



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 8000139/22

Heard on 31 May and 1 June 2023

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**Employment Judge J Young
Members: Mr T Lithgow
Ms M Watt**

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Piotr Kubas

**Claimant
In Person**

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Brothers of Charity Scotland

**Respondent
Represented by:
Mr S McEntee,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claim presented to it of discrimination because of the protected characteristic of race under section 13 of the Equality Act 2010 does not succeed.

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REASONS

1. In this case the claimant presented a claim to the Employment Tribunal on 9 November 2022 complaining that he had been discriminated against

because of the protected characteristic of race. He made application for early conciliation on 30 August 2022 and the appropriate Certificate was issued on 11 October 2022. He claims direct discrimination because of his Polish nationality under section 13 of the Equality Act 2010 ("EA"). He remained
5 employed by the respondent at the time of the final hearing being on sick leave.

2. The claimant is a support worker supplying care services employed by the respondent. He maintains that he received less favourable treatment by a
10 disciplinary investigation taking place into an incident on 19 April 2022 whereby a service user left his property while the claimant was on duty. As a result he received a final written warning on 10 June 2022 in relation to that incident. He maintains that on or around 20 August 2021 and then on or around 23 May 2022 similar incidents occurred with two non Polish support
15 workers and on those occasions no disciplinary investigation or penalty was imposed. He relies on those two support workers (MB and TR) as his comparators.

3. The respondent denies discrimination. It is maintained that the circumstances
20 of the previous incidents differed from the incident involving the claimant and it was that which accounted for the final written warning being issued. It was also maintained in the ET3 response that a complaint prior to 31 May 2022 may be time barred but the Tribunal was advised at the hearing that issue was not being pursued.

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4. The issues for the Tribunal were:-

Direct Discrimination

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Did the respondent do any of the following things:-

- (a) Undertake a disciplinary investigation into an incident on
19 April 2022 whereby service user A left his property

while the claimant was on duty in the property providing care services to A?

5 (b) Convene a disciplinary hearing on 7 June 2022 in relation to the claimant's conduct with respect to that incident on 19 April 2022?

10 (c) Issue a final written warning to the claimant on 10 June 2022 in relation to the incident?

(d) Refused to uphold the claimant's appeal against the final written warning by letter dated 19 July 2022?

15 (e) If so were these acts or omissions or any of them less favourable treatment because of the claimant's Polish nationality?

20 (f) Was the claimant treated worse than other(s) of British nationality were or would have been treated in materially the same circumstances?

25 (g) If there was nobody in materially the same circumstances as the claimant the Tribunal required to decide whether he was treated worse than someone else would have been treated. Was it appropriate to infer from evidence about the treatment of people whose circumstances were similar but not materially identical to how a British national would have been treated if they found themselves in the same circumstances as the claimant?

30 (h) If so did the respondent's treatment amount to a detriment?

Remedy for Discrimination

5 (a) Should the Tribunal make a recommendation to take steps to reduce any adverse effect on the claimant and if so what should it recommend?

(b) What compensation should be awarded in the event of discriminatory treatment?

10 (c) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply and if so did the respondent or the claimant unreasonably fail to comply? If so is it just and equitable to increase or decrease any award and by what proportion? Should interest be awarded on any
15 compensation?

Documents

5. The parties had helpfully liaised in providing a joint file of documents. That
20 was supplemented by 2 further documents received in the course of the hearing resulting in the file of documents being paginated 1-143 (J1-143).

The Hearing

25 6. At the Hearing evidence was given by (1) the claimant; (2) Simon Cullum who had been employed by the respondent for approximately 6.5 years and held the position of Quality Manager as from 1 April 2023. Previously he had been Assistant Support Manager overseeing the running of 4 different houses providing care services; (3) Michelle Devlin being Senior Manager of
30 Supported Living Services with the respondent and who had been in that position since April 2020; (4) Dawn Barratt, Head of Care Services with the respondent since December 2020.

7. From the relevant evidence led, admissions made and documents produced the Tribunal were able to make Findings in Fact on the issues.

5 Findings in Fact

8. The respondent is a charity providing care and support to individuals who have a learning disability and/or significant health needs in the Scottish Borders. They have approximately 210 employees providing care and support to around 100 individuals. The services are provided mainly to allow individuals to live as independently as possible in their own home.
9. The claimant is employed by the respondent as a Support Worker with continuous service from 30 November 2005. He has been on sick leave with the respondent since 13 June 2022.
10. The claimant provided support to a service user A with dementia, poor mobility and general lack of cognitive ability at supported accommodation in Selkirk. That accommodation comprised ground and first floors and was occupied by another service user (B) whose needs were less than service user A in that he was quite independent in being able to be out during the day and come and go as he pleased.
11. The claimant advised that he worked 37.5 hours per week over 2/3 shifts which involved a sleepover. He would be in the accommodation 9am/10am-9am the following day. The sleepover would usually be 10pm-7.30am weekdays or 10am-8am Saturday/Sunday.
12. His colleague Support Worker MB and TR shared shifts in the accommodation.
13. The accommodation consisted of living room areas for each of service users A and B with the bedroom for service user A off his living room area. There was a shared kitchen on the ground floor with one bathroom downstairs.

