EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr A George	AND	Dorset Healthcare University NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT SOUTHAMPTON **ON** 26 to 28 September 2022

EMPLOYMENT JUDGE GRAY **MEMBERS: MS A SINCLAIR**
MR N KNIGHT

Representation

For the Claimant: **Mr Downey (Counsel)**
For the Respondent: **Mr O'Dempsey (Counsel)**

RESERVED JUDGMENT ON LIABILITY ONLY

The unanimous judgment of the tribunal is that:

- **The complaints of unfair dismissal and direct race discrimination fail and are dismissed.**
- **The complaint of wrongful dismissal succeeds (remedy for this is still to be determined).**
- **The complaints for accrued but unpaid holiday pay and breach of contract (other than for notice pay (wrongful dismissal)) are dismissed on withdrawal.**

REASONS

1. By his claim form the Claimant has presented claims of:

    a. Unfair dismissal;

    b. Discrimination on the grounds of race;

    c. Breach of contract (relating to notice and relating to failure by the Respondent to follow its own procedures and non-payment of holiday pay);

    d. Accrued but unpaid holiday pay.

2. As is recorded in the case management summary of Employment Judge Dawson (from the case management preliminary hearing on the 1 July 2021):

3. The Claimant was employed by the Respondent as a nurse. He was dismissed for alleged gross misconduct in relation to the provision of medication. He says that he was treated more harshly than non-Indian employees would have been, in the past others have been dealt with on an informal basis. The Respondent denies that. The only issue of discrimination is whether the Claimant was dismissed because of his race.

4. The timetable agreed at the case management hearing was also confirmed as agreed at the commencement of this the final hearing:

    Day 1 Until noon Tribunal reading and preliminary matters
    Afternoon Respondent's evidence

    Day 2 Until 11 am Respondent's evidence
    Until 4pm Claimant's evidence

    Day 3 Until 11am Submissions
    Until 4pm Deliberations, Judgment, and remedy if appropriate [***note that this final hearing was subsequently converted to liability only so this part would be to case manage for the determination of remedy if appropriate***].

5. Unfortunately, the agreed times for the presentation of the parties' oral evidence could not be met. This led to submissions being made after the lunch recess on day three. With insufficient time then left for the Tribunal to deliberate and deliver judgment, it was reserved.

6. The agreed issues to be determined in respect of liability (for the complaints still pursued as the Claimant withdrew the complaints for accrued but unpaid holiday pay and breach of contract (other than for notice pay (wrongful dismissal)) before the hearing of evidence commenced) are as follows:

1. Unfair dismissal

1.1 Was the Claimant dismissed? This is admitted.

1.2 What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996.

1.3 Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances? The burden of proof is neutral here, but it helps to know the Claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:

1.3.1 The Claimant says that the real reason for the dismissal was the Claimant's race.

1.3.2 The Respondent did not deal with the matter in accordance with its normal processes which would be to deal with the matter informally on the basis of "lessons learned".

1.4 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

1.5 If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

1.6 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged.

2. Wrongful dismissal; notice pay

2.1 What was the Claimant's notice period?

2.2 Was the Claimant paid for that notice period? It is accepted that he wasn't

2.3 If not, was the Claimant guilty of gross misconduct or did he do something so serious that the Respondent was entitled to dismiss without notice?

3. Direct race discrimination (Equality Act 2010 section 13)

3.1 The Claimant describes himself as Indian.

3.2 The Respondent admits that it dismissed the Claimant.

3.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant says he was treated worse than Mr Sibanda but also relies upon a hypothetical comparator.

7. For reference at this hearing, we were presented with:

    a. A main hearing bundle that started at 370 pages and was then extended at the beginning of the first day to 411 pages.

    b. A supplemental bundle consisting of 156 pages.

    c. An abbreviation list.

8. We were presented witness statements as follows:

    a. Claimant.

    b. Mr M Comfort (“MC”), who carried out the investigation.

    c. Ms L Orchard (“LO”), who says she took the decision to dismiss the Claimant.

    d. Mr M Kelly (“MK”), who heard the appeal against dismissal.

9. All four witness then gave oral evidence and were subject to cross examination.

10. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

The Facts

11. The Claimant's contract of employment is at pages 49 to 52 of the main bundle and his job description at pages 77 to 81.

12. The Claimant was employed from the 17 June 2004 as a Staff Nurse Grade E (see page 49).

13. The Job description (as at page 77) records the Claimant's role as a Band 5 Staff Nurse.

14. The notice period for this employment, based on the Claimant's length of service and contract of employment, would be 12 weeks (see page 50).

15. At page 51 of the bundle, we see that the employment contract refers to Disciplinary and Grievance Procedures, stating that a copy is available on request and copies are also kept in the HR department.

