EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109246/2021

Hearing Held in person in Edinburgh on 11-12 July & 17-18 October 2022

Employment Judge A Strain

Members: James McCaig & Jean Lindsay

Mr J Musialkowski	Claimant In Person
The Richmond Fellowship Scotland Limited	Respondent Represented by: Mr N MacDougal - Advocate

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

(1) the Claimant's claims of unfair dismissal and direct race discrimination are unsuccessful and are dismissed.

Background

1. The Claimant represented himself. He asserted a claim of Unfair Dismissal and Direct Race Discrimination on the basis of his Polish race/nationality. The Claimant sought a Basic Award and a Compensatory Award as detailed in his schedule of loss.

2. The issues for determination were set out in the PH Note of 28 March 2022 (Pages 81-82).

3. A Polish Interpreter was provide by the tribunal to assist the Claimant.

4. The Respondent was represented by Mr MacDougal, Advocate.

5. The Parties had lodged a joint bundle of documents with the tribunal in advance of the Hearing which extended to 307 pages.

6. The tribunal heard evidence from the Claimant and Louise Welby (Supervisor), Lindsay Stokes (HR Business Partner) and Paul Hepburn (Area Manager) for the Respondent.

7. Following conclusion of the Respondent's evidence on 12 July 2022 the Parties indicated that they intended to settle the matter and asked the tribunal to adjourn so that the terms of settlement could be agreed. The tribunal agreed to this reqiest and adjourned. Subsequently the tribunal received confirmation that settlement had not been achieved so the tribunal hearing recommenced on 17 October 2022.

8. The Claimant concluded his evidence and case on 17 October 2022. The tribunal adjourned to 18 October 2022 for final submissions. Prior to adjourning Mr MacDougal gave the Claimant a copy of his Written Submissions to which he intended to refer.

9. Both Parties then attended on 18 October 2022 and made oral submissions to the tribunal. Mr MacDougal also lodged the written submissions which he had provided to the Claimant.

Findings in Fact

10. Having heard the evidence and considered the documentary evidence before it the Tribunal made the following findings-in fact:

11. ■ The Claimant was employed by the Respondent from 6 November 201 7 until the termination of his employment by dismissal on 16 December 2020.

12. The Claimant was employed as a complex needs practitioner providing support to service users deployed at the Respondent's site at Teviot Court, Penicuik. The service users lived at the site.

13. The Respondent is a registered charity engaged in providing support for vulnerable service users.

14. The Claimant was employed under a contract of employment signed and dated 18 October 2017 (Pages 136-145).

15. Clause 5 of his contract of employment provided that the Claimant would work 39 hours per week and may be required to undertake sleepover and/or waking nights working (Page 137).

Suspension and Investigation

16. On 26 October 2020 the Claimant was suspended on full pay by his Manager (Kay Gillespie) (KG) following an incident between the Claimant and another Manager Kris Fenty (KF). This suspension was confimed in 'writing by letter of 27 October 2020 (Page 249-250).

17. The reason given for the suspension was to investigate the allegation that he had a verbal and physical confrontation with KF on 26 October 2020.

18. Lindsay Stokes (LS) (HR Business Partner) was appointed to conduct the investigation.

19. On 30 October 2020 the Claimant attended an investigation meeting with LS. Notes of the meeting are Pages 257-259.

20. The Claimant issued a supplementary statement by email of 11 November 2020 (Page 260).

21. LS met with and obtained statements and additional information from KF, Kris Smith' **(KS),** Laurence Naismith **(LN),** LW, Sharon Sloan **(SS)** and Rhonda Johnston (RJ) (Pages 261-282).

22. LS prepared an investigation report which contained her conclusions and recommendations (Pages 251-256). Her recommendation was for a disciplinary hearing to take place in relation to allegations of gross misconduct by the Claimant in respect of the incident on 26 October 2020.

