EMPLOYMENT TRIBUNALS

Claimant:	**Mr F Oseghale**
Respondent:	**Cygnet Learning Disability Limited**
Heard at:	**East London Employment Tribunal**
On:	**10, 11, 12 and 13 October 2023, 1 November 2023 and 2 and 3 November 2023 in chambers.**
Before:	**Employment Judge Park**
Members:	**Ms J Houzer** **Mr P Lush**

Representation

Claimant:	Mr N Brockley (counsel)
Respondent:	Mr O Onibokun (legal representative)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. **The claimant's claims for direct discrimination fail and are dismissed.**

2. **The claimant's claim for unfair dismissal is well-founded and succeeds.**

3. **The claimant's claim for wrongful dismissal is well-founded and succeeds.**

4. **A reduction of 40% is made to the compensatory award under *Polkey v Dayton Services Limited* [1988] ICR 142.**

5. **A reduction of 60% is made to both the compensatory award and basic award under section 122(2) and 123(6) Employment Rights Act 1996.**

6. The respondent is ordered to pay the claimant the sum of £2,641.26 which is comprised of the following:

6.1. Basic award of £685.20.

6.2. Compensatory award of £716.10.

6.3. Notice pay of £1,239.96.

REASONS

Claims and Issues

1. The Claimant's claims were for unfair dismissal, wrongful dismissal and direct discrimination on the grounds of race.

2. There were two claims of direct race discrimination. The unfavourable treatment the claimant said happened and was because of his race was:

   2.1. the appointment of Rebecca Patchett to a substantive role in June 2021 that had not been advertised, and the claimant says she had not performed well at an interview for an advertised role and the claimant had not been given a similar opportunity to be appointed into such a role; and

   2.2. the dismissal.

3. During the hearing it became apparent that the claimant may have intended to bring a further direct discrimination claim based on the respondent referring him to the NMC. This had not been fully identified during case management. There were references to an NMC referral, albeit indirectly, within the original grounds of claim. After the preliminary hearing the claimant had identified some comparators he relied on for his direct discrimination claim. The less favourable treatment in respect of some of those comparators was the referral to the NMC following disciplinary proceedings. The claimant believed the respondent had referred him but not the comparators. During this hearing the claimant indicated that he had intended to bring such a claim, but he did not make an application to amend the claim. During the course of the hearing it became apparent that in fact the claimant had not actually been referred to the NMC by the respondent in any event. Therefore, even if the claimant had sought to amend the claim it would not have succeeded as it was based on misunderstanding by the claimant so he would not have been able to prove any less favourable treatment had occurred.

4. Though not expressly included in the list of issues, the respondent's position was that the Tribunal did not have jurisdiction to hear the claimant's claim set out at 2.1 as it was out of time. This is also an issue for us to determine.

5. The claimant had originally included claims that he had made protected disclosures and:

5.1. he had been subjected to a detriment; and

5.2. the dismissal was automatically unfair as the sole or principal reason was the fact he had made qualifying disclosures.

6. At a preliminary hearing on 13 February 2022 Acting Regional Employment Judge Burgher had concluded the whistleblowing claims had little reasonable prospects of success and made deposit orders in respect of those claims. The claimant had not paid the deposit, so those claims were struck out.

7. The claimant had initially included a claim in respect of holiday pay. Following the preliminary hearing the parties confirmed that this issue had been resolved. This was subsequently dismissed on withdrawal.

Procedure, documents and evidence heard

8. The parties were both represented.

9. A bundle of documents had been prepared and was provided. We were also provided with two videos containing CCTV footage. These were watched during the hearing.

10. Before the hearing the claimant's representative had raised issues about an additional document that had been disclosed by the respondent after the exchange of witness statements. It was not clear if the claimant objected to the respondent relying on that document or if he was merely bringing to the Tribunal's attention the fact it had been disclosed at a late stage. The claimant's representative took instructions on this on the first day of the hearing, which had been set aside as a reading day. At the beginning of the second day the claimant's representative advised that they did not object to the documents being included.

11. The claimant gave evidence and had prepared a witness statement. He also called as a witness Mr Sylvester Ogbenuju. The respondent advised that he did not need to cross examine Mr Ogbenuju. Mr Ogbenuju attended to confirm his evidence. The claimant wished to ask Mr Ogbenuju supplementary questions about the videos that were included in evidence. This request was not allowed. The claimant had the videos before witness statements were exchanged so any evidence Mr Ogbenuju wished to give about the CCTV footage should have been included in his statement.

12. The respondent called five witnesses. They were Ms Alice Zimba, Mr Ron Gutu, Mr Barry Swire, Ms Lauren Blanch and Ms Kristy Watters. The hearing was in person. Mr Gutu was unable to attend the Tribunal due to unavoidable personal commitments. An application had been made by the respondent that he gave evidence remotely. This had been granted and the hearing was converted to a hybrid hearing. On the first day of the hearing the respondent advised that Ms Watters had tested positive for Covid and asked she also gave evidence remotely. We considered if this was possible and concluded that as the hearing was already converted to a hybrid hearing this would be in accordance with the Overriding Objective.

13. At the outset of the hearing the respondent's representative advised that the respondent was having difficulty confirming Mr Gutu's attendance because Mr Gutu no longer worked for the respondent. At the start of the second day the respondent was still unable to confirm that Mr Gutu would attend or when. In the circumstances we decided it would be appropriate to make a witness order. Mr Gutu subsequently attended and gave evidence by video.

14. On the second day the respondent advised that additional documents were being disclosed and that they also wished to rely on a supplementary witness statement by Ms Lauren Blanch. We asked that they were provided to the claimant's representative for consideration. The claimant remained under oath, but we provided permission for the claimant's representative to speak with the claimant for the sole purpose of obtaining instructions on the additional documents and statement. The claimant initially objected to the inclusion of the additional documents and statement. On discussion with the claimant's representative it appeared the main objection was due to the procedural history of the case, in that the claimant had asked for additional disclosure from the respondent which had not been forthcoming. The claimant felt the respondent was selectively providing additional documents at a late stage, despite having not provided the documents that he had asked for earlier. Following discussion with the claimant's representative, he agreed there was no objection to the additional documents and statement being admitted. This was with the caveat that we also took note of additional email correspondence between the parties about the claimant's earlier concerns about disclosure.

Findings of fact

Background

15. The claimant is a registered mental health nurse. He qualified in September 2019.

16. The respondent is a private healthcare provider. It runs hospitals and provides other services for people with mental health needs and learning disabilities. The claimant initially worked for the respondent between 2016 as a locum care support worker. He continued to work for the respondent in support roles, either as locum or bank staff, until 2019. Once the claimant qualified as a nurse, he left the respondent for a role elsewhere.