16. There were a number of Respondent polices and procedures presented to us in evidence:

    a. Disciplinary and Capability Policy

    b. Disciplinary and Capability Procedures for Line Managers and Employees

    c. Policy for reporting and Management of Incidents Including Serious Incidents

    d. Administration of Medicines Policy

    e. NMC The Code.

17. During the course of the oral evidence reference was made to parts of those, in particular:

    a. The definition of gross misconduct being … "misconduct of such a serious nature that it fundamentally breaches the contractual relationship between the individual and the organisation. In the event that an individual commits an act of gross misconduct, the Trust will be entitled to dismiss the individual summarily (i.e., dismiss without notice and further pay)." (page 56).

    b. That the Disciplinary and Capability Procedure (with the exception of serious or gross misconduct) is intended, in the first instance, to

correct shortcomings of staff and provide support in achieving and maintaining acceptable standards of conduct …" (page 56)

c. "Gross misconduct is conduct of such a serious nature that it breaches the contractual relationship between the employee and the Trust. Matters that are considered to amount to gross misconduct include: … An act or omission that has the potential to place a child or vulnerable adult at risk" (page 64 and 65).

d. "A decision to suspend an employee should only be taken after careful consideration of the circumstances. Alternatives … should be considered in the first instance, for example, temporary relocation or re-assignment of duties." (page 66).

e. "Drug errors must be reported in the usual way via the online incident reporting system…" (page 72 of the supplemental bundle).

18. It is not in dispute that the Claimant was aware of these procedures. He was provided copies of the disciplinary policy and procedures as part of the disciplinary process. Also, as is confirmed in the undisputed evidence of LO (see paragraph 4 of her statement), the Claimant would have been aware and had access to copies of the Incident Reporting Policy, Medicines Policy and the Code.

19. By way of background the Claimant was based on the Melstock Ward of the Respondent since 2019. He worked on the night shift.

20. We were referred to supervision notes dated 26 July 2019 (pages 242 to 243) concerning the work of the Claimant and to a performance improvement plan in place with the Claimant dated 11 October 2019 (see page 158).

21. The dismissal in this case relates in the main to matters arising on the 4 November 2019 when the Claimant was working as the lone RMN, alongside some support workers.

22. The allegations against the Claimant start with an email from Mr Roberts (one of the support workers) dated 8 November 2019 (see pages 88 to 90). Reference is also made to Patient A's wellbeing plan (page 153).

23. This leads to a meeting with the Claimant on the 12 November 2019 where a suspension risk assessment is carried out by Ms Legg.

24. The Claimant confirmed that he remembered the meeting with Ms Legg on the 12 November 2019 and he did not dispute the record of it (see page 100). He was aware of the two main issues raised, as recorded in that note,

being … “sleeping on night shift [and] not completing an incident form when medication was found stashed in their bedroom”.

25. The Claimant was also aware of the risk assessment for suspension report (see page 93) and that he had seen that in advance of the disciplinary hearing.

26. The report notes the allegations as the Claimant had not observed a patient take her medication. Then, following those medications being found untaken, the Claimant did not complete an incident report. Also, that the Claimant was noted as being asleep on duty in the day area of the ward for approximately 15 minutes.

27. The Claimant confirmed with reference to the summary at the bottom of page 93 and top of page 94 that it was indicated that the allegations were potentially gross misconduct and when asked if he could see why it was potentially gross misconduct, he confirmed that he could because sleeping on duty is “serious gross misconduct”. We therefore find that this is a matter that would fall into the serious or gross misconduct exception of the disciplinary procedure explaining why an informal process would not be appropriate.

28. The Claimant is not suspended at that time the suspension risk assessment confirming that the Claimant … “can remain in their place of work but will need to have adjustments made to their shift patterns as cannot work as the lone RMN on night duties until the allegations are further investigated and a conclusion drawn.” (page 96). The Claimant, instead being placed on day shifts, continues at work until he is signed off sick on the 17 November 2019 until the 22 February 2020 and then subject to shielding (see paragraph 13 of MK’s witness statement).

29. The Claimant accepted during cross examination (with reference to page 66 paragraph 4.4.3) that an employee can be accused of gross misconduct and not suspended. On this basis, the non-suspension of the Claimant, should not be taken as the Respondent not considering the matters as serious. The Claimant himself accepts the sleeping allegation is “serious gross misconduct”. This course of action in our view does not therefore waive any alleged breach that the Respondent seeks to subsequently rely upon.

30. By letter dated 15 November 2019 MC is provided with terms of reference to conduct an investigation into the allegations (see pages 101 to 103). MC confirms in his evidence that this was his first investigation (see paragraph 5 of his statement).