Disciplinary Process

23. By letter of 1 December 2020 the Claimant was invited to a Disciplinary Hearing by the Respondent (Pages 283-284). The letter informed the

Claimant that the Disciplinary Hearing would be conducted by Jim Heron (JH) (Area Manager), the allegations against him, the right to be accompanied and that the potential outcome could be dismissal. It also enclosed a copy of the investigation Report.

24. The Claimant attended and participated in the Disciplinary Hearing without being accompanied on 10 November 2020. Notes of the Disciplinary Hearing were produced (Pages 285-289). The Disciplinary Hearing ended with the Claimant being informed that the outcome would be advised in writing to him.

25. By letter of 15 December 2020 the Respondent wrote to the Claimant and informed him of the outcome of the Disciplinary Hearing. He was informed that the allegations were upheld and that he was being summarily dismissed with effect from 16 December 2020. He was also informed of the right to appeal the decision. The letter was produced (Pages 299-300).

26. KF was summarily dismissed for gross misconduct.

Appeal

27. By email of 23 December 2020 the Claimant indicated that he was appealing the decision on the grounds stated in his email (Page 301).

28. By letter of 18 January 2021 the Respondent informed the Claimant that an Appeal Hearing would take place on 29 January 2021, that he had the right to be accompanied and that the Appeal Hearing would take place on 29 January 2021 and be conducted by Paul Hepburn (PH) (Area Manager).

29. The Claimant attended the Appeal Hearing on 29 January 2021 unaccompanied. Notes of the Appeal Hearing were produced (Pages 304-306).

30. The outcome of the Appeal Hearing was communicated to the Claimant by letter of 10 February 2021 from the Respondent (page 307).

Discrimination

31. The Respondent produced Rotas showing the employees who worked nightshift, the number of nightshifts per month and the race/nationality of the employees for the period May 2018 to December 2020 (Pages 188-241).

32. The Respondent produced an analysis of the nightshift working patterns from the Rotas (Page 242-243).

33. The Claimant worked marginally more night shifts than other employees during the months of May & June 2018, July, November and December 2019, January and July 2020 but did not work any nightshifts March 2019.

34. In 2018 the Claimant worked 33 nightshifts compared with a Scottish employee who worked 29. In 2019 the Claimant worked 34 nightshifts, a Scottish employee worked 10. In 2020 the Claimant worked 7 nightshifts, a Scottish employee worked 26.

35. Nightshift working was a contractual duty under the Claimant's contract of employment Clause 5.

36. By email of 12 June 2020 (Page 244-245) the Claimant objected to the allocation of nightshifts in the July 2020 Rota to LW.

37. By email of the same date LW confirmed to the Claimant that the Rota was withdrawn and would be amended and reissued (Page 245).

38. The allocation of nightshifts to the Claimant was done by LW on the basis of her confidence and trust in the Claimant and not motivated in any way by considerations of race/nationality.

The Relevant Law

39. The claimant asserts unfair dismissal.

Unfair Dismissal

40. Section 94 of the Employment Rights Act 1996 ("the ERA") provides for the right of an employee not to be unfairly dismissed by his employer.

Section 98(1) provides the following:-

Y*1)* *in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -*

(a) *the reason (or, if more than one, the principal reasons) for the dismissal, and*

(b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify dismissal of an employee holding the position which the employee held.*

(2) 4 *reason falls within this subsection if it -*

(a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

(b) *relates to the conduct of an employee,*

(c) *is that the employee was redundant, or*

(d) *or is that the employee could not continue to work in the position which he held without contravention (either on his part or on the part of his employer) of a duty or restriction imposed by or under an enactment.*

(4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -*

(a) *depends 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*

(b) *shall be determined in accordance with equity and the substantial merits of the case."*

41. In terms of Section 98(1) it is for the employer to establish the reason for dismissal In the event the employer establishes there was a potentially fair reason for dismissal, the Tribunal then has to go on to consider the fairness of the dismissal under Section 98(4).

