EMPLOYMENT TRIBUNALS

Mr C Chirwa **Craegmore Healthcare Limited**

Claimant Respondent

Heard: In Leeds **On: 20 to 22 November 2023**

Before:

Employment Judge JM Wade

Dr C Langman

Mr J Howarth

Representation:

Claimant: **Miss M Chirwa, daughter**

Respondent: **Mr G Price, counsel**

Interpreter (21 and 22 November only): Mr A Woki

JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The claimant's Equality Act complaints of direct race discrimination and victimisation are dismissed.

2. The claimant's unfair dismissal complaint is not well founded.

REASONS

Introduction

1. The claimant worked for the respondent as a support worker supporting learning disabled and other impaired adults in a residential setting. He was dismissed in early 2022. He presented a claim form about his dismissal as a litigant in person on 26 May

2023. The complaint was presented in time. The complaints for determination by this Tribunal were unfair dismissal, victimisation and direct race discrimination.

2. The claimant summarised his complaint this way at the end of a number of paragraphs in the claim form. "*I feel the company was looking for a reason to get rid of me since 2015 when I sued them for racism. Even some of my colleagues told me that the company did not like me because of this."*

Issues

3. The issues identified in case management in discussion with the claimant's then solicitor were:
   3.1. The claimant is black and compares himself with a hypothetical white comparator (during the evidence this was developed to include SW as an evidential comparator, who admitted to seeing a scald and making no written report of it at the time).
   3.2. In investigating and dismissing the claimant did the respondent treat the claimant less favourably than it would have treated a hypothetical white comparator?
   3.3. If so, was it because of race?
   3.4. Did the claimant do a protected act by pursuing an Employment Tribunal claim against the respondent for race discrimination in 2015?
   3.5. Did the respondent subject the claimant to a detriment by investigating and dismissing him?
   3.6. If so, was it because the claimant did a protected act?
   3.7. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
   3.8. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
      3.8.1. there were reasonable grounds for that belief;
      3.8.2. at the time the belief was formed the respondent had carried out a reasonable investigation;
      3.8.3. the respondent otherwise acted in a procedurally fair manner;
      3.8.4. dismissal was within the range of reasonable responses.

4. The case management orders also identified remedy issues and the Tribunal heard evidence from the claimant about his schedule of loss.

Conduct of the proceedings

5. At a first case management hearing on 10 August 2022 the claimant was represented by a solicitor – the respondent had not presented a response in time. At a second case management hearing on 25 January 2023 permission was given for a late response presented in August 2022, and orders were made for a final hearing in early July of 2023. The claimant's age discrimination complaint was struck out, no cause having been shown why that should not be done. The complaints were clarified and the claimant was again represented by a solicitor.

6. On 28 February 2023 the claimant's schedule of loss was presented, it said this: "to date the claimant has not managed to secure alternative employment and is unlikely to secure alternative work quickly due to the claimant's age. However, he will continue to attempt to mitigate his losses and a revised schedule will be submitted if appropriate". The claimant was 67 at the date of his dismissal.

7. There was then correspondence indicating a failure to comply with orders, a failure to provide a recording referred to in the claim particulars, and a failure to provide any mitigation evidence. Ultimately the recording was provided to the respondent's solicitors, its authenticity was to be challenged and a transcript was sought. The transcript was not provided.

8. The parties exchanged statements on 16 June and the respondent confirmed it was ready for the hearing. The parties attended the final hearing on 3 July. The claimant's solicitor had notified it was no longer representing the claimant. His first language is Shona and he was accompanied by his daughter, a nurse by profession who also spoke Shona, and an interpreter was present for the hearing.

9. The claimant's postponement application was granted, and the claimant's request for permission to serve a further statement was granted subject to procedural requirements to ensure he understood its contents. An interpreter was again ordered for this hearing.

10. The claimant again did not comply with the orders previously made resulting in the respondent chasing the supplemental statement. The claimant provided a copy of his original 14 page statement with one sentence removed ("I *viewed the injury and I concluded it did not warrant medical assistance*"), rather than providing any additional

evidence. At the start of the claimant's evidence Miss Chirwa confirmed that the statement had been translated for the claimant and he did agree its contents.

11. As a result of the postponed hearing the claimant was directed to provide evidence of his means by the Employment Judge following a costs application from the respondent. He had not done so by the start of this hearing.