31. The Claimant agreed that the letter dated 20 November 2019 (pages 104 to 105) confirmed the outcome of the discussions on the 12 November 2019.

32. The Claimant agreed he understood the allegations being put to him as set out in that letter, that there was to be a formal management investigation, that he had received a copy of the disciplinary policy, and that he was aware that MC could talk to witnesses. The Claimant confirmed that he [the Claimant] did not name anyone in particular to be interviewed.

33. We note here that the Claimant had union representation throughout the internal disciplinary process. The Claimant also confirmed in cross examination that he had discussed the need for witnesses with his union representative and they had advised none were needed.

34. MC has presented to us in his witness evidence details of the investigation he undertook.

35. About the investigation MC confirmed that the balance of probability reference was relied upon and that the weight of evidence (i.e., 2 people saying one thing versus one person saying another) led to his findings. Appendix 5, the guidance on conducting an investigation, from the supplemental bundle (pages 25 to 26), refers to a check list that MC confirmed he relied upon to conduct his investigation. This includes reference to … "reviewing findings to establish on the balance of probability what did/did not occur".

36. MC is asked to carry out some follow up investigation into matters. About this, during cross examination of the Claimant, it was explored that by LO following up on a question the Claimant had raised (why Mr Roberts did not wake him up if he saw he was asleep) that this would point against her having a motive to unfairly dismiss him. Further, that MC then did follow the matter up. It was put to the Claimant with reference to pages 248 and 249, including a reply from Mr Roberts dated 1 March 2020 saying why he did not want to re-interviewed, that MC doesn't leave it there instead seeking written responses from him. It was put to the Claimant that MC having received the email from Mr Roberts perseveres and that MC is interested. The Claimant agreed that MC is interested, he asked the question and he appreciated that. It was put to the Claimant that Mr Roberts does say why he does not want to be interviewed (see page 248). It was submitted therefore that it is not right for the Claimant to say what he says in paragraph 11 of his witness statement. We agree with this submission, these documents do not support what the Claimant asserts.

37. We were also made aware during the course of this hearing that there were a number of iterations of the investigation report MC produced following

input from HR. Copies of those were then provided for the Tribunal's reference.

38. Considering those in the context of this being MC's first investigation and him explaining in his oral evidence the reasons for the decisions he reached, we accept his evidence on this matter. It was not put to MC that anything he did was motivated by the Claimant's race.

39. We would also note here that although reference is made in the Claimant's closing submissions of HR confirming certain witnesses need not be called to the hearing, such a decision is mitigated as the Claimant was told he could request witnesses. As noted, the Claimant confirmed in cross examination that he had discussed this with his union and their advice was there was no need to call any.

40. LO is then asked to conduct a disciplinary (see paragraph 5 of her statement). It is her first disciplinary hearing although she had training on the policies and procedures, and she says that she was well supported by HR (see paragraph 6 of her statement). It was suggested to LO in cross examination that it was HR that made the decision to dismiss. LO denied this. We accept what LO says, which was stated under oath, that she was the decision maker. We recognise that there was potentially a heavier HR involvement in the process due to this being LO's first disciplinary hearing, but we have not been presented sufficient evidence that proves to us on the balance of probability that LO was not the decision maker in this matter.

41. The Claimant is invited to a disciplinary hearing by letter dated 13 January 2020 (see pages 162 to 163) to take place on the 27 January 2020. It sets out the allegations as follows (in summary):

    a. That the Claimant is reported to have slept on duty during a night shift completed on the 4 November 2019, in the communal area of the ward. Further, concern has also been raised that the Claimant has previously been found drowsy or asleep on other shifts.

    b. That the Claimant failed to observe a patient take their medication. That medication was then found in the patient's bedroom. An incident report was not completed.

    c. A further dose of the medication was administered by the Claimant against the advice of the on call Advanced Nurse Practitioner.

42. The letter confirms that the allegations if founded may constitute gross misconduct and the outcome of the hearing could result in disciplinary action up to and including summary dismissal.

43. It confirms that the Claimant may call upon witnesses during the course of the hearing (although to advise in advance who), and he has the right to be accompanied. Copies of the disciplinary policy and procedure are included with the letter.

44. The hearing takes place on the 27 January 2020. The Claimant is accompanied by his union representative.

45. We were referred to the minutes of this hearing (page 168 to 176).

46. We would observe here that no issue was raised with this Tribunal that the minutes for this and the other meetings were not an accurate reflection of those meetings.

47. The minutes show the Claimant being afforded the opportunity to ask questions and put his case (see for example page 170 which notes that the Claimant was asked if he had any questions of MC).