14. Service user A had a bed alarm sensitive to movement. At the time of the incident involving the claimant the front and back doors to the property were fitted with alarms set by a switch. If the alarm was set and a door was opened the alarm would sound. The Support Workers on shift carried a pager which would make a loud noise and vibrate in the event the bed alarm or front door alarm was triggered.

10 **Employment Policies and Procedures**

15. The claimant was subject to the Scottish Social Services Council (SSSC) Codes of Practice (J35/63).
16. The claimant was also subject to the respondent's Disciplinary Policy and Procedure (J64/74) which advised that prior to any disciplinary hearing an investigation would be conducted to gather evidence and enable a decision to be taken on whether there was a disciplinary case to answer. Such investigation would normally be conducted by a Line Manager. If it was found that there were grounds for disciplinary action then written notice of the hearing would be issued. Examples of gross misconduct were given which might render an employee liable to dismissal or, where there was a level of mitigation resulting in the matter being treated just short of dismissal, a final written warning. One of the examples of gross misconduct given was:-

“Conduct which harms, or places at risk of harm, a person or persons receiving support, including failure to provide support or forming an inappropriate relationship with person(s) receiving support, representing abuse of position of trust”.

17. A right of appeal existed against a disciplinary decision to be taken by someone senior to the person who held the original hearing.

Incident of 19 April 2022

18. An incident occurred on 19 April 2022 when service user A left the accommodation. The claimant submitted an incident report form on the matter and described the circumstances as:-

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“A was pacing around the house, both the alarms on the front and back door were on, but the front one didn’t work. A left the house and was heading up the street. A neighbour called and said (A) had left the house. Staff went out to bring him home”.

19. On action taken it was stated *“The new alarm was fitted on the front door”.*

20. In evidence the claimant advised that A had been “wandering about the house” and had then fallen asleep in a chair within service user B’s living area. The claimant went to carry out some work in A’s living area. He then heard someone “come to the door and he went to the living room door to find a neighbour indicating that A was walking up the street”. He stated he was shocked that A had got out without the alarm going off and that when he saw him he was about 40 metres from the house.

21. The neighbour came from “two doors up the street” and stated that A had been “half way to the school when she saw him”. He took A back to the house. He was calm but confused.

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22. A had phoned his Line Manager Simon Cullum and was advised to fit another alarm to the front door which was done shortly after. Thus there were then two alarms on the front door which were set independently of each other.

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23. Mr Cullum indicated that the call from the client was a “lengthy call so that he could understand the incident and make some recommendations”. The claimant had stated that he was “pretty sure that he had set the alarm and it was not possible to exclude that there was a fault”. He had instructed an

additional alarm be fixed to the front door. That was the end of the incident pending a report form being completed and submitted by the claimant.

5 24. The incident report form was not received until 12 May 2022 (J75) despite repeated requests. The claimant disputed that such requests had been made but the Tribunal were satisfied that Mr Cullum had been conscientious in seeking a completed incident report form and had gone to the property on 12 May 2022 with a form which had then been completed.

10 25. The desire for a written report had been heightened as on or around 10 May 2022 Mr Cullum had received further information on the incident from a co support worker SA. This followed a conversation that SA had had with the neighbour who had reported that service user A was out of the house on 19 April 2022. This conversation had concerned SA and he had come to report it to Mr Cullum on 10 May 2022. Mr Cullum advised that the report had been
15 made as SA had had a “crisis of confidence” in that he knew that there was something he required to report and did so when Mr Cullum was visiting the house in which SA was working. SA had asked if he could speak to him in private and he did so. The matter disclosed was outlined in the report form
20 submitted by SA on 17 May 2022 (J80/83).