12. An error in administration resulted in an interpreter not being arranged for the start of this hearing. The Tribunal discussed matters with the parties. They agreed to proceed without an interpreter for the duration of the respondent's evidence, which was heard first, in the expectation that an interpreter would be available for the commencement of the claimant's evidence. The Tribunal also invited the claimant and Miss Chirwa to take breaks if they wished to discuss matters before releasing the respondent's witnesses. Miss Chirwa also has Shona.

Evidence

13. We have had a file of around 200 pages prepared for the last occasion with no additions other than an email witness statement from a former colleague. We have heard oral evidence on behalf of the employer from Mr Lakeland who conducted a fact finding exercise, from Mr Bratchley-Clarke who took a decision to dismiss the claimant, and then from Mr Donovan who heard the claimant's appeal against dismissal.

14. Miss Chirwa had prepared questions for the respondent's witnesses and she has done an able job of exploring matters with the respondent's witnesses. The Tribunal then put the formal allegations and issues that formed the claimant's case to the respondent's witnesses, if they had not been put during questions on his behalf. The Tribunal made clear that it was not adopting the claimant's case, nor should the respondent witnesses agree just because the questions were being asked by the Tribunal. Nevertheless fairness required that they had the opportunity respond to the claimant's allegations of unfairness, victimisation and discrimination.

15. Then we had sworn evidence from Mr Chirwa with an interpreter sworn in. Just a word about that. The interpreter was arranged at short notice. He and the claimant took a minute or two to confirm they could communicate well before he was sworn in. However, when the evidence was underway Miss Chirwa expressed concerns about the quality of the interpretation and we asked her to raise those when they happened, and we would then explore them, but likely exclude the claimant and the interpreter

while that was done. She misunderstood that direction and did not raise any further concerns until the end of the claimant's cross examination.

16. We then took steps to explore in re-examination with Mr Chirwa the matters and areas where she thought there had been difficulty in understanding. Generally speaking, albeit recognising that we have taken those and other steps to ensure questions were fairly asked and understood, we are unanimous in considering that there has been a fair hearing of this case, and that we have been able to cover the evidence and have put to both Mr Chirwa and the employer witnesses the nature of the allegations he makes and why he makes them and in reverse to have the employer's case put to him in a fair way.

17. As far as our assessment of the evidence, it has become apparent when undertaking a review chronologically of what was done in the fact finding investigation and subsequently, that (1) across the timeline from the first onset in late December when a telephone call from the GP came in, until the end of the claimant's appeal process, that procedure is largely not in dispute and we have been assisted by contemporaneous documents. Secondly, we are satisfied that the employer's records of meetings with the claimant and other staff are a reliable record of what was discussed at the time. Often such notes are not verbatim, but we are satisfied that in this case they are virtually verbatim, because they appear "warts and all". We do not rule out (and address below) that one remark may have been said, and that there might be small errors in transcription –for example in place names, but that does not detract from the otherwise reliable nature of the notes before us.
18. That conclusion is supported by the notes themselves, but also by our assessment of the three respondent witnesses, two of whom are registered nurses. We consider they all acted in good faith and their evidence was straight forward and had the ring of truth about it when they were giving it. Our assessment of them is that they could be relied on.
19. Our assessment of the claimant's evidence includes that the information he has given about these matters has evolved over time, with some stark contrasts and changes of position. Where that is relevant to a finding, it is explained below.

20. The claimant alleged (although it was not put to Mr Lakeland) that Mr Lakeland said in his first interview with the claimant – "what am I going to say to safeguarding?" and that this was not in the notes. The claimant also said that where the notes recorded him giving the time of the incident as "a month ago", he had said he wasn't sure and it could have been one or two months ago. On the first matter we address the

claimant's case on the basis that the remark was made, albeit it is not fair to make a finding one way or the other because it was not put. On the second, the difference between "a month ago" and "one or two months ago, not sure", is not, in the context of events as they unfolded such as to undermine the notes. In fact we prefer the notes evidentially, because it is clear Mr Lakeland followed the evidence, and if he had been told, one or two months, not sure, we consider he would have looked in both months from the outset.

21. We also had an email provided by a former colleague of the claimant - a senior support worker - who did not attend the hearing. That email was sent to the claimant on 28 June 2023 in advance of the previous hearing and it confirmed the facts at the genesis of these matters and gave further information about the resident involved. It also referred to 14 years' of consistent care provided by the claimant and his very good working relationships with residents. The email further confirmed that during the four years she and the claimant had worked together the claimant had never failed to report anything or failed to comply with procedures. We took this evidence into account, but it was not before the employer at the time.