42. The Tribunal should first examine the facts known to the employer at the time of the dismissal and ignore facts discovered later. The onus of proof is on the employer.

43. The Tribunal must then ask whether in all the circumstances the employer acted reasonably in treating that reason as a sufficient reason for dismissing the employee. The onus of proof is no longer on the employer at this stage. The matter is at large for determination by the Tribunal under section 98(4).

44. The Tribunal must also consider whether the respondent carried out a fair procedure taking into account the terms of the ACAS Code of Practice. In that regard, any procedural issues identified by the Tribunal should be considered alongside the other issues arising in the claim, including the reason for dismissal *(Taylor* v OCS *Group Ltd [2006] EWCA Civ 702, paragraph 48).*

45. What a Tribunal must decide is not what it would have done but whether the employer acted reasonably; *Grundy (Teddington) Ltd v Willis HSBC Bank Pic (formerly Midland Bank pic) v Madden 2000 ICR 1283.* It should be recognised that different, employers may reasonably react in different ways and it is unfair where the conduct or decision making fell outside the range of reasonable responses. The question is not whether a reasonable employer would dismiss but whether the decision fell within the range of responses open to a reasonable employer taking account of the fact different employers can equally reasonably reach different decisions. This applies both to the decision to dismiss and the procedure adopted.

46. Mr Justice Browne-Wilkinson in his judgement in *Iceland Frozen Foods Ltd v Jones ICR 17,* in the Employment Appeal Tribunal, summarised the law. The approach the Tribunal must adopt is as follows: i. “The starting out should always be the words of section 98(4) themselves ii. In applying the section, a Tribunal must consider the reasonableness of the employers conduct, not

simply whether they (the members of the Tribunal) consider the dismissal to be fair Hi.In judging the reasonableness of the employers conduct, a Tribunal must not substitute its decision as to what was the right course to adopt In many (though not all) cases there is a band of reasonable responses to the employee's conduct which in which the employer acting reasonably may take one view, another quite reasonably take another The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which the reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, it is falls outside the band it is unfair."

47. In terms of procedural fairness, the (then) House of Lords in *Polkey v AE Dayton Services Ltd 1988 iCR 142* firmly establishes that procedural fairness is highly relevant to the reasonableness test under section 98(4). Where an employer fails to take appropriate procedural steps, the Tribunal is not permitted to ask in applying the reasonableness test whether it would have made any difference if the right procedure had been followed. If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced. Lord Bridge set out in this case the procedural steps which an employer in the great majority of cases will be necessary for an employer to take to be considered to have acted reasonably in dismissing: "in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

48. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal According to the Employment Appeal Tribunal in *British Home Stores v Burchell 1980 ICR 303* the employer must show: 1. It believed the employee guilty of misconduct 2. It had in mind reasonable grounds upon which to sustain that belief 3. At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was

reasonable in the circumstances. 4. The employer need not have conclusive evidence of misconduct but a genuine and reasonable belief, reasonably tested. The burden of proof is on the employer to show a fair reason but the second stage of reasonableness is a neutral burden. The Tribunal must be satisfied that the employer acted fairly and reasonably in all the circumstances in dismissing for that reason, taking account of the size and resources of the employer, equity and the substantial merits of the case

49. In some limited cases it may be permissible for Tribunals to "look behind" the stated reason for dismissal. In *Jhuti v Royal Mail 2020 ICR 731* the Supreme Court held that in general Tribunals should focus upon the reason given by the decision maker, subject to exceptions , such as where someone in the hierarchy of responsibility above the employee determines that for one reason the employer should be dismissed but that reason is hidden behind an invented reason which the decision maker adopts . In those exceptional cases it is the Tribunal's duty to look beyond the invented reason. The Supreme Court noted that instances of decisions to dismiss in good faith, not just for a wrong reason, but for a reason which the employee's line manager has dishonestly constructed will not be common.

