



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101776/2023

Held in Glasgow on 17, 18 and 19 July 2023; 1 and 2 August 2023; 12 and 13 September 2023

**Employment Judge S MacLean
Tribunal Member P McColl
Tribunal Member J McCaig**

Mr M Wellington

**Claimant
Represented by:
Ms B Kadirgolam -
Solicitor**

Simon Community Scotland

**Respondent
Represented by:
Mr D Milne -
Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

- (1) the respondent unfairly dismissed the claimant;
- (2) the respondent is ordered to pay to the claimant a monetary award of £19,014.42. The Employment Protection (Recoupment of Benefit) Regulations 1996 do not apply; and
- (3) the claim of direct discrimination claim is dismissed.

REASONS

Introduction

1. The respondent is a charity that provides help and support to homeless people. The respondent employed the claimant as a support worker from 12 November 2012 until his employment was terminated on 29 November 2022.

2. The claim is about unfair dismissal contrary to section 98 of the Employment Rights Act 1996 (the ERA) and direct race discrimination contrary to section 13 of the Equality Act 2010 (the EqA). The claimant maintains that the disciplinary process, particularly the investigation, was biased and the respondent did not have genuine grounds for believing that the claimant was guilty of gross misconduct. The claimant says that because of his race, he was treated less favourably in the respondent's handling of a resident's complaint; in the manner in which the investigation was carried out; the disciplinary process; and the decision to dismiss. The claimant relies on hypothetical comparators who are of white British nationality.
3. The respondent denies that it directly discriminated against the claimant as alleged. The respondent denies any less favourable treatment and maintains that it carried out a reasonable investigation and acted reasonably in all the circumstances in dismissing the claimant.
4. The final hearing was conducted in person. At the first sitting, the claimant gave evidence. The Tribunal also partly heard the evidence of Janine Aitken, investigating officer. At the second sitting, Ms Aitken's evidence was completed and the Tribunal heard evidence from Jan Williamson, hearing manager and Lesley Henderson, appeal manager. Senior management of the respondent observed whilst the respondent's witnesses gave evidence. The parties prepared a joint file of documents to which the witnesses were referred during the course of proceedings. The final sitting was for the purposes of hearing the parties' submissions which were given orally.
5. The Tribunal has set out facts as found that are essential to the Tribunal's reasons or to an understanding of important parts of evidence. During its deliberations the Tribunal considered the submissions and has dealt with the points made in submissions whilst setting out the facts, law and the application of the law to those facts.

The issues

6. The issues that the Tribunal has to decide were as follows.

Unfair dismissal

7. What was the reason or principal reason for the dismissal? The respondent says that the reason was conduct. The claimant says that the dismissal was because of his race. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
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 decide in particular whether:
- a. were there reasonable grounds for that belief?
 - b. at the time the belief was formed, the respondent had carried out a reasonable investigation;
 - c. the respondent otherwise acted in a procedurally fair manner; and
 - d. dismissal was within the range of reasonable responses.

Direct discrimination

9. The claimant is a British national of black African Caribbean ethnicity. He compares himself with people of white British nationality.
10. Did the respondent do the following:
- a. undertake an investigation into resident 1's complaint;
 - b. extend/change the direction of the investigation;
 - c. recommend disciplinary action without supporting objective evidence; and
 - d. dismissal the claimant.
11. Was that less favourable treatment? The Tribunal has to decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's circumstances. The claimant's comparators are other staff members of white

British nationality. The respondent did not carry out any investigation into the behaviour of other staff members despite being instructed to do so.

12. If so, was the less favourable treatment was because of the claimant's race?

The claimant said that Ms Aitken's judgment of him was preconceived as "lazy" and having "underlying anger" were based on perceived racial stereotypes.

13. Alternatively, did the claimant, on the proscribed grounds, received less favourable treatment than others?

Remedy

14. The Tribunal will then have to decide what, if any, remedy is to be awarded.

Findings in fact

Background

15. The respondent is a charity providing services to people experiencing or at risk of homelessness in Glasgow, Edinburgh and Perth. The respondent employs approximately 250 staff. Its head office is in Glasgow.

16. The respondent employed the claimant as a support worker from 12 November 2012. From around October 2020, the claimant was based at the respondent's Lenzie Gate service where one to one support is provided to eight men affected by homelessness. He reported to the service lead. His support worker colleagues at Lenzie Gate are of white British nationality.

17. The claimant is a British national of black African Caribbean ethnicity. He was widowed in 2019. The claimant has two teenage sons.

18. Janine Aitken joined the respondent on 16 September 2022 as service lead. She had no previous experience of carrying out investigations. Ms Aitken reported to then head of service until Jan Williamson joined the respondent, on an interim part time basis (Tuesday to Thursday) between November 2022 and January 2023.

The policies

19. The respondent's complaints procedure for residents does not require complaints to be in writing. Complaints about members of staff are to be raised with the service manager. An informal approach is encouraged and if it is not resolved informally the complaint can be resubmitted for a more formal response. If a formal response to a complaint is requested, a written acknowledgement of the complaint will be sent within five days. A member of staff will be authorised to investigate the complaint. A full written response to the issues raised will be sent within 28 days unless an extension of time is agreed. There is an appeals procedure.
20. The respondent's disciplinary policy provides examples of general misconduct that includes breaches of the SSSC Codes of Practice and inappropriate behaviour in the workplace. Examples of gross misconduct include serious breaches of the SSSC Codes of Practice and sexual misconduct at work. The disciplinary policy provides for suspension for serious allegations. The investigating manager is to gather evidence; assess the evidence; and recommend next stages. The investigation manager completes an investigation form. The investigation form and evidence is reviewed by the HR department to ensure a consistent and fair outcome has been reached taking into account good standards of practice, equality and fairness. The investigation form and all the evidence is then passed to a hearing manager should formal procedures be invoked. The disciplinary policy provides for a right to be accompanied at the formal stages of the disciplinary process. There is a right of appeal against any formal disciplinary action.

The resident complaint

21. On joining the respondent Ms Aitken understood, from what she was told by the HR manager, that previous service managers had failed to address longstanding issues and had not conducted appropriate supervision of support workers. Ms Aitken was excited about what she considered were challenges in her new role.