The Law

22. The Employment Rights Act 1996 provisions (SS 94, 95 and 98) and relevant case law principles are well known and inform the questions the Tribunal has asked and answered in this case – the issues - including the principles embodied in BHS v Burchell.

23. In addition we directed ourselves to Mr MS Doy v Clays Limited UKEAT 0034/18/DA, which is authority for the proposition that the Tribunal must make factual findings when the claimant's case concerns alleged unfairness by treating other employees more leniently. We also take into account Carmelli Bakeries Ltd v Mr T Benali**:** UKEAT/0616/12/RN, as authority for the proposition that a cursory investigation into mitigation or matters of leniency, even where gross misconduct was found, could sustain (in the sense of the finding not being perverse) an allegation of victimisation.

24. The Tribunal gave itself a direction derived from Hadjioannou v Coral Casino's Ltd [1981]IRLR 352. In short, caution is required and cases must be "truly similar or sufficiently similar" before unreasonableness can be established on that ground alone.

25. We also give ourselves a Sainsburys v Hitt direction to the effect that the "range of reasonable responses test" applies also to the Tribunal's assessment of an investigation. We further observe that Section 98(4) requires us to examine whether

the respondent acted reasonably in dismissing for its reason, standing back and assessing the process from start to finish. Further that a reasonable investigation also examines exculpatory or mitigation evidence.

26. The Equality Act 2010 provisions engaged by this case are as follows:
27. Section 13 relevantly provides:

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

28. Section 27 relevantly provides:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;...

29. In drawing inferences, that is making further findings of fact from the conduct or disclosure of a party, the Tribunal has to exercise the same care that it exercises in making any finding of fact. If an explanation is given and accepted, the lack of disclosure or reprehensible conduct is not capable of sustaining a conclusion that race or a protected act was an influence on the mind of the witness. (For similar, see Lord Justice Underhill, paragraph 38 C DeSilva v NAFTHE UK EAT/0384/07/LA).
30. In examining primary facts, poor treatment is not enough to establish discrimination. See in particular Madarassy v Numora International Plc [2007] IRLR 246 para 56, per Mummery LJ: "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that on the balance of probabilities the respondent had committed an unlawful act of discrimination".
31. If the tribunal is satisfied that the prohibited characteristic was one of the reasons for the treatment in question, this is sufficient to establish direct discrimination. It need not be the sole or even the main reason for that treatment; it is sufficient that it had a significant influence on the outcome: Lord Nichols in Nagarajan v London Regional Transport [2000] 1AC501 House of Lords at 512H to 513B. Significant in this context means not trivial.
32. Section 23 relevantly provides:- .."(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case". In discussing comparators for direct discrimination in race cases Lord Hoffman in Ahsan v Watt [2008] ICR 82 paragraphs 36-37 said this:

"*The meaning of these apparently simple words was considered by the House in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. Nothing has been said in this appeal to cast any doubt upon the principles there stated by the House, but the case produced five lengthy speeches and it may be useful to summarise:*

The test for discrimination involves a comparison between the treatment of the complainant and another person (the "statutory comparator") actual or hypothetical, who is not of the same sex or racial group, as the case may be.

The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the complainant: section 3(4).

The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated: see Lord Scott of Foscote in Shamoon at paragraph 109 and Lord Rodger of Earlsferry at paragraph 143. This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question (the "evidential comparator") to those of the complainant and all the other evidence in the case.

It is probably uncommon to find a real person who qualifies under section 3(4) as a statutory comparator. Lord Rodger's example at paragraph 139 of Shamoon of the two employees with similar disciplinary records who are found drinking together in working time has a factual simplicity which may be rare in ordinary life. At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are "materially different" is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator."

Direct evidence of discrimination is rare and frequently tribunals have to infer discrimination from all the material facts: Elias J (President) in Ladell: "Where the applicant has proven facts from which inferences could be drawn that the employer treated the applicant less favourably [on the prohibited ground], then the burden moves to the employer" … then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on a prohibited ground. If he fails to establish that, the tribunal must find that there is discrimination".