17. The claimant re-joined the respondent in March 2020 in the role of mental health nurse at Cygnet Hospital, Colchester. His contract of employment stated his employment commenced on 2 March 2020.

18. At Cygnet Hospital there were several different wards. The claimant originally worked on Highwoods Ward. He subsequently transferred to work at Oak Court.

Vacancies and job applications in May-June 2021

19. On 11 May 2021 the claimant received an email advising there was a vacancy for the role of Acting Clinical Team Leader. This email had been sent by Lauren Froud (now known as Lauren Blanch), Clinical Services Manager, to several

registered mental health nurses. This role would have been a promotion for the claimant, though it would only be on an interim basis. The claimant applied for the role and sent his CV to Ms Blanch on 21 May 2021.

20. The claimant attended an interview for the role on 27 May 2021. He was interviewed by Ms Blanch and Puleng Mvuni. The interview process was standardised and all candidates were asked the same questions and given a score between 1 and 5 for each answer. The scores were then added up. The claimant scored 45 in total.

21. Several other candidates were also interviewed including Oluwole Falowo, Rebecca Patchett, Rebecca Peachey and Sarah Bidwell. At some point, though it was not clear from the documentary evidence, another role was also advertised. According to Ms Blanch the two roles were both acting up positions. Oluwole Falowo scored 99 and was offered one role. Sarah Bidwell scored 124 and Rebecca Peachey 109. They were offered the other role on a job-share basis. Rebecca Patchett scored 95.

22. Ms Patchett was subsequently offered another Clinical Team Leader role. The offer of this role to Ms Patchett formed the basis for one of the claimant's direct race discrimination claims. It was accepted by the respondent that Ms Patchett had been offered the role of acting Clinical Team Leader in June 2021. It was also accepted by the respondent that this role was offered to Ms Patchett without another interview. The claimant suggested that this was a permanent role. We accepted the respondent's explanation that it was an interim role. We were provided with supervision notes from July 2021 and these make it clear that Ms Patchett would return to her substantive staff nurse role in due course.

23. The respondent provided limited documentary evidence showing clearly what happened with the various recruitment exercises and the appointment of Ms Patchett to the role in June 2021. It was difficult to ascertain exactly what had occurred and we noted that there appeared to have been a lack of transparency in Ms Patchett's appointment.

24. We heard some more detailed evidence about what happened from Ms Blanch, who had been involved in the process, albeit events took place over 2 years ago, so her recollection was not certain. She explained that another interim Clinical Team Leader vacancy arose due to staff sickness. She explained that Ms Patchett had already been interviewed twice for Clinical Team Leader roles and both times had scored highly but she had ultimately been unsuccessful as others had scored higher. Ms Blanch explained that because Ms Patchett had scored highly enough to be appointed and narrowly missed out previously, they decided to offer her the new interim role without further interview. We accepted Ms Blanch's explanation that this is what happened. It was clear and credible. Ms Blanch also explained that the claimant was not in consideration at this point because his score had been so low. She explained that a candidate needed to have a minimum score at interview in order to be appointed. She recalled this was around 75%. The claimant did not meet this standard. Ms Blanch explained that if the claimant had scored at a similar level to Ms Patchett then a different

approach would have been taken when filling the third vacancy. Again, we found this explanation credible. It made sense to appoint Ms Patchett, given that the vacancy was just temporary and it arose so soon after a similar recruitment process.

25. The claimant was unhappy with what had happened. According to him he raised this with Ron Gutu, the respondent's Operations Director. The claimant has suggested that this caused tension. The claimant may have perceived this to be the case, but he did not provide any clear evidence that showed there had been any tension.

Events of 10 October 2020

26. The claimant transferred to Oak Court in August 2021.

27. On 28 September 2021 an incident occurred between two service users in Oak Court, known as JS and YB. Following the incident JS threatened to kill YB. The incident was raised as a safeguarding issue but not taken further. It was generally accepted that following the incident a plan was in place to ensure that YB and JS were kept apart. We were not provided of documentary evidence of this, but we accepted it was communicated verbally during handovers between shifts.

28. On 10 October 2021 the claimant worked a night shift at Oak Court. He was the Nurse in Charge on the ward. There were no other registered nurses working the night shift, but there were support workers.

29. It was generally accepted that the shift was challenging. YB had been difficult to manage. He ended up sitting on the corridor floor where he was attended by some support workers. JS had also been agitated and he was taken back to his room. In the early hours of 11 October 2021 the claimant brought JS out of his room into the corridor where YB was still sitting. JS moved towards YB and support workers had to intervene to deescalate the situation.

30. The claimant wrote up an incident report about the events overnight of 10-11 October 2021. This included his account of events. He stated that YB had been unsettled and was on the floor. The claimant said in his incident report that JS *"came out again from his bedroom and was charging towards YB, staff intervened".*

31. On 11 October 2021 George Wejinya, a support worker who was working on that shift, sent an email to Puleng Mvuni, Ward Manager, raising concerns about what had happened. He said he had some *"ongoing issues"* with his working relationship with the claimant. Then he set out what he said had occurred that night. In this email Mr Wejinya says that the claimant had called JS out of his room twice to *"frighten him",* meaning frightening YB.

32. On 12 October Walter Aghama, who had been the Night Manager on 10-11 October 2021, sent an email to Laruen Blanch and Puleng Mvuni about the incident. He said that 2 members of staff had reported to him that the claimant

had *"intentionally called out a service user, JS, to either frighten or scare off another service user (YB)".*

33. On 11 October 2021 the claimant was suspended by telephone. This was confirmed in a letter from Ms Blanch dated 12 October 2021. In this letter Ms Blanch advised the claimant that an investigation was being carried out into the following two allegations:

    33.1. his conduct on the ward had compromised patient safety; and

    33.2. he had displayed unprofessional behaviour towards his colleagues.

    The letter did not include any further details, such as the date of when any incident had occurred that was being investigated.

34. On 13 October 2023 a post incident review was carried out by Puleng Mvuni. At this meeting were 5 support workers who had been present during the incident on 10-11 October 2021. They provided their initial feedback on what had happened during the shift. The record indicates the staff were concerned that the claimant had escalated the incident and that he had encouraged JB to intimidate YB. The support workers were also shown the CCTV footage of the incident. The discussion was not just about the claimant, it was wider and there were also discussions about how others had acted that night, such as the holds used and body language of staff members.

35. The claimant was not spoken to as part of this post incident review. He was not at the meeting carried out by Puleng Mvuni. Neither did anyone speak to him separately to obtain his own immediate account or recollection of events.

36. At some point someone added wording to the claimant's initial incident report. The report was approved by Puleng Mvuni. This additional wording stated there were concerns about the claimant's actions. The claimant was not informed of this additional wording at the time. We were provided with no evidence clarifying who had added this wording or when.