50. In *Ilea v Gravett 1988 1RLR 487 the* Employment Appeal Tribunal considered the Burchill principles and held that those principles require an employer to prove, on the balance of probabilities that he believed, again on the balance of probabilities, that the employee was guilty of misconduct and that in all the circumstances based upon the knowledge of and after consideration of sufficient relevant facts and factors he could reasonably do so. In relation to whether the employer could reasonably believe in the guilt, there are an infinite variety of facts that can arise. At one extreme there will be cases where the employee is virtually caught in the act and at the other extreme the issue is one of pure inference. As the scale moves more towards the latter, the matter arising from inference, the amount of investigation and inquiry will increase. It may be that after hearing the employee further investigation ought reasonably to be made. The question is whether a reason able employer could have reached the conclusion on the available relevant evidence.

51. In that case the Employment Appeal Tribunal upheld the Tribunal which found that the employer had not investigated the matter sufficiently and therefore did not have before them all the relevant facts and factors upon which they could reasonably have reached the genuine belief they held. The sufficiency of the relevant evidence and the reasonableness of the conclusion are inextricably entwined.

52. The amount of investigation needed will vary from case to case. In *Gray Dunn v Edwards EAT/324/79* Lord McDonald stated that "it is now well settled that common sense places limits upon the degree of investigation required of an employer who is seized of information which points strongly towards the commission of a disciplinary offence which merits dismissal." In that case the Court found that further evidence would not have altered the outcome as the employer had shown that they would have taken the same course even if they had heard further evidence. That was a case which relied upon the now superseded *British Labour Pump v Byrne 1979 IRLR 94* principle but emphasises that the amount of investigation needed will vary in each case. Thus in *RSPB v Croucher 1984 IRLR 425* the Employment Appeal Tribunal held that where dishonest conduct is admitted there is very little by way of investigation needed since there is little doubt as to whether or not the misconduct occurred.

53. A Tribunal in assessing the fairness of a dismissal should avoid substituting what it considers necessary and instead consider what a reasonable employer would do, applying the statutory test, to ensure the employer had reasonable grounds to sustain the belief in the employee's guilt after as much investigation as was reasonable was carried out. In *Ulsterbus v Henderson 1989 IRLR 251* the Northern Irish Court of Appeal found that a Tribunal was wrong to find that in certain circumstances a reasonable employer would carry out a quast-judicial investigation with confrontation of witnesses and crossexamination of witnesses. In that case a careful and thorough investigation had been carried out and the appeal that took place involved a "most meticulous review of all the evidence" and considered whether there was any possibility that a mistake had been made. The court emphasised that

the employer need only satisfy the Tribunal that they had reasonable grounds for their beliefs.

54. Where there are defects in a disciplinary procedure, these should be analysed in the context in which they occurred. The Employment Appeal Tribunal emphasised in *Fuller v Lloyds Bank 1991 IRLR 336* that where there is a procedural defect, the question to be answered is whether the procedure amounted to a fair process. A dismissal will normally be unfair where there was a defect of such seriousness that the procedure itself was unfair or where the result of the defect taken overall was unfair. In considering the procedure, a Tribunal should apply the range of reasonable responses test and not what it would have done (see ***Sainsburys v Hitt 2003 IRLR 23).***

55. The Court in *Babapulle v Ealing 2013 IRLR 854* emphasised that a finding of gross misconduct does not automatically justify dismissal as a matter of law since mitigating factors should be taken into account and the employer must act reasonably. Length of service can be taken into account *(Strouthous v London Underground 2004 IRLR 636).*

56. In considering a claim for unfair dismissal by reason of conduct, the Tribunal is required to consider the terms of the ACAS Code of Practice on Disciplinary and Grievance matters. This sets out what a reasonable employer would normally do when considering dismissal by reason of conduct. This includes conducting the necessary investigations, inviting the employee to a meeting, conducting a fair meeting, issuing an outcome letter and allowing an appeal. Where a grievance has been raised during the process, it may be appropriate to pause the process and deal with the grievance or to deal with matter concurrently.