33. Underhill J in the Martin v Devonshire Solicitors [2011] ICR 352, para 37 said: *"Tribunals will generally not go far wrong if they ask the question suggested by Lord Nichols in Nagarajan, namely whether the prescribed ground or protected act had a significant influence on the outcome".* In Igen Limited v Wong [2005] IRLR 258CA the guidance issued in Barton in respect of sex discrimination cases and was said to apply and approved in relation to race and disability discrimination, including:

    "…*the first stage involves the claimant establishing such facts from which the Tribunal could conclude that the respondent had committed an act of discrimination in the absence of an adequate explanation from the respondent ("such facts"). If the claimant does not prove such facts he or she will fail...*

    It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves, in some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in...

    In deciding whether the claimant has proved such facts it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences [for inferences, read, further facts] it is proper to draw from the primary facts found by the tribunal... "

34. The guidance goes on to say that in considering the conclusions that can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation. At the final stage, the respondent must establish that the treatment is in no sense whatsoever on the grounds of the protected characteristic.

35. Mr Justice Underhill (then President) in IPC Media Limited v Millar UKEAT/0395/12/SM is a reminder that our starting point is to identify the putative discriminator, and to examine their thought processes, conscious or unconscious.

<u>Findings of fact</u>

36. The short hand used below to identify those involved, including a learning disabled resident, is to avoid inadvertent and unnecessary identification of those who have not had a chance to be heard during this hearing.

37. The claimant had been employed by the respondent since 2007 as a support worker. He worked at a residence looking after learning disabled and other impaired adults. He had supported one resident, "the resident", since 2007 and knew him well. Take out coffees were a regular feature of the resident's social life and routine which were important to him. The claimant has completed a great amount of relevant training

throughout his employment including most recently: safeguarding adults in February 2020, safeguarding children in September 2020, recording supervisions in December 2019, sepsis and understanding autism in 2021. He had not completed electronic report making (Datix). He knew very well that any incident of harm concerning a resident needed to be reported in writing. The practice at the time in the residence was that support workers completed at least the diary or daily notes for a resident and seniors or management completed the reporting of any accidents or incidents or formal safeguarding reporting (including on Datix). This practice was not the respondent's policy – staff were required to complete manuscript incident/accident reports if they could not access Datix.

38. The residence had around 17 staff comprising support workers and senior support workers, and a deputy manager. In the autumn/winter of 2021 it was without a manager, and there were quality concerns following internal audit procedures.

39. On 23 December 2021 the temporary manager was informed that the resident's GP had called to advise a burn on the resident's chest and that the GP would report to the local safeguarding team because the cause was unknown. The burn appeared to be about a week old. The temporary manager spoke to the resident who informed her that the claimant did it by accident and spilt coffee on him some time between September and November 2021. Photographs were taken and a body map were completed.

40. At that time Mr Lakeland was working at the residence as a staff member because there was an outbreak of Covid. He is an associate director of quality for the respondent. He was asked to undertake an investigation of by an operations director. The remit was: "allegations of abuse that a service user received unreported burns." He commenced that by speaking to the claimant the next day – 24 December - by telephone. The remit was "fact finding in relation to an unexplained burn on the chest of the service user"…. He also told the claimant that the resident had said the claimant spilt coffee on him.

41. The claimant gave his explanation that there had been a spillage when he was driving the car and he didn't know exactly how it had happened, and "I wrote this down in the diary". When asked when the incident had happened, the claimant said it was "last month". The claimant also said he told the deputy manager.

42. Mr Lakeland then reviewed the resident's notes/diary for November. There were no burn or coffee spillage notes made by the claimant. He found one note in the margin on 21 November which had been scribbled over. The note recorded that a senior support worker (SSW) had looked at a burn and said it was okay. Mr Lakeland interviewed that senior support worker on 29 December. SSW's recall about when she saw a burn was poor and she referred to plasters. Her explanation for failing to write anything herself in the notes was simply that, "there's a lot going on" and she probably forgot.

43. On 29 December Mr Lakeland also interviewed the resident, his mother, and another support worker, SW. SW had made the entry in the note on 21 November, and she was identified by the resident as a person he had told about the burn the day he had his hair cut. SW described noticing a smudge on the resident's jumper, also "it was the last time he had his hair cut". She had asked him about it while the claimant was present, and the resident said the claimant had done it, and the claimant said, "no you did it yourself". SW then said let's have a look and saw a red mark. She said she then reported it to SSW, who checked the burn and said it was okay. SW expected SSW to take charge and make a report. She also said that the resident "always tells me what happens each day" and "they should have stopped the car and taken him to a and e". In his interview with Mr Lakeland the resident had also said the coffee was in "Kersal, Leigh" and that the burn had bled on another day, and that it really hurt. His mother had told Mr Lakeland that the resident had said the claimant had spilt coffee on him.