<u>The disciplinary investigation</u>

37. The decision to suspend and start the investigation was taken by Ron Gutu. He confirmed this in evidence but his account of what happened was lacking in detail. It was not clear which documents he had seen when the decision to suspend the claimant was taken. Of particular importance we find that it is possible he was aware of the specific allegation Mr Wejinya made in this email about the claimant's motive. Neither was there any evidence, either in Mr Gutu's witness statement or other documentary evidence, that showed how this decision had been made or what specifically Mr Gutu wanted to be investigated. We find that he did instigate the investigation and we also find on balance it is likely that he did know at that early stage that there had been an allegation that the claimant's actions had been deliberate.

38. It was unclear from the respondent's evidence what happened next. At some point Alice Zimba was appointed to investigate. She could not recall when she was appointed. When pressed during oral evidence she was very vague about what had occurred. We were provided with minimal documentary evidence on the start of the investigation. These were a few emails between Alice Zimba and Alan Kiss, HR Business Partner, from 14-16 December 2021 starting to arrange interviews with witnesses. We were not provided with any documentary evidence showing how the investigation was started, such as any correspondence setting out the scope of what Ms Zimba was asked to investigate. During oral evidence none of the respondent's witnesses were able to provide any further details either or explain what had happened.

39. We infer from the lack of evidence that no investigation was started until the middle of December 2021, over 2 months after the incident itself. Ms Zimba suggested in evidence that there were logistical reasons for the delay. No evidence of this was provided by the respondent, such as internal emails progressing matters or seeking updates. We inferred from this lack of evidence that the investigation was just not progressed. We also accepted the claimant's evidence that he was not provided with any updates during this time while suspended. The respondent provided no evidence to the contrary.

40. The investigation did eventually commence in the middle of December 2021. As noted, we have not seen any evidence confirming what allegation or questions Ms Zimba was specifically asked to investigate. The final investigation report, which was not produced until the end of January 2022, states that it is into an allegation of *"attempt to use intimidation from service user JS to move patient YB from corridor".* However, it is not clear if this was the initial allegation that was being investigated or if that was just included in the report at the end. We also note that it is different to what the claimant was told when he was suspended.

41. The claimant attended an investigation meeting with Ms Zimba on 22 December 2021. This was held via Zoom. The claimant said that this was the first time he was told that the investigation was about the incident on 10-11 October 2021. We accepted this was the case. The notes of the meeting record the claimant saying this. There was no other contemporaneous evidence provided by the respondent showing that the claimant was informed of this detail earlier. As we have already concluded, the claimant had also not been asked to provide his account of the incident immediately after it occurred. He had just been suspended and informed of an investigation of quite a general nature.

42. During this meeting the claimant was shown the CCTV and asked to explain what had happened. The claimant provided his own account and said that he had been trying to move JS to the lounge as JS wanted to do so, and he believed he could do it safely as other members of staff were shielding YB.

43. At the end of the meeting the claimant noted that no statement had been taken from him. Ms Zimba said that if he wished to write a statement he could. The claimant did prepare a statement afterwards and included in this his reflection on the incident. He sent this to Ms Zimba in late December 2021.

44. As part of the investigation Ms Zimba interviewed five other individuals. Four of these were support workers who had been present on the night of 10-11 October 2021. These were George Wejinya, Clifford Chibnwah, Sylvester Ogbunuju and Nashir Kabugu. Mr Ogbunuju, Mr Chibnwah and Mr Kabugu were all interviewed on 20 January 2021, so over 3 months since the incident. The notes of the interview with Mr Wejinya are undated. Ms Zimba also interviewed Walter Aghama, who had been Night Manager. He had not witnessed the actual incident but had been called to the ward during the night and had also spoken with staff after, which he had reported in an email dated 12 October 2021.

45. Minutes were taken of the interviews. These all indicate that the interviews were short. Ms Zimba asked the support staff to tell her what had happened that night. Having seen the notes of the meetings we have found that Ms Zimba's questions to those she interviewed were limited. She asked questions that briefly took the interviewees through the incident. However, she did not ask any probing questions or ask for clarification on any points.

46. Ms Zimba had copies of the emails that had been sent in October by Mr Aghama and Mr Wejinya and one by Mr Kabugu sent on 16 October. Ms Zimba did not ask any of those witnesses anything about the emails they had sent or ask that they provide any further explanation about what they had said at the time. Neither did she ask any detailed questions about the specific allegation that related to the claimant's motivation for his actions, i.e. that he was trying to use JS to intimidate YB. In the interview Mr Wejinya says that he perceived the claimant to be trying to frighten YB. Ms Zimba does not ask anything further about this, such as why Mr Wejinya perceived this to be the case or what he saw that gave that impression.

47. Ms Zimba also interviewed Mr Aghama. Mr Aghama had reported in his email dated 12 October 2021 that staff members had raised concerns about the claimant's actions with him. He refers to Mr Wejinya and Mr Chibnwah. Ms Zimba does not ask Mr Aghama to expand on this email or explain in more detail what was reported to him at the time. She only asked what had happened on the day, even though Mr Aghama had not witnessed the actual incident. She also did not ask Mr Chibnwah or Mr Wejinya if they had said anything to Mr Aghama after the incident.

48. Ms Zimba completed her investigation and prepared a report dated 31 January 2021. She included in this the 3 emails from Mr Wejinya, Mr Aghama and Mr Kabugu, the interview notes and an additional report about YB. The nature of this document was not explained by any witnesses or within the report. The original incident report and post incident review were not included in the investigation report, even though Ms Zimba said she had seen these during the investigation.

49. Ms Zimba set out her conclusions in the report. She recommended that the matter proceed to a disciplinary, based on a conclusion that the claimant did not follow the plan to keep JS and YB separate. This much was not disputed, in that

the claimant accepted he had brought JS out of his room, having first asked others to do so. However, Ms Zimba also set out more detailed findings in which she concluded that on the balance of probabilities the claimant had intentionally tried to incite JS against YB. Having reviewed the evidence collated in the investigation we cannot see how Ms Zimba reached that conclusion. Ms Zimba did not ask any of the witnesses, and particularly Mr Wejinya, any questions on this point. In her report she listed this specific allegation as the main one being investigated. However, during her interviews she he did not make any enquiries on this point. In particular, she did not ask Mr Wejinya about how had reached this conclusion. None of the other witnesses reported this was the claimant's purpose.

50. Overall, our conclusion is that the actual investigation by Ms Zimba was superficial and did not explore in any depth the factual matters that were actually contested. The more detailed conclusions she reached do not appear to be supported by the evidence she gathered. Instead, it appears that the original allegation made by Mr Wejinya in his email was taken at face value and not explored further.