57. The reasonableness of the decision to dismiss is scrutinised at the time of the final decision to dismiss - at the conclusion of the appeal process ***(West Midland v Tipton 1986 ICR 192).*** This was confirmed in ***Taylor v OCS 2006 IRLR 613*** where the Court of Appeal emphasised that there is no rule of law that only a rehearing upon appeal is capable of curing earlier defects (and that a mere review never is). The Tribunal should consider the disciplinary

process as a whole and apply the statutory test and consider the fairness of the whole disciplinary process, if there was a defect in the process, subsequent proceedings should be carefully considered. The statutory test should be considered in the round.

Direct racial discrimination

58. Direct discrimination occurs where *"because of a protected characteristic, A treats B less favourably than A treats or would treat others"* (section 13(1), EA 2010).

59. The less favourable treatment must be because of a protected characteristic. This requires the tribunal to consider the reason why the claimant was treated less favourably: what was the Respondent's conscious or subconscious reason for the treatment?

60. The tribunal will need to consider the processes which led A to take a particular course of action in respect of B, and to consider whether a protected characteristic played a significant part in the treatment.

61. ' If the treatment of B puts them at a clear disadvantage compared with others, then it is more likely that the treatment will be less favourable.

62. There must be no material difference between the circumstances of B and the comparator (section 23(1), EA 2010).

Burden of Proof

63. A two-stage approach to the burden of proof applies [Royal Mail Group Ltd v Efobi [2021] UKSC 33]:

Stage 1: can the Claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the Respondent.

Stage 2: is the Respondent's explanation sufficient to show that it did not discriminate?

64. The burden will shift where there are facts from which a tribunal could decide, in the absence of any other explanation that a breach has occurred. In that

situation a respondent is required to show a non-discriminatory explanation for the primary facts on which the prima facie case is based [Glasgow City Council v Zafar [1998] IRLR 36 (HL)].

Submissions

65. The Claimant made oral submissions at the conclusion of the case and referred to his Schedule of Loss.

66. The Respondent lodged Written Submissions and spoke to these.

Observations on the Evidence

67. There was generally no dispute between the Parties and the witnesses as to the facts in this case. The Claimant accepted that he had created the poster referred to in respect of KF and the events of 26 October 2020 were not in dispute.

68. The Claimant instigated the physical contact between KF and himself and was unrepentant - he would do the same again. He saw himself as standing up to a bully.

69. In so far as the Discrimination claim was concerned the Claimant had no credible or reliable evidence in support of this. It was his suspicion and it was not supported by the documentary evidence in the form of the Rotas which he accepted were accurate.

70. The Tribunal then considered the various claims advanced.

Unfair Dismissal

Reason for dismissal

71. The Tribunal considered the evidence in order to determine the reason, or principal reason for dismissal, at the point when that Claimant was dismissed.

72. The reason given by the Respondent was conduct. On the basis of the evidence before it the Tribunal accepted and found that the reason, or principal reason, for the termination of his employment was the Claimant's

conduct. This is a potentially fair reason. The Tribunal went on to consider the fairness of the dismissal under Section 98(4).

73. The Tribunal examined the facts known to the Respondent at the time of the dismissal. The onus of proof is on the Respondent.

74. The Tribunal then asked whether in all the circumstances the Respondent acted reasonably in treating that reason as a sufficient reason for dismissing the Claimant. The onus of proof is no longer on the employer at this stage. The matter is at large for determination by the Tribunal under section 98(4).