48. At the conclusion of that meeting it is decided that matters will need to be investigated further (see page 176).

49. LO explains at paragraph 17 of her witness statement that during an adjournment of the meeting she felt unable to make a decision. She says that she found the Claimant's account confusing and felt further investigation was required. Then at paragraph 18 of her statement LO says that she sent a list of questions to MC for further investigation (see page 177). MC then investigated those (see pages 236 to 255).

50. The Claimant challenged this being LO's list of questions by asserting that it was HR and not LO driving the process and that we should carefully consider the document at pages 177 to 178 which is an email from HR to LO dated 3 February 2020. The email is written to suggest that the further points of investigation are suggested by HR, for example it says (page 178) … "If you are in agreement with the above, please can you share this with [MC] in his role as the investigating officer …". LO in cross examination said that these were her ideas for further investigation that had been captured by HR. We note that the email (at page 177) does say … "please find below a summary of the additional areas of investigation I have noted:".

51. About this matter we would observe that LO needs to agree to the points of additional investigation before they are sent to MC. Also, that it was not put to LO in cross examination by the Claimant that it was missing anything. The issue for the Claimant is that HR were driving the process. We do not know (there being no witness evidence presented to us from the author of the email) whether the "I have noted" means they are her investigation queries or her noting LO's investigation queries as LO asserts. On the

balance of probability, we accept what LO tells us in that these are matters she does want investigated before she makes her decision. That does suggest a willingness on her part to make sure a fair and informed decision is made.

52. There was then to be a reconvened hearing on the 3 April 2020, but that did not happen due to COVID and the Claimant shielding, so it was ultimately set up for the 26 June 2020 remotely via TEAMS (see page 206).

53. About the Claimant's assertion that there was unfair delay in the process we find that the delay that happened was caused by external factors and not purposively done to be unfair to the Claimant. The Claimant has also not asserted that the delay meant he could not properly put his case at the reconvened hearing.

54. The reconvened hearing happens on the 26 June 2020. The Claimant is once again accompanied with a union representative.

55. The minutes for this hearing are at pages 206 to 214 of the main bundle. It is then adjourned to the 1 July 2020 when the outcome is then communicated (the minutes for that are at pages 215 to 220). It is at that LO says she summarily dismissed the Claimant for gross misconduct. We accept that it was her decision to dismiss the Claimant.

56. It is within the minutes of the outcome hearing that we find the only reference by the Claimant during the disciplinary process to a suggestion of race discrimination. The notes record the Claimant saying … this is very unfair, nothing happened to the patient there. I am victim of racism…" (page 219) … "I mentioned about discrimination and it was ignored, they never supported me to write about this…" (page 220) … "I feel it is racism" (page 220). LO does say to the Claimant … "We have made this decision based on all the information given. You have the right to appeal if you feel you have faced discrimination on the unit and racism." (page 220).

57. The evidence presented by the Claimant as to why he asserts race discrimination is very limited. He refers to it in paragraphs 55 and 56 of his statement.

58. Paragraph 55 … "It is notable that I only gave 3 tablets to this patient on my shift, so it is evident that the other tablets discovered were from previous shifts, or even previous days which, logically, means that my colleagues during the day shift, or on previous night shifts have failed to observe this patient taking her medication, yet it was only I who have been punished and I have to ask the question why that is, as the only difference between us, is my race or ethnicity.".

59. Paragraph 56 … “After long and structured thought about the difference in the treatment I have been subjected to when others have been treated differently, the only difference I can see between us is that I am of a different racial origin.”.

60. In cross examination about what he is recorded as having said in the minutes … “I mentioned about discrimination and it was ignored”, he explained that relates to him raising matters with his manager, and not as part of the disciplinary process. He acknowledged that he did not say that level of detail in the outcome hearing. We note that he also presents no evidence about such matters in his witness statement, having been given opportunity to add to it at the start of his oral evidence.

61. We would also observe that no evidence is provided by the Claimant as to his named actual comparator (Mr Sibanda) nor a hypothetical comparator. We would also note that the circumstances of Mr Sibanda based on the documents we have been provided are materially different. He is in a junior role and accused of sleeping, then given a final written warning on 30 September 2005 for sleeping whilst undertaking level 3 continuous observations (see page 366). As well as a sleeping on duty allegation the Claimant is also accused of issues to do with the administering of medication and the reporting of an incident, and is in a more senior role, being responsible for that part of the ward at the relevant time. We would also note that although reference is made by the Claimant to the support workers, including Mr Roberts, not being disciplined for previously refusing to complete an incident report (paragraphs 39 and 40 of his witness statement), this particular matter was not put to any of the Respondent’s witnesses in cross examination, and they are junior to the Claimant in any event to mean, even if what the Claimant says had been evidenced with specifics and/or documentation, there would be a material difference in their circumstances to his.