26. That report form stated:-

25 *“While taking (B) out to his routine he stopped to speak to a lady and two neighbours. During this chat the lady informed us she had been the person who alerted staff to A going out of house. In this she was quite angry: she said she knew A and would have got him herself but had a full car. She then drove to house and knocked on door. Got no reply at first so tried again, the door was answered by PK who
30 was wearing headphones. She said he didn’t seem aware A had gone. I said the alarm had not worked to kind of reassure them”.*

27. On receipt of the incident form completed by the claimant on 12 May 2022 it was stated by Mr Cullum in the section "*Further action(s) taken*":-

5 (1) *PK stated alarm "did not work". This was in doubt and no report of issue again. Speculation if alarm was set at all at time of incident but could have been an intermittent fault (hence addition of extra alarm).*

10 (2) *Info since come to light that neighbour who raised the alarm tried for a long time to get answer at front door. They told another member of staff that PK answered door with earphones in. Investigation required (J78).*

15 28. On the incident form submitted by SA, Mr Cullum stated in the section for "*Furter Action(s) Taken*":-

20 "*Contacted Senior Manager, HR and Social Work. Investigation to ensue. Need to speak to SA; neighbour and PK due to the headphone issue*".

29. From this narrative of events the Tribunal found that investigation was decided upon as a consequence of information provided by the neighbour that at the relevant time the claimant was wearing earphones.

25 30. An investigation was conducted by Simon Cullum and he made notes of the interviews. He interviewed SA on 19 May 2022 (J85/90); the neighbour on 19 May 2022 (J91/94); the claimant on 20 May 2022 (J95/100); and MB on 20 May 2022 (J101-103).

30 31. SA advised that the neighbour had said she "*banged*" on the door. There was no answer and had then "*knocked again*" and the "person on shift came to the door and was wearing headphones" and she was "*like he wouldn't have been able to hear anything, he didn't know he was away*" (J86).

32. The neighbour advised that the incident took place around midday and she was in her car going to pick up grandchildren with one child in the car. She spotted A and took the car down the street and *“turned at the bottom of the road came right along the street and there was not anybody there and I thought oh. I could not have put him in the car cos that would not have been proper so I came back along turned at the end of Anderson Road back along the street stopped the car in the middle of the road went to A’s house where the door was open”*. She then described that she had knocked on the door *“like a policeman’s knock 3 loud knocks, I never got an answer so then I shouted and I put a step in the door and shouted cos I did not know where anybody was. Then the door opened and this gentleman came out”*. She then advised that *“I did not think it was very proper being in charge of somebody like A and having these iPod or whatever they are called in their ears, they are iPods or whatever they are”* which she went on to agree were earphones in saying *“yes just like a gone wrong hearing aid with the bit hanging down the outside of your ear, all the young ones go about with them, I think they are iPods I don’t know”* and that these were *“in both ears”*.(J9\1-94)
- 20 33. The claimant in his statement (J05-100) gave an account of the matter and was asked about the wearing of earphones (J96). In this he responded to the initial question as to whether he was wearing earphones *“maybe, no I don’t usually use them at work”* and when advised that the neighbour had noticed that he was wearing earphones he indicated *“yes, probably, if she saw them then probably I was”* and later indicated *“I don’t usually use them at work, but I had some new ones I was trying them”* and when asked what he was *“listening to”* stated *“the Bible, I downloaded it in Polish, I do not usually use them at work”*.
- 30 34. MB advised that she had thought the alarm was working that day but had assisted in fitting the second alarm on the front door thereafter. She had no information to provide regarding the wearing of earphones. She had not been present at the time.(J101-103)

35. Mr Cullum prepared an investigation report (J104/106) and he concluded that it was unclear if the alarm had been set correctly or if there was an intermittent fault but that a neighbour had noticed that the claimant had in each ear an earphone when she went to alert staff that A was on his own in the street. He advised that the matter should progress to a disciplinary on an allegation of gross misconduct namely conduct which *"harms or places at risk of harm a person or persons receiving support"*

36. The claimant was then invited to a disciplinary hearing which was to be conducted by Michelle Devlin with HR support. The allegation was stated to be:-

"Conduct which harms, or places at risk of harm, a person or persons receiving support, including failure to provide support. In particular on 19 April 2022 a service user left the house unattended whilst you were providing support, this occurred when you were wearing headphones, potentially leaving the service user at risk of harm".

37. The disciplinary hearing took place on 7 June 2022. The claimant chose not to be represented at this time. The meeting was recorded and a transcript of the proceeding (J109/118) showed that the claimant was asked *"Were you wearing headphones, did you have earphones?"* and responded

"Do you know I don't think I had them. I didn't have them. I know that SC persuaded me to something that I didn't do. Because first of all I don't have wireless headphones at all because they hurt my ears so I couldn't wear them, I didn't" and:-

7 was under lots of stress and he said she said you had earphones so I was like so probably but afterwards I thought I didn't have them on as when A left the house and a neighbour was coming I heard the horn and I was like who is doing this and why. I heard the woman say hello A is up the road, I heard her talking so I couldn't be wearing the earphones as I wouldn't hear anything".

38. He did agree that the earphones should not be used whilst on duty. He also advised that he had heard there was a further incident of A leaving the house some time after the incident involving the claimant.