44. SW said that she had again been working when the burn blister had popped and she had administered first aid, dressing the wound and again asking the SSW to check it and remove the dressing. That was not noted by SW, SSW or an agency worker also on shift that night, SW explained it was the practice that the floor looking after the resident completed the notes. She admitted to adding the entry in the margin on 21 November, which she said she did in December when she was told about the investigation. She was very upset in her interview, saying she had been told she was getting the blame for it by the deputy manager.

45. Finally, on 30 December Mr Lakeland spoke to the deputy manager. By that time he had also reviewed the resident's petty cash book and found hair cut, coffee, and plasters/cream receipts for November (albeit the coffee appeared purchased from a

different location to that indicated by the resident). He considered that from these records, in the context of the witness evidence, the original spillage incident could be traced to 8 November, the date of the last haircut. He told the deputy manager that date. The deputy manager's recall and explanation was also poor. The deputy manager admitted to failing to check daily notes or make appropriate electronic reports, his explanation was "with everything else that was going on". He said the first his first awareness of a burn was in December when the GP rang. He had also been on sick leave in November.

46. On 31 December Mr Lakeland spoke again to the claimant and put to him the details provided by the resident - how the incident had happened, involving the claimant putting sweetener in the coffee, and the claimant maintained the resident had poured coffee on himself. Mr Lakeland also asked the claimant why plasters and cream had been purchased on 21 November and the claimant said he did not know and did not buy them. When told that no written entry in the notes could be found (the claimant having said he did write it in the notes) the claimant said, "no, I did not write it, I told everyone and if they did not write I do not know". The claimant said he had told SW that night on return to the residence, and had told seniors, managers and everyone in the morning. Mr Lakeland also told the claimant that the deputy manager had said that his first awareness was in December – or rather that the claimant had not told him when the scald occurred - the claimant maintained that he had told him the next day.

47. Mr Lakeland considered options in the report form of: no further action (following an investigation), refer the claimant to a disciplinary hearing, or issue a letter of concern to the claimant. He considered that three matters – being involved in an incident of scalding and failing to appropriately observe and treat, failing to appropriately record the incident, and failing to escalate concerns, were matters which required a disciplinary process. Mr Lakeland put some emphasis in his report on the claimant's buying of plasters and cream, indicating a knowledge of harm, but failing to be transparent in recording it, which he considered, "may constitute gross misconduct" He recorded in his report that the claimant had offered no mitigation. He completed his report on 31 December and provided it to the respondent's human resources team, who allocated Mr Bratchley Clarke to conduct a disciplinary process.

48. Mr Lakeland did not know that the claimant had presented a previous complaint of race discrimination against the respondent, much less that it involved the deputy manager. That previous claim had no influence whatsoever on the conduct of his

investigation. His investigation simply followed the information he was given by witnesses at various points. He acted entirely in good faith.

49. As to whether race played any part in his investigation, the resident had named the claimant as spilling the coffee on him accidentally and as the cause of the burn. There were no records on the respondent's system to inform the GP when she called. In circumstances where the respondent was required to investigate that state of affairs, we can confidently find that had the resident named a white colleague in similar circumstances, they too would have been the first person called to start the investigation. Thereafter Mr Lakeland would have simply followed the evidence with an open mind as he did in this case.

50. The conclusions he formed, based on the information he had at the time, were with reasonable grounds at the time. Even if the remark, "what am I going to tell safeguarding?" was made on the first call to the claimant, it was a justified remark given the claimant accepted an incident had occurred when he was present and Mr Lakeland could find no incident or accident report. The remark is not a basis to infer less favourable treatment because of race, or that race played any part in Mr Lakeland's investigation or conclusion, nor that he was seeking to "scapegoat" the claimant. He was at the start of an investigation and he had a duty to provide information for the local authority safeguarding processes.

51. Mr Lakeland now knows that after different information, from the claimant and others through the disciplinary process, different conclusions could be reached about when the incident occurred (but not about whether it occurred). The fact of different later conclusions does not support the claimant's case that had the claimant been a white colleague, different conclusions would have been reached on Mr Lakeland's fact find. We accept Mr Lakeland's evidence that race played no part in his investigation or its conclusions. He had some knowledge of relevant colleagues' races because he was present in the residence. As to whether that knowledge subconsciously influenced him to make adverse findings against the claimant, the methodical and chronological approach he followed, and the bias training he had received, renders that wholly unlikely such that we find it did not happen.