22. The claimant's previous line manager had not spoken to the claimant regarding his performance or conduct. No issues had been raised with him directly by colleagues or line managers.
23. During her limited interaction with the claimant, Ms Aitken did not form a positive view of him. She considered that he lacked motivation, was negative and resentful about her proposed changes.
24. Every day that Ms Aitken was on shift, resident 1 raised issues with her. This was not unusual. The issues were not restricted to the claimant. Ms Aitken could not remember the specifics of the complaints. She asked if he was making formal complaints to which he replied that he was not.
25. During one conversation with Ms Aitken, resident 1 claimed that resident 2 told him that the claimant had said that resident 2 owed resident 1 money. Resident 2 later assaulted resident 1. Resident 1 did not want to formalise any complaint.
26. Ms Aitken asked resident 2 if the claimant said that resident 2 owed resident 1 money. Resident 2 said, yes and the claimant appeared happy to tell him. Ms Aitken did not make any enquiries about the assault.
27. Around late September 2023 in the late evening the claimant was working in the office when resident 1 contacted the claimant to ask him to repair his scooter's tyre. The claimant was not sure if he could repair it. The claimant explained to resident 1 that he was busy just now but would look at it later. Resident 1 then appeared at the office wanting the tyre fixed immediately. Resident 1 was annoyed that the claimant said that he did not have time and said that he would get the claimant sacked. Another member of staff (staff member 5) was in the vicinity at the time.
28. Resident 1 approached Ms Aitken and "off loaded" that the claimant was not nice to him. Ms Aitken asked resident 1 if he was making a formal complaint. Resident 1 decided that he was.
29. On 7 October 2022, a Teams meeting with was arranged with resident 1, Ms Aitken and the then head of service. No formal record was made of the

meeting. Ms Aitken made notes in a general notebook. She said that resident 1 said:

- a. The claimant advised resident 1 that he did not have time to blow up his tyres of his electric scooter (the scooter complaint).
 - 5 b. Resident 2 told him, that the claimant said that resident 2 owed resident 1 money (the money complaint). Sometime after this, resident 2 assaulted resident 1.
 - c. The claimant told resident 1 that he should have raised the request for notice before a health and safety check at a resident meeting and not afterwards (the meeting complaint).
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30. There was no discussion about what resident 1 wanted the respondent to do in response to the complaint. Ms Aitken thought the meeting lasted between 10 and 45 minutes.
31. After the Teams meeting the then head of service asked Ms Aitken to investigate resident 1's complaints. Ms Aitken was inexperienced in investigations. She was unfamiliar with the respondent's policies or ACAS guidance.
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32. Ms Aitken spoke to the claimant. She told him that resident 1 had complained about him to the then head of service about the scooter complaint and the money complaint. The claimant was surprised. He said that there was a record about the scooter complaint at which a colleague was present. He denied discussing finances with the residents. He was not on duty when the assault took place. The claimant heard about the assault when he returned to work. This was not the first time that resident 2 had assaulted resident 1.
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33. Ms Aitken said that she would investigate resident 1's complaints. The claimant understood that this would involve looking at the relevant entries in the records and speaking to the staff on duty when resident 1's complaints took place.
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34. Ms Aitken spoke to the HR manager who advised that she speak to the members of staff. Ms Aitken made no further enquiries into the specific complaints raised by resident 1. There was no written acknowledgement of the complaint sent to resident 1 nor was he sent a full written response to any
5 of the issues that he raised.

35. Ms Aitken decided that from what she had seen of the claimant, he had a complete lack of warmth or regard for the residents. She wanted to find out the team's perception of the claimant and what concerns they had.

Disciplinary investigation

10 36. Over the course of the following weeks, Ms Aitken spoke individually to members of staff. She continued to seek advice from the HR manager who commented that she was not surprised. The HR manager advised Ms Aitken to speak to all the staff members. Ms Aitken also spoke to her new line manager, Jan Williamson about the investigation.

15 37. Ms Aitken told the members of staff that the discussion was part of an investigation and their comments would be anonymised in the investigation form. The investigation was specifically related to the complaints raised by resident 1. Ms Aitken jotted down notes of her discussions with staff members in a general notebook.

20 38. Ms Aitken spoke to staff member 1. Their discussion, which Ms Aitken described as an emotional rant, going off at a tangent, lasted around 30 minutes during which staff member 1 said that when the claimant was on shift with less experienced members of staff, "he is inappropriate". No specific examples were provided nor did staff member 1 say that he witnessed
25 inappropriate behaviour.

39. In subsequent discussions with members of staff, Ms Aitken asked if the claimant made inappropriate comments towards female members of staff. There was no record of any comments by staff member 2 about this issue. Ms Aitken considered that he was not engaging as he did not really answer
30 her questions. Ms Aitken concluded that staff member 2 was protecting his

friend, the claimant. She disregarded his comments unless she considered that they supported her perception of the claimant.

40. Staff member 3 was asked if he has witnessed any issues with the claimant's behaviour toward female staff and student. He replied no, he would have raised this.
41. Staff member 4 made comments about the claimant's attitude and behaviour which Ms Aitken noted. She made no notes of any comments by staff member 4 in relation to the claimant's behaviour towards female staff and students.
42. Despite staff member 5 being present during the scooter complaint he was not asked about this incident. He was asked about the claimant's work ethic and behaviour towards residents. Staff member 5 was also asked if the claimant had made sexually inappropriate comments to female members of staff. He advised that to his knowledge the claimant had made sexually inappropriate comments to four females. When asked to give examples, staff member 5 only referred to an incident where a co-worker (staff member 6) told the claimant that she was trying to get hold of him. Staff member 5 said that the claimant replied, "I was having a wank". Staff member 6 laughed.
43. Ms Aitken contacted staff member 6 who was on maternity leave. She advised staff member 6 of what staff member 5 alleged the claimant to have said to her, and asked if she recalled this. Staff member 6 said yes. It was a regular occurrence. Staff member 6 said that staff member 3 was present when the claimant made a comment about "screwing Erin". Staff member 6 did not witness any other incidents but said students had disclosed concerns about inappropriate language and behaviour. She described the claimant as "extremely lazy" although she was not sure if he meant it.
44. Ms Aitken then spoke to two former female students who had become relief workers. When asked about the claimant being inappropriate in any way relief worker 1 referred to a comment made to a resident about sex noises. When pressed relief worker 1 referred the claimant's close proximity in the office. Ms Aitken asked for other examples. The following comments were noted, "Hot weather makes everyone horny"; "Enjoying the view" and "The amount

of things I get up to in closes I wouldn't want CCTV". Relief worker 2 said that the claimant was inappropriate with both staff and residents. She said he was inappropriate because of his proximity to her in the office. She also referred to the claimant justifying a former resident being inappropriate with young females. None of the examples mentioned were raised with the claimant at the time nor was it suggested that they were raised by the relief workers with other colleagues.

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45. At some point Ms Aitken used the investigation form template. Under the heading "evidence gathered", she listed themes: negative, attitude and behaviour; lack of motivation; avoidance of work tasks; and sexually inappropriate language and behaviour. Under each theme she selectively quoted comments of those staff members who she considered relevant, all of which were anonymised and lacked any context or timeframe.