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39. By letter of 10 June 2022 (J119-121) the claimant was advised that there was no evidence to support an allegation that the claimant failed to set the alarm on the day in question but that:-

10 *I believe that you probably were wearing earphones whilst supporting A which potentially led you to not hearing him leave the house, therefore you were not able to respond to A and leaving him at risk of harm”*

15 *“Whilst providing support staff members must be able to respond in an emergency and must not be partaking in any activity which would hinder their ability to hear, this includes the wearing of earphones on a shift or sleepover”.*

20 40. In those circumstances the claimant was advised that he was being issued with a final written warning which would remain on his file for a period of 12 months from 10 June 2022 and that he had a right of appeal.

25 41. The claimant appealed against the decision saying that he thought the penalty too severe taking into consideration that it is only based on him *“probably wearing earphones”*. He advised that the reason why the service user had left the house was that he had dementia and the alarm did not work.

30 42. He also raised the issue of another *“2 incidents happening of A leaving the house after the incident on the 19th of April which I believe have not been investigated and those incidents did not cause risk to the service user the same as in my case. I do not understand why you did take action about a Polish support worker and not against a British support worker on whose shift the incident happened. It looks that this is an example of treating two support*

workers differently in two almost identical situations so could you please explain this to me why the Brothers of Charity actions differs on those 2 incidents?” (J123/124)

5 43. The appeal hearing was taken by Dawn Barratt on 12 July 2022 and again recorded with a transcript being produced (J125/130).

44. In that hearing the claimant advised that the matter had caused him extreme psychological and emotional harm and damage. He had commenced sick
10 leave at this point. He advised that the same situation *“happened again at Anderson Road and it happened twice after the incident with me and I believe the senior managers know about it and I believe that an incident report was filled in for that and there was no action taken against his support worker and I feel that this is discrimination because I am Polish support worker and there
15 was action taken and the blame put on me ...”*. He felt that he had been treated unfairly in that the action *“was taken just against me, I felt devastated as I was just targeted as a person that somebody was waiting for me to make a mistake which in my opinion wasn’t my fault’*.

20 45. On the issue of whether the claimant was wearing earphones or headphones he advised that *“It was like the first meeting happened and I came to the office not knowing what was happening and it was mentioned somebody saw me wearing and I thought maybe yes. So I was wearing, I was under lots of pressure lots of stress, you know after like trying to think what had happened
25 I remembered that I wasn’t wearing them so I had a mask, with not wires but the strings, so this was confused with the headphones”*.

46. On the issue of discrimination the claimant again advised that he considered he was treated differently to a British support worker and did not know why.
30 He confirmed there were no racial comments on any other matters but simply the different treatment.

47. He was asked about the comment made that he was testing out ear buds/earphones and indicated *“Maybe I was testing them but to be honest I*

don't remember, no it was a long time. So maybe I said it yes" and when asked "So there was one occasion that you maybe brought them in and tested them out when you were on a sleepover" to which he indicated "Maybe".

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48. The outcome letter of 19 July 2022 (J131/132) advised that an investigation had been made into the allegation that the action had been taken because of his Polish nationality but there had been no *"evidence to support this allegation"*. The letter detailed what the claimant had said about wearing of earphones but concluded in a belief that the claimant was *"wearing earphones whilst supporting A"* and that this had potentially resulted in you *"not hearing him leave the house when the alarm failed to work"*. It was also stated that it was believed the claimant had worn earphones whilst *"on a sleepover shift which put A at risk of you not hearing him"*. As a result the appeal did not succeed.

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49. The claimant in evidence agreed that the report of the investigation was an accurate account of that meeting including the reference he made to wearing earphones. However when he went home that evening he *"realised admitting to something I did not do"* and believed he had been manipulated in the hearing by matters being exaggerated in relation to the time he was out of the house and the length of time the neighbour had spent seeking to attract his attention. He had been very stressed by the whole matter and had not sought to have the Minutes corrected. He explained that he had been unable to function properly at this point because of the stress of the whole situation.

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50. Neither did he accept in evidence that any wearing of earphones whilst on duty was an act of misconduct as he had seen others wearing earphones and there was no policy on the matter.

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Incident with MB.