52. The claimant was suspended by the deputy manager on 5 January 2022. The respondent's communications about that and the subsequent disciplinary process that followed cannot be faulted, procedurally, – it was a process in which the claimant had

every opportunity to explain matters at each stage and provide any evidence on which he wished to rely. The claimant was provided with a support line and all relevant information, and he was invited to a disciplinary meeting on 21 January. On January he emailed Mr Bratchley-Clark to request the resident's notes from October and November because he recalled the hairdresser had told the resident not to go in November, and he now believed the incident happened around the end of October.

53. At the meeting the claimant was supported by his daughter. All matters were discussed and on this occasion the claimant was adamant he **had** made an entry in the daily notes in October, on the day of the claimant's haircut, in relation to the coffee incident. He was also clear that the deputy manager checked the notes generally and that he had told others.

54. Mr Bratchley-Clark adjourned the disciplinary hearing and then reviewed the resident's notes for the whole of October. He then found an entry made by a different staff member on 26 October – the Tribunal read out the entire note to the claimant slowly during re-examination, checking for understanding. The relevant part was: "[*the resident] showed [the member of staff] a small burn on his chest (minor) - [the resident] said he spilt one of his coffees yesterday) [the resident has no pain and [the member of staff] passed on to [another colleague] - no concerns*". It had been suggested to the claimant in cross examination that there was no mention in the note that he had told the reporting staff member of the incident. Miss Chirwa had concerns that he had not understood the question and having had the passage read out, he agreed that there was no mention of him or his involvement the day before.

55. Mr Bratchley-Clark also found a short entry in the diary made by the claimant on the day before. The entry made no mention of the incident, nor indeed of the cinema trip, coffee or other outing details. It was a very short note about the morning. He provided the pages of these notes to the claimant. The disciplinary hearing then re-convened on 9 February and the claimant was accompanied by his wife who both translated for him, and played an active role in ensuring his position was communicated.

56. At the re-convened hearing on 9 February 2022 Mr Bratchley-Clark told the claimant that given the date of the incident could now be confirmed, the significance of the plasters purchase fell away. The focus of the conduct issue was the failure to record or document the incident, with no medical attention being sought at that time by the claimant. The claimant's reason for not documenting the incident was that he was out

late with the resident, he understood the need to do so, but he forgot the next day, having told others.

57. After some further discussion Mr Bratchley-Clark adjourned the hearing again to consider his decision. He knew the claimant had a clean disciplinary record because that was in the investigation report, and he knew he had undertaken relevant training. He also knew, because human resources had told him when he was first asked to undertake the disciplinary hearing on or around 18 January 2022, that a previous successful claim of race discrimination had been made by the claimant. He did not know any other details. That information was given in the context of advising Mr Bratchley-Clark that the respondent's disciplinary policy must be followed to the letter – and it was.

58. Mr Bratchley-Clark re-convened and wanted to discuss his conclusions and decision with the claimant. He considered that because the claimant had not recorded the incident, and because no other colleague had reported that he had told them of the incident, there was no evidence of him communicating the incident to others. When the claimant repeated, with his wife translating, that he had told the deputy manager and seniors the next day, Mr Bratchley-Clark said: "there has been investigations with other colleagues, I cannot discuss this, we are here to discuss your actions and your responsibilities and what is expected of you.... " and again "I need to give you my outcome".

59. When the claimant's wife was translating and relaying the claimant's points, Mr Bratchley-Clark said "there will be no different answer to this". The claimant had said he did not understand why he was suspended for a December incident but was now being criticised for the October incident.

60. Mr Bratchley-Clark gave his decision, and it was clear that the claimant understood that he was being dismissed largely because of his failure to record the October incident in the context of being with the resident at the time of the burn. He wanted to know why he was the only person dismissed and why seniors and others were still working.

61. In his outcome letter Mr Bratchley-Clark was clear on his conclusions on the three allegations: 1) he had found that the service user had spilt coffee on himself – that

was a conclusion with reasonable grounds, given different accounts given and the most contemporaneous written evidence in the resident's note of what he had said at the time, 2) the claimant had failed to record the incident – that too was the only reasonable conclusion on the evidence - and 3) on the balance of probabilities he considered that other staff had not been verbally informed – this was a reasonable belief on reasonable grounds. The claimant's was the only account to the effect he had told others; he did not have before him the mitigating evidence which was before this Tribunal - the colleague's email to the effect that in four years the claimant had never not followed procedure or failed to report something. He also knew that varying accounts had been given of the writing up by the claimant, and generally his position sought to deflect blame towards others. He reasonably believed the claimant had engaged in conduct without excuse - it was his job to record incidents exactly such as this for obvious reasons. He considered these matters were a gross breach of trust and confidence and dismissed the claimant with immediate effect on 9 February 2022.