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46. The claimant remained at work throughout the investigation. Ms Aitken met the claimant around 17 November 2022 on his return from nightshift. The claimant expected the discussion to relate to resident 1's complaints. The meeting lasted about an hour and a half.

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47. At the investigation meeting Ms Aitken used the partially completed investigation form to which she had added her own comments/responses about the claimant. Ms Aitken read out to the claimant the comments made by staff members and asked for his comments. As the claimant was speaking Ms Aitken typed his comments into the partially completed investigation form. She had difficulty including all the information that he provided. Some comments were mistakenly attributed to claimant rather than Ms Aitken and contrarywise.

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48. The claimant was stunned and upset by the comments read out to him. He endeavoured as best he could to respond. He did not recognise the person that was being described. He felt that it was a character assassination.

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49. Towards the end of the investigation meeting, Ms Aitken dealt with the theme of sexually inappropriate language and behaviour. The claimant was in a state of shock and was trying to comprehend what was happening. About the

comment, "I was having a wank" the claimant said he would not speak like that and was the least likely to discuss sexual behaviour. He commented that another colleague, staff member 6 brought up more sexual comments than anyone else talking about TikTok. The claimant denied that he would use the word, "screw" and the allegation about making sexual noises. Regarding close proximity in the office the claimant had no idea and could only apologise. He might have been asked to show something on the computer. He did not recall the other comments which were attributed to him by the relief worker 1. The claimant accepted that he might have said, "hot weather makes everyone horny" but he would not have come out with that comment, there must have been a conversation. He did not know the context of the other comments. The claimant was asked why different colleagues would say similar things. The claimant was concerned he could not understand this. He wondered if they were taking comments the wrong way. It was not deliberate. He would not have initiated discussions. He could not understand why he would have made those comments.

50. Ms Aitken intervened and commented that the claimant had given two different responses: he did not make the comments and that he would only make comments if he knew people well enough.

20 51. The meeting ended. The claimant was upset. He later spoke to Ms Aitken to say that if there had been issues these should have been addressed through supervision which he had not received. Ms Aitken spoke who the HR manager who confirmed that this comment should be included in the investigation form.

25 52. Ms Aitken completed the investigation form. Under the heading "witness statements" Ms Aitken recorded, "Discussed in full in the section "evidence gathered". The investigation form included not only Ms Aitken's comments during her discussion with the claimant but in the summary of the investigation, she referred to speaking to all staff for a broader understanding of the claimant as a worker and "to ensure that there was adequate support" for resident 1's complaint. She also wrote "in addition some of the basis of the investigation was due to her own observations since joining the

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organisation". She narrated her negative view of the claimant's performance. Later in the investigation form under a heading "manager's viewpoint", Ms Aitken reiterated her negative view of the claimant, his attitude towards her and residents. She referred to the claimant having underlying anger and resentment with regard to the service and any (even minor) changes she tried to introduce.

53. Ms Aiken recommended that the matter should proceed to disciplinary. The investigation form was dated 10 November 2022.

54. The investigation form was sent to the HR manager. She did not complete the section of the investigation form confirming when it was received by HR. It was passed to Jan Williamson.

55. The HR manager prepared a letter to the claimant dated 18 November 2022, sent by Ms Williamson advising that, following the investigation on 17 November 2022, the respondent was considering disciplinary action, which may result in summary dismissal. A copy of the investigation form was enclosed.

56. In the letter which was sent the claimant on 21 November 2022, he was advised that:

a. He was being suspended from duty on full pay.

b. A disciplinary hearing was arranged for 24 November 2022 via Google Meet.

c. The concern was around the claimant's conduct towards residents and staff including seriously sexually inappropriate comments towards female students and one female member of staff. The allegations against him (which were not specified) may breach specific sections of the SSSC Code of Practice, could potentially constitute gross misconduct and may result in summary dismissal.

d. Jan Williamson (head of women's services) would chair the disciplinary hearing and the HR manager would also be present. The

claimant was advised that he would be given an opportunity to put forward his case and any mitigating factors that he considered relevant.

- e. The claimant would be allowed to bring along a work colleague or TU representative.

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57. The disciplinary hearing was conducted remotely by Ms Williamson on 24 November 2022. The claimant participated from his uncle's house because his children were off school because of a strike. The claimant was unaccompanied. He was not a member of a trade union. His colleagues were involved in the investigation. He felt that he had no choice but to proceed. The HR manager said she would turn her camera off but would be taking notes. If there was anything she wanted to ask then she would.

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58. Ms Williamson went through the investigation form. She asked the claimant about the complaints from resident 1. The claimant provided an explanation mentioning the contemporaneous records (NetSuite notes) that were available documenting the background to the scooter complaint, the money complaint and the meeting complaint. The HR manager advised that the claimant has asked about providing the notes but she had told him to give the context at the disciplinary hearing and to submit them afterwards so "we" can understand the context. The claimant explained the background. He considered that resident 1 had complex issues, challenging behaviours and could be vindictive when drinking. He had threatened the claimant that he would get him sacked. The claimant considered that while he often gave resident 2 the benefit of the doubt, resident 2 had previously lied about a bike that he alleged stolen been stolen which was not. The claimant said that he advised residents not to lend money. If they do then they have deal with the situation responsibly. The claimant was surprised that he was described as unapproachable. He said that he did not use terms of endearment and did not smoke so did not use cigarettes as an incentive with residents.

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59. The claimant did not recognise himself as asserting dominance. He thought he had a good relationship with colleagues. It was a high pressure job, staff

shortages but everyone was supportive and no issues had been raised with him before. The claimant said that there were a lot of general allegations with no specific names or dates. He thought Ms Aitken would have checked the NetSuite notes and spoken to the colleague who was present when resident
5 1 threatened to get him sacked. The claimant was stunned and felt blindsided. He denied that he avoided doing things.

60. Ms Williamson then referred the claimant to alleged behaviour to female members of the team that was sexually inappropriate. She said that the investigation form “captures” what Ms Aitken was told and the claimant’s
10 responses. The claimant said that he had no recollection of making the comments. Ms Williamson referred to the allegation that the claimant said that he was “having a wank”. The claimant said that he would not use that term. Also, if there is an sexual innuendo staff member 6 was at the heart of it; she was a strong woman and spoke her mind. He referred to an incident
15 where she showed a TikTok video. He said that this was office banter. Ms Williamson asked what the claimant meant by this. He explained that he did not use the term, Ms Aiken had used it. He would have said having a laugh. The HR manager interjected saying that the claimant would not use the term “wank” but he just did and that was the same with the word “banter”. She said
20 that the claimant was contradicting himself. The claimant was confused. The HR manager continued to ask questions. The claimant’s position was that his conversations depend on his relationship with his colleagues. Ms Williamson referred to the allegation about “screwing Erin”. The claimant said that it was not a term he would use. It did not happen. Ms Williamson pressed about
25 what term he would use. The claimant reiterated that he would not say that.