51. MB is a Support Worker with the respondent and also took shifts in the care of A. On 20 August 2021 an incident took place which MB described on the incident report form (J133/137) as:-

10 *“A left the house and walked along the pavement towards the primary school. Staff (MB) went after him calling his name, but he kept on walking. MB caught up with him and explained that it was not safe and it is very dangerous to leave the house without his support staff. He kept on saying he wanted to go home and Anderson Road was not his home. He was a bit confused. I think it was his dementia”.*

15 52. On the “Action Taken” it was stated:-

20 *“Staff have locked both doors of the house and put the keys out of reach. Manager Simon Cullum has advised to write up an incident form and will sort out a risk assessment in place to ensure A’s safety as locking doors would be classed as restraint”.*

53. On “Further Action(s) Taken” Simon Cullum advised:-

25 *“Have asked team to get quotes for door audible alarms (battery operated) for front and back door/thumblocks front and back. And slide bolts on both gates from front garden onto pavement/road. Keeping door locked not a permanent solution presently”.*

30 54. Mr Cullum advised that he saw this particular incident as being different in that A had left the house and the staff member had realised he had gone and went after him. At the time there was no alarm on the front door and A’s propensity to leave was not realised at that time but became part of increased “dementia pathway”. He had not opened the door to leave before.

55. At that point the action taken was to get alarms fitted so that staff would be alerted to the door opening and there was no investigation required into the issue. No reference had been made to the staff member not being able to hear because of the wearing of earphones. It was not the case that staff were able to “eyeball a client 24/7” and there will be “times when staff member not with the client”. If there had been an allegation regarding earphones then there would have been an investigation. No investigation was intended with the claimant until such time as the allegation regarding him wearing earphones came to light.

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Incident with TR

56. On 23rd May 2022 an incident occurred when TR was on duty involving A leaving the house at Anderson Road. This was described in the incident report form (J138-141) as:-

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“Staff (TR) went to use the toilet. A left the house through the front door. He started walking to the right down the hill on the pavement. TR managed to divert him back. He was agitated and kept saying he wanted to leave the house (referring to Anderson Road). He said and kept repeating “I didn’t like it here and I can’t stay here”. The second time he left the front door again, luckily he did not go far TR got him in time. The door alarm and pager did not go off as it wasn’t working properly”.

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57. Mr Cullum explained that he was off ill when this incident took place but was made aware of it when he returned. The Manager at the time has since left the respondent’s employ. He noted that the action to be taken following the incident was for the alarms to be checked and in terms of action taken it was noted:-

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“M phoned the Borders Alarm Care and technician came to the house at 13.20pm. Had a look at the pager and changed A’s bed package as well. Tested the door alarm with the pager and it’s

working now. Kirsty has recommended staff to fill in an incident form and get it to the office as soon as possible”.

58. It was also noted:-

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“Staff locked both doors and put the key out of reach S McD has been informed about the situation as well”.

59. It was explained that since this incident the care of A had been reviewed and given his increased and increasing dementia was now located in a care home.

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60. Mr Cullum's position was that on the information available it could not be said “for definite that the alarms failed” but there was no allegation of a hindrance in an ability to hear what was happening in the home. The staff member was able to respond and get the claimant back. He was aware of him leaving the house. He did not have to be told.

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61. He refuted the allegation that the incident with the claimant was investigated and a final warning issued because the claimant was Polish. The issue was not whether he set the alarm or not but the allegation that he was wearing earphones. If there had been any allegation either in the case of MB or TR that they were wearing earphones at the time and so their hearing hindered then an investigation would have ensued.

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Remedy

62. The claimant had been off work on sick absence since 13 June 2022. He produced a Schedule of Loss (J34) showing that prior to absence his earnings ran at the rate of £1900 net per month. He estimated loss of earnings since sick absence in the sum of £6045.44 to end January 2023. Since that time he had received a payment of £195 in February and March 2023 and then no pay until date of hearing.

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63. He indicated that he wished compensation for his loss of earnings and the appropriate amount for injury to feelings were his claims successful based on the Vento scale.

5 64. In his ET1 claim form he also indicated that he wished a recommendation made but no detail was given of any suggested recommendation .

Submissions

10 65. The Tribunal were grateful for the submissions from the parties and no disrespect is intended in making a summary.

The Claimant

15 66. The claimant submitted that the action taken against him was unfair and was taken because he was Polish.

67. The claimant pointed to the similar circumstances involving the two support workers MB and TR where the resident concerned had left the premises.
20 This was particularly so in the case of TR when the resident had left the premises on two occasions after two alarms had been fitted to the front door.

68. He believed that the circumstances had been exaggerated in his case by Simon Cullum in his statement that the neighbour had been trying for a long
25 time to alert him to the fact that the resident was in the street. It was suggested that the neighbour had been in the hall looking for him which was an exaggerated position in relation to the statement made by the neighbour. Mr Cullum had exaggerated the position to make it look as if it was more serious than it was.

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69. It had been stated in evidence by Dawn Barratt that the resident had been outside "for 15 minutes or so" which was clearly an exaggeration and likely came from the written report by Mr Cullum which had exaggerated the position.