62. Mr Bratchley-Clark was not seeking to pin blame on the claimant for a December injury to a service user and to scape goat him or satisfy safeguarding. He had been asked to consider disciplinary allegations concerning a coffee burn while a resident was with the claimant, and a subsequent failure to document that incident. His conclusions are balanced - he found that there had been a failure to record the incident by the person that was with the service user at that time, and that failure he considered was sufficient reason in context, given the rules and the procedures in place at the respondent, understandably so, to safeguard both staff and residents - to dismiss Mr Chirwa. He did not consider that others' failures to document mitigated the claimant's failure, and he did not consider the claimant's and long service and clean record were sufficient mitigation – if anything he considered the claimant knew very well what had to be done and did not do it. Some would say this is harsh, but we accepted Mr Bratchley-Clark's evidence that neither race, nor the previous claim played any conscious part in his thinking. He too is a registered nurse, acutely aware of the particular needs in this sector, and he made his decisions on the evidence in front of him, and in good faith.

63. The dismissal letter gave the claimant the appeal email address and the claimant appealed by a letter drafted with family help. That was delayed due to a mistaken email address but the respondent nevertheless progressed and heard the appeal.

64. The claimant did not in that appeal make allegations of race discrimination or victimisation, but he did say he had been scapegoated and protested the DBS

reporting because the incident did not cause serious or moderate harm, but was minor.

65. He also gave the names of the other staff he alleged had been present and were made aware by him of the incident in October, confirming those originally interviewed and adding one new one. He addressed each allegation and gave yet further information, including that “when [the resident] spilt his coffee I lifted his jumper away from his skin and applied ice blocks from my drink directly onto his skin...”. This information was not given in the original investigation, nor in the disciplinary hearing. In his statement for these proceedings the claimant said, “whilst in the car [the resident] spilt hot coffee on himself. I therefore used a tissue to wipe the liquid and to act as a carrier between the skin and his wet jumper as best I could...”.

66. Mr Donovan arranged to conduct the claimant’s appeal on 7 April 2022. He then interviewed the further colleague support worker, named by the claimant, on 5 April and again the deputy manager on 6 April. The former said she had also taken part in another investigation with a service manager about the same incident. The notes of those interviews in a separate investigation were provided to the claimant in these proceedings but were not available to Mr Donovan at the time. Those interviews in a separate process were on 18 February 2022 and 1 March 2022.

67. Mr Donovan conducted an appeal meeting with the claimant on 7 April, and then interviewed a further witness, SSW, again. He was also asked to review the resident’s notes for 25 to 31 October again because the claimant, in the appeal, said he was sure he wrote something down (although in his appeal letter he accepted he had forgotten to write up the incident in the notes).

68. Having conducted the deputy manager second interview, Mr Donovan suspected that that the deputy manager was not being completely honest about what he had been told and when, and his own actions, but he also considered that the interviews with other staff did not corroborate with any degree of certainty that the claimant had told them of the incident the next day. On balance he maintained the conclusion that the claimant had not told others the next day. Mr Donovan did not know of the claimant’s previous proceedings, and again, is a registered nurse with professional obligations for probity.

69. Separately to the appeal Mr Donnovan raised concerns about notetaking generally and his view that residents were at risk because of the approach - and he did so knowing that the service was in fact closing.

70. Mr Donnovan gave a reasoned outcome decision in a letter dated 25 April 2022 setting out his response to each point in the claimant's appeal letter. He decided to maintain the dismissal in a letter on 25 April: he said "you made a clinical decision and failed to safeguard the service user" and the decision to dismiss you remains.

71. Mr Donnovan had reasonable grounds to believe, and did believe that the claimant had not documented the incident or his response to it, and had known the resident was at risk – he could not have known through how many layers of skin the burn had permeated, and first aid should have been documented so that others would know that was the case. He considered an alternative of a final written warning with remedial training in place, but ultimately he knew the service was closing, and he considered the matter justified dismissal, given the context and setting.