61. In relation to invading colleagues’ space the claimant said that the office was a small space. He would only go towards someone if he was showing something on the computer other than that people were sitting on chairs. He could not think when that would happen. There was no specific time frame
30 and he there was nothing to pin him down. The HR manager interjected. She considered that it was not unreasonable for people not to remember a specific date/time but would remember the statements because they were explicit.

She understood that the claimant was saying that they should have told the claimant so they he could change his behaviour. The claimant said that was not his position. It did not happen but he was trying to think of every conversation and what he may have said.

5 62. Ms Williamson then asked about with whom the claimant was friendly and if he would have a sexual innuendo chat with them. The claimant said that it was not something that happened. He was confused. There were other members of staff who brought up sexual innuendo more often. The claimant was asked who. He declined to comment. Ms Williamson said that the
10 claimant's position at the disciplinary hearing was that it did not happen but referred to the claimant previously saying to Ms Aitken that the claimant was more comfortable having conversations with some rather than other. The HR manager interjected that in her view the claimant had contradicted himself on a number of occasions. She pressed him on various points asking him if the
15 content of the investigation form was correct or incorrect. The claimant was baffled. The HR manager pressed the claimant putting to him that the comments could have happened between staff members 2 and 5. It was a calculated conversation depending on who was present. The claimant said that there was a natural conversation, he would not instigate it conversations
20 flow and people introduce things.

63. When Ms Williamson concluded she asked the HR manager if she had any questions. The HR manager asked about the "nice view" allegation and the claimant's comment to Ms Aitken about not being attracted to any of the females. The claimant said he did not recall making the comment. He could
25 not understand why he would have said that. The HR manager said that it inferred that if the claimant had found the female colleagues attractive it was something he would have said. The claimant said no. He was confused at the time.

64. The claimant referred to the investigation being very subjective and not
30 evidence based. There was lack of details of names, dates and times. There were no proper statements by people. Ms Aitken had been very subjective in her own thoughts and was becoming a potential witness rather than an

independent investigator. They had only worked together for 10 shifts and during this period, the claimant had been on holiday and on night shifts when Ms Aitken was not present. The claimant had not had a supervision in over a year and no issues regarding performance, attitude or motivation had been addressed with him. The claimant said he felt discriminated against. Ms Aitken was looking for evidence to support her position. She used negative stereotype for black people when she talked about the claimant's motivation, being lazy and not a part of the team. Ms Williamson asked the claimant to explain. He attempted to look for the comment in the investigation form but could not find it.

65. The claimant was advised that Ms Williamson only worked Tuesdays to Thursday. The outcome would be given virtually, face to face.

66. The claimant sent the NetSuite notes. There was no further investigation. Ms Williamson discussed the matter with the HR manager who prepared a letter dated 29 November 2022 which Ms Williamson read out to the claimant (the disciplinary outcome letter).

67. Ms Williamson referred to the full investigation and the discussion at the disciplinary hearing. She believed that on this occasion the residents accounts were consistent and the altercation was unlikely to have happened without some provocation. The claimant had some influence over the matter.

68. The main concern was the allegation of the sexual misconduct towards female colleagues and students. While the claimant denied any wrongdoing Ms Williamson said that the concerns raised by six members of staff and two students were all consistent with sexual inappropriateness. Ms Williamson referred to the claimant's "inconsistent evidence" which made Ms Williamson question the claimant's credibility in contrast with the six "corroborated" accounts.

69. Ms Williamson acknowledged that the management of the service had been inconsistent in the past 12 months and there may not have been frequent supervision. She accepted that the claimant may have been unaware of how his practice was viewed as there had been no feedback but he was an

experienced support worker. She considered that the issues not relating to sexual misconduct would have merited a formal conduct warning and being placed on a performance improvement plan. However, as the main allegation was sexual misconduct, Ms Williamson believed that the claimant had behaved in a way that has contravened the respondent's values and ethos and the trust and confidence between the claimant and the organisation had been irrevocably damaged. She considered that this was gross misconduct. The only mitigation appeared to be that the claimant did not intend to cause offence but she considered it had little bearing. The claimant's reaction was concerning as the claimant appeared more troubled with the allegations about his practice than those of serious sexual misconduct. Accordingly, the claimant was advised that he was being dismissed on the grounds of gross misconduct. The claimant was advised of his right to appeal.

70. The claimant appealed the decision by letter dated 4 December 2022 (the appeal letter). He considered that the basis of the investigation meeting and investigation form was grossly flawed and unjust; there was a lack of supporting evidence of the allegations of sexual misconduct and failure to comply with the ACAS code.

71. The HR manager approached Lesley Henderson, strategic lead - east to conduct the appeal hearing. From management meetings, Ms Henderson was aware of the disciplinary matter but had not been directly involved. Ms Henderson was sent the investigation form, the disciplinary outcome letter, the notes of the disciplinary hearing and the appeal letter.

72. Ms Henderson noted that none of the witnesses were named. She asked about the statements provided by the witnesses in relation to the alleged inappropriate sexual remarks. She was told that three had given statements (staff members 1, 5 and 6) and one (staff member 3) had declined to give a statement. She requested copies of the statements of the staff members 1, 5 and 6 and relief workers 1 and 2.

73. Ms Aitken's notebook which included, among other things, notes of her discussions during the investigation was removed by a resident 1 in

December 2022. When it was returned Ms Aitken shredded the notebook. When asked for the statements Ms Aitken prepared a document headed “witness statements in the investigation of Mark Wellington October 2022” (the appeal document). The appeal document narrated the names of residents 1 and 2, staff members 1, 5 and 6 and relief workers 1 and 2 along with questions that Ms Aitken purported to have asked and their response which included the quotes attributed to them in the investigation form.

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74. Ms Henderson received the appeal document. A copy was not provided to the claimant. Ms Henderson considered that it was not relevant; it was a verification exercise.

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75. At the appeal hearing, conducted remotely by Ms Henderson, the claimant was unaccompanied. The HR manager was present and took notes. It lasted about 30 minutes. The HR manager confirmed that the claimant could not be accompanied by a colleague from Lenzie Gate as they were conflicted as all were involved in the investigation.

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76. Ms Henderson explained that the appeal hearing was to allow the claimant to explain his reasons for appeal. The claimant raised points to which Ms Henderson responded during the appeal hearing. She considered that while it may be perceived that there were leading questions there needed to be a level of context to enable the witnesses to respond appropriately. Ms Aitken only made a recommendation. It was the hearing manager’s decision. Ms Henderson said that racial stereotypes did not form part of the judgment to dismiss and was happy to remove them as she did not want perceived prejudices. She considered that the allegations were corroborated “by consistent nature of the statement as theme of sexual misconduct”. Ms Henderson questioned what difference the provision of witness names would have had as some of the comments would be unacceptable regardless of the context.