70. He referred to the sketch that he had supplied (J143) showing the resident could not have been more than 20 metres or so away from the house.
- 5 71. During the appeal he had raised the issue of discrimination with Dawn Barratt but she had not known much about the incident involving TR.
72. It was notable that the resident had been moved to more suitable accommodation to cater for his increased dementia. That was a decision
10 made after he had continued to leave the house. It highlighted the difficulties for support workers caring for A in April 2022.
73. There was lack of investigation in the incident involving TR. It was not clear whether he had set the alarms or not and it would appear that the client had
15 left twice that day. The duration of time out of the house was unknown.
74. The client was out in the street at risk in each of the cases involving TR and MB and it could not be shown just how long the client was out of the house on those occasions.
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75. He emphasised the busy nature of the work involved and the challenging behaviour of the resident; that the client would awaken at night during “sleepover”; that the resident’s dementia was deteriorating and with an urge to leave the house; that there had been faulty alarms; and that a single care
25 worker was no longer fit for the client’s needs. All these matters seemed to have been ignored by management resulting in the final written warning and unreasonable decision.
76. This unfair treatment came after reliable and trustworthy service from the
30 claimant and caused him great injury to feelings as well as stress, anxiety and an inability to come back to work due to the pressure of the investigation.
77. He referred to the Schedule of Loss regarding his loss and sought compensation.

78. He knew that it would be difficult to find another job due to the damage to his reputation and the stress which had been caused. He had not been able to actively look for further work. He did not think it was possible that the alarms could have been faulty with TR but the respondents had not taken action against him. He considered that the respondents had found something against him and used it to punish him. Essentially they were looking for a reason to punish him.

10 **For the Respondent**
Time Limits

79. Under reference to section 123(3)(a) of the Equality Act 2010 it was conceded that there was conduct in this case extending over a period of time and given that the investigation report was dated 2 June 2022 then complaints about matters that occurred before 31st May 2022 were brought in time and no time bar argument was made.

Discrimination because of Polish nationality

80. The respondent did not dispute that the following actions were taken namely:-

- A disciplinary investigation into the incident on 19 April 2022 whereby service user A left the property whilst the claimant was on duty.
- Convening a disciplinary hearing on 7 June 2022 in relation to that incident
- Issuing a final written warning to the claimant on 10 June 2022
- Refusing to uphold the claimant's appeal

81. It was also accepted that neither MB or TR shared the claimant's protected characteristic in that they were not Polish.

82. However for the comparison with the two comparators to be valid there must be “no *material difference between the circumstances relating to each case*” when determining whether a claimant has been treated less favourably than a comparator (s23(1) of the Equality Act 2010).

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83. Reference was made to **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UK HL 11 where it was explained that meant that the “*comparator required for the purposes of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class*”.

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84. Accordingly it was submitted that an actual comparator whose material circumstances differed from those of the claimant would not be appropriate. It was noted that “*evidential value will, however, be variable and will inevitably be weakened by material differences between the circumstances relating to them and the circumstances of the victim*”.

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85. In the case of MB it was submitted that there were significant differences and no reason to consider that individual had committed misconduct in that:-

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- There was no allegation that MB was wearing earphones at the time that incident took place
- No allegation that MB was notified that the service user was out the house by a third party
- There were no alarms fitted to the property at that time

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86. However in the case of the claimant there was an allegation made that he was wearing earphones; he was notified by a third party that the service user was out the house and there were alarms fitted to the property.

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87. In respect of TR the differences were:-

- No allegation that TR was wearing earphones at the time this incident took place
- 5 • No allegation that TR was notified to the service user's location by a member of the public

88. It was submitted those were materially different circumstances in that the allegation against the claimant was that he was wearing earphones and that he was notified by a third party that the service user was out the house.

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89. It was acknowledged that different decision makers did not amount to a material difference for the purpose of identifying a comparator. However it was useful evidentially that Mr Cullum had demonstrated why there was a difference between the incident involving TR and the claimant and why it was that no action was taken against TR.

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90. It was submitted that the material differences weakened the evidential value between the circumstances relating to the comparators and the circumstances of the claimant.

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91. It was submitted that in the absence of an actual comparator it was necessary to consider a hypothetical comparator who resembled the claimant in all material respects. There was no evidence to suggest that a person who was found to be likely wearing earphones after an investigation, while looking after a person supported who left their care without their knowledge and were notified to the person's supported location by a third party, would not have undergone an investigation disciplinary process and issued with a final written warning upheld at appeal. The evidence from the respondent's witnesses was that they would have treated a British support worker in the same set of circumstances in the same manner.