72. The unifying and simple reason he maintained this decision on appeal was that he thought it was the right decision in context, and he did not consider that even if others, particularly the deputy manager, had also been at fault, that those matters mitigated the claimant's conduct. Mr Donovan also had no knowledge of the ethnicity of other colleagues, in particular those to whom the claimant said he had reported matters – he spoke to them only by telephone.

73. Since his dismissal the claimant has been working for cash, undertaking cleaning of cars and premises through his church and others. He has not banked the sums earned, nor kept accounts, and he has not registered as self employed. He could not quantify the sums earned, described them as small and that he has used them to pay rent and buy food. He could not say how much his rent was per month. He confirmed he was also in receipt of a pension. We make these findings because his evidence was somewhat at odds with the schedule of loss, which set out no work or mitigation since dismissal.

Conclusions

74. It is necessary to address the Equality Act allegations first.

75. The claimant's claim form says: "I have a recording of [deputy manager] during a telephone conversation to which he acknowledged being aware of the incident as I had reported it to him in the morning". He goes on to say that he also reported it to a member of staff and that he checked and there was no need for treatment with the doctor.

76. There was no recording before the Tribunal and there was no reference to it during the course of this hearing and no explanation for that. There was also no reference to the recording by the claimant during the investigation and disciplinary process – which – given ACAS conciliation started on 15 March 2022, and before the appeal was heard, is surprising. He has had the opportunity to put it before this Tribunal and he has not done so.

77. In any event, Mr Donovan was frank in his email at the time, that he did not necessarily accept the deputy manager had given a wholly honest account of matters, but he did not know of the previous proceedings, and they did not form part of his thinking.

78. It was also the case that parallel investigations had taken place of other colleagues' conduct. It is easy to lose sight of the context for the original suspension of the claimant – that a fact find suggested his direct involvement in harm to the resident, and a lack of treatment and reporting. That others were not suspended is not a fact from which we could conclude victimisation, or less favourable treatment because of race.

79. As far as the race discrimination allegations are concerned, our findings include that Mr Donovan had no knowledge of ethnicity of other colleagues. GIven the claimant relies on the hypothetical white colleague in similar circumstances, the closest similar circumstances were those of SW.

80. She observed the burn on the night that it occurred, and again on a separate occasion when a blister had burst, and did not document those matters at the time. She was the subject of investigations, but, because the respondent did not tell us she was dismissed for conduct, we conclude she was not.

81. We ask ourselves had SW, or another white colleague with English as a second language been the member of staff who had accompanied the resident to McDonalds, been in the vehicle with him when he spilt his coffee, had applied either ice or tissue, had returned to the residence without seeking further medical help, had not then mentioned the matter until another colleague - SW - noticed the mark and then failed to document the incident or their treatment at the end of the shift, the next day, or at all, relying on others to do so, such that two or three months later when a GP alerts a concern about a new unexplained burn, at a time when the assistant director of quality is on site because there is a Covid infection, and there are other concerns about quality in that residence such that it is to close, we find the investigation and course of events would have been exactly the same. The white colleague too would have been investigated and if they had given the varying accounts that the claimant gave, and other colleagues had responded as they did, that colleague too would have been dismissed.

82. It will be apparent from the findings and conclusions above that the claimant has not proven facts from which we can find the Equality Act contraventions he alleges. Neither race nor his previous proceedings had any influence on the employer's decisions, and those complaints must be dismissed.

83. As to the unfair dismissal complaint, the respondent's investigation, in the round was wholly reasonable, as was its procedure in tackling the conduct matters which emerged through the initial fact find. Both Mr Bratchley-Clark and Mr Donovan had reasonable grounds for their beliefs, which were genuinely held, that the claimant had engaged in misconduct. The only real issue in this case was whether the decision to dismiss fell outside the band of reasonable responses in all the circumstances, but particularly the claimant's long service and clean record.

84. It is in these decisions where the full experience of the members of the Tribunal becomes invaluable, from both employer and employee side. It aligned with the respondent's evidence that colleagues had been dismissed previously for failing to record matters in particular circumstances. This case contains a very sad chain of events and a sad end to working in a particular residence and with a particular resident. It is one where some employers may have imposed a final written warning with training, as Mr Donovan considered. Nevertheless it follows, and the Tribunal considers, other reasonable employers would have dismissed. This was a decision

within the band of reasonable responses in all the circumstances including equity and the substantial merits of the case. For these reasons the unfair dismissal complaint is not well founded.

Employment Judge JM Wade

22 November 2023