62. Despite the Claimant being told any concerns he has about discrimination can be raised in an appeal; he does not raise them as a ground of appeal.

63. The Claimant’s dismissal is confirmed by letter dated 3 July 2020 (see pages 200 to 221). The original allegations have been separated into four specifics, being (in summary):

    a. Failing to observe the patient take her medication

    b. No incident report being completed after discovery of the medication being found in the patient’s bedroom

    c. Being reported to have slept on duty

d. A further dose being administered against advice.

64. Although separated into four, the allegations remain the same as those set out in the letter inviting the Claimant to a disciplinary hearing.

65. With reference to page 204 the letter states … "In summary, the panel upheld allegation 1, 2 and 3, and reached a finding of Gross Misconduct on the basis that there has been a breach of the Trust's Administrations of Medicines Policy, Reporting & Management of Incidents Policy and that your actions and omissions had the potential to place a vulnerable adult at risk.".

66. LO maintained in her witness statement and oral evidence that this was the reason for her dismissal.

67. The fourth allegation was not upheld. We note in respect of the three allegations that were upheld, about allegations 1 (medicine) and 3 (sleeping) LO states in the letter they were proven on the balance of probability, and allegation 2 (incident report) was proven.

68. In cross examination the Claimant was taken through this outcome letter in detail and although he did not agree the outcome, he accepted he could see the considerations of the evidence in this letter, that they had looked at evidence, weighed the evidence and reached a conclusion.

69. LO explains in her witness statement (at paragraphs 31 to 34) her reasons for why she took the decision to dismiss. She also denies it had anything to do with the Claimant's race (paragraph 40), which she also denied in cross examination.

70. What LO says, in summary, is that because the Claimant was an experienced nurse, knew about the policies, but still did what she believed he had done, it was a gross misconduct matter, and because he did not take ownership for his actions, instead blaming others, that caused an irreparable breakdown in trust and confidence. LO did not consider he could practice safely, providing no assurance he could reflect and learn from mistakes. She felt that summary dismissal was appropriate her finding him guilty of gross misconduct.

71. The Claimant does submit an appeal against his dismissal dated 13 July 2020 (see page 222). As we have already noted, despite him being told any concerns he has about discrimination can be raised in an appeal; he does not raise them as a ground of appeal.

72. MK hears the appeal and upholds the decision to dismiss on the 8 September 2020. No challenge is asserted against the fairness of the

appeal, nor any allegation of race discrimination made against MK. It is clear from the appeal hearing, the outcome letter and his statement that MK considered each of the individual grounds of appeal raised by the Claimant. Although in cross examination MK was challenged as to whether he had addressed the Claimant's overarching concern that what he was accused of did not fit the definition of gross misconduct, MK maintained that he had addressed it by responding to each individual appeal complaint and then when looked at cumulatively, it was addressed. Reference can also be seen in the appeal outcome letter at page 281 to the linking of the reasoning given to why they concurred that the Claimant's actions constituted gross misconduct. We therefore accept MK's evidence on this matter.

73. The Claimant maintained in his evidence to this Tribunal that he did not believe he was asleep on duty, believed he had observed the medication being taken and acknowledged an incident report should have been completed at the time, but he thought that he had good reason for not doing it at that time.

74. The support workers who allege the Claimant was asleep have not attended this hearing to give evidence, and Mr Roberts has never explained why, if he saw the Claimant asleep, he did not wake him. The Claimant accepted though that he acted in a way that meant he could be perceived as being asleep. He also accepted that it was his choice not to complete the incident report at the time. The Claimant also gave an account of why he believed the patient had taken her medicine.

75. This is not a case therefore where we have an admission by the Claimant on the matters found against him by LO.

76. For the purposes of the complaint of wrongful dismissal it is for the Respondent to present evidence to us so that we are satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. In short, we need to find on the balance of probability that he did do the things he is accused of. LO in her own dismissal letter acknowledges she finds what she does about allegations 1 and 3 on the balance of probability. We recognise that LO can do this and that for the purposes of considering whether there is an unfair dismissal it would be enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct.

77. The Respondent though has not proven to us on the balance of probability that the Claimant was asleep on duty, nor that he did not observe matters concerning the taking of the medication as he asserts. We note that the report the NMC produces on the 11 July 2022 (see pages 400 to 406) reaches similar conclusions on this matter (see in particular page 405).

78. About the NMC referral it was confirmed to us by MK that he referred this internally at the conclusion of the appeal. It is not followed up though until the end of 2020 when LO is asked what is happening with the NMC referral. The matter is then referred to the NMC on the 17 March 2021 (see page 403). This is a significant delay in view of how seriously LO and MK viewed matters, however we note from the evidence LO and MK gave us, that the delay was not down to them.