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92. Even if the Tribunal found that the comparators were appropriate and there was less favourable treatment it was submitted that it was not because of the

claimant's Polish nationality. That was because on this occasion the claimant was found likely to be wearing earphones at the relevant time.

Remedy

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93. It was submitted that no recommendation should be made. The final written warning was to expire 10 June 2023. It was also submitted that no financial loss had been suffered. No medical evidence had been produced to demonstrate that the alleged discriminatory acts caused ill health and no evidence to prove liability in that respect. With reference to any injury to feelings award this should be at the lower end of the Vento scale. This was a one off isolated occurrence if there was found to be discrimination.
94. The evidence demonstrated that there had been compliance with the ACAS Code of Practice on Disciplinary and Grievance Procedures in the investigation and the hearings which had been held.

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Discussion and Conclusions

Relevant Law

95. Section 13(1) of the Equality Act 2010 (EqA) provides that direct discrimination occurs where "*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*". Therefore section 13(1) bites if:-

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- It treats that person less favourably than it treats or would treat others and
- The difference in treatment was because of a protected characteristic

96. It is not always possible to separate the two issues and in some cases “*the less favourable treatment issue cannot be resolved without at the same time deciding the reason why issue. The two issues are intertwined*” (**Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337).

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97. As has been stated direct discrimination is rarely blatant. Such claims present special problems of proof. For that reason the burden of proof rules applied to claims of unlawful discrimination in employment are more favourable to the claimant than those that apply to claims brought under most other employment rights and protections. Once a claimant shows *prima facie* evidence from which the Tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of discrimination, the Tribunal is obliged to uphold the claim unless the employer can show that it did not discriminate - s136 EqA.

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98. Where an employer behaves unreasonably that does not mean there has been discrimination but it may be evidence supporting that inference if there is nothing else to explain the behaviour (**Anya v University of Oxford** [2001] ICR 847).

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99. In order to claim direct discrimination under section 13 a claimant must have been treated less favourably than a comparator who was in the same or not materially different circumstances as the claimant. A successful direct discrimination claim depends on a Tribunal being satisfied that the claimant was treated less favourably than a comparator because of a protected characteristic. It is for the Tribunal to decide as a matter of fact what is less favourable. The fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment.

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100. A claimant who simply shows that he was treated differently with another in a comparable situation will not, without more, succeed with a complaint of unlawful direct discrimination. The EqA outlaws less favourable not different treatment and the two are not synonymous.

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101. A complaint of direct discrimination will only succeed where the Tribunal finds that their protected characteristic was a reason for the claimant's less favourable treatment. In that connection a discriminator's motive and intentions are irrelevant when determining whether the elements of a direct discrimination claim have been made out.

102. In this case the Tribunal considered the best approach to deciding whether allegedly discriminatory treatment was "*because of*" a protected characteristic was to focus on the reason why, in factual terms the employer acted as it did.

Discussion

103. In the evidence a good deal of discussion took place on the circumstances surrounding the incidents involving the claimant, MB and TR when the service user had left his home despite the presence of support workers. In particular the claimant spent time seeking to compare the time that the resident had been out of the house in other instances compared with the length of time he calculated that the service user had been out of the house on 19 April 2022. He considered this had been exaggerated in his case. That was particularly so in the evidence of the appeal officer Ms Barratt who had stated she thought the user may have been out the house for 15 minutes or so. Also he was concerned about the non function of two alarms in the incidents involving TR and whether that could be established that they were in fact faulty. Additionally he also considered that there had been exaggeration in the length of time that the neighbour had sought to attract his attention to the service user's departure from his accommodation.

104. However the Tribunal accepted that had there been no allegation that the claimant was wearing earphones at the relevant time no action would have been taken against him. That would have been consistent with the circumstances prevailing with MB and TR.

105. In the evidence the initial report on the incident of 19 April 2022 was made to Mr Cullum by the claimant on the telephone. No action was taken on that report. Mr Cullum at that time knew that the service user had left the house and a neighbour had called to report seeing him “up the road” and that the claimant had gone to persuade him back to the accommodation. The claimant had indicated that the alarm had not worked and Mr Cullum’s position was that he could not exclude that there was a fault. He then instructed an additional alarm to the door. Pending any further incident report from the claimant no further action was to be taken.