75. The Tribunal followed the guidance of the Employment Appeal Tribunal in *British Home Stores v Burchell 1980 ICR 303* the employer must show: 1. It believed the employee guilty of misconduct 2. It had in mind reasonable grounds upon which to sustain that belief 3. At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances. 4. The employer need not have conclusive evidence of misconduct but a genuine and reasonable belief, reasonably tested. The burden of proof is on the employer to show a fair reason but the second stage of reasonableness is a neutral burden. The Tribunal must be satisfied that the employer acted fairly and reasonably in all the circumstances in dismissing for that reason, taking account of the size and resources of the employer, equity and the substantial merits of the case

Reasonable Grounds to sustain belief of misconduct

76. The Tribunal considered the available evidence. It was clear (and not in dispute between the Parties) upon what evidence the Respondent had relied to form the belief of misconduct. There had been a comprehensive investigation and report. The Claimant accepted he had created the poster and the description of how he had behaved on 26 October 2020. He had engaged in a physical confrontation in an environment where supported individuals lived.

77. The Tribunal concluded that the Respondent had clear grounds upon which to sustain the belief of misconduct.

Reasonable investigation

78. The Claimant had been interviewed and an investigation statement taken. A comprehensive investigation had taken place and a detailed report prepared by LS.

79. There was no suggestion that the investigation was in any way deficient or that there should have been any further investigation.

80. The Tribunal concluded there had been reasonable investigation.

Genuine and Reasonable Belief of Misconduct

81. The Tribunal concluded that the Respondent did have a genuine and reasonable belief of misconduct. The Claimant accepted the factual circumstances of what had transipired on 26 October 2020. There was no contrary evidence.

Was dismissal fair and reasonable in all the circumstances

82. The Tribunal considered and found that it was. This was an admitted incident of physical confrontation between two SSSC registered professionals in a support setting where vulnerable individuals lived. The incident took place in front of service users and other professional members of staff. Both individuals involved in the confrontation were dismissed and as such there was no disparity in treatment.

83. The Claimant was unrepentent in his views that should the same situation arise he would behave in the same manner. He considered his actions justified as standing up to an alleged bully yet failed to accept the Respondent's argument that he could have raised complaints of bullying through the appropriate Channells and not taken matters into his own hands.

84. The Respondent had undertaken a comprehensive investigation, disciplinary and appeals process which was fairly and reasonably conducted.

85. The Respondent clearly valued and respected the Claimant from the evidence before the Tribunal. However, having considered all alternatives the

Respondent had concluded there was no option other than to dismiss. The Tribunal considered and found that to be an entirely fair and reasonable approach in the circumstances.

Direct Discrimination

86. The Tribunal considered the issues for determination.

Nighshift Allocation

87. It was clear that the Claimant worked marginally more night shifts than other employees during the months of May & June 2018, July, November and December 2019, January and July 2020 but did not work any nightshifts March 2019.

88. In 2018 the Claimant worked 33 nightshifts compared with a Scottish employee who worked 29. In 2019 the Claimant worked 34 nightshifts, a Scottish employee worked 10. In 2020 the Claimant worked 7 nightshifts, a Scottish employee worked 26.

89. Nightshift working was a contractual duty under the Claimant's contract of employment Clause 5.

90. The Claimant accepted the rotas were generally correct.

Less Favourable Treatment

91. The Tribunal considered that there was no basis for asserting that there was any less favourable treatment of the Claimant on the basis of his race/nationality in the circumstances.

92. Over the whole of the relevant period the Claimant had not been allocated significantly more nightshifts than other employees of different race/nationality to him. It was only in 2019 it could be said that he was allocated significantly more than other employees. However, in 2020 he was allocated significantly less than a Scottish employee.

93. The Tribunal found no evidence to support the assertion that the allocation of nightshifts was motivated by race/nationality. The Tribunal accepted LW's

clear evidence on that point. The allocation of nightshifts was done by LW on the basis of her confidence and trust in the Claimant.

94. The Claimant was unable to identify any appropriate comparator to support his claim of discrimination.

95. The Claimant could have complained about the allocation of nightshifts but did not do so until 12 June 2020. When he did so the allocation was immediately withdrawn and adjusted by LW.

96. The claim of direct discrimination is unsuccessful and is dismissed.

Employment Judge: **A Strain**
Date of Judgment: **18 November 2022**
Entered in register: **22 November 2022**
and copied to parties