51. The matter proceeded to a disciplinary hearing. The claimant was sent a letter dated 10 February 2022 inviting him to a meeting on 14 February 2022. The investigation report was included. In the letter the respondent stated the allegation being considered was that the claimant's conduct had compromised patient safety by not following a safeguarding plan and he had displayed unprofessional behaviour towards colleagues. There was no mention of any more specific allegation relating to the claimant's motivation for bringing JS out of his room.

52. The disciplinary hearing took place on 28 February 2022. The claimant was accompanied by his trade union representative. There was some discussion that day. The hearing was adjourned and continued on 1 March 2022.

53. Ron Gutu chaired the disciplinary hearing. At the outset Mr Gutu confirmed with the claimant the allegation. At the hearing he stated that this included an allegation that the claimant had deliberately incited JS towards YB. During this meeting the CCTV footage was watched and the claimant went through his account of events and answered Mr Gutu's questions. Mr Gutu discussed with the claimant why he made the decisions he did. At one point he put to the claimant that the only reason he had to take JS out of his room was to incite YB. The claimant's trade union representative pointed out to Mr Gutu that only one witness said this, namely Mr Wejinya. None of the others interviewed said that they heard this. This specific point was not explored any further by Mr Gutu in the disciplinary hearing.

54. During the hearing the claimant accepted that his actions on the relevant night had fallen short of the standard expected of him. He explained to Mr Gutu why he had acted as he had. The claimant's explanation was that he was trying to take JS to the lounge as he said he was agitated. He also explained how he had

since reflected and considered what he would do differently if faced with a similar situation.

55. At the end of the hearing Mr Gutu said he would provide the outcome in between 7 and 10 days. He also said that he would decide if he needed to speak to anyone else and, if he did, he would inform the claimant. The claimant's trade union representative flagged up concerns about the allegation that the claimant had deliberately brought JS to YB. The trade union representative noted that it had been stated two members of staff reported this, but the witness statements did not corroborate this.

56. Mr Gutu subsequently interviewed two witnesses again. On 2 March 2022 he interviewed Mr Kabugu and on 3 March 2022 he interviewed Mr Wejinya.

57. Mr Gutu asked Mr Kabugu in more detail what happened including what he understood were the claimant's reasons for calling JS out of his room. Mr Kabugu said he did not know why the claimant would call JS out of his room. He did not give any view on what the claimant's reasons were, he just said that he did not know.

58. Mr Gutu also went through events again with Mr Wejinya. He asked Mr Wejinya what he had heard. Mr Wejinya responded that he could not remember. He also said during this meeting he could not understand the claimant's reasons for bringing out JS. During this meeting Mr Gutu did not ask Mr Wejinya about his original email or why he had specifically said initially that the claimant had been trying to frighten YB.

59. The claimant attended a further disciplinary hearing on 22 March 2022. The claimant says that he was not provided with copies of the notes of the additional interviews Mr Gutu had carried out. The respondent did not provide any documentary evidence showing that the claimant was provided with the additional interviews, such as an email or letter enclosing them. The minutes of the meeting also do not record the claimant and his union representative being given copies of the documents or even being told that additional interviews had been carried out. Mr Gutu said in cross-examination that he could not recall providing the documents to the claimant. We have concluded that the claimant was not told that Mr Gutu had carried out further interviews or provided with copies of the records.

60. During this further disciplinary hearing Mr Gutu discussed the incident again with the claimant. The discussion was quite general. Mr Gutu asked the claimant if he had any final comments. The claimant put forward his arguments that the statements of other members of staff were not in good faith. His union representative also reiterated the point he had made previously that only Mr Wejinya had said that the claimant had been trying to incite JS. Mr Gutu said this would be taken into account, but he did not discuss this point further with the claimant.

61. Mr Gutu did not make the decision that day. He sent the decision to the claimant by letter dated 8 April 2022. He said that he had concluded the claimant had compromised patient safety on the ward and displayed unprofessional behaviour towards his colleagues. He also expressly stated that the claimant had *"brought patient JS out of his room for no other reason apart from intimidating the other patient YB."* Mr Gutu then set out in some detail the reasons he had reached that conclusion. He informed the claimant that as a result he was summarily dismissed.

62. In terms of Mr Gutu's conclusions, we accept that he genuinely believed that the claimant's actions on 10-11 October were at fault and the standard of his practice was below that which was acceptable. It was not in dispute that the claimant had decided to bring JS out of his room while YB was in the corridor. The claimant accepted throughout the proceedings that this was a mistake and an error of judgment. In his evidence Mr Gutu was able to explain clearly his concerns.

63. What was less clear was whether Mr Gutu genuinely believed that the claimant had brought JS out "*For no other reason apart from intimidating the other patient"*, i.e. that he believed that the claimant had this particular motivation at the time. Mr Gutu did not explain how he reached this conclusion in his statement, but glossed over this issue. When we asked him about this issue, he said he thought the claimant's actions were deliberate, but we found his explanation for why he reached this conclusion unconvincing. On balance we have concluded that Mr Gutu probably did believe that the claimant acted deliberately, but it was not something he had considered thoroughly. This contrasted with his more detailed explanation about why he found that the claimant's judgment in general had been poor on the relevant night.

64. The claimant appealed against dismissal. He included comments on different points Mr Gutu had made in the dismissal letter. He reiterated what he said he had done to reflect on the incident.

65. The claimant attended an appeal hearing on 10 May 2022. Barry Swire, Operations Director, chaired the appeal hearing. The claimant was accompanied by his union representative. During the meeting the claimant's trade union representative asked that the dismissal was overturned and replaced with a final written warning. Mr Swire adjourned the meeting as he said he needed to look into other issues.

66. The appeal hearing was reconvened on 26 May 2022. Mr Swire had reviewed the CCTV footage. As a result of this he had concerns about another incident the same night. He said that there was footage of the claimant holding medication but at a later point he is not holding the medication. Mr Swire said it looked like the medication had been left unattended by the claimant. This had been flagged up at the first appeal hearing. Mr Swire had investigated this point further. Much of the appeal meeting was taken up discussing this point. The appeal was adjourned again.

67. Mr Swire sought advice form HR on this new issue. He was advised it was not part of the original investigation so would need to be investigated separately. However, it was not evidence that could be relied on as part of the appeal.

68. On 13 June 2022 the claimant wrote to the respondent. He complained about the new allegations being brought up and that there had not been a further appeal hearing. He said he would not attend any further meetings and asked that the appeal outcome was sent to him. Mr Swire sent the claimant the outcome on 23 June 2022. He upheld the decision to dismiss the claimant.