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77. Ms Henderson concluded the appeal hearing. She advised that she had various diary commitment that week and would advised of her decision on 20 December 2022 at a virtual meeting.

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78. At the virtual meeting on 20 December 2022, Ms Henderson read the appeal outcome letter. Ms Henderson did not agree that there was any racial bias or discrimination. In any event she disregarded any concerns in relation to references to the claimant being “lazy” or having “underlying anger”. Ms Henderson focused on the sexual misconduct issues. She concluded that she came to the same view that dismissal was the correct outcome.
79. At the date of termination, the claimant had been continuously employed for 10 years. He was 52 years of age. The claimant’s gross weekly salary was £459.60 and his net take home pay was £375. The claimant was in receipt of ESA of £344 per month.
80. The claimant unsuccessfully applied for a job in February 2023. The claimant has received from his doctor statements of fitness to work between 3 March 2023 to 16 July 2023. The claimant has been certified unfit for work until 16 July 2023. The reason stated is “anxiety and depression”. The claimant said that this was for a number of reasons including his embarrassment at the allegations, his wife’s passing, the difficulties with his son’s education and the financial strain.

Observations on witnesses and conflict to evidence

81. The Tribunal was mindful that for ill health reasons the claimant required to take breaks throughout the hearing. The Tribunal considered that the claimant gave his evidence in an understated manner. He was nervous but endeavoured to answer questions even when the response was not necessarily in his favour. The Tribunal’s impression was that the claimant answered question as best he could without incriminating anyone else.
82. The Tribunal considered that Ms Aitken was an unreliable witness. Ms Aitken candidly accepted that she had difficulty remembering what had happened during the investigation process. She referred to the investigation being some time ago. While the Tribunal acknowledged that Ms Aitken’s involvement was in late September/November 2022, the Tribunal found it incredible given her recommendation and the subsequent consequences for the claimant that Ms Aitken was unable to recall with any certainty when and the order in which

she spoke to residents and staff. She often responded that she could not remember, or she was inexperienced. Some of her responses were contradictory or that, she “believed” that she would have done something.

5 83. The Tribunal recognised that much of Ms Aitken’s evidence was from memory as she no longer had the contemporaneous notes. Usually the investigation form would have assisted her but it was written in a way that confused rather than clarified the issues. The Tribunal’s impression was that Ms Aitken lacked experience and objectivity. The investigation process was impulsive. The Tribunal felt that it was significant that in view of her lack of experience Ms
10 Aitken sought support from the HR manager and Ms Williamson during the investigation process.

84. The Tribunal was unpersuaded by Ms Aitken’s evidence on the following issues.

15 85. In relation to the investigation process Ms Aitken confirmed that the number attributed to staff members related to the order in which she spoke to them. Beyond that she could not recall when she spoke resident 2, the staff members, and how often and when she spoke to the claimant. While Ms Aitken referred to interviewing 12 people the Tribunal were unable to identify all of them, even on an anonymous basis.

20 86. The header of the investigation form is dated 24 October 2022. It states that “later” the allegation made by resident 1 was corroborated by resident 2 but also refers to that discussion with resident 2 being on 26 September 2022 after the formal complaint by resident 1 being made on 7 October 2022.

25 87. The investigation form refers to an initial meeting with the claimant on 24 October 2022. The recommendation to proceed to a disciplinary hearing is signed by Ms Aitken on 10 November 2022. The notification of suspension and invite to the disciplinary hearing refers to the investigation conducted by Ms Aitken on 17 November 2022. The Tribunal was unable on the evidence
30 before it to find that there was a discussion with the claimant (after the initial discussion about the complaint by resident 1) where Ms Aitken told the claimant of additional concerns raised by staff members or the nature of those

concerns. The Tribunal considered that there was no suggestion that the claimant was aware of any investigation into sexually inappropriate behaviour towards colleagues until the investigation meeting on 17 November 2022.

5 88. Ms Aitken said that staff member 1 referred to the claimant being sexually inappropriate. When it was brought to her attention that the word “sexually” was not in the quote attributable to staff member 1 in the investigation form she said that she failed to capture that at the time. The Tribunal noted that staff member 1 was not present when the claimant made any of the alleged sexual comments. Further other members of staff allegedly deliberately kept
10 information from him as “he has daughters”. He would have been upset and wanted to protect him. When Ms Aitken was asked by Ms Henderson in December 2022 for the “witness statements” Ms Aitken failed to correct any oversight. That said the Tribunal considered that it was likely that the “witness statements” were created from the investigation form as Ms Aitken no longer
15 had the notebook used by her when the investigation was taking place.

89. The investigation form made reference to comments made by staff member 2 under the themes negative attitude and behaviour and lack of motivation. There were no comments about sexually inappropriate language and behaviour. Ms Aitken said that she disregarded them. The Tribunal could
20 make no assessment about what, if any, comments were made by staff member 2 other than if they did not support Ms Aitken’s conclusion they were disregarded. There was also no evidence to suggest that the claimant was more friendly with staff member 2 than any other colleague.

90. Ms Aitken comments in the investigation form that staff member 3 denied
25 witnessing any issues with the claimant’s behaviour toward females and that he would have raised this. She also comments that staff member 6, says that staff member 3 was present when the claimant made a comment about “screwing Erin” and allegedly said, “That’s enough Mark”. Ms Aitken noted that this was concerning as staff member 3 did not inform her of this when
30 asked if he witnessed anything. The “witness statement” for staff member 6 makes no reference to staff member 3 making any comment to the claimant. Ms Aitken did not revert to staff member 3 to comment about this alleged

incident. Instead, she decided that those aspects of staff member 3's comments that were supportive of the claimant were unreliable but included in the investigation form comments that support her position in relation attitude and behaviour.

5 91. Ms Aitken said that she was asked to send over the witness statements of the people making allegations of inappropriate sexual behaviour and staff member 3 who allegedly witnessed an alleged incident. She prepared the appeal document in which there was no reference to staff member 3. Ms Henderson said that she was told that staff member 3 had declined to provide
10 a statement. The investigation form refers to comments made by staff member 3. He did not decline to make a statement. As indicated above he was not spoken to after the discussion with staff member 6. Ms Aitken instead drew her own conclusion.

15 92. Ms Aitken's evidence about the notebook containing notes of the fact finding discussions was confusing. The notebook was for her general use and was not a separate record of the individual fact finding discussions. Ms Aitken did not record the whole of the discussions, only some negative comments without clarity of the question that prompted the comments and what else was said. At some point she typed some of those comments into the investigation
20 form. Ms Aitken did not put notes of her meeting with the claimant into her notebook. She typed his comments directly into the investigation form during the investigation meeting. The notebook was taken by a resident 1 sometime in late November/early December 2022. When it was recovered, Ms Aitken was advised to shred it and not put sensitive information into a notebook
25 again. Ms Aitken was vague as to when this happened.