79. Having established the above facts, we now apply the law.

The Law

80. Unfair dismissal (sections 94 and 98 Employment Rights Act 1996)

81. Pursuant to section 94 Employment Rights Act 1996 ('ERA 1996') an employee has the right not to be unfairly dismissed by their employer. Whether or not an employee has been unfairly dismissed is determined in accordance with section 98 ERA 1996:

(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 reason) 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 the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it…

…(b) relates to the conduct of the employee, …

(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.

82. It is for the Respondent to prove on the balance of probabilities, the sole or principal reason for dismissal. In considering fairness the burden is neutral.

83. In conduct cases, when considering whether or not the dismissal was reasonable the Tribunal must have regard to whether, at the time of dismissal, the employer:

    a. genuinely believed that the employee was guilty of misconduct;

    b. had reasonable grounds on which to base that belief;

    c. at the time it had carried out as much investigation as was reasonable in the circumstances (**British Home Stores Ltd v Burchell [1978] IRLR 379**).

84. The Tribunal must be careful not to substitute its view for that of the employer and should consider instead whether the employer acted within the range of responses available to a reasonable employer when considering both whether dismissal was reasonable and all other aspects of fairness, for example whether the investigation was reasonable (**Sainsbury PLC v Hitt [2003] ICR 111** and **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**).

85. We have also considered the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code"). The ACAS Code confirms at paragraph 3 that … "Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code.".

86. We were referred to the following case authorities in submissions:

    a. **Eastlands Homes Partnership Ltd v Cunningham** – the Tribunal must have regard to whether the employer had reasonable grounds for its belief that the employee was guilty of gross misconduct.

b. **Sandwell & West Birmingham Hospitals NHS Trust v Westwood** … "… the question as to what is gross misconduct must be a mixed question of law and fact and that will be so when the question falls to be considered in the context of the reasonableness of the sanction in unfair dismissal or in the context of breach of contract … Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee… the conduct must be a deliberate and wilful contradiction of the contractual terms … Alternatively it must amount to a very considerable negligence, historically summarised as "gross negligence"…". (HHJ Hand paragraphs 110 – 112).

c. **Ben Cook v MSHK Ltd 2009 EWCA Civ 624**, it is not just inaction that can lead to an employer being taken to have affirmed an employee's breach of contract. Employers who, for whatever reason, intend to delay taking disciplinary action in respect of a serious breach of contract by an employee should reserve the right to take action up to and including summary dismissal in response to the breach.

87. When considering a complaint of unfair dismissal, the starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

88. Wrongful dismissal

89. The Claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.

90. The Tribunal must determine whether, there is a contractual power to dismiss without notice that applies to the Claimant and/or on the balance of

probabilities, the Claimant acted in repudiatory breach of the contract as alleged.

91. There is a link between summary dismissal and wrongful dismissal as dismissal without notice is wrongful (i.e., is a breach by the employer) unless the employer can show (as the Respondent asserts in this case) that summary dismissal was justified because of the employee's repudiatory breach of contract.

92. A Tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct. This is a different standard from that required of employers resisting a claim of unfair dismissal, where reasonable belief may suffice. This was raised with the parties during the presentation of the oral evidence. Consideration is also given to this principal as articulated in **Shaw v B and W Group Ltd EAT 0583/11** and **Enable Care and Home Support Ltd v Pearson EAT 0366/09.** The essential question is whether the Claimant was actually in breach of contract to the extent that his conduct might be regarded as repudiatory, not whether the employer, reasonably or otherwise, believed that he was. It is a factual question whether the employee is guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract.

93. Direct Race Discrimination (section 13 Equality Act 2010)

94. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the EqA.

95. The protected characteristic relied upon in this case is race as set out in sections 4 and 9 of the EqA.

96. The other relevant statutory provisions are:

S.13 of the Equality Act 2010 states:

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

S.23 of the Equality Act 2010 states:

On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

S.39 (2) of the Equality Act 2010 states:

An employer (A) must not discriminate against an employee of A's (B)—
as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

S.136 of the Equality Act 2010 states:

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.

97. With regard to the claim for direct discrimination, the claim will fail unless the Claimant has been treated less favourably on the ground of his race than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The

Claimant needs to prove some evidential basis upon which it could be said that this comparator would not have been dismissed.

98. In **Madarassy v Nomura International Plc [2007] ICR 867 CA** Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in **Igen Ltd and Ors v Wong [2005] IRLR 258 CA** was also approved by the Supreme Court in **Hewage v Grampian Health Board [2012] IRLR 870 SC**. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both **Ayodele v Citylink Ltd [2018] ICR 748** and **Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18**.