69. In the original dismissal letter Mr Gutu had said the claimant would be referred to the NMC. Mr Swire said again that a referral had been made. In fact no referral had been made at that time and one has not been made by the respondent since.

General findings of fact on comparators

70. In support of his direct discrimination claims about the dismissal the claimant identified several comparators. These were nurses about whom there were allegations of misconduct and the claimant says he was treated less favourably than them. We set out here the key facts about the comparators the claimant has identified.

71. The three comparators are Caroline Harding, Paul Mills and Niall Fitzgerald. The main facts about each one are not disputed. Their circumstances are were as follows:

    71.1. Allegations of misconduct were made against Ms Harding in 2020 and investigated but not upheld. Another allegation of theft was made in 2022. This was upheld and she was dismissed.

    71.2. Allegations of misconduct were made against Mr Mills about a medication error. He was dismissed but reinstated on appeal.

    71.3. Allegations of inappropriate restraint were made against Mr Fitzgerald. The respondent concluded that he had acted in a proportionate manner so no disciplinary action was taken.

72. The claimant has asserted that none were referred to the NMC. This was because there was no mention of a referral in any outcome letter sent to the named individuals. The respondent was unable to corroborate either way whether referrals had been made, but due to how the issues had been framed following the preliminary hearing they had not considered this issue in more detail when preparing for the case so did not disclose evidence on this point. The claimant also did not provide any other evidence about any referrals or lack of referrals. Our conclusion was this was just an assumption by the claimant and he has not proved this was the case.

73. In terms of the allegations against the individuals and action taken, we were provided with some evidence from the time. These corroborate what the respondent said about its decisions about each named comparator. These were as follows:

    73.1. Ms Harding was not disciplined in 2020 as following the investigation there were no grounds to do so. She was dismissed in 2022 based on evidence of misconduct.

    73.2. In respect of Mr Mills, he admitted what had happened, but the respondent accepted on appeal that the mitigating circumstances should have been taken into account, so he was reinstated.

    73.3. An investigation was carried out into Mr Fitzgerald's actions and as a result they concluded that his actions had been proportionate as he was preventing injury to others.

<u>The claimant's employment and other events post-dismissal</u>

74. The claimant's employment terminated on 8 April 2022. He had been suspended, so had not undertaken any work for the respondent, since 11 October 2021.

75. The claimant did not look for new employment immediately. The claimant had a back condition and was not fit to work because of this. He received a diagnosis on 11 May 2022 and was informed he would need surgery. He had surgery on 7 July 2022 and needed time to recover.

76. The claimant accepted that had he not been dismissed he would have been signed off work in any event and only entitled to Statutory Sick Pay ("SSP"). He has suggested that the respondent would then have been under a duty to make reasonable adjustments. Our conclusion is that the claimant would not have been working during this time and would only have been in receipt of SSP. Nursing work tends to be physically demanding. The claimant in evidence also said that he was often bed bound during this time and unable to do anything. This suggests that it is unlikely he would have been able to work even with adjustments in place.

77. The claimant was well enough to work again from 1 October 2022. He initially undertook nursing work via an agency. We were provided with details of his earnings from this work. The work was not reliable and the claimant's health was still not good. He found an office based role within an IT company. This was a fixed term contract, starting on 6 March 2023 and finishing on 5 September 2023. The claimant's salary in this role was £3,333.33 gross per month.

78. The claimant has not found further work since then. His own evidence is that he has not looked for work due to personal circumstances, such as having to move house.

79. In terms of pay, we were provided with a schedule of loss from the claimant setting out what he had earned with the respondent and his earnings in the different work he has undertaken since then. There was some dispute about the claimant's average pay while employed by the respondent. Unfortunately, we were not provided with copies of the claimant's pay statements from when he worked for the respondent. We were only provided with details of what the claimant's net pay had been in the last months of his employment. The respondent agreed with these sums but not with the claimant's calculation of his average pay.

80. The figures provided were as follows:

January 2022	-	£2,545.92
February 2022	-	£2,545.92
March 2022	-	£2,268.91
April 2022	-	£2,515.38
May 2022	-	£729.53 which was a shortfall from March.

The respondent challenged how the average monthly or weekly pay should be calculated but did not dispute the claimant's assertion that the sum paid in May related to March. We accepted the consequence of this is that pay for March 2022 should have included this additional sum. On this basis we have concluded that the claimant's monthly average pay for February-April 2022 was £2,686.58 net and his weekly net average pay was £619.98.

81. The claimant provided some pay statements from the employment he had undertaken from October 2022 until April 2023. These earnings were also summarised in the claimant's schedule of loss, though there were some errors, which the claimant accepted needed to be corrected.

82. Based on the pay information the claimant provided we have calculated that he earned in total £16,366.03 gross between October 2022 and the end of February 2023. Due to the nature of this work the claimant was paid gross without the deduction of tax and NICs. We were not provided with evidence on the tax paid, but the claimant suggested it should be reduced by 20% to provide the net amount. This was not challenged by the respondent. This would amount to £13,092.03 net earnings in this period.

83. On 6 March 2023 the claimant started working under a fixed term contract. This was a salaried position. The claimant earned £3,333.33 gross per month which was equivalent to what he earned with the respondent.

84. The claimant has earned nothing further since 5 September 2023.

85. We were provided with no evidence on any benefits the claimant has received since he was dismissed by the respondent.

The Law

Unfair Dismissal

86. The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. Where, as here, there is no dispute that an employee was dismissed, the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

> "98 General.
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it –
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that Case Number: 3202301/2019 26 of his employer) of a duty or restriction imposed by or under an enactment.
>
> (3) ...
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

87. For the purposes of Section 98(2) ERA 1996 'conduct' means actions 'of such a nature whether done in the course of employment or outwith it that reflect in some way upon the employer/employee relationship': **Thomson v Alloa Motor Co Ltd [1983] IRLR 403, EAT**. It is not necessary that the conduct is culpable **JP Morgan Securities plc v Ktorza UKEAT/0311/16.**

88. Where the reason, or principal reason, for the dismissal is established as conduct then it will usually, but not invariably, be necessary to have regard for the guidance set out in **British Home Stores Ltd v Burchell [1978] IRLR 379**, which lays down a three-stage test: (i) the employer must establish that he genuinely did believe that the employee was guilty of the misconduct; (ii) that belief must have been formed on reasonable grounds; and (iii) the employer must have investigated the matter reasonably. Following amendments to the statutory scheme the burden of proof is on the employer on point (i) (which goes to the reason for the dismissal) but it is neutral on the other two points **Boys and Girls Welfare Society v McDonald [1996] IRLR 129.**

89. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions, but both of those decisions might be reasonable.

90. The range of reasonable responses test applies as much to any investigation and the procedure followed as it does to the substantive decision to impose dismissal as a penalty **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**.