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106. No action was in fact taken at that time until Mr Cullum received further information from SA on 10 May 2022 about a discussion that he had had with the neighbour in the street. At that time it was alleged that the claimant had been wearing earphones when he came to speak to her and was advised of the departure of the resident from the accommodation. Mr Cullum then obtained the incident report form (which had not been previously completed by the claimant) on 12 May 2022. On that form he recorded that the claimant had advised that the door alarms had not worked and that an additional alarm would be put on the door; and significantly there was further information that the neighbour who had raised the alarm had indicated the claimant was wearing earphones when he came to the door and it had taken some time to get an answer when she called. That triggered his need for an investigation into the incident. That caused Mr Cullum to note on the Incident report form from SA of 17 May 2022 that an investigation was to ensue “*due to the headphone issue*”

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107. Had there been no issue of the wearing of earphones the Tribunal were satisfied from the evidence that there would have been no investigation into the incident involving the claimant. The respondent accepted that the presence of a support worker did not guarantee that a service user would not leave his accommodation if determined to do so. It was accepted by the respondent that it was not possible to have “eyes on the user” 24 hours a day. Certain precautions had been put in place by way of bed and other alarms to alert the support worker to movement at night and any attempt to

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leave the premises but it was accepted that there may be intermittent failure in alarms.

5 108. In neither of the case involving MB or TR was there any suggestion of them wearing earphones at the time and so increasing the risk of not hearing a resident move out of the house in the event of a fault in alarms.

109. In the incident involving MB there was at that time no alarm fitted to the door.

10 110. In the case of TR there were two alarms on the front door and again it was accepted that there may have been a fault which was attended to.

111. The claimant did not assert that either MB or TR were wearing earphones at the time and, in any event there was no evidence to support that contention.

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112. If the further investigation had shown such an allegation to be completely unfounded (for example the neighbour had either denied or stated that she had no recollection of making an allegation on the claimant wearing earphones) then clearly the Tribunal would have required to take that into account in assessing whether the true reason for investigation was discriminatory.

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113. However a further statement from the neighbour (J91-94) taken by Mr Cullum supported the allegation. That supported the view that an investigation required to ensue as a result of the allegation regarding the wearing of earphones.

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114. Given the neighbour's position on the wearing of earphones and the ambiguity of the claimant's position in the investigation as to whether or not he conceded wearing earphones the Tribunal considered that there were reasonable grounds for proceeding to a disciplinary hearing. At the investigation meeting with the claimant (J95/100) he was asked whether he was wearing earphones at the time and initially indicated "*Yes, probably, if she saw them then probably I was*" and that "*I don't usually use them at work*"

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but I had got some new ones I was trying them” and was listening to “the Bible, I downloaded it in Polish I do not usually use them at work”.

- 5 115. Those responses were before the respondent and so again there was a basis for them to proceed to a disciplinary hearing on the matter.
- 10 116. At the disciplinary hearing the claimant sought to disassociate himself from previous remarks on earphones and stated that he had been confused and upset about the matter; and had only agreed with the proposition that he was wearing earphones through the stress of the situation rather than thinking clearly.
- 15 117. The outcome of the disciplinary hearing was the final written warning which took the view that there was a likelihood that the claimant had been wearing earphones at the time. In the circumstances the respondents required to make a judgment on whether or not the allegation was true. They had evidence from the neighbour. They had very ambiguous answers within the investigation and disciplinary hearing on the claimant’s position in that respect. The Tribunal considered that there was a basis upon which the respondent could issue the final written warning.
- 20 118. Essentially in examining the reason for the treatment of the claimant the Tribunal did not have to be satisfied that the investigation, disciplinary process and final written warning was “fair or unfair”. Essentially in an examination of the “*reason why*” and whether the treatment was for a discriminatory or non discriminatory reason it was sufficient to be able to identify facts from which the Tribunal could conclude that the written warning could be justified. As narrated one of the examples within the Discipline procedure of gross misconduct relates to conduct which carries the risk of harm. The claimant within the disciplinary investigation and hearings conceded support workers should not be using earphones whilst on duty. One employer may have issued a written warning in these circumstances another may have not. But the Tribunal could not from the facts disclosed within the investigation and disciplinary hearing make any finding that a final
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written warning had no basis or was at odds with the evidence such that there must have been another reason for the issue of the warning than that put forward by the respondent.

5 119. The material difference between the treatment of the claimant and his comparators was the issue of whether he was wearing earphone at the time the service user left the property. That ingredient was missing in respect of MB and TR. The Tribunal were also satisfied that a hypothetical comparator
10 namely a non Polish person who had worn earphones on duty and a service user had left the premises would have been treated in the same way as the claimant.

Conclusion

15 120. The Tribunal were therefore satisfied that the reason for the treatment of the claimant was non discriminatory namely a belief (which had a basis) that the claimant was wearing earphones at the time the service user left the premises. That was the reason why the investigation was mounted; the matter investigated, went to disciplinary proceedings and warning issued.
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121. Given that conclusion the Tribunal could not find that the claimant had been discriminated against because of his Polish nationality and the claim fails.
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30 **Employment Judge: J Young**
Date of Judgment: 06 July 2023
Entered in register: 06 July 2023
and copied to parties