter really answer the concerns the claimant raised.
- 79.6 However, having said all that, the tribunal understands that this organisation is a relatively new and small organisation and that managers did, as described by Mr Brown, wear a number of hats. The tribunal accepts that they were trying to follow a fair process and give the claimant a full opportunity to give his version of events. When the claimant raised concerns about his health and mental wellbeing, the respondent immediately responded by delaying the disciplinary proceedings and engaging with him on that matter. They also sought more information on his grievance which contained allegations of discrimination and the notes do show that they tried to understand both what he was saying and point out to him that he appeared to misunderstand the nature of a discrimination claim.

There are insufficient failings of the process for the tribunal to draw inferences that those failings were related or because of the claimant's race. The very fact that the respondent did decide to follow a clear process giving the claimant an opportunity to attend shows that it is less likely to have been race related or the respondent would not have taken that risk. Neither party really needed to engage in that process if, as the claimant says, he accepts that he was self-employed at the point of the incident.

79.7 The tribunal records and reminded the claimant that this is not a claim for unfair dismissal because there is no jurisdiction to hear that matter. These procedural failings can only be relevant if they show an inference of race discrimination and the claimant has not managed to shift the burden of proof to the respondent to show such discrimination or that it was related to his race. We appreciate it created some uncertainty for the claimant and that it made it a difficult process for him to follow and that he was upset throughout. That is not the same as being able to prove race discrimination.

80. Unlawful deduction of wages – Issue 11

80.1 Turing then briefly to the question of whether the claimant can succeed in his unlawful deduction of wages claim. It is simply not possible for him to do so. Even if the claimant could be said to be a worker under s.230 of the ERA, the contract that he signed does not make provision for him to be paid during suspension. He was on a zero hours contract and the contract he signed said that he would not be paid during suspension. That claim must fail.

Breach of contract- Issues 12-14

80.2 The notice pay claim is slightly more complicated because there is a statutory right to a minimum period of notice of one week for employees, unless the respondent is entitled to dismiss summarily. There is nothing in the claimant's contract to that effect. However, the claimant said that he was self-employed on a number of occasions, it is only in the tribunal hearing that he has sought to argue that, at some point he moved from being self-employed to being an employee, but there is very little evidence to support that suggestion. His suggestion is that it was because they were following the disciplinary process. The claimant agreed that he was a self-employed independent contractor; that he received gross pay for the work he did and had no set hours of work. Being asked to attend disciplinary hearings is not sufficient to convert that status to that of an employee when he was suspended without pay, in line with his written contract and subsequently terminated. Again, the tribunal has some sympathy with the claimant because it is clear that he was a little confused by the need for that process. However, the claimant cannot rely on the provisions for a statutory notice period at s.86 ERA and that claim must fail. Even if we are wrong about that, we find that the claimant would not have been entitled to notice because this was

a dismissal for gross misconduct. It is clear that he was told that it was LADO's opinion that it was gross misconduct and it became the view of the respondent. The claimant was told on a number of occasions that the allegations did amount to gross misconduct.

- 80.3 The claimant's claims under s13 and 26 EQA for harassment related to race and direct discrimination because of race are dismissed. His claims for unlawful deduction of wages and breach of contract are also dismissed

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Employment Judge Manley

Date: .....11<sup>th</sup> February 2022.....

Sent to the parties on: ....13<sup>th</sup> Feb 2022.

..THY.....  
For the Tribunal Office