91. In terms of the reasonableness of the investigation and the procedure that was followed, the “relevant circumstances” referred to in Section 98(4) include the gravity of the charge and their potential effect upon the employee **A v B Case Number: 3202301/2019 27 [2003] IRLR 405**. A v B also provides authority for the proposition that a fair investigation requires that the investigator examines not only the evidence that leads to a conclusion that the employee is guilty of misconduct but also that which tends to show that they are not. However, where during any disciplinary process an employee makes admissions a reasonable employer might normally be expected to proceed on the basis of those admissions **CRO Ports London Ltd v Mr P Wiltshire UKEAT/0344/14/DM**.

92. When considering a complaint of unfair dismissal under s.98(4) of the 1996 Act, where the employee has exercised a right of appeal in disciplinary proceedings the tribunal must consider the overall process **Taylor v OCS Group Ltd 2006 ICR 1602, CA**.

93. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

> *"any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."*

The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

Wrongful Dismissal

94. A claim for wrongful dismissal is a claim that the Claimant was dismissed in breach of her contract of employment by being dismissed without notice. The Claimant's entitlement to notice will be determined by her contract of employment or the statutory minimum notice set out in the Employment Rights Act 1996. If an employee is otherwise entitled to notice an employer may have a defence to a wrongful dismissal claim if it can show that the employee was in repudiatory breach of their contract of employment, due to their conduct.

95. The test which the Tribunal must apply in a claim for wrongful dismissal is different from that to be applied to the claim for unfair dismissal. The issue is not whether or not the employer acted reasonably. In a claim for wrongful dismissal the Tribunal must make its own findings of fact on whether or not the Claimant had acted in such a way that there was a repudiatory breach of contract.

Direct Discrimination

96. Direct discrimination takes place where a person treats the claimant less favourably because of race than that person treats or would treat others. Under s23(1) Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. 'Race' includes nationality or national origins.

97. Decisions are frequently reached for more than one reason. Provided the protected characteristic or, in a victimisation claim, the protected act, had a significant influence on the outcome, discrimination is made out. **(Nagarajan v London Regional Transport [1999] IRLR 572, HL)**

98. Section 136 of the Equality Act 2010 sets out the burden of proof. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

99. Accordingly, where a claimant establishes facts from which discrimination could be inferred then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the respondent. Guidelines on the burden of proof were set out by the Court of Appeal in **Igen Ltd v Wong [2005] EWCA Civ. 142; [2005] IRLR 258**. Once the burden of proof has shifted, it is for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities,

that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

100. The Court of Appeal in **Madarassy v Nomura International plc [2007] EWCA Civ. 33; [2007] IRLR 246**, a case brought under the then Sex Discrimination Act 1975, states:

> *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'*

101. Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' (**Chapman v Simon [1994] IRLR 124)** or from 'thin air' (***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**). Discrimination also cannot be inferred only from unfair or unreasonable conduct (**Glasgow *City Council v Zafar* [1998] ICR 120)**.

102. This means that to succeed with any of his claims for direct discrimination the claimant must first show that he has been treated less favourably than others in the same circumstances. The claimant must also have shown facts from which we can infer that the reason for the less favourable treatment may have been due to the claimant's race. Only after this does the burden shift to the respondent who must show that there is a different non-discriminatory reason for the treatment, that it is in no way due to the claimant's race.

<u>Compensation for unfair dismissal</u>

103. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

> *"any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."*

The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

104. Where an employer has dismissed for a substantively fair reason but has failed to follow a fair procedure, the compensatory award may be reduced by up to 100% if it can be shown that a fair procedure would have resulted in dismissal in any event *(**Polkey v AE Dayton Services Ltd*** [1988] ICR 142 HL).

105. Section 122(2) of the Employment Rights Act 1996 provides:

> *"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly".*

106. Section 123(6) of the Employment Rights Act 1996 provides:

> *"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

Discussion and Conclusions

Direct race discrimination – recruitment process and appointment of Rebecca Patchett

107. The claimant said that he had been treated less favourably than Ms Patchett when she was appointed to the role of Acting Team Leader in 2021 and he was not.

108. The claimant relied on Ms Patchett as a comparator. On the face of it, the claimant and Ms Patchett were comparable. They were both staff nurses and they had both applied for an Acting Team Leader role shortly before but been unsuccessful. Ms Patchett was a white woman and the claimant is a black man.

109. Based on the evidence we heard we have concluded that in fact Ms Patchett was not an appropriate comparator to the claimant. Their backgrounds were similar, in that the claimant and Ms Patchett were both qualified staff nurses employed by the respondent. Their circumstances diverged following the first recruitment process. In that competition the claimant scored very poorly. He only received 45. We accepted the evidence of Ms Blanch that such a low score meant that he would not have been offered the role of Acting Team Leader in any event, irrespective of how other candidates performed, because he was not appointable. On the contrary Ms Patchett scored very highly and she only lost out initially because there were three other candidates whose performance had been better. This meant that Ms Patchett had already shown she was appointable in the role of Acting Team Leader hence she was offered the position when another role became available.

110. Due to the substantial difference in performance in the recruitment process the circumstances of the claimant and Ms Patchett were not substantially the same and our conclusion is she was not an appropriate comparator.

111. We also concluded that the claimant had also not provided any other evidence from which we could infer that the reason for the different in treatment between him and Ms Patchett may have been race. This was mere assertion or speculation by the claimant.

112. As the claimant has not proved facts from which we could infer the reason he was not offered the role could have been his race this claim for direct race discrimination does not succeed.

Termination of Employment – Unfair dismissal and wrongful dismissal

113. The respondent's reason for dismissing the claimant was his conduct. This was not disputed. An incident occurred on the night of 10-11 October 2021 and the claimant accepted that his conduct that night had fallen short of the standard required.

114. There were two different allegations of misconduct made by the respondent against the claimant. These were:

    114.1. A more general allegation that the claimant's actions on 10-11 October 2021 had been unprofessional and endangered patient safety.

    114.2. A second more specific allegation about the claimant's motivation, that he had deliberately intended to use or incite JS to intimidate YB.

115. The more general allegation was not disputed by the claimant. He acknowledged he had made mistakes and that his conduct was not of a satisfactory standard. The respondent's concerns on this issue had been relatively consistent throughout the investigation and disciplinary process. We accepted that Mr Gutu's genuinely concluded that the claimant's conduct was at fault in this more general sense. We also accepted it was reasonable to reach this conclusion, given that it was not disputed by the claimant.

116. We did not reach the same conclusion in respect of the allegation about the claimant's motivation. We accepted that Mr Gutu did conclude that the claimant had this motivation. However, we were not satisfied that it was reasonable for Mr Gutu to reach this conclusion based on the evidence he had at the time. Neither were we satisfied he reached this conclusion having considered the evidence in a fairly.

117. To explain our reasons for reaching this conclusion we will first set out our conclusions about the investigation. We have concluded that the investigation carried out by the respondent was flawed and it was not reasonable in the circumstances. We have reached this conclusion based on the following findings:

    117.1. There was a significant delay between the incident itself, which occurred on 10-11 October 2021, and the start of the investigation. The claimant was not interviewed until the second half of December 2021, over two months later. Other witnesses were not interviewed until January 2021. The investigation related to an incident that occurred on a single night, that of 10-11 October 2021. There was CCTV footage, but the investigation mainly involved speaking to witnesses to the incident. A delay of this long before interviewing witnesses will inevitably compromise the reliability of that evidence.

117.2. The delay in interviewing the claimant was of particular concern. The claimant was suspended the day after the incident but was not told what was being investigated until he was interviewed two months later. We could see no reason for this delay. On the contrary, this was a situation where we would expect that an employer would prioritise obtaining the claimant's account of the incident promptly. This did not happen and there was no explanation for this delay.

117.3. Throughout the investigation there was a lack of clarity over what exactly was being investigated. There was no dispute that an incident of concern had happened on 10-11 October 2021. However, Mr Wejinya had made more serious allegations about the claimant in his email. It was unclear from the documents and witness evidence whether the investigation was into the incident more generally or if the more specific allegations about the claimant's motive were also within the scope of the investigation.

117.4. In terms of the scope of the investigation, we also note that it was not clear from the evidence what Mr Gutu knew from the outset. He was the one who made the decision to start an investigation. He was not clear on whether he was just informed of an incident in general or if he was also aware from the beginning of the specific allegations made by Mr Wejinya about the claimant's alleged motive.

117.5. When the investigation did eventually take place, we conclude that it was done in a superficial manner. The questions to the witnesses were minimal. Critically Mr Wejinya was not asked about the allegations he had made in his email. Neither was this explored by Ms Zimba with any of the other witnesses. The superficiality of the investigation compounded the delay that had already occurred.

117.6. When she wrote up her report Ms Zimba then reached conclusions about the claimant's alleged motive. However, we could not see how she had reached that conclusion. As we have noted, it is not clear what the scope of the investigation was from the outset, i.e. whether it was just the incident or also the allegation by Mr Wejinya. None of the evidence gathered by Ms Zimba related to the claimant's alleged motivation. It was only the email from Mr Wejinya that pointed to this conclusion, but Ms Zimba had not even asked Mr Wejinya about this during the investigation.

117.7. During the disciplinary hearing the claimant raised concerns about Mr Wejinya. Mr Gutu did go and interview him again, but again he did not actually ask him about his email or why he made the allegation he had. Further, Mr Gutu did not tell the claimant that he had re-interviewed anyone or provide the claimant with the notes of those further interviews.

118. We have concluded it was not reasonable for Mr Gutu to conclude that the claimant's actions had been deliberate with a particular untoward motive. The evidence we heard indicated Mr Wejinya's email probably planted the seed of an idea that the claimant had acted as he did with a specific motive in mind. Once that idea had taken hold it seems to have just been accepted by both Ms Zimba

and Mr Gutu as the only possible explanation for why the claimant acted as he did. However, this disputed point was never explored as part of the investigation and Mr Wejinya was never questioned about why he had made this specific allegation. Mr Gutu's conclusion on this point was not based on the evidence that had been gathered during the investigation, because there was none. On balance we have concluded he did not approach this issue with an open mind, and just proceeded on the basis this was the only possible explanation.

119. To summarise, we have concluded that it was reasonable for Mr Gutu to find the claimant's conduct was at fault but when he made his decision it was not reasonable for him to conclude that the claimant was deliberately trying to incite one patient to intimidate another. That conclusion was not supported by any real evidence and was just an assumption.

120. We have then considered whether or not dismissal was reasonable in the circumstances. The claimant admitted his conduct was at fault, so there were clearly grounds for the respondent to take some disciplinary action against the claimant. It is on this point that the difference between the two allegations becomes significant. If it was reasonable for the respondent to uphold an allegation that the claimant had deliberately sought to use one patient to intimidate another it is clear that dismissal would also be reasonable. Such conduct by a nurse is obviously very serious.

121. However, we have found that it was not reasonable for the respondent to find that the claimant had this motivation. We have concluded that it was only reasonable for Mr Gutu to conclude that the claimant's conduct was at fault and he made an error of judgment. On this the claimant accepted this was the case. This is still potentially very serious and the question for us is whether it would still be in the band of reasonable responses to dismiss for this reason.

122. We considered this at length, keeping in mind that the question for us to determine is whether any reasonable employer may have dismissed in the same circumstances. Having done so we have concluded that dismissal was not reasonable when considering just the allegation that the claimant had acted in an unprofessional manner. We note that the incident was serious and there was a risk to patient safety. However, it was a single incident and it occurred in the context of a particularly difficult shift. The claimant accepted he was at fault and had made mistakes.

123. We have concluded that once the allegation about the claimant's motive is taken out of the equation then dismissal would not have been reasonable.

124. Based on the above, our conclusion is that the dismissal was unfair. The investigation was flawed both in terms of the delay in starting the investigation and the lack of investigation into the more serious allegation. On this basis it was not reasonable for Mr Gutu to reach the conclusion he did. It would not have been reasonable to dismiss just because of the less serious allegations, which were accepted by the claimant.

125. Finally, we have considered the procedure overall. With the original disciplinary process there was an obvious flaw in that Mr Gutu did not inform the claimant he had reinterviewed 2 witnesses or provide him with notes of those interviews. This was not a fair procedure as the claimant should have been provided with the evidence the respondent relied on.

126. There was an appeal that was relatively thorough. However, we have concluded it did not remedy any of the flaws in the investigation or the failure to inform the claimant of the additional interviews. The claimant was still not informed those interviews had taken place. We also find that it is very unlikely that the flaws in the investigation could realistically have been remedied at appeal. One of the key issues was the delay in starting the investigation and interviewing witnesses, hence compromising evidence.

127. For these reasons we are satisfied the dismissal was unfair in all the circumstances so the claimant's claim for unfair dismissal succeeds.

128. We are also satisfied that the respondent has not shown that the claimant had fundamentally breached his contract of employment and the wrongful dismissal claim also succeeds.

Polkey and contribution

129. This is a case where we need to consider both the likelihood that the claimant would have been dismissed had a fair procedure, including a fair investigation, been followed and the fact that the claimant's conduct was at fault.

130. First turning to the procedure, there were the following procedural flaws:

    130.1. The investigation was flawed from the outset. The claimant was not informed of the reason for the investigation or interviewed for over two months. Other witnesses were not interviewed until a month later. This compromised the quality of any evidence.

    130.2. When interviews did take place, they were superficial in nature.

    130.3. Further interviews were carried out and relied on without informing the claimant or providing him with this evidence.

131. In these circumstances trying to work out what may have happened had the investigation proceeded promptly involves a relatively high level of speculation. The outcome could have been the same but based on robust evidence. However, it equally could have taken a different turn.

132. During the appeal the possibility of another allegation against the claimant was raised. The implication suggested by the respondent was that had this allegation been investigated the claimant would have been dismissed in any event. Mr Swire undertook some investigation himself into this point. However, it was limited and not relied on as part of the appeal. Again, it cannot be said with any

certainty that the claimant would have been dismissed later as the level of speculation is too high.

133. We do still accept that there is a possibility the claimant could still have been dismissed but we cannot conclude that the likelihood is very high. We have concluded a reduction of 40% should be made to the compensatory award.

134. We have also considered the extent to which the claimant's conduct was such that any reduction should be made under section 122(2) and 123(6) Employment Rights Act 1996. We have accepted the claimant's conduct was at fault and some disciplinary sanction was reasonable. The conduct was relatively serious, but the claimant did accept this and reflect on his actions. A reduction should be made to both the basic award and compensatory award of 60% for this reason.

Dismissal – direct discrimination

135. The claimant has also complained that the dismissal was direct discrimination on the grounds of race. In support of this claim the claimant provided details of a number of comparators.

136. We have considered these comparators and mainly found that their circumstances are not sufficiently similar to be appropriate comparators in support of the claimant's claim for direct discrimination. On this we have concluded the following:

    136.1. An initial point to note is that the nature of the allegations of misconduct differed. Caroline Harding was accused of theft. Paul Mills was accused of a medication error. Their circumstances are not substantially the same as the claimant.

    136.2. In Caroline Harding's case, she was dismissed so she was not treated more favourably. The claimant suggested that she could have been dismissed at an earlier date, so was treated more favourably then. The evidence provided by the respondent indicated that the allegations were not upheld, hence the difference in treatment.

137. Niall Fitzgerald's situation is more similar to that of the claimant. He was accused of inappropriate restraint of a patient, so the allegations relate to decisions made about patients while in a difficult situation. The respondent accepted there were mitigating circumstances so did not impose any disciplinary sanction.

138. To an extent this is similar to the claimant. They appear to both have been working on shifts where difficulties arose with a patient and their actions were criticized. The claimant says leniency was shown to Mr Fitzgerald because of the mitigating circumstances but not to him. However, the details of the allegations and the mitigating circumstances are different and specific to the individual incident. In addition, there is a key difference in that in the claimant's case Mr Gutu upheld a more serious allegation. This decision, as we have concluded, may have been flawed but it does mean the circumstances were different.

139. For completeness, we also note that the claimant has not provided any evidence from which we could infer that any difference of treatment between him and Mr Fitzgerald (or any of the other named comparators) may have been due to race. There is no evidence on this at all, it is again just speculative.

140. Therefore, the direct discrimination claim about the dismissal does not succeed and is dismissed.

Remedy for wrongful dismissal and unfair dismissal

141. The claimant succeeds with his claim for wrongful dismissal. Under his contract of employment, he was entitled to statutory notice. He had worked for the respondent for two years so was entitled to two weeks' notice. We have calculated his net weekly pay was £619.98. His notice pay is £1,239.96.

142. The claimant had worked for the respondent for two complete years. At the date of dismissal, he was 50 years' old. At the time the claimant was dismissed the statutory cap on a week's pay was £571. It was agreed the claimant's gross weekly pay exceeded the statutory cap.

143. The basic award would be £1,713.00 (2 x 1.5 x £571). This is reduced by 60% due to our finding on contributory fault. This makes a basic award of £685.20.

144. We made the following findings in respect of the claimant's losses and mitigation after dismissal:

    144.1. The claimant was not fit to work from the time he was dismissed until he started work in October 2022. He would have received statutory sick pay of £99.35 per week from 22 April 2022 (after the end of his notice) until 14 October 2022. This is a period of 25 weeks.

    144.2. The claimant found work on 14 October 2022. Initially he did agency work which he did until the end of February 2023. We calculated that his net earnings from 14 October 2022 until February 2023 were £13,092.03.

    144.3. From 6 March 2023 until 5 September 2023 the claimant earned a salary equivalent to what he earned with the respondent. He had no earnings after 5 September 2023, but he has not looked for work since then.

145. As the claimant was not fit to work, underwent surgery and then was recovering from April 2022 until October 2022 we accepted it was reasonable that he was not seeking work at that time. We do not accept that had he been employed he may have worked with adjustments. The claimant's evidence was he was at times bed bound. We find he would probably have been signed off work the entire time and have received statutory sick pay. Therefore, we award compensation equivalent to the statutory sick pay for this period. This equates to £2,483.75 (25 x £99.35).

146. From 14 October 2022 until 5 March 2023 the claimant undertook work and we accept he mitigated his losses in doing this. He signed up with agencies and worked relatively consistently. As a nurse this is a reasonable way to mitigate losses. Had the claimant been working for the respondent he would have earned £13,019.58 (21 weeks x £619.98). We have calculated he earned during this time £13,092.03 net. His net earnings slightly exceed what he earned with the respondent, so we award no compensation for this period.

147. The claimant then started a fixed term contract in which his earnings were the same as he earned when employed by the respondent, so he has no losses for that period of time.

148. From September 2023 we have concluded the claimant has not mitigated his losses. His own account was that he did not seek work for personal reasons. It may have been reasonable for the claimant to take time out from seeking work. However, his losses from September 2023 onwards are due to his own decisions and not connected to the dismissal. We award no compensation for loss of earnings from then on.

149. The claimant claimed £500 for loss of statutory rights. The respondent suggested this should be £350. We agreed that a sum of £500 was appropriate. In reaching this conclusion we noted that the work the claimant has managed to secure since his dismissal has been insecure, either via an agency or on relatively short fixed term contracts, meaning he has not had an opportunity to regain some of the statutory rights he had at the time of his dismissal.

150. The total compensatory award is loss of earnings of £2,483.75 plus £500 for loss of statutory rights, making £2,9483.75 in total. We then apply the 40% *Polkey* reduction and 60% contributory fault. This makes £716.10.

151. The total compensation awarded is as follows:

    151.1. Basic award of £685.20.

    151.2. Compensatory award of £716.10.

    151.3. Notice pay of £1,239.96.

    The total of which is £2,641.26

Employment Judge S Park
Date: 22 February 2024