99. We are also reminded in the submissions of Claimant's Counsel that as has now be confirmed by the Supreme Court in **Efobi v Royal Mail Group Ltd [2021] UKSC 33**, the initial burden is on the Claimant to establish facts from which the Tribunal could conclude, in the absence of an adequate explanation, that an unlawful act of discrimination had been committed. In establishing facts, the Claimant can rely on both primary facts and also inferences that can be properly drawn from those facts.

100. Reference was also made to **Qureshi v Victoria University of Manchester and another [2001] ICR 863**, which confirms it is not necessary for a Tribunal to make a specific finding as to whether any one of the circumstantial matters raised by the Claimant would of itself amount in law to a discrete act of discrimination. The Tribunal must look at the totality of its findings of fact and decide whether they add up to a sufficient basis from which to draw an inference that the Respondent has treated the complainant less favourably on the protected ground.

101. Also, we were referred to **Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust EAT 0269/15** (the obiter comments of Mr Justice Langstaff), unreasonable behaviour is not of its nature essentially and necessarily behaviour adopted because of a protected characteristic of the Claimant. An employer may assert that it is unreasonable to all, although as a defence this is likely to be harder to demonstrate, though not impossible, in a case where the evidence shows that only one employee was subjected to the employer's unreasonable behaviour.

102. Where the Claimant has proven facts from which conclusions may be drawn that the Respondent has treated the Claimant less favourably on the ground of the protected characteristic then the burden of proof has moved to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.

103. The burden of proof does not shift to the Respondent simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that the Respondent had committed an unlawful act of discrimination (Madarassy). "Could conclude" must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

104. The tribunal needs to consider all the evidence relevant to the discrimination complaint, that is (i) whether the act complained of occurred at all; (ii) evidence as to the actual comparator(s) relied on by the Claimant to prove less favourable treatment; (iii) evidence as to whether the comparisons being made by the Claimant were of like with like; and (iv) available evidence of the reasons for the differential treatment.

105. The circumstances of the comparator must be the same, or not materially different to the Claimant circumstances. If there is any material difference between the circumstances of the Claimant and the circumstances of the comparator, the statutory definition of comparator is not being applied (**Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL**).

106. It is for the Claimant to show that the hypothetical comparator in the same situation as the Claimant would have been treated more favourably.

107. In short, it is not sufficient to merely assert a difference in status and a difference in treatment. For the Respondent to be required to show that it

has not committed an act of discrimination it is necessary for there to be some material before the Employment Tribunal from which it 'could properly conclude' that on the balance of probabilities the Respondent had committed an act of unlawful discrimination.

The Decision

108. The Respondent admits dismissing the Claimant.

109. What was the reason for dismissal?

110. The Respondent asserts that it was a reason related to conduct, saying that … "In summary, the panel upheld allegation 1 [medicine], 2 [incident report] and 3 [sleeping], and reached a finding of Gross Misconduct on the basis that there has been a breach of the Trust's Administrations of Medicines Policy, Reporting & Management of Incidents Policy and that your actions and omissions had the potential to place a vulnerable adult at risk.".

111. It relies upon the definition of gross misconduct in its disciplinary policy.

112. LO, the dismissing officer at the Respondent, states in the letter of dismissal her reasons (which were also presented orally at the outcome meeting on the 1 July 2020). In cross examination the Claimant was taken through this outcome letter in detail and although he did not agree the outcome, he accepted he could see the considerations of the evidence in this letter, that they had looked at evidence, weighed the evidence and reached a conclusion.

113. LO maintained these were her reasons in her evidence to this Tribunal.

114. The Claimant's case is this was a false reason, the real reason being his race.

115. This overlaps with the Claimant's challenges to the fairness of the dismissal being:

a. that the real reason for the dismissal was the Claimant's race; and

b. The Respondent did not deal with the matter in accordance with its normal processes which would be to deal with the matter informally on the basis of “lessons learned”.

116. Did the Respondent hold a genuine belief in the Claimant’s misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances?

117. In view of what the Claimant asserts as to the real reason we have considered carefully from the primary facts found whether facts have been established from which we could conclude (in the absence of an adequate explanation from the Respondent), that an act of discrimination has occurred. We have not found this. The Respondent has presented reason and explanation for the decision to dismiss, and the Claimant through the evidence presented, including a lack of caparison evidence whether actual or hypothetical, has not established facts upon which we could conclude (in the absence of an adequate explanation from the Respondent), that an act of discrimination has occurred by him being dismissed in these circumstances.

118. About these matters we accept the evidence of LO as to the reason, she dismissed the Claimant, namely the Claimant’s misconduct.

119. We also accept that LO did have reasonable grounds to hold her asserted belief. LO articulates a full explanation in the letter of dismissal and the Claimant accepted that he could see the considerations of the evidence in this letter, that they had looked at evidence, weighed the evidence and reached a conclusion.

120. The Claimant challenges the procedure saying that the Respondent did not deal with the matter in accordance with its normal processes which would be to deal with the matter informally on the basis of “lessons learned”.

121. The Claimant has not proven this on the balance of probability. What happened to the Claimant was the normal process for serious or gross misconduct allegations. Furthermore, the Claimant has not evidenced what in our view would amount to a breach of the ACAS code.

122. The allegations were understood by the Claimant, which he accepts potentially amount to gross misconduct. He was given opportunity to present his case, afforded access to representation at the hearings and permitted an appeal. The Respondent did not divert from the position it stated at the outset as to the potential seriousness of the matter. There was reasonable investigation based on the circumstances of this case. The

disciplinary process was protracted, but this we accept was due to external factors and not by design.

123. The Claimant. when asked if he could see why it was potentially gross misconduct, confirmed that he could because sleeping on duty is "serious gross misconduct". We therefore find that this is a matter that would fall into the serious or gross misconduct exception of the disciplinary procedure explaining why an informal process would not be appropriate.

124. The Claimant accepted during cross examination that an employee can be accused of gross misconduct and not suspended. On this basis, the non-suspension of the Claimant should not be taken as the Respondent not considering the matters as serious. The Claimant himself accepts the sleeping allegation is "serious gross misconduct". This course of action in our view does not therefore waive any alleged breach that the Respondent seeks to subsequently rely upon.

125. We find the dismissal to be procedurally fair in all the circumstances of this case.

126. Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

127. We accept that it was, albeit at the harshest end. LO genuinely believed on reasonable grounds after a reasonable investigation that the Claimant had committed an act of gross misconduct. LO had a reasonable basis for concluding matters as she articulates in the dismissal letter and her evidence to this Tribunal. She reasonably believed that the Claimant would not learn from these matters and without such a recognition on the part of the Claimant, the sanction was the harshest. In our view it is within the range for these reasons.

128. Accordingly, we find that even bearing in mind the size and administrative resources of this employer the Claimant's dismissal was fair and reasonable in all the circumstances of the case, and we therefore dismiss the Claimant's unfair dismissal complaint.

129. For all these reasons the complaints of direct race discrimination and unfair dismissal fail and are dismissed.

130. As to the complaint of wrongful dismissal for notice pay. Pursuant to his employment contract the Claimant would have been entitled to 12 weeks' notice had he not been summarily dismissed without notice.

131. A Tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct. This is a different standard from that required of employers resisting a claim of unfair dismissal, where reasonable belief may suffice. The essential question is whether the Claimant was actually in breach of contract to the extent that his conduct might be regarded as repudiatory, not whether the employer, reasonably or otherwise, believed that he was. It is a factual question whether the employee is guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract.

132. The Claimant maintained in his evidence to this Tribunal that he did not believe he was asleep on duty, believed he had observed the medication being taken and acknowledged an incident report should have been completed at the time, but he thought that he had good reason for not doing it at that time.

133. The support workers who allege the Claimant was asleep have not attended this hearing to give evidence, and Mr Roberts has never explained why, if he saw the Claimant asleep, he did not wake him. The Claimant accepted though that he acted in a way that meant he could be perceived as being asleep. He also accepted that it was his choice not to complete the incident report at the time. The Claimant also gave an account of why he believed the patient had taken her medicine.

134. This is not a case therefore where we have an admission by the Claimant on the matters found against him by LO.

135. For the purposes of the complaint of wrongful dismissal it is for the Respondent to present evidence to us so that we are satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. In short, we need to find on the balance of probability that he did do the things he is accused of. LO in her own dismissal letter acknowledges she finds what she does about allegations 1 and 3 on the balance of probability. We recognise that LO can do this and that for the purposes of considering whether there is an unfair dismissal it would be enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct.

136. The Respondent though has not proven to us on the balance of probability that the Claimant was asleep on duty, nor that he did not observe matters concerning the taking of the medication as he asserts. We note that

the report the NMC produced on the 11 July 2022 reaches similar conclusions on this matter (see in particular page 405).

137. By the Respondent not discharging the burden of proof we find that the Claimant's complaint of wrongful dismissal succeeds.

138. As we have noted about the NMC referral there was a significant delay in this being done. This cannot be in the interests of any party involved in such a matter and we would encourage the Respondent to ensure such processes are improved so such a delay does not happen again.

139. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 6; the findings of fact made in relation to those issues are at paragraphs 11 to 78; a concise identification of the relevant law is at paragraphs 80 to 107; how that law has been applied to those findings in order to decide the issues is at paragraphs 108 to 137.

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Employment Judge Gray
Date: 30 September 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON
6 October 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE