



EMPLOYMENT TRIBUNALS

Claimant: Mr K L

Respondent: London Underground Ltd

Heard at: London Central

On: 4, 5 & 6 January 2023

Before: Employment Judge H Grewal

Representation

Claimant: In person

Respondent: Ms S Tharoo, Counsel

JUDGMENT

The judgment of the Tribunal is that the complaint of unfair dismissal is not well-founded.

REASONS

1 In a claim form presented on 30 March 2022 the Claimant complained of unfair dismissal and discrimination on the grounds of race and religion or belief. Early Conciliation ("EC") commenced on 14 February 2022 and the EC certificate was granted on 28 March 2022. The complaints of discrimination were dismissed on withdrawal on 22 June 2022. The only complaint that I had to determine was that of unfair dismissal.

The Issues

2 It was agreed that the issues that I had to determine were as follows:

2.1 What was the reason for the dismissal? The Respondent contended that it was a reason related to conduct.

2.2 If it was, whether the dismissal was fair.

3 The Claimant indicated that he was seeking reinstatement. We agreed that at this stage I would deal with liability only.

The Law

4 The onus is on the Respondent to prove the reason or the principal reason for the dismissal. A reason relating to the conduct of the employee is a potentially fair reason (section 98(1) and (2) of the Employment Rights Act 1996 (“ERA 1996”). Once the employer establishes a potentially fair reason, the Tribunal then has to consider whether dismissal was fair within the meaning of section 98(4) ERA 1996, in other words, whether the employer acted reasonably or unreasonably in all the circumstances of the case in treating the reason established as a sufficient reason for dismissing the employee.

5 In **British Home Stores Ltd v Burchell [1978] ICR 303** the EAT held that in determining whether a conduct dismissal is fair, the Tribunal must ask itself the following three questions:

- (i) Whether the employer believed that the employee was guilty of the alleged misconduct;
- (ii) Whether the employer had in his mind reasonable grounds upon which to sustain that belief; and
- (iii) Whether, at the stage that he formed that belief, he had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

6 In determining the issue of fairness the Tribunal also has to look at whether there were any flaws in the procedure which were such as to render the dismissal unfair, and, finally, whether dismissal was within the band of reasonable responses open to a reasonable employer in all the circumstances of the case.

7 The case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**, approved by the Court of Appeal in **Post Office v Foley [2000] IRLR 827** lays down the approach that the Tribunal should adopt when answering the question posed by Section 98(4). It emphasises that in judging the reasonableness of the employer’s conduct the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer and that the function of the Tribunal is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. The range of reasonable responses approach applies to the conduct of the investigations, in order to determine whether they are reasonable in all the circumstances, as much as it applies to other procedural and substantive aspects of

the decision to dismiss a person from his employment for a conduct reason – **Sainsbury’s Supermarkets Ltd v Hitt [2002] EWCA Civ 1588.**

The Evidence

8 The Claimant gave evidence in support of his claim. The Tribunal read the witness statements of the Claimant’s father, Kevin Rich (resident at Bosence Farm), Kerry Kilday (adult care support worker) and Marie Harrington (RMT) who gave evidence on behalf of the Claimant. The first three witnesses were not called because the Respondent’s counsel did not wish to ask them questions. Ms Harrington was required to give evidence but did not attend. I admitted her witness statement but indicated that I would attach such weight to it as I thought appropriate as the Respondent had not had the opportunity to cross-examine her. The following witnesses gave evidence on behalf of the Respondent – Simon Jones (Band 3 Customer Experience Manager at the relevant time) and Allan Gardner (Head of Customer Services for the Piccadilly Line at the relevant time). The documentary evidence in the case comprised a little over 600 pages. Having considered all the oral and documentary evidence the Tribunal made the following findings of fact.

Findings of fact

9 The Respondent is responsible for operating the London Underground train network.

10 The Claimant commenced employment with the Respondent on 10 Sept 2018 as a Customer Services Assistant working at a London Underground station. In February 2020 he was promoted to Customer Services Supervisor (“CSS”), which is classified as a “safety critical role”. Customer Services Supervisors are responsible for supervising operations and staff at their designated stations. The key duties of a CSS include opening and closing the station, ensuring the efficient and safe operation of the station environment, managing security checks, supervising congestion control to prevent overcrowding, identifying and resolving faults and hazards and responding to and managing operational incidents.

11 The Respondent operates a zero tolerance policy towards drugs and alcohol. The Transport and Works Act (“TWA”) 1992 makes it a criminal offence for anyone in a safety critical role to work on a transport system when he is unfit to carry out that work through drink or drugs. A person is considered to be unfit to carry out any work if his ability to carry out that work is for the time being impaired. Under TWA 1992 in those circumstance the responsible operator will also have committed a criminal offence unless it “exercised all due diligence” to prevent its employees committing that type of offence.

12 The Respondent has a written Drugs and Work Standard to ensure that all its employees are aware that it has a zero tolerance approach to drugs. Paragraph 3.2 of the Standard provides,

“All employees and suppliers are required:

- a) *Not to consume or use illegal drugs at any time, whether on duty or not, so as to ensure that they are not under the influence when reporting for duty, carrying out work for the company or when on company premises.”*

Paragraph 3.3 provides,

“In the event of any breach of this standard:

3.3.1 Disciplinary procedures shall apply to LU employees, which may result in charges of gross misconduct and dismissal.

3.3.2 LU shall endeavour to assist a LU employee who, prior to breaches of this standard, admits to drug abuse or a drug related problem. However, such an admission shall not give immunity from disciplinary action once a breach of the standard has occurred.”

13 The Respondent's Code of Conduct provides, at paragraph 3.1.1, that all employees are required to comply with all LUL policies, standards and supporting guidelines, working procedures and safety instructions relevant to their job. The Respondent's Discipline Standard provides at paragraph 3.2.5 that employees can be dismissed without notice in cases of gross misconduct. It gives a non-exhaustive list of examples of gross misconduct, which include breaches of the Drugs and Work Standard and failure to follow safety procedures and/or rules, thereby affecting or potentially affecting the safety of employees, customers and others.

14 The Respondent has a dedicated in-house Drug and Alcohol Assessment and Treatment Service (“DAATS”) to provide assistance to employees with drugs and/or alcohol problems. Employees referred to DAATS for support are first assessed to determine what treatment is appropriate for the particular employee based on that individual's circumstances and whether the individual is in fact ready to engage with a treatment programme. Appropriate treatment could be counselling, group therapy or residential rehabilitation treatment. Where residential rehabilitation treatment is recommended, the Respondent uses a number of different treatment centres to provide that service. Often the determining factor as to which centre it uses will be the availability of space at any given time.

15 The Respondent invests a considerable amount of time and money supporting employees with drug and alcohol problems by providing the DAATS service and treatment. In 2018-2019 it spent £326,000 on the DDATS service and treatment. Generally it gives employees one shot at addressing their addiction. If an employee does not succeed, unless there is significant relevant mitigation, the most likely result is that the employee will be dismissed.

16 In September 2020 the Claimant was absent sick from work for six weeks following an operation on his hand. On 20 November the Claimant told the Respondent's Occupational Health Counsellor that while he had been off sick he had started using cocaine and was still using it. The Claimant was referred to DAATs on the same day and stood down from his duties 23 November.

17 The Claimant signed an assessment agreement with DAATS on 26 November 2020 and the assessment began immediately. The Claimant was assessed by and dealt with by Elizabeth Darlison (Manager) and Dan Ruggirello (designated worker) at DAATS. He was required to attend assessment groups twice a week.

18 As the Claimant was still using cocaine, on 3 December DAATS talked to the Claimant about him having residential treatment. The Claimant said that he was

unsure about residential treatment. They explained to him what it would entail. They also informed him that as he was still using cocaine, there would be serious concerns about him returning to his substantive role safely. 104

19 On 7 December Mr Ruggirello sent the Claimant a DAATS treatment questionnaire and a draft referral form for Bosence Farm in Cornwall (residential rehabilitation treatment centre). He had to respond to the treatment questionnaire and fill in some information in the draft referral.

20 At a DAATS assessment group meeting on 8 December the Claimant said that he felt anxious because he had concerns about going to residential treatment. He said that he did not want to go to Cornwall in case something happened to his parents and that he had never left London for longer than three weeks. Mr Ruggirello advised him to complete the documents and the Claimant said that he would do so before 5 pm. After the end of the assessment the Claimant sent Mr Ruggirello text messages he was “*scared to leave some relationships.*” At the assessment group on 10 December the Claimant said that he was still feeling very anxious about going to the rehabilitation centre. Following discussions with Mr Ruggirello, the Claimant completed the relevant documentation on 15 December.

21 One of the questions in the questionnaire was what reservations or concerns he might have about going to treatment. The Claimant responded,

“Shared room

Most time spent away from London is 4 weeks with family, this is 12 weeks alone

It is far away from home in an emergency

Halal food

What to tell friends etc.”

The Claimant also had to fill in certain information in the draft referral form. It asked whether he has any current mental illness or concerns. The Claimant wrote “Depression/anxiety”. He said that it had been diagnosed five years previously via his GP and that he was not currently engaged with Mental Health Services. He was prescribed 20 mg Citalopram daily.

22 Mr Ruggirello sent the referral to Bosence Farm on 15 December 2020. He advised the Claimant to make contact with Bosence Farm to raise any queries that he might have. The Claimant called Bosence Farm and spoke to the Centre Manager Tim Greenhalgh. The Claimant asked him about halal food and Mr Greenhalgh asked him what halal food was. The Claimant explained to him what it was and he said that he would look into it. Following the conversation the Claimant sent Mr Ruggirello a text message about it.

23 On 4 January the Claimant told Mr Ruggirello that he was ready to sign the forms.

24 At a meeting with Ms Darlison and Mr Ruggirello on the following day the Claimant said that he had been abstaining from 1 January. He said that he was concerned that Bosence Farm not aware of what halal food was. Ms Darlison assured him that she had spoken to them and they would arrange halal food. He said that he was thinking of not going as he had managed to abstain with the support of his family. Ms Darlison got frustrated with the Claimant as she felt that he was

making excuses not to go and said to him “Do you want to go to rehab or not?” The Claimant accepted that he had got angry with her at that meeting.

25 On 12 January 2021 Mr Ruggirello sent the Claimant various DAATS documents and agreements to sign in respect of his attending the rehabilitation centre. The Claimant sent Mr Ruggirello an email in which he said

“I have read the attached document and agree to its terms and conditions.”

The documents sent to the Claimant were the following – the DAATS Treatment Agreement Contract, the DAATS Assessment Outcome Sheet, Agreement to contribute to the treatment costs and Instructions for people going into treatment.

26 The DAATS Treatment Agreement Contract provided that the Claimant would be admitted to Bosence Farm on 18 January 2021 and that his treatment would complete on 12 April 2021. The terms of the agreement were as follows –

“1. I will follow the instructions of staff at Bosence Farm and will remain abstinent from all mood-altering chemicals both while I am on the programme and for the rest of my continued employment with LUL.

2. I will not leave Bosence Farm except with the permission of the staff there.

3. I will complete the period of treatment advised unless given leave not to do so by the DAATS manager.

4. I will return to work when advised to do so by the people responsible for my treatment.

In return for my compliance, I understand that my employment will be kept open for me and that DAATS will keep my line manager informed of my progress. Further, I understand that DAATS will negotiate on my behalf the terms and conditions of my return to work. Should I fail to complete the treatment to the satisfaction of the DAATS Manager, I understand that he/she may not be in a position to recommend my reinstatement to safety critical duties and/or my suitability for continued employment.

I understand that this agreement forms part of my terms and conditions of employment. I also understand that should I breach its provisions in any way the matter could be regarded as gross misconduct and my employment may be terminated summarily.”

27 The Instructions from DAATS for people going into treatment said, among other things,

“We will not take phone calls from employees in treatment. You need to channel information through your counsellor or the administration of the centre. They can then contact us if needed.

We will normally review you halfway through your treatment. This is done by telephone with a DAATS counsellor. This will be arranged between DAATS

and your focal counsellor. A suitable quiet and confidential area will be provided by the treatment centre.

If you feel you are in serious difficulty and would like us to review your case, you should request your counsellor to contact us and arrange for us to visit. We will arrange this as soon as is practically possible. You can also do this in writing to Elizabeth Darlison, DAATS Manager. You must inform your counsellor if you do this.

If you leave treatment before the end for whatever reason, you must understand that this might affect your employment. We will deal with each case on its merits.”

28 The agreement to contribute to the treatment costs provided that the total cost of the treatment was £9,900 and that the Claimant's contribution to that was to be £750.

29 The Claimant started residential treatment at Bosence Farm on 18 January 2021. On arrival he was quarantined for a week due to Covid. He was quarantined with AB, a female resident receiving treatment. In a report prepared later Bosence Farm noted that staff felt that the Claimant and AB were *“both over stepping boundaries and hyping each other up in negative talk and behaviour detrimental to their recovery process.”*

30 During the Claimant's stay at Bosence Farm halal food was provided for him.

31 According to notes made by staff at Bosence Farm, at a group meeting on 5 February 2021 the Claimant said that a peer (the word used at Bosence Farm to describe fellow residents being treated there) had been racist. He did not want to say who it was but he wanted to share with the house that it was not acceptable. The staff at the meeting stated that racism was not acceptable at the centre under any circumstances. According to the notes, after the meeting AB had approached staff in the office and said that she felt that the Claimant had been referring to her in the group meeting. She denied that she had been racist. She said that they had been watching Peaky Blinders and she said that they were taking “whacky backy” (which was a reference to a drug). The Claimant had said that she had used a racist word (“Paki”) and she had denied it. Staff had spoken to her and the Claimant together and individually. AB had decided to leave. At a house meeting afterwards the Claimant had been threatened by another peer in the group (CD) as people in the group were angry about her leaving and blamed the Claimant for it. CD was asked to apologise to the Claimant and to agree to treat him in a respectful manner, which he did.

32 According to a “Significant Event Sheet” filled in by the Claimant the most significant event that occurred on 17 February 2021 was that he was told that he had to change his room. He noted that he had felt very stressed about it. On 18 February he started packing his suitcase and wanted to leave. The staff at Bosence Farm contacted DAATS and a Zoom meeting was arranged. It was attended by Ms Darlison and Mr Ruggirello from DAATS and Tim Greenhalgh and Ben Sweet from Bosence Farm. The meeting lasted for about an hour. Ms Darlison produced a one page note summarising what was discussed. Initially Ms Darlison and Mr Ruggirello spoke to the Claimant on his own. The Claimant said that he had had abuse from a female and she had been asked to leave. He said that another male peer had threatened

him relating to the female peer being discharged, This had been discussed with the two counsellors at the time of the event and had been resolved. He also said that moving rooms had been stressful for him and had stressed him more than others who had also moved rooms. He had been accused of sexism and had had racist comments made to him. He said that he wanted to go home as he had been doing all his work and had reached his goals. The counsellors and his peers had wanted him to sleep on it and think about it. He said that he had seven peers – three of them were alright but he could not get on with the others. Messrs Greenhalgh and Sweet then joined the meeting. They identified the following as being the Claimant's barriers toward the recovery process – struggling to identify consequences, blaming others, unhealthy dynamics, struggling to reflect and own his part and sexualised comments. At the end of the meeting the Claimant agreed to stay and work on his attitudes and behaviours.

33 In his "Significant Event Sheet" dated 18 February the Claimant noted that at the meeting the four of them had pulled no punches but it had made him find his inner strength to stay and he had learnt that giving up was easy, he should keep going and that he might just see the light at the end of the tunnel.

34 In the evening on 4 March 2021 the Claimant was involved in an altercation with another female resident. They were on kitchen duties together. The Claimant said that she had refused to do any of the work and told him to shut up and called him a prick. She said that Claimant had said to her "I am not the police officer that you gave the pacemaker to. Don't talk to me like that." That was a reference to her having been convicted of attacking a police officer who had suffered a heart attack. It was information that she had revealed in group sessions. The Claimant denied that he had said that. Tim Greenhailgh notes that he told them that "*such dynamics were common particularly when people started doing their TDs*". I understand him to have been saying that such arguments and disagreements were common. He then went on to say that what was more of an issue was dishonesty. The following morning the Claimant admitted that he had said that to her and that he had not been honest about it. On 8 March the Claimant was asked to sign a written warning. It said,

"This is a written warning concerning dishonest and intimidating behaviour. In particular: You were challenged by staff as a result of an altercation with another member of the community an at this time you failed to be honest and attempted to hide that you had used a peers personal information to gain a position of power. [sic]

It is an expectation of Bosence Farm that you practice honesty at all times.

It is also an expectation that all who reside in the community provide a safe environment free from intimidation."

It also stated that any further breaks of expectations would lead to the team discussing his stay at Bosence Farm. The Claimant initially refused to sign the warning but did so on the following day.

35 On 10 March 2021 Bosence Farm produced a midway report on the Claimant. The report referred to the matters set out at paragraphs 29 and 31 (above). In addition to that, it said that in the initial period the Claimant had pushed boundaries and had repeatedly talked over staff. He had struggled to keep boundaries with the

female peer that had become “*a common thread through his stay.*” There had been a couple of incidents of the Claimant being told that he had been intimidating towards peers and he had been challenged in groups around sexism. It also referring to him wanting to leave on several occasions and to the written warning for lying. It set out the group sessions that he had attended and the various steps of the process that he had completed. It continued that his pattern of behaviour could be linked to the fact that he felt that he had been bullied by his sisters but had been unable to react because his father would not allow it. It concluded,

“In contrary to some of the self-destructive behaviour patterns KL has exhibited, he can be a caring, supportive and valued member of the community. We believe that if KL can take personal responsibility, remain open and willing to the available support he can develop healthier ways of interacting with the world and achieve a sustainable ongoing recovery.”

36 On 11 March DAATS contacted Annie Woollock (the Claimant’s key worker) to arrange a midway review for the Claimant. They said that they had “*wanted to give some time for the episode from last week to settle*” and suggested doing it the following week. They tried to organise it for 16 March but Ms Woolcock did not work on Tuesdays. While they were trying to arrange the meeting the Claimant tried to contact DAATS directly and was told that he must do it through his key worker. On 17 March a midway meeting was arranged for 23 March 2021.

37 Richard Henly, a member of staff, produced a signed statement about what happened on the evening of 17 March 2021. He said that at 9 pm that evening the Claimant had approached him in the lounge and said that CD had called him a “wanker” and a “dickhead” and he was not going to put up with it anymore and what was he going to do about it. He went to find CD and the Claimant followed him. They came across CD who had gone to the office to find Mr Henley. They both started shouting their version of what had happened. Mr Henley said that he would speak to them individually.

38 He spoke first to CD in the office. CD said that he had been in the kitchen making his soup and the Claimant had come in and picked up a knife and started to walk around the kitchen getting in his way. The Claimant had then leaned over his shoulder and said that he was going to “knock him out.” Mr Henley listened to CD for half an hour and asked him not to engage with the Claimant on any level until the morning when he could discuss the incident with the team.

39 Mr Henley then invited the Claimant into the office and asked him for his account. The Claimant said that CD had called him a “wanker” and a “dickhead” and had pushed past him in the kitchen. He also said that CD had belittled his faith earlier in the evening. He said that he had had no part to play in the incident in the kitchen. Mr Henley tried to talk to the Claimant but he would not listen to what he had to say. The Claimant said that CD had pushed past him in the kitchen and that that was an assault. Mr Henley said he had conflicting accounts of what had happened and whom should he believe. The Claimant said that he should believe him and that CD was lying.

40 CD approached Mr Henley again at 3.30 a.m. and asked him to process what had happened the previous evening. Mr Henley made the same point about conflicting accounts and asked him whom he should he believe. CD said either both of them or

none of them. He did ultimately take responsibility for his part in calling the Claimant a “wanker” and a “dickhead.”

41 The following morning Ben Sweet spoke to the Claimant and CD separately about the incident. They were both asked what they wanted to do, whether they were able to work through it and whether they wanted to continue with their recovery. They were told that the staff did not want to hear any more about the incident the previous night and any more bickering between them and that if there was any further bickering they would both be asked to leave. They were asked to reflect on it and decide what they wanted to do and were told that staff would speak to them again after lunch. The Claimant was very angry and shouted at Ben Sweet and would not listen to what he had to say.

42 Mr Sweet made DAATS aware of the incident. The Claimant called Ms Darlison but was unable to speak to her. The Claimant then called his father and asked him to call DAATS. His father spoke to Mr Darlison. She said that they had had a meeting with the Claimant on 18 February and a review had been arranged for 23 March. She explained that it was not appropriate for her to get involved on a regular basis and that there was a process for him to make contact with them through the staff at Bosenice Farm. She felt that it was important to respect the boundaries to enable him to receive his treatment from the centre. That having been said, they always worked together with the team at Bosenice Farm for the benefit of their employees and their joint common goals.

43 At 12.58 the Claimant called the police. According to a log obtained by the Claimant from the police he gave the following account to the police. He said that he followed Islam and a male at the Centre had belittled his faith, about a month earlier the same male had threatened to knock him out and he believed that he had admitted that to staff, at a meeting the previous day they had been discussing “higher powers” and the Claimant had said that he regarded his father as a higher power and the male had responded with “So you have two Gods now. Do you pray to your dad too?”, the male had refused to cook his food, he believed that he had been targeted by him, the previous day there had been an altercation and the male had pushed him by the sink and again by the door, he felt that staff were not supporting him and had dismissed his concerns about the male belittling his faith, he had been told that if there was any bickering they would both be out, that seemed unfair to him as the other male was on a final warning whereas he was on a first warning.

44 Ben Sweet and Anita Woollock spoke to the Claimant after lunch to see what he had decided to do. He told them that he had contacted the police and filed a report about CD belittling his faith and assaulting him.

45 The staff at Bosenice Farm had further discussions and decided that the Claimant should be asked to leave. He was called into the office and asked to make a statement about the incident the previous day. He dictated a statement but refused to sign it. In that statement he is recorded as having said that on the evening of 17 March he went to the kitchen to get a knife and that CD and K Rich were in the kitchen. He got the knife and went back to the dining room. When he returned to the kitchen to put the knife back only CD was there. He kept saying “dickhead” and “wanker” under his breath. As he was putting the knife away CD pushed him with his shoulders by the sink. As he was walking out of the door CD used either his hands or his shoulder to push him again. The staff told him that he was being asked to leave.

After he had collected his belonging from his room, he was taken to the railway station.

46 Bosence Farm prepared a discharge report on 22 March and this was provided to DAATS. The first five paragraphs of the report repeated what had been written in the midway report on 10 March. It then dealt with the incident on the evening of 17 March. It said,

“The incident that occurred on the evening of 17.03.21 has been recorded in detail and statements from all the peers involved have been taken. KL has said he was in the kitchen with the peer and he called him several names and had pushed him with his shoulders and KL was further pushed either by the peer’s hand or shoulder as he was leaving the kitchen. KL approached staff for support and as he did this the peer was coming out of the office and KL had to move out of the way to avoid the peer otherwise he would have had contact with his shoulder.

The staff member spoke to KL and he denied any part to play in the kitchen/ He also said the peer had belittled his faith by making comments. KL would not listen to the member of staff and continued to blame the peer. He also said he felt he had been assaulted by the peer. The staff member told KL that he had been given conflicting accounts and KL’s initial response when asked who the member of staff should believe was he didn’t know who should be believed and then said the peer was lying. KL continued to say it was all the peer’s fault.

The peer spoke to staff, later in the evening, and said that he had called KL names in the kitchen.

A further peer told staff , late on the 17.03.21, that KL had said ‘I am going to knock him the fuck out’ this was directed at the peer KL had been in altercation with.”

It then set out what the Claimant and CD had been told on the morning of 18 March and said that the Claimant had been “*angry and abusive towards Ben Sweet -Key Worker. He was shouting and would not listen to staff.*” It continued,

“Team discussions were held and there were major concerns with KL’s behaviour escalating. Also, concerns around his unwillingness to engage by listening and taking responsibility for his part to play in the altercations.

KL approached staff to say he had been in contact with the police and made an incident report that he had had his faith belittled and he had been physically pushed by the peer.

Further discussions were held with staff and it was decided KL should be asked to leave. His threat to hit another peer, his lack of willingness and ability to take on responsibility made it untenable for us to continue to work with him.”

47 On 23 March Ms Darlison and Mr Ruggirello had a Zoom meeting with the Claimant. The Claimant was asked to share his experience of Bosence Farm and the events that had led to his discharge. The Claimant said that he had had some good

experiences but there were many issues that he wanted to raise. He said that a female peer had called him "Paki" and had then left of her own accord. A male peer had approached him and had said "You'll be getting kicked out next". They had had an argument and the matter had then been discussed in the group. He said that that peer and him had had ongoing arguments until he had been discharged. He said that he had gone to the kitchen to get a knife and the peer in question was swearing under his breath and had pushed him. He had reported it but nothing had been done. He then decided to call the police to get a crime number and had been advised by the police that it was potentially assault. He had informed Bosence Farm that he had called the police and that had resulted in his discharge. He had tried to contact Ms Darlison but had been unable to do so. Mr Ruggirello informed the Claimant that as he was in breach of the treatment agreement that he had signed, he would be discharged from DAATS and referred back to his manager. The Claimant asked whether he could go to another treatment centre, and Ms Darlison said that they could not facilitate that given the circumstances and the discharge. The Claimant said that he felt that he should not lose his job because he had been treated unfairly.

48 On 25 March Ms Darlison sent the Claimant a letter discharging him from DAATS. The letter was copied to his line manager. She said that the contracted end date for his treatment was 12 April 2021. He had been discharged from Bosence Farm on 18 March 2021. She said,

"The Interim Report received by DAATS on 10th March 2021 states that although some of your triggers were identified, the destructive behaviours continued.

Following an on-going incident that escalated on 17th March 2021, Bosence Farm asked you to leave. In that final report post your discharge, Bosence Farm have stated that you had threatened to hit another peer. Your lack of willingness and ability to take responsibility made it untenable for them to continue to try and work with you.

You are now in breach of the DAATS Treatment Agreement Contract. You have been discharged from the treatment centre for the reasons stated above, this results in a formal discharge from DAATS and access to any further support. DAATS are unable to recommend a safe reinstatement to your substantive role or continued employment.

I have absolute confidence in Bosence Farm and the experienced professional team that have supported you throughout your stay. I have no reason to doubt the report for your discharge and the decisions that have been made."

49 The Claimant responded that he had not threatened anyone and Bosence Farm had failed to note that he had been threatened, assaulted and subjected to hate crime. He said that there had been a sustained campaign of bullying and racism or religious hate. His halal food had not always been cooked for him although it was the responsibility of the person on duty to cook everyone's food. It had been an unfair discharge.

50 On 1 April 2021 Paul Oliver, Customer Services Manager, invited the Claimant to fact finding meeting on 8 April. He was told that purpose of the meeting was to establish the facts and that no decision would be made as to whether to instigate the

Respondent's Discipline at Work Procedure until the investigation had been completed. Although the Respondent's procedure do not allow for representation at fact find meetings, the Claimant was exceptionally permitted to be accompanied.

51 The fact finding meeting took place on 8 April 2021. The Claimant was accompanied by M Harrington from the RMT. The Claimant was asked about his experience at Bosence Farm. He said that on arrival he had had to isolate for one week with a female peer. His key worker, Annie, had accused them both of flirting. Whilst he had been isolating he had been told that the shopping spend was £30 when it was £40 and on one occasion Tim Greenhalgh had shut a door in his face. He had been called a "Paki" by the peer with whom he was isolating. He had raised it at a group meeting. The peer had put a note under his door about their discussion, had gone to the office and had then left. CD, another peer, had said that he would make sure that the Claimant left next. Tim Greenhalgh had pushed the Claimant into saying that he had been controlling in his relationships. He felt that Tim had prejudiced views about Muslim men and relationships. CD had threatened him on 7 February. He had reported that. CD had also made derogatory comments about his faith and had said that his son had just come out of the army after killing Muslims. He had complained many times to Annie about CD belittling his religion but she had played it down. In the middle of the third week CD had threatened to knock him out. He had reported it to Tim and they were told to stay away from each other. He said that at the meeting on 18 February with DAATS Tim had said that he had been sexually forward with a female peer. Dan and Liz had asked him whether he would complete the treatment if he were moved elsewhere and he had said that he would. Tim had said that it did not matter where he went because the outcome would be the same. He had been persuaded to stay, Dan had said that he could contact him any time. He talked about the incident that had led to him being given a written warning. He said that he felt that he had not done anything wrong but had been advised by his father to sign the warning. When CD was on kitchen duty he refused to cook his halal food. He then talked about what had happened on 17 and 18 March. On 16 March he had told Dean, another peer, that he could knock CD out but that he would never fight him because he was older. The Claimant raised certain questions that he wanted Mr Oliver to ask Ms Darlison.

52 On 9 April 2021 the Claimant was suspended on full pay. The reason for the suspension was that he had been discharged from DAATS treatment centre.

53 On 3 May 2021 Mr Oliver sent to Ms Darlison the questions that the Claimant had wanted him to ask her. They related to the numbers and racial origins of persons that DAATS had referred to Bosence Farm and those who had not completed their stay, the reasons for not completing their stay, how many of them had been discharged and how many had referred to another rehabilitation centre and whether any complaints had been made about Bosence Farm. She responded that the request was the same as had been made by the Claimant under the Freedom of Information Act, This request was refused for the same reasons as that request had been refused. They had confirmed that they held the information but had not disclosed it as to do so would have been a breach of their obligations under the Data Protection Regulations as it would lead to the disclosure of personal data of individuals who would not have had any expectation that it would be disclosed to the public.

54 On 28 April the Claimant told his line manager that the police had told him that a witness from the rehabilitation centre had come forward and had supported his

account. He said he hoped that the witness would also be a witness in the work investigation. He was advised that if there was any additional information that he wanted P Oliver to consider he should send it to him.

55 On 6 May Mr Oliver had a Teams meeting with Ms Darlison and Mr Ruggirello. He asked them to send him all the agreements made between DAATS and the Claimant in respect of his treatment. Following the meeting he asked them two questions. The first was whether the Claimant had stated at any time, before, during or after the treatment, that he was unhappy with the support that he had received from DAATS. The second was whether he had stated at any time that he was being treated unfairly by the staff members at Bosence Farm or that the facilities were inadequate. In response to the first question, they both responded that he had never stated that he was unhappy with the support received from DAATS. In response to the second question, Mr Ruggirello replied that at the meeting after his discharge the Claimant had said that he had been treated unfairly by Bosence Farm. They both said that he had not said that facilities were inadequate.

56 On 28 May 2021 the police informed the Claimant that they had concluded their investigation. They had interviewed all the witnesses, including the suspect who had denied the offence. They had concluded that there was insufficient evidence to proceed with a criminal prosecution due to the lack of independent witnesses.

57 The Respondent's Discipline at Work Procedure provides,

"A full investigation and collation of all the evidence is paramount. When the manager has completed the investigation, he/she will review the evidence obtained and decide whether to drop the matter, deal with the matter informally, or arrange for the matter to be dealt with formally under the disciplinary procedure..."

Gross Misconduct

Where there is evidence of Gross Misconduct, the case must be referred to a Company Disciplinary Interview. 'Gross' is the term used to describe the most serious breaches of standards, rules or procedures that jeopardise the contract."

Under the procedure the Company Disciplinary Interview ("CDI") must be conducted by two managers of at least Manager Grade, who must be at least one grade higher than the employee concerned and not previously involved in the case.

58 On 10 June 2021 Mr Oliver wrote to the Claimant that having considered all the facts he had decided to refer the Claimant to a Company Disciplinary Interview. He said that he would receive formal notification to attend the CDI soon. He warned him that if the charge were to be proved, immediate termination of employment would be a possible outcome.

59 In early July 2021 Mr Oliver was advised by the Respondent's legal department to obtain certain further information from DAATS. On 7 July 2021 he sent an email to Ms Darlison and Mr Ruggirello and asked them the following questions:

- (i) How the Claimant had gone from saying he had a problem with drugs to him going to Cornwall for residential treatment;
- (ii) How DAATS reported back to the business, and why they discharged the Claimant and made the recommendations they did, and
- (iii) What DAATS made of the allegations made by the Claimant about issues around his race and religion, whether they were satisfied that Bosence Farm had made the right call and whether they considered it was a gross misconduct issue.

Ms Darlison responded as follows to the first two questions.

- (i) The referral had come from the counselling service as the Claimant had disclosed to them that he was an active drug user. He had been unable to stop using throughout the assessment process and although he was fearful of changing he had understood that he needed help to enable him to make a safe return to the workplace.
- (ii) The Claimant's manager had been kept informed of his progress on a need to know basis by email and telephone. The discharge from DAATS was a direct result of the Claimant breaching the contract that he had signed. His discharge from Bosence Farm meant that the treatment had not been completed and DAATS were unable to continue to support him. When that happened each case was managed individually and carefully considered before the next step was taken.

In response to the third question she said,

"I have worked closely with Bosence Farm for over 5 years and consider that, therapeutically and professionally, as a residential treatment service, they are fair and consistent with all of the employees from TFL. I am satisfied that the decision made by Bosence Farm to discharge KL was entirely appropriate, DAATS and Bosence worked together through-out KL's stay to try and reach resolutions to maintain KL's stay.

The DAATS contracts are very clear, the DAATS process for discharge is clearly stated in the documents. The outcome of KL's case is a formal discharge which follows a CDI process recommending that KL does not return to safety critical duties and is not suitable for continued employment."

60 On 26 June the Claimant sent a voice recording and some text messages which he wanted to be considered as part of the investigation to someone in Employee Relations who was not involved in his investigation. Ultimately, the Claimant's email was forwarded to Roksana Gwyn, who was assisting Mr Oliver. She wrote to the Claimant on 14 July that the investigation had been concluded and that any further information or evidence should be submitted at the disciplinary hearing.

61 On 4 August 2021 Mr Oliver sent the Claimant a letter inviting him to attend a CDI on 18 August 2021 or, if that was not possible, 24 August 2021. The charge was gross misconduct in that on 18 March 2021 he had breached the DAATS Treatment Agreement Contract by failing to complete the period of treatment advised and failing to complete treatment to the satisfaction of the DAATS Manager. The conduct was contrary to paragraphs 3.1.1. and 3.4.3 of the Respondent's Code of Conduct. Paragraph 3.4.3 stated that employees were required to comply with the Respondent's Drugs and Alcohol at Work Standards. He was told that the hearing would be chaired by Simon Jones and James Harriss. He was asked to send any

documents on which he wished to rely and the names of any witness whom he wished to call to Messrs Jones and Harriss at least three days prior to the hearing. He was advised of the right to be accompanied. He was sent a copy of Mr Oliver's report and all the appendices attached to it.

62 Mr Oliver's report set out how the Claimant had come to be referred to DAATS and to go to Bosence Farm, the documents that he had signed on 12 January 2021, referred briefly to the meeting of 18 February, referred to the fact that the interim report on 10 March had said that the Claimant's destructive behaviours were continuing. It said that on 17 March there had been an incident between the Claimant and another resident which had escalated and that on 18 March the Claimant had been asked to leave Bosence Farm and that on 25 March he had been discharged from DAATS. Attached to the report as appendices were the Respondent's Code of Conduct and Alcohol and Drugs at Work Standards, the agreements that the Claimant had signed on 12 March, the letter of 25 March discharging the Claimant from DAATS, the notes of the Claimant's fact find interview on 8 April 2021, the Claimant's statement about 17 March which he dictated on 18 March, and the DAATS team's responses of 4 May, 7 May and 8 July 2021.

63 On 9 August Marie Harrington, the Claimant's RMT representative said that she could not attend on either of the two dates that had been suggested. On 13 August 2021 she sent an email to Mr Jones asking for a large number of documents. They included notes of the review meeting held with DAATS on 22 March, notes of the meeting held on 18 February, the interim report of 10 March 2021, any report from Bosence Farm stating the reason for the discharge, the statements taken by the Bosence Farm staff from K Rich and the responses to the questions that the Claimant had asked. Mr Jones responded that most of the information was held by DAATS and should be requested from them. The CDI panel did not have the information. He said that their role was to decide the case based on the information provided in the report and its appendices and by the Claimant at the hearing. It was not the panel's role to carry out additional investigation/find supporting evidence before the hearing. However, if at the hearing something came to light that warranted additional information being needed, then the panel might decide to explore it further.

64 On 16 August Ms Harrinton requested the same documents and information from Ms Darlison. Ms Darlison responded that she would need to make a Subject Access Request for most of them.

65 On 7 September Ms Harrington submitted a large number of documents for the CDI hearing which was due to take place on 10 September. These included a statement from the Claimant's father and records of his telephone calls, a recording of a telephone call with K Rich and a transcript of that recording, texts exchanged between the Claimant and K Rich, a statement from K Kilday, a response to a complaint by a previous resident and CQC inspection reports.

66 The Claimant's father's statement said that on 17 March the Claimant had called him at 10 p.m. and told him that CD had pushed him. He called again on 18 March and asked his father to speak to DAATS as he had been unable to do so. He had called Ms Darlison at 11 a.m. and had told her about the incident and asked her to help. She had said that she would contact the Rehab the following day as she did regularly. He had told her that the Claimant had a problem now, to which she had

replied that she would do the best she could. His son had told him that he had called the police for his own safety and he had fully supported him doing that.

67 In the transcript of the telephone call between the Claimant and Mr Rich, Mr Rich said that he had been called by the police to give his account. He said that he had been in the kitchen all the time, he had left briefly to take something next door and then he had come back and then CD “*threw you out of the door.*” He said that he had been called to the office the next day and had said what he had seen. He repeated later that all he had seen was CD shoving the Claimant out of the door. There was also a conversation about the Claimant having said that if he wanted to, he could knock CD out right now and then.

68 In her statement Ms Kilday said that she was a mental health adult support worker. When the Claimant went to Bosence Farm he had been allowed to name five family and friends whom he contact once a week. She was one of the five names he gave. Approximately two weeks after he arrived he mentioned being subjected to racial abuse by the patients – one had called him a racist name and the other had belittled his faith. A patient had refused to cook his food and nothing had been done about it. The Claimant had told her that on his penultimate day he had been left with no choice but to call the police when he had been physically pushed by a patient and the staff had not dealt with it.

69 The CDI hearing took place on 10 September 2021. The Claimant was accompanied by Ms Harrington. The Claimant said that he was seeing a counsellor at TFL for depression and anxiety and had told him about his use of cocaine and the counsellor had referred him to DAATS. The Claimant repeated many of the matters that he had raised at the fact find interview and gave his account about what had happened on 17 March. He said that when he had told Ben and Annie on 18 March that he had called the police, Ben had said “this is serious now.” He had told him to wait in a room and not to speak to anyone. After an hour he had asked him for a statement. He had given a statement and Annie had typed it. She had typed it several times but he had refused to sign it because it did not contain everything he had said. Mr Jones raised the fact that the DAATS letter had said that the Claimant had threatened to punch a peer but he could not see any evidence to corroborate that. The Claimant said that it had come from the fact that on 18 March Dean had been called in and he had told them that the Claimant had said that he was going to knock out CD. The Claimant was asked if he knew what the phrase “destructive behaviour” in the DAATS discharge letter referred to. The Claimant’s response is recorded as,

“Being argumentative. If someone said something I didn’t agree with, I would stand up for myself. They knew one of my triggers was my religion. Even one time I was talking about my ex-girlfriend and Tim said that happened because I was controlling because I called my girlfriend at 2.00 in the morning.”

Ms Harrington went through the documents produced by the Claimant and commented on the important documents from Bosence Farm which were missing, such as the midway and discharge reports. She emphasized the positive steps that the Claimant had taken toward his recovery. The Claimant also submitted a written mitigation statement. The hearing started at 10.30 and ended at 3 p.m. There were a couple of breaks during the hearing. Mr Jones told them that they would be given a decision in about two weeks’ time.

70 After the hearing the CDI panel asked DAATS for any documents or reports that it had relating to the Claimant's behaviour/conduct and discharge from Bosence Farm. On 20 September Ms Darlison sent the panel the notes of the meeting on 18 February and the discharge report of 22 March 2021. In her email she said,

"KL's father made contact with me via telephone after KL left treatment, he wanted to tell me details of KL's journey in treatment, I kindly informed KL's father that it was not appropriate for him to make contact with me and would not discuss details of his sons experience or give an opinion..."

In my opinion every effort was made to support KL throughout all of the DAATS process (especially around boundaries) – from the initial referral to KL being discharged from Bosence Farm. Whilst in some part KL seemed to make progress towards the opportunity of a different way of being, KL seemed unable to sustain behaviours that would enable any long term change, inevitably rendering him unteachable, or perhaps not ready for treatment at this time."

71 The CDI hearing was reconvened on 22 October 2021. The Claimant was accompanied by Ms Harrington. At the reconvened hearing they went through the documents that the panel had obtained from DAATS and other new documents introduced by the Claimant. The Claimant said that he had been aggressive on a Zoom call with Ms Darlison before he went to Bosence Farm. The Claimant and Ms Harrington said that the Claimant had been asked to leave because he had called the police; at that stage Bosence Farm had felt that it was serious and that they might be asked why they had not done anything to deal with CD's behaviour towards the Claimant. The Claimant said that he thought the female peer who he alleged had been racist had been asked to leave. He was asked about the incident that led to him getting the written warning. The hearing lasted about two hours.

72 The CDI panel sent its outcome to the Claimant on 24 November 2021. The letter said that the disciplinary charge of breaching the DAATS treatment agreement contract by failing to complete the treatment advised and to the satisfaction of the DAATS manager had been proved as the Claimant had failed to complete the agreed term at the Bosence Farm treatment centre. The Claimant had raised three points in mitigation. These were (i) Bosence Farm had not taken action against other peers in relation to their racial or religiously intolerant behaviour towards him, (ii) Bosence Farm had failed to deal with another peer who had been antagonistic to him on a number of occasions and (iii) he had been asked to leave because he had called the police about the combined action of the antagonistic peer and the Farm's inaction over it. It said that the panel could not rely too heavily on the telephone call recordings as it had no evidence of their provenance and no way of verifying their authenticity. The panel found that Bosence Farm had taken action in respect of racial or religiously intolerant behaviour – the female peer who the Claimant had said had made a racist remark had been asked to leave and that staff had engaged with him in respect of the behaviour of the male peer (CD) and the Claimant had said that he did not want to take it further. It had also discussed negative behaviours with both the Claimant and the male peer and they had agreed to work it out amicably. On the Claimant's own account, the male peer was on a final warning. In respect of the third point of mitigation, the panel said that the Farm had acted to contain the issue between the two of them, but the Claimant, unsatisfied with that outcome, had

decided to call the police. The police had found there was no case to answer and had described it as “he said, she said.” Nor did it accept the Farm had discharged the Claimant because the police’s investigation into the Claimant’s complaint would bring their failures to light. They said that once the call had been made, the damage had been done. Discharging the Claimant would not stop the investigation. The panel noted that throughout the period of the Claimant’s treatment at Bosence Farm he had been asked to consider the way he took accountability for his actions/part in events or incidents that occurred and similarly throughout the CDI hearing he seemed to have struggled with the ability to take accountability for the part he played in interactions with peers and the outcomes of situations.

73 They then considered the sanction and recognised that there was a range of sanctions available to them (final written warning, regrading, suspended dismissal and summary dismissal). They said that they had reviewed relevant comparator cases and although no two cases are the same, similar cases had resulted in summary dismissal. They considered whether there was any reason why they should not employ the option of summary dismissal. They continued,

“It is critical that all staff who work in LU to adhere to its Drugs and Alcohol procedures and standards at all times. It is of serious concern to the Panel that you failed to complete your arranged treatment at Bosence Farm – LU has a zero tolerance to drugs and alcohol to minimize risk of damage to passengers, staff and property. This also allows LU to comply with relevant legislation and protect its reputation as a provider of safe public transport.”

The decision of the panel was to summarily dismiss the Claimant with immediate effect. The Claimant was advised of his right to appeal the decision. The Claimant’s employment terminated on 24 November 2021.

74 On 29 November Ms Harrington asked the panel for the details of the comparator cases. Mr Jones provided the information to Ms Harrington without revealing the identity of the individuals. Between November 2019 and October 2020 three employees had been summarily dismissed for failure to complete the agreed DAATS treatment.

75 Ms Harrington submitted an appeal on behalf of the Claimant on 30 November 2021. The main ground of appeal was that the penalty was too harsh, and other points made were in support of that. They included the following - many points raised in mitigation had not been addressed or accepted and the panel had been wrong to dismiss their contention that the Claimant had been discharged from Bosence Farm because he had called the police.

76 The appeal hearing took place on 26 January 2022. The appeal was conducted by Allan Gardner and the Claimant was accompanied by Ms Harrington. Mr Gardner said at the outset of the hearing that it was not a re-hearing but about the points in the outcome which the Claimant disputed. Mr Gardner then went through the points made in the ground of appeal and asked the Claimant and Ms Harrington to expand on each of them and asked some questions. The hearing lasted over an hour. There were certain documents to which Ms Harrington referred that Mr Gardner did not have and Ms Harrington undertook to provide them to him. She did so after the hearing.

77 Notes of the hearing were sent to the Claimant and Ms Harrington and an agreed version was produced on 8 February.

78 On 3 February 2022 Ms Harrington gave Mr Gardner the name of an employee who she believed had left a rehabilitation centre voluntarily in 2010-2011 but had not been dismissed. On 15 March Mr Gardner sought further clarification and documents Ms Harrington. Ms Harrington responded on 16 March and provided the documents.

79 Prior to reaching his decision Mr Gardener spoke on 17 March to Messrs Jones and Harriss to find out whether they had considered all the mitigation provided by the Claimant and to Ms Darlison and Mr Ruggirello about a number of matters. One of the questions that Mr Gardner asked them was how they ensured that the treatment centres to which they referred their employees were well run and appropriate. Ms Darlison said that the procurement process for engaging treatment centres was very thorough and each contract was renewed annually. Treatment centres were also inspected by the CQC and Bosence Farm had received an overall rating of “good” at its last inspection in 2019. Mr Gardner made inquiries about the employee Ms Harrington had mentioned to him. His inquiries revealed that that case went back to 2007. Ms Darlison confirmed that the employee had left the treatment centre voluntarily and had been discharged by DAATS. The matter had then been referred to his manager. The manager had since retired and no one in HR had any records of it. Mr Gardner also made inquiries with HR as to whether anyone was aware of any cases where someone had left a treatment centre and had remained in employment. Eleven people in HR had responded and had said that they were not aware of any such case. The contract used by DAATS prior to 2016 was slightly different from the one that the Claimant had signed.

80 Mr Gardner sent the Claimant his decision on 23 March 2022. It comprised twelve typed pages and dealt in detail with each of the points raised in the grounds of appeal. He dismissed the appeal. I summarise below some of his responses to the points raised and his reasons for reaching the decision that he did. The panel had not dismissed the recording of the call with K Rich as hearsay and without value. The panel had considered it and had concluded that “it could not be relied on too heavily” for the reasons that it had given. Mr Gardner said that he had spent some time listening to the recording and gave detailed reasons as to why he agreed with the panel’s conclusion not to rely too heavily on it. The panel had not dismissed the notes made by staff at the treatment centre. However, it was hard to give weight to, and reach a firm conclusion on, something that only contained some of the information that a document actually contained. The panel had confirmed to him that it had considered the treatment centre’s response to a complaint from a former resident but as it had been heavily redacted, the nature of the complaint was not clear. He had considered the document but had been unable to reach a conclusion as so much of it had been redacted. He made the point that if it was a comprehensive upholding of a significant complaint, it was hard to understand why so much of the treatment centre’s response to it had to be redacted. One possible explanation was that the redacted sections might have painted the whole matter in a different light. He set out what DAATS’ responses had been to the matters that he had raised with them. He said that the panel had considered the Claimant’s case that he had been asked to leave the treatment centre because he had called the police and that the centre was concerned that the outcome of any police investigation would have reflected badly on them. It had also considered the Claimant’s contention that that was the reason why it had painted him in such a bad light in the discharge

report. Mr Gardner made the obvious point that a report that is explaining the reason why it had asked the Claimant to leave was, by its nature, going to have to outline negative aspects of his behaviour. Mr Gardner's conclusion on this issue was as follows –

“It would appear to me from all the evidence, that the reason you were asked to leave was culmination of a whole series of events that you were central to. The fact that you called the police before informing the staff at the centre of your intention to do so, may or may not have been one of the treatment centre's reasons for asking you to leave, or it may well have been the straw. But from all the evidence I have concluded that it was certainly not the only reasons for you being asked to leave.”

He also said that the Claimant's belief that had he still been at the treatment centre, the police's investigation potentially would have had a different outcome was just his opinion. He could not see why a potential witness to the incident would have given a different version of what happened to the police, depending on whether or not the Claimant was present at the treatment centre. The Claimant had been formally discharged by DAATS and, therefore, access to further support and DAATS had been unable to recommend a safe reinstatement to his substantive role or continued employment. It was very difficult for him or the panel to ignore that recommendation. He concluded by saying,

“The proven charge under consideration is very serious and, as the CDI panel concluded, and by its nature, strike at the heart of the employment contract that exists between you and London Underground. Therefore, I do not believe that the mitigation that you presented at the CDI and at the appeal, and subsequent to the appeal, is sufficient to alter the sanction decided by the CDI panel.”

Conclusions

81 It was not in dispute that the Claimant was addicted to drugs and could not perform his role because of that. Instead of dismissing him for that, the Respondent had provided him with treatment in order to recover from the addiction. It was made clear to the Claimant at the start of that treatment that if he did not complete the treatment he could be dismissed. It was not in dispute that the Respondent had dismissed the Claimant because he had breached the DAATS Treatment Agreement Contract by failing to complete the treatment at Bosence Farm. Equally, there was no dispute that he had breached that contract because he had been discharged from Bosence Farm before the treatment had concluded. That is a reason related to conduct.

82 The Claimant's case was that the Respondent had not carried out as much investigation as was reasonable in all the circumstances of the circumstances, it did not have reasonable grounds to believe that he was guilty of the misconduct alleged and that dismissal was not within the band of reasonable response. His case, in essence, was that had it carried out a reasonable investigation, it would have concluded that he had not in any way contributed to, or caused, his discharge from the treatment centre and, therefore, he ought not to have been dismissed. Or to put it in another way, the Claimant's case was that although was technically guilty of the

misconduct alleged, he ought not to have been dismissed for it because there were such strong mitigating factors.

83 It is important to remember that the employer is obliged to carry out as much investigation as is reasonable in all the circumstances. In this case the investigation started with Mr Oliver on 8 April 2021 asking the Claimant his side of the story about what had happened at Bosence Farm. On 6 May 2021 he interviewed Ms Darlison and Mr Ruggirello and obtained from them all the agreements between DAATS and the Claimant relating to his treatment. He followed that up by asking them additional questions on that day and again on 8 July 2021. The CDI panel had the documents that Ms Harrington submitted on 7 September (which included the recording of the call with K Rich, the statement from the Claimant's father and Ms Kidday, the response to a complaint from a former resident and CQC inspection reports). The CDI panel looked at all the documents produced by Ms Harrington and listened to what she and the Claimant had to say. That was a long hearing at which the panel went through the documents that Mr Oliver had produced and those produced on behalf of the Claimant. After the hearing, the panel obtained additional documents relating to the Claimant's time and discharge from Bosence Farm. They then reconvened the CDI panel and went through the additional documents they had obtained and those the Claimant had submitted. The Claimant and Ms Harrington had a further opportunity at the appeal hearing to raise matters that they considered important. Mr Gardner asked Ms Darlison and Mr Ruggirello further questions. He looked at further documents that Ms Harrington produced including the case notes from Bosence Farm and other documents obtained by the Claimant as part of a Subject Access Request. I concluded that the Respondent had conducted as much investigation as was reasonable in all the circumstances.

84 As it is not in dispute that the Claimant was guilty of the misconduct alleged, it cannot be said that the Respondent did not have reasonable grounds on which upon which to sustain that belief. The real issue was whether dismissal was within the band of reasonable responses which a reasonable employer might have adopted. The Claimant's case is that it was not because there were strong mitigating factors which showed that he was not responsible in any way for his discharge. That is the basis on which his appeal was pursued, namely that the sanction was too harsh. The three main issues raised at the CDI panel and in the appeal were that he had been the victim of race discrimination and someone has belittled his faith, that there had been a "campaign" against him by CD, that Bosence Farm had not taken any action in respect of these matters and that it had discharged him because he had involved the police and that was going to reflect badly on them. Both the CDI panel and Mr Gardner looked at and considered all those issues. The alleged racial discrimination related a remark made by a female peer in his first week there. The evidence at the CDI panel and/or the appeal was that she had denied that she had made a racist remark. Staff had said at a meeting that racism was not acceptable and had spoken to the female peer and the Claimant. As a result of the conversation, she had left. There was very limited evidence of remarks related to his faith in the staff notes. There were a couple of references to comments made by CD and CD refusing to cook his food. In respect of the Claimant's relationship with CD, the staff notes showed that he had threatened the Claimant when the female peer had been asked to leave but that staff had asked him to apologise to the Claimant and to agree to speak to him in a respectful manner and that he had done so. The Respondent concluded on the evidence before it, as it was entitled to do, that the staff at Bosence Farm had not ignored the issues raised by the Claimant

85 The panel and Mr Gardner did not accept that the only reason that the Claimant had been asked to leave was because he had called the police and because Bosence Farm had wanted to limit any damage to its reputation. They accepted, as Mr Gardener said, that it might well have been one of the reasons that he was asked to leave and that it might well have been the last straw. Both the panel and Mr Gardner found on the evidence before them that the Claimant was not, as he claimed, completely blameless. There was a lot of evidence before them that contradicted the picture that the Claimant was trying to portray. There were the barriers toward his recovery process identified at the meeting on 18 February (paragraph 32), the events that led to him being given a written warning on 4 March 2021 (paragraph 34), the remarks made in the midway report on 10 March (paragraph 35), the different accounts given by the Claimant and CD about the events of 17 March, the Claimant getting angry and shouting at Mr Sweet on 18 March (paragraph 41), the comments in the discharge report of 22 March (paragraph 46), Ms Darlison's response to Mr Oliver (paragraph 59) and to Mr Gardner (paragraph 79), there was evidence about the Claimant having said that he could knock CD out if he wanted (paragraph 67) and the fact that the police had investigated the Claimant's complaint and had decided not to take it any further.

86 The Claimant and his representative were given every opportunity to put forward whatever evidence and arguments they wanted. Both the CDI panel and Mr Gardner considered all the evidence and mitigation put forward by the Claimant. It did not accept the case that he put forward. The Respondent was entitled on the evidence before it to reach the conclusions that it did. The Respondent could not continue to employ the Claimant while he was addicted to drugs. It gave him the opportunity to recover from his addiction at a cost to itself. The Claimant understood clearly that if that treatment was not concluded, it could lead to his dismissal. Dismissal was within the band of reasonable responses. The Respondent acted reasonably in all the circumstances of the case in treating the Claimant's breach of the DAATS agreement and the discharge form DAATS as a sufficient reason for dismissing the Claimant.

Employment Judge - Grewal

Date: 13/03/2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

.13/03/2023

FOR THE TRIBUNAL OFFICE