30 93. When asked if she spoke to staff members 2 and 5 about their alleged discussions with the claimant, Ms Aitken said that she did remember the HR manager asking her to ask them if they were ever involved in banter. She thought she was asked to do this after the claimant was dismissed. She was unclear if and when she had that discussion. She did not say that she was asked to speak to staff member 6 or that she ever did so.

94. Ms Williamson was a more reliable witness although the Tribunal felt that on occasions her recollection was vague and unconvincing. For example, she could not remember when she first became aware of the disciplinary investigation, who made her aware and when she saw the investigation form.
- 5 Ms Aitken said that due to her lack of experience she sought support from Ms Williamson. Ms Williamson could not recall giving guidance or support to Ms Aitken. If she did, Ms Williamson said that they would not have talked specifically. Ms Williamson could not recall when the disciplinary outcome letter was prepared and approved by her. Ms Williamson's appointment was
- 10 only for three months. Given the outcome of the disciplinary hearing in the first month of her appointment, the Tribunal found it surprising that these details were not memorable.
95. The Tribunal considered that Ms Henderson's gave her evidence confidently. While Ms Henderson is no longer an employee of the respondent the Tribunal
- 15 had no doubt about her high regard for the respondent's values. The Tribunal's understanding of her evidence was that she approached the appeal hearing on the basis that Ms Aitken and Ms Williamson had been recruited based on those values. She trusted her senior management colleagues. She believed that the investigation had been carried out by an experienced
- 20 manager to the best of her abilities, with the support of the HR manager. If Ms Aitken did not have enough experience Ms Henderson liked to think that the respondent would have supported her. In Ms Henderson's view the investigation process had already had been assessed by Ms Williamson. Ms Henderson did not see the need to question the investigation process. The
- 25 Tribunal's impression was that Ms Henderson had a closed mind and her decision was predetermined. The Tribunal formed that view from her evidence and the notes of the appeal hearing taken by the HR manager which demonstrated Ms Henderson replying to the appeal points during the appeal hearing rather than listening to the claimant's position and then reflecting on
- 30 it.

Discussion and deliberation

96. The Tribunal referred to the list of issues. There were two broad issues: unfair dismissal and direct race discrimination. The Tribunal considered the relevant law.

Unfair dismissal

5 97. Under section 94 of the Employment Rights Act 1996 (the ERA) an employee has the right not to be unfairly dismissed by their employer.

98. The Tribunal noted that in relation to the unfair dismissal claim the critical question for the claimant was whether his dismissal was fair in terms of section 98 of the ERA. The respondent asserted that the reason for dismissal was conduct which is a potentially fair reason under section 98(2)(b) of the ERA.

99. The Tribunal referred to its findings. Ms Williamson's evidence was that the breaches of the SSSC Code and inappropriate behaviour were examples of misconduct in the respondent's disciplinary policy. She said that making sexually inappropriate comments were reason for the claimant's dismissal.

100. The Tribunal was satisfied that the respondent had shown the reason for dismissal was conduct. Accordingly the respondent was successful in establishing that the dismissal was for a potentially fair reason.

101. The Tribunal then turned to consider whether the respondent met the objective test in section 98(4): whether in all the circumstances (including its size and administrative resources), the respondent acted reasonably in treating that reason as a sufficient reason for dismissal.

102. The Tribunal had to decide whether the respondent's decision to dismiss the claimant fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted. The objective test is applied to the decision to dismiss and to the investigation which led to that decision (*Sainsburys Supermarkets Limited v Hitt* [2003] IRLR 23]. It is an assessment of the reasonableness of the respondent's conduct not the level of injustice to the claimant.

103. The Tribunal referred to the three stage test for conduct dismissals set out in the case of *British Home Stores Limited v Burchell* [1980] ICR 303 [EAT].
- a. At the time of dismissal, the employer believed the employee to be guilty of misconduct.
 - 5 b. At the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct.
 - c. At the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.
- 10 104. The Tribunal was satisfied that from the disciplinary outcome letter and appeal outcome letter that Ms Williamson and Ms Henderson believed the claimant to be guilty of the misconduct.
105. The Tribunal then asked if the respondent had reasonable grounds for the belief in the alleged misconduct and at the time it formed that belief had the
15 respondent carried out as much investigation as was reasonable in the circumstances?
106. The Tribunal was mindful that it could not substitute its own view as to whether a reasonable investigation was carried out or embark on an analysis of the quality of the evidence obtained so as to lead to its own view of the evidence
20 resulting in its conclusion as to what the respondent ought to have found as opposed to applying a range of reasonable responses tests to the investigation carried out by the respondent leading to its conclusion to dismiss the claimant.
107. The Tribunal turned to the investigation by Ms Aitken. She had only recently
25 been employed by the respondent and was inexperienced in investigations. Ms Aitken understood from the HR manager that previous managers had failed to address longstanding issues and had not conducted appropriate supervision of support workers. Before undertaking the investigation, Ms Aitken had already formed a negative view of the claimant's attitude and work
30 ethic. She considered that he was not receptive to her proposed changes.

108. The Tribunal accepted that resident 1 complained to Ms Aitken. However the Tribunal's impression was that she escalated it to a formal complaint. Ms Aitken also decided to widen the scope of her investigation into the claimant's work practice and ethos. The Tribunal felt that this was less about Ms Aitken gaining an understanding of the experience of others, as submitted by Mr Milne, and more about making her mark as service lead. Ms Aitken appeared to lose sight quickly of the complaint process as there was no evidence of her providing a written or any response to resident 1. Ms Aitken appeared to be seeking validation of her view of the claimant's performance.
109. The Tribunal considered that while some employers, for good reason, would have dealt with the complaint first before investigating the claimant's work practice, it was not unreasonable for Ms Aitken to consider them together.
110. Having decided on this approach however the Tribunal was not convinced by Mr Milne's submission that the comments which led to the claimant's dismissal arose entirely organically. The Tribunal did not accept that the issues relating to sexual inappropriateness were raised by staff member 1. It appeared that it was not until speaking to staff member 5 (which was presumably after speaking to staff members 2, 3 and 4) that there was any reference to alleged sexually inappropriate behaviour. That prompted Ms Aitken to contact staff member 6 (who was on maternity leave). Staff member 6 was told that a staff member had spoken about the claimant saying that he was "having a wank". Staff member 6 was asked if she remembered this.
111. Mr Milne submitted that Ms Aitken did not, as Mr Kadirgolam submitted, cherry pick answers. Mr Milne said that while it was desirable to have a full context in which the comments were made in a question and answer note, the investigation form did not render the dismissal unfair.
112. The disciplinary policy mentions during the investigation to witness statements may be obtained and the investigation will include collation of all relevant documents. The Tribunal acknowledged that the way investigating managers record fact finding discussions vary and it was not for the Tribunal to decide how it would have conducted the investigation. The question for the

Tribunal was whether the way the respondent conducted the investigation was in the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted.

- 5 113. The investigation form was a proforma which included guideline comments which were to be deleted as the investigation form was completed. The Tribunal noted that investigation form included a section for witness statements yet none were prepared. Ms Aitken only made reference to the previous section of “evidence gathered”.
- 10 114. The Tribunal considered the way in which the investigation form was completed was not within the range of reasonable responses. A reasonable employer would in the Tribunal’s view have ensured the investigation form recorded all the people who were interviewed, when that happened and what was said.
- 15 115. Mr Milne submitted that further investigation into the context of the claimant comments was not required. Where there is a strong evidential case of misconduct against an employee the authorities are clear that the stronger the information which points towards dismissal, the less investigation is required (see *Gray v Dunn and Co v Edwards* [1980] IRLR 23).
- 20 116. The Tribunal did not agree that context of the comments were not required. In the Tribunal’s view a reasonable employer would have asked the witnesses when and how the alleged comments were made particularly as the witnesses were anonymised. The Tribunal considered that if the witnesses were able to quote exactly what was alleged to have been said, it was surprising that they would not also remember when, and the circumstances in which the
25 comments were made. While the Tribunal appreciated that the witnesses might not have remembered the exact dates, the Tribunal felt that a reasonable employer would have asked the question and recorded the answer.
- 30 117. When the claimant attended the investigation meeting with Ms Aitken he understood that this related to her investigation into resident 1’s complaints. The Tribunal felt given the seriousness of the allegations, that a reasonable

employer would have informed the claimant before his investigatory meeting that the scope of the investigation had gone beyond resident's 1 complaint and the complaint policy and was now an investigation under the disciplinary process.

5 118. Mr Kadirgolam submitted that Ms Aitken was partial during the investigation. Mr Milne said that she did not believe that the claimant's dismissal would happen when she began investigating the complaints. The Tribunal accepted Ms Aitken was inexperienced and sought support from the HR manager. It was also accepted that it was not Ms Aitken's decision to discipline and
10 ultimately dismiss the claimant. However the Tribunal considered that she was partial during the investigation and disregarded evidence which she considered was neutral or supportive of the claimant. Her role was to establish facts and whether disciplinary action was warranted, not to judge the claimant's conduct which is what the Tribunal considered she did.

15 119. The investigation did not stop with the investigation form it continued throughout the disciplinary hearing. The HR manager was involved throughout the proceedings. From Ms Aitken's evidence the Tribunal considered that the HR manager must have been aware of Ms Aitken's inexperience. There was no evidence of the HR manager reviewing the
20 investigation form to ensure a fair and consistent outcome had been reached. The HR manager almost immediately passed the investigation form to Ms Williamson.

120. Ms Williamson had only recently taken on her interim role with the respondent. While Ms Aitken referred to speaking to Ms Williamson during the
25 investigation there was no evidence to suggest that Ms Williamson made any further enquiries of Ms Aitken or sought clarification of the investigation form. Ms Williamson relied on the HR manager and proceeded on the basis that there were no issues about the investigation process.

121. The disciplinary hearing was conducted remotely. While the Tribunal
30 considered that it was reasonable for the respondent to so do, in the Tribunal's view a reasonable employer would have ensured that the claimant was

undistracted, clarified that he had the investigation form before him and was offered breaks. While it was reasonable for the HR manager to participate, with her camera off, to take notes the Tribunal considered that a reasonable employer would not have allowed the HR manager to intervene in the manner that she did. The Tribunal felt that her interventions went beyond clarifying points for the notes. The Tribunal considered that the HR manager interrupted the discussion, expressed her view and confused rather than clarified the situation.

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122. Before the appeal hearing, Ms Henderson was aware of the claimant's concerns about Ms Aiken's partiality. Ms Henderson asked for more information. She was told that staff member 3 had declined to give a statement. She also asked for the Ms Aitken's notes of her discussions with the witnesses who mentioned alleged sexual misconduct. Ms Henderson was provided with the appeal document which she did not provide to the claimant.

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123. The Tribunal considered that a reasonable employer would have provided the claimant with details about further information that had been requested and what had been received. The Tribunal noted that Ms Henderson's view was that given the allegations it was unnecessary for the claimant to know when and the context of the allegations. She considered that it was irrelevant as regardless of the context, what was said was inappropriate. As previously explained, the Tribunal considered that a reasonable employer would have endeavoured to provide this information so that the claimant had a proper opportunity to provide some explanation.

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124. It seemed to the Tribunal that the claimant had no recollection of saying what was alleged. He did not know who was alleged to have made the allegation, when and the context of that discussion. It was therefore challenging for him to comment on why the allegation was made or what he might have said or why.

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125. During the investigation, disciplinary hearing and appeal hearing the claimant made reference an incident with staff member 6, initiated by her and potential jokes with staff members 2 and 5. The Tribunal had difficulty understanding

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why this was not investigated during the disciplinary process given Ms Henderson's comments about there being no basis for using inappropriate language under any circumstances other than directly quoting a resident. The Tribunal was unconvinced that the HR manager instructed Ms Aitken after the claimant's dismissal to make any enquires with staff members 2, 5 and 6. If there was such an instruction the Tribunal was sceptical that it was followed. The Tribunal considered that a reasonable employer would have widened the investigation and spoken to staff members, particularly those mentioned by the claimant, about the nature and appropriateness of their discussions.

10 126. The Tribunal then applied the range of reasonable responses test to the decision to dismiss and the procedure by which that decision had been reached.

127. The Tribunal has commented above about the reasonableness of the investigation.

15 128. There was no history of misconduct by the claimant. He was a long standing employee. The claimant was aware of the alleged inappropriate sexual comments shortly before the disciplinary hearing. He was suspended and was unable to be accompanied at the formal hearings. The claimant denied the alleged misconduct.

20 129. Mr Milne submitted that the respondent believed that the claimant made inappropriate sexual conduct on the following basis:

a. Six staff members (clarified on appeal to be five) and two students raised concerns which were consistent with inappropriateness. There was consistency.

25 b. The claimant gave inconsistent answers during the disciplinary and appeal hearings.

c. Ms Williamson considered that there was a degree of familiarity of how the claimant used the terms; the words just rolled off his tongue. She was entitled to take this into account.

d. Ms Williamson relied on the claimant saying that the allegations were not true, he questioned the context in which they were made and said they were conversations that he may have had with staff member 5 and staff member 2.

5 130. The Tribunal felt that the themes stemmed from the initial investigation. The
respondent relied on what the claimant was purported to have said at the
investigation meeting. The disciplinary and appeal hearings placed heavy
reliance on the investigation form which was selective, incomplete and
contained inconsistencies and inaccuracies. The respondent's themes for
10 reaching the decision to dismiss took no account of the claimant being
questioned remotely about allegations which before the investigation meeting
he had been unaware of and had not been previously raised with him by
colleagues or management and about which he had no context. The
Tribunal's impression was that the issues having come to light the respondent
15 reacted to the situation and the decision to dismiss the claimant was
predetermined.

131. Mr Milne said that procedure does not sit in a vacuum to be assessed
separately (see *Sharkey v Lloyds Bank plc* (UKEAT/0005/15) approved in
NHS 24 v Pillar UKEAT/00005/16). He submitted that when taken in the
20 round, the substance of the investigation was reasonable. Any procedural
omissions had no material effect of the decision.

132. The Tribunal did not agree with this submission. The disciplinary hearing
focussed on the claimant's comments in the investigation form. The way in
which the claimant was questioned at the disciplinary hearing appeared to be
25 less about allowing the claimant to explain his position and more about telling
the claimant what had been recorded in the investigation form. Given the
investigation and discussion at the disciplinary hearing, it was in the Tribunal's
view understandable that the claimant was familiar with the terms but that did
not mean that he used the terms. The appeal hearing was in the Tribunal's a
30 rubber stamping exercise. While Ms Henderson sought further information, it
was in the Tribunal's view to support a conclusion that that she had already
reached before the appeal hearing.

133. The Tribunal concluded that for all the above reasons the respondent acted unreasonably in all the circumstances in treating the claimant's conduct as a sufficient reason to dismiss him. Accordingly the dismissal was unfair.

Race Discrimination

5 134. The Tribunal referred to section 13 of the EqA. Direct discrimination occurs where because of the protected characteristic (in this case race) A treats B less favourably than A treats and would treat others.

135. It is an objective test. A claimant must prove that the principal or at least an important or significant cause of the less favourable treatment is the fact that
10 the alleged discriminator had done a protected act (*Nagarajan v London Regional Transport* [1999] ICR 877).

136. In terms of less favourable treatment, it is not enough for the claimant to simply to show that they have been treated differently. There must also be a quality in the treatment that enables the complainant reasonably to complain
15 about it (*Chief Constable West Yorkshire of Police v Khan* 2001 ICR 1065).

137. The Tribunal noted from the issues to be determined that this is usually a two stage test. However the Tribunal agreed with Ms Milne's submissions that in the questions were so intertwined this case that the Tribunal should ask the single question: did the claimant receive, on the proscribed grounds, less
20 favourable treatment?

138. The Tribunal appreciated that many residents' complaints are treated informally. That is what is envisaged under the complaints procedure. Once there is a formal response to a complaint there is an investigation. Depending on the nature of that complaint, in the Tribunal's view, that investigation may
25 involve other staff members. Indeed the claimant anticipated Ms Aitken speaking to staff member 5 who was present during part of the scooter incident. While the Tribunal appreciated that the investigation expanded beyond the initial complaint, the Tribunal was not satisfied that there was evidence to infer that that the principal or significant cause of this was the
30 claimant's race. In the Tribunal's view this was due to Ms Aitken looking for

“adequate support” for resident 1’s complaint and seeking to validate her view of the claimant’s working practices.

139. During the investigation Ms Aitken spoke to other staff members and residents. The comment of the claimant being “extremely lazy” is attributed to staff member 6. Other colleagues (including Ms Aiken), while not considering the claimant to be the most effective worker, did not describe him as lazy. Ms Aiken commented on underlying anger issues but that was her perception of the claimant in relation to her trying to implement new procedures.
140. The Tribunal considered that the view of Ms Aitken and the claimant’s work colleagues was the principal or significant cause of the claimant’s dismissal. The Tribunal has set out above its comments on the investigation. The claimant did not allege that his work colleagues who spoke to Ms Aitken as part of the investigation were discriminatory. Nor did he suggest that Ms Williamson or the HR manager were discriminatory. The Tribunal considered that Ms Aitken lacked experience in carrying out investigations. She sought support and would have carried out the investigation in the way that she did regardless of the claimant’s race.
141. The Tribunal therefore concluded that the claimant did not receive less favourable treatment because of his race and dismissed the direct race discrimination complaint.

Remedy

142. The Tribunal then turned to remedy. The claimant sought compensation.
143. The claimant was entitled to a basic award. At the date of termination, the claimant was 52 years old. He had ten years of continuous service. His gross weekly salary was £459.60. The claimant’s basic award is £6,894.
144. The Tribunal then turned to the compensatory award. The claimant sought past loss from the date of dismissal until the final hearing (41 weeks). The claimant’s net weekly wage is £375. There was no issue taken with mitigation. The total past loss is £15,375. The claimant was in receipt of ESA at £344

per month, that is (344 x 12/52) £79.38 per week. Accordingly, from the total past loss there requires to be deducted 41 weeks x £79.38 of ESA, that is £3,254.58 leaving a balance of £12,120.42 (£15,375.00 - £3,254.58).

5 145. The claimant sought future loss on the basis that he had been unable to work due to stress and depression caused by the discrimination the claimant experienced during the investigation, disciplinary process and dismissal. The Tribunal did not find the respondent to have discriminated against the claimant. Further, while the Tribunal did not doubt the way that the claimant was feeling. It was understandable that he felt the way he did in relation to
10 his situation. However, from his evidence, his ill health was not entirely attributable to the respondent's actions. The claimant has now addressed his grievances with the respondent. The Tribunal agreed with Mr Milne's submission that it was not just and equitable to extend the claimant's loss beyond the final hearing.

15 146. The total monetary loss is the basic award (£6,894) added to the compensatory award (£12,120.42) that is £19,014.42.

20 147. The Tribunal then considered Mr Milne's submission about making a Polkey reduction. He argued that if the respondent had investigated the context of the documents the respondent still would have dismissed the claimant in any event. The Tribunal did not consider that on the evidence it was able to reach that view. Had the context of the comments been put to the claimant he may have been able to provide an explanation which would have justified sanction short of dismissal.

25 148. The claimant did not in the Tribunal's view contribute to his dismissal. Accordingly, there was no reduction in respond of contributory conduct.

149. The Tribunal concluded that the claimant was unfairly dismissed and ordered the respondent to pay to the claimant a monetary award of £19,014.42.

150. The Employment Protection (Recoupment of Benefit) Regulations 1996 do not apply.

Employment Judge: S MacLean
Date of Judgment: 21 November 2023
Entered in register: 22 November 2023
and